Asbestos in the Courts

The Challenge of Mass Toxic Torts

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Rand is a private, nonprofit institution, incorporated in 1948, which engages in nonpartisan research and analysis on problems of national security and the public welfare.

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The Institute disseminates the results of its work widely to state and federal officials, legislators, and judges, to the business, consumer affairs, labor, legal, and research communities, and to the general public.
Foreword

This report is a landmark achievement in civil justice research. It is the culmination of an intensive, sustained effort to uncover the facts about the way our civil justice system is handling the resolution of disputes over awarding compensation for injuries and deaths attributed to asbestos exposure. Working with data gathered from published and unpublished sources and with information obtained in structured interviews with participants in the asbestos litigation system, the authors have developed the first comprehensive picture of that system and the way it works.

The picture is not a pretty one. Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses. On the positive side, the system did provide strong incentives for lawyers to pursue compensation for injured workers even though the costs of doing so were high and the ultimate results uncertain. Also, the system demonstrated its openness to innovative legal theories and procedures and responsiveness to new substantive information. And by holding manufacturers responsible for injuries to those who used their products, it does hold the promise of deterring behavior that is known to be likely to cause injury.

But the recent high-volume phase of asbestos litigation highlights the weaknesses of the system. Injured parties have little power or control over their own cases. We hold out the ideal of individualized justice but deliver it en masse. Lawyers on both sides are beset by conflicting interests that often transcend the interests of their clients. Rather than become enmeshed in what they regard as almost unending asbestos litigation, many judges avoid such cases altogether. Courts often defer to other priorities as they allocate their limited resources. Dispositions are slow, recoveries sometimes irrational and often inconsistent. Discovery and other costly procedures are geared to trials that don’t happen rather than to settlements that eventually do. Legal arguments are repetitive, time-consuming, and costly, and transaction
costs as a whole are high, that is, higher than for any other type of tort litigation for which costs have been estimated.

Developing and documenting this picture is consistent with the mission of the Institute for Civil Justice: conducting empirical research directed at increasing an understanding of the civil justice system. But it is only one step in the process of improving the way our society resolves disputes. Action is required because, unfortunately, mass toxic injury litigation is a growth industry. Much depends on our capability as a nation to do it right, or at least a great deal better than we're doing it now.

The resolution of disputes arising from latent injuries due to toxic substances and products confronts us with unprecedented social, economic, and legal problems as well as with potentially massive expenditures of time, brainpower, effort, and money. The authors of this report call for the establishment of a national commission to confront these problems and fashion solutions that will improve the delivery of justice in this arena. I believe it is in the interest of all citizens to create and sustain such a commission or similar mechanism to ensure that mass toxic tort litigation will receive the urgent treatment it requires now—before future litigation destroys our already inadequate capability to deliver justice at acceptable levels of equity and efficiency.

Gustave H. Shubert
Director, The Institute for Civil Justice
EXECUTIVE SUMMARY

BACKGROUND

For decades, asbestos has been used in numerous industrial settings, in ships, in schools, and in homes across the country. But asbestos is now known to cause a variety of diseases. Many workers who were exposed to asbestos years ago now have seriously disabling injuries, and many have died of asbestos-related diseases. Although medical knowledge on the nature and extent of the association between asbestos exposure and disease developed gradually, by the 1980s, studies had established a link between exposure and disease. Moreover, there is substantial evidence that at least some producers knew then about the dangers of asbestos exposure.

Since the early 1970s, over 30,000 claims have been filed against asbestos manufacturers in courts around the country to compensate workers for injuries due to exposure. Over the next several decades, tens of thousands more may be filed. By the end of 1982, about $1 billion had been spent for compensation and litigation expenses of asbestos claims. Estimates of future costs range from $4 billion to $87 billion. In response to these financial demands, several asbestos manufacturers have filed for reorganization under Chapter 11 of the federal Bankruptcy Act of 1979.

The large number of claims, the severity of injuries, the financial stakes involved, the social issues raised by the past behavior of asbestos manufacturers, and the possibility that the available resources for compensation will be insufficient have led many observers to view asbestos litigation as a test of the civil justice system’s ability to efficiently and equitably compensate injured parties while deterring future injurious behavior. This view is intensified by the widespread belief that asbestos injury cases represent a new and growing class of lawsuits that pose special problems for the tort system. This class of suits
differs from traditional personal injury litigation in the following important ways:

- The injuries are medically complex—often difficult to detect, associated with multiple causative factors, and of an uncertain prognosis.
- The injuries are attributed to earlier exposure to toxic substances or products that likely occurred many years before symptoms were detected.
- The circumstances of injury apply to a large group of plaintiffs.
- A relatively small number of producers and suppliers were implicated in the behavior that led to the plaintiffs’ injuries; many of these firms are named in nearly every case.

Some argue that compensation for such injuries cannot be efficiently and equitably provided nor damages fairly and reasonably apportioned by the tort system. Others assert that the tort system provides the only practical means of providing adequate compensation for asbestos-related injuries, and that it is the most powerful tool for ensuring that manufacturers pay adequate attention to the potentially harmful side effects of their products. In recent years, several major studies of asbestos litigation have been published, some of which appear to support one side of this argument, and some the other.

For policymakers who are considering the implications of the asbestos litigation history in dealing with future mass toxic claims, assessing the validity of these conflicting arguments is essential. Whether one believes that alternatives to the tort system are necessary should rest in part on one’s assessment of how well the tort system has processed asbestos claims. Alternative designs for such systems or for modifications to the tort system itself should be based on careful consideration of how the civil justice system has dealt with the challenges presented by asbestos litigation.

In 1983, Rand’s Institute for Civil Justice undertook a study of court procedures for processing asbestos worker claims that ultimately became an examination of this larger issue. For our study, we selected 10 courts with large asbestos caseloads, chosen to represent different geographical regions and to include both state and federal trial court systems. We visited each court and conducted lengthy interviews with the judges and other court officials involved in asbestos litigation, as well as with the lawyers for both plaintiffs and defendants. We also

1 The federal courts studied were: northern California, Massachusetts, New Jersey, eastern Pennsylvania, and eastern Texas. The state courts studied were Alameda (California), Los Angeles, Middlesex (New Jersey), Philadelphia, and San Francisco.
reviewed court orders and opinions, examined standardized forms used in the pretrial process, and where available, statistical reports. In some instances, we observed trials and pretrial proceedings. In all, we interviewed 81 key participants in asbestos litigation, including 24 judges and magistrates, 17 other court officials, 22 plaintiff attorneys, and 18 defense attorneys. This Report presents the results of our study.

THE EVOLUTION OF ASBESTOS LITIGATION

Asbestos litigation has changed considerably over the past 15 years. During the 1970s, motivated by social concerns and financial incentives afforded by the jury trial system and contingent fee arrangements, plaintiff attorneys invested substantial resources to bring third-party lawsuits against asbestos manufacturers. Their efforts to develop evidence on the connection between asbestos exposure and worker injury and on manufacturer knowledge of that connection, and to expand the application of strict liability to latent injury suits resulted in legal victories against asbestos manufacturers, opening up the tort system to large numbers of injured workers who had heretofore not been able to obtain substantial compensation for asbestos-related diseases.

By the late 1970s, the potential for plaintiff success had been widely recognized, and asbestos cases surged into the court system in parts of the country where worker exposure was common. As defendants and their insurers realized the scope of the litigation against them, they voiced concern about their capacity to compensate present and future claimants. They also sought various avenues for limiting their liability and diminishing transaction costs, including litigating insurance coverage issues, supporting establishment of a federal compensation system, and declaring bankruptcy. Both plaintiffs and defendants continued their vigorous litigation of individual claims, making full use of the appellate process.

By the time of our study—late 1983 through early 1985—the litigation had entered a new phase. In courts where asbestos workers were concentrated, asbestos claims constituted 10 to 20 percent of the pending civil caseload. Because asbestos injuries are medically complex, individual worker histories are difficult to assemble, and each claim involves a large number of parties, pretrial preparation of these cases was more costly and time-consuming than for more routine personal injury claims. These same features also complicated and delayed the disposition of asbestos cases. After the bankruptcies of three major

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2The main body of the fieldwork was carried out between December 1983 and June 1984.
defendants, other asbestos manufacturers were slow to regroup and resisted agreeing to formulas for apportioning damages. Thus, disposing of cases against all defendants usually required judicial intervention. Although some of the major substantive legal issues had been resolved in some jurisdictions, others remained open, and many questions were subject to repetitive litigation, as the parties and their attorneys sought to delay disposition of claims, obtain more favorable rulings, or sustain uncertainty about the ultimate resolution of key questions.

One feature of asbestos litigation that distinguishes it from ordinary tort litigation is the way in which it is organized and distributed. In major jurisdictions, asbestos cases are concentrated in the hands of relatively few law firms: on average, 20 defense firms and 3 to 5 plaintiff firms per site. Some plaintiff lawyers have multijurisdictional practices; many are members of a nationwide organization that shares evidentiary information. During the early phases of the litigation, the small size and cohesiveness of the plaintiff bar contributed significantly to plaintiff victories. More recently, however, the characteristics of asbestos cases and especially the organization of the litigation have posed serious problems for the tort system. This Report analyzes those problems by closely examining how the system has dealt with three key tasks: deciding substantive legal issues, preparing cases for trial, and disposing of claims.

DECIDING SUBSTANTIVE ISSUES: MAJOR LEGAL QUESTIONS

Asbestos cases raise a set of particularly complicated substantive issues for the civil justice system. When should a claim be brought to court? How can it be determined whether an injury has actually occurred? What grounds are appropriate for a finding of liability? Who should contribute to compensation payments? What share should be paid by each defendant that has been found liable? All of these are questions that the tort system handles relatively easily for traumatic injury cases. But they pose special problems for cases involving latent injuries resulting from exposure to toxic substances. Generally, the courts have been unwilling to change the substantive rules to fit the special characteristics of asbestos cases.
Timing of Claims

In some jurisdictions, asbestos workers are barred from recovering damages for their injuries by statutes of limitations that require that suits be filed within a few years of the injury's occurrence. Most states have adopted a “discovery” interpretation of their statutes of limitations, holding that the statutory period does not begin to run until the plaintiff either discovers, or could reasonably have been expected to discover, that he has been injured. The latter interpretation has proved problematic for many asbestos plaintiffs who have only recently become disabled due to asbestos-related diseases. Another question of timing is raised by the progressive and multiple character of asbestos injuries. A single asbestos worker may develop several medically distinct asbestos-related diseases, each of which may become apparent at a different time. When the statutory filing period has elapsed for the disease that first manifests itself, has it elapsed for all asbestos injury claims? Courts have reached contradictory conclusions on this point. A further complication arises if a claim for one injury due to asbestos exposure is tried to verdict and the plaintiff later develops another injury. A claim for that second injury might be barred under the legal doctrine of res judicata, which holds that a final judgment on a claim precludes subsequent action involving the same claim.

Causation

Traditional tort law standards for proving causation require evidence of a direct link between a particular individual condition or event and the case at hand. For many asbestos claimants, however, the evidence of a link between exposure and injury is probabilistic. The evidence establishes, with a high degree of certainty, the likelihood that particular claimants with particular histories of asbestos exposure will develop specific diseases. It may not, however, absolutely establish that a particular plaintiff is injured, that his injury was caused by asbestos, or that he will develop more serious disabilities in the future. Juries are given the task of deciding whether the facts meet legal standards of causation, based on medical evidence and expert testimony.

To meet these standards, plaintiffs must also be able to prove that particular asbestos products caused their injuries, for only those manufacturers whose products they used will be held liable. But identifying the specific products that caused their injuries is difficult for workers who were exposed to a variety of products over a long period of time, and for whom the identity of those products was then of little
import. In practice, what constitutes adequate product identification varies from court to court, and even from judge to judge.

To diminish the product identification burden placed on plaintiffs, some plaintiff attorneys in asbestos and other toxic tort cases have argued that it should be sufficient for a plaintiff to demonstrate use of a generic product. All defendants who manufactured the product, they argue, should be held liable for injuries caused by the product, and should contribute to settlement and trial outcomes in proportion to their share of the market. To date, plaintiff attorneys have been unsuccessful in their attempts to apply this "market share" doctrine to asbestos cases.

**Apportioning Damages**

If multiple defendants are judged liable for a plaintiff’s injuries, there must be some way of deciding how much each defendant should contribute to the total amount paid to the plaintiff, often termed "apportionment of damages." If the case is disposed of without trial, the plaintiff may either make separate settlement agreements with each defendant or settle with a group of some or all defendants. In the case of one-on-one settlements, defendants are free to pay any share of the damages they wish. If a settlement is reached with a group of defendants, those defendants are free to adopt any rules they wish for apportioning damages among themselves.

If a case is tried or if some defendants settle before trial, while others contest the suit to verdict, the situation is more complex. Most states have adopted statutory rules that specify appropriate apportionment of damages and determine the effect of settlement on other defendants’ liability. Some statutes call for a *pro rata* allocation of damages, while others permit allocation according to the relative fault of the defendants, as determined by a jury. In most states, amounts paid in settlement to a plaintiff are subtracted from his damages, reducing his total recovery from nonsettling defendants. In a few, however, under certain conditions, a plaintiff who settles with some defendants and tries his case against others to verdict may recover a larger amount than if he had tried his case against all the defendants. On the other hand, in some states a defendant may obtain a better outcome by going to trial and paying his *pro rata* share rather than settling before trial. Thus, in some jurisdictions, the legal rules for apportioning damages may impede settlement of asbestos cases. Although defendants formally oppose the spread of "market share" liability, in practice, in many jurisdictions they have adopted the concept as a basis for apportioning damages among themselves.
DECIDING SUBSTANTIVE ISSUES: PROCESS CONCERNS

The substantive questions raised by asbestos litigation can be sorted into three categories: (1) questions that are common to all or most asbestos claims, (2) questions that are common to large subsets of claims, and (3) questions that are specific to individual claims. Questions about the connection between asbestos exposure and asbestos disease—Does asbestos exposure cause injuries? What kinds of injuries are caused by asbestos? How much exposure is necessary to produce particular diseases? What factors other than asbestos exposure contribute to these diseases?—apply to all asbestos claims. Questions about how much various manufacturers knew about the links between asbestos exposure and asbestos disease pertain to all claims against manufacturers whose degree of knowledge is at issue. Questions about the authenticity of documents that bear on the issue of manufacturer knowledge are common to all claims that attempt to introduce that evidence. Questions about the specific products used at various worksites, and about the amounts of these products in use at various times, are relevant to all claims brought by workers at that site. Questions about whether and how much a particular claimant is injured, whether and for how many years he was exposed to asbestos, and what his medical and other damages have been are specific to individual claims.

The civil justice system has dealt with most substantive issues common to all asbestos cases (categories 1 and 2 above) in a particularistic, case-by-case fashion, deciding the same issues over and over again in every jurisdiction in which cases arise. But the costs of this particularistic approach have been so great that courts and lawyers in most jurisdictions have turned to group disposition practices in which individual levels of compensation are set without close attention to the factors that differentiate cases (category 3 issues).

Formal Approaches

To reduce the costs of the substantive decision-making process, the civil justice system provides a number of formal mechanisms for treating similar claims collectively, including “class actions,” and “multidistricting” (within the federal courts) and limiting parties’ rights to

3The class action enables one or more plaintiffs to bring suit on behalf of a larger number of parties (the “class”) and obtain a decision that will apply to all members of the class. Class actions must be certified by the court; conditions for class certification are specified in Rule 23 of the Federal Rules of Civil Procedure.

4Cases involving “common questions of fact” may be brought together in a single federal district court by assigning responsibility for managing some or all phases of the
relitigate issues by various issue preclusion doctrines. But neither the plaintiff nor the defense attorneys have vigorously pursued the application of such mechanisms to asbestos litigation. When appellate courts have considered such approaches, they have generally rejected them as inappropriate for this type of litigation.

In the early stages of the litigation, attorneys were just beginning to develop strategies for applying legal doctrine to latent injuries caused by toxic exposure, and plaintiff attorneys were still uncovering evidence of defendants' knowledge of the links between asbestos exposure and workers' injuries. At that time, uncertainty about the ultimate outcomes of specific substantive disputes probably discouraged parties on both sides from seeking definitive judgments on key issues for large blocks of cases.

By the time of our study, when treating cases collectively and reaching closure on key substantive issues arguably became more appropriate, attorneys on both sides had well-developed routines and incentives for continuing to litigate common substantive issues on a case-by-case basis.

Class Actions. Plaintiff lawyers specializing in personal injury cases have traditionally frowned on class actions, believing that they deprive individual claimants of their "due process rights," and result in lower monetary settlements. Some also chafe under the procedures for managing class actions, which place control over the litigation in the hands of a small committee of attorneys. Fear of reduced fees is also a likely source of plaintiff attorney hostility toward class actions.

On the defense side, opposition to class actions, which are often brought by consumers and employees, has also been traditional. Some asbestos defendants (and their insurers) may have opposed class certification because they saw their potential liability as substantially less than that of the larger asbestos manufacturers (e.g., the Manville Corporation), and did not want to be definitively classed with those firms. Such marginal defendants may have foreseen that with a case-by-case disposition system, they would be able to reach low cost settlements with plaintiffs. Major defendants may have believed that their ultimate financial position would be better if they accepted the transaction costs associated with a case-by-case disposition process, stretching out

5 Issue preclusion is an overall term for doctrines that specify when litigation of an issue may be closed off, including stare decisis, collateral estoppel, and judicial notice.
6 A federal class action suit cannot be settled without the approval of the court (Federal Rules of Civil Procedure, Rule 23(e)); the court will generally also review and approve the fees paid to attorneys representing the class.
compensation payments over time, than if they were forced to pay an enormous class action award or several such awards within a relatively short time period. Also, defense attorneys have no financial incentives to press the class certification issue.

Multidistricting. Assigning asbestos cases filed in the federal system to a single district would have been at least an inconvenience for all attorneys practicing outside that district. Had the Multidistrict Litigation Panel shifted all asbestos cases to a single district, with time, attorneys outside that district might have found themselves with a smaller and smaller share of the asbestos litigation business. Most important, perhaps, such an action would have placed responsibility for deciding key substantive issues in the hands of a single judge.

Issue preclusion. Cutting off litigation is a serious step that raises questions about due process and equity. Judicial interpretations of when it is appropriate to bar relitigation of substantive issues vary from jurisdiction to jurisdiction. One of the courts we studied, the federal court in east Texas, has made a vigorous and sustained effort to apply issue preclusion doctrines to asbestos litigation. But the trial court has not been able to persuade the Court of Appeals for the 5th Circuit that its efforts are appropriate.

Informal Approaches

Despite the reluctance of attorneys to pursue collective decisionmaking mechanisms and the general unwillingness of appellate courts to permit issue preclusion, innovative steps have been taken informally at the local level that achieve some of the objectives sought with the rejected formal approaches. Informal mechanisms are attractive because they benefit all participants without limiting their options. They are acceptable to attorneys for several reasons. First, informal mechanisms have been applied either to nondispositive issues, or to dispositive issues that are considered to have only a modest effect on case value. Second, attorneys may view informal issue preclusion as a way to expedite disposition without placing a definitive answer to a key substantive issue on the appellate record. Third, devices such as the "lead case" preserve the attorneys' freedom to file claims outside that case when they do not wish the "lead case" ruling to apply to it. Finally, attorneys may feel that an innovative procedure which serves them well when implemented by one particular judge could have a negative effect if it were adopted by other, less trusted judges. For judges, informal issue preclusion and grouping cases reduces the time required for substantive decisionmaking. The fact that these informal understandings depend on relationships between specific judges and
attorneys illustrates their inherent weakness as mechanisms for reducing litigation. As the specific participants change, so may the informal understandings about the set of issues that are “settled.”

PREPARING CASES FOR TRIAL

The courts that we studied used several different techniques to cope with the burden of pretrial preparations. Each technique has been judged effective by most participants in the system. Use of these techniques appears to be partly responsible for the courts’ ability to manage the pretrial preparation of large numbers of cases without placing inordinate demands on judicial resources. But disposition of cases, which does require an unusual amount of judicial resources, has not generally been expedited by efficiency gains in pretrial preparation.

Specialization

Specialization in asbestos litigation involves both judicial personnel and lawyers. All the federal courts we studied use an individual calendar system that randomly assigns cases to judges at the time cases are filed. The cases then become the judge’s responsibility until disposition, either by settlement or judgment. All but one of the courts in our sample have modified this system somewhat to permit specialized management of asbestos cases. In several courts, asbestos cases are assigned to a single judge’s calendar for pretrial supervision and trial, if necessary. In New Jersey and Massachusetts, all asbestos cases are assigned at the time of filing to a judge who has delegated responsibility for case management during the pretrial period to a magistrate who works under his supervision. Asbestos cases have been assigned to almost all judges in eastern Pennsylvania, but responsibility for coordinating and expediting pretrial processing has been informally delegated to a single judge. The Eastern District of Texas, with only four judges, is the one federal court in our sample that has not designated a specialist to supervise pretrial preparation.

All the state trial courts we studied used some variant of the master calendar system, in which a case may be assigned to different judges at different stages of the pretrial process. Three of the five state courts that we studied modified their regular civil case assignment system, establishing an “all-purpose” asbestos judge who is responsible for all asbestos cases throughout the pretrial period.

The asbestos specialist in each court developed class knowledge regarding the litigation, provided consistency in rulings across cases,
and established procedures to coordinate and expedite discovery activities. Specialization saved valuable judicial learning time, which was useful to the court and parties alike. Consistency increased the ability of asbestos lawyers to predict rulings on related matters and reduced the demand for judicial intervention.

But judicial specialization appears to have had costs as well as benefits. The unusual treatment accorded asbestos cases marked them as different from ordinary cases and appears to have led to some apprehension by other judges about getting involved in asbestos trials. For courts in which special asbestos functions have been delegated to a single magistrate, the gap between responsibility for managing the cases (which was assigned to the magistrate) and responsibility for bringing the cases to trial (which rests with the judge) has had an inhibiting effect on dispositions.

Lawyers involved in asbestos litigation have developed even more expertise than the asbestos judges. As a group, plaintiff lawyers nurtured the litigation from an occasional high-risk case that involved extremely difficult questions of law and proof into a low-risk, mass-production industry. Without those considerable efforts, there would be no asbestos litigation. Because of those efforts and others made by defense lawyers in response, there is now a large volume of accessible information about the asbestos industry, the practices, products, and culpability of specific manufacturers and suppliers; the products used at various work sites at various times; the medical consequences of asbestos exposure; and the issues involved in medical causation. Not only have the lawyers in asbestos cases organized the complicated raw materials of asbestos litigation, but their long-term involvement has meant that fewer unproductive discovery efforts are initiated. These lawyers, who have become expert at predicting judicial reactions, require less judicial intervention than in earlier stages and less than would occur if the cases were spread among a much larger group of attorneys. But the other side of lawyer specialization is that the limited number of lawyers, which leads to organizational efficiency in the pretrial phase, leads to problems in the disposition phase of asbestos litigation.

**Standardization**

Specialization has enabled the judges and attorneys responsible for asbestos caseloads to identify ways of reducing the paperwork and duplicated effort in the pretrial preparation of individual cases. Although workers exposed to asbestos have never been certified as a class, virtually every court in our sample has worked out standard
procedures for dealing collectively with its large volume of cases. To their mutual benefit, attorneys and judges have also collaborated on methods to streamline and routinize the pleadings, eliminate duplication in pretrial discovery motions, and reduce the lawyers' burden in discovery efforts.

Coordination Among Attorneys

The concentration of asbestos cases within a small number of law firms provides an opportunity for coordinating lawyer efforts that has been exploited in all the courts we studied. The result is a more efficient distribution of work among defense firms, a reduction in the work imposed on plaintiff firms, and a reduction of the burden on the plaintiffs. But coordination among asbestos lawyers has not occurred without problems. Plaintiff lawyers have taken conflicting positions on the bankruptcy proceedings, on class actions and multidistricting, and have occasionally filed complaints about the client recruitment practices of other lawyers. In some courts, coordination has been difficult to initiate because no lawyers have been willing to take the lead; in others, cost-sharing arrangements have been hard to negotiate.

Allocation of Resources to Asbestos Litigation

We were frequently told by officials of the courts we studied that they needed additional judges to meet the demands of their ordinary caseloads. Some of those courts also have concentrations of other complex cases that consume disproportionate amounts of judicial time. Demands on limited judicial resources provided the courts with the principal incentive for streamlining court procedures to handle their asbestos caseloads. The specialization and standardization measures they adopted helped them incorporate the large influx of new cases into their ordinary routines without diverting substantial amounts of judicial time to asbestos cases. In fact, all the courts we studied have committed less than the equivalent of one judge working full-time to asbestos case management. Several courts, however, have assigned administrative and clerical personnel to work full-time on processing these cases. On the other hand, the fact that so many courts have assigned judges and magistrates to asbestos cases as a specific group is in itself unusual.

Both plaintiff and defense firms had incentives to limit the personnel needed to manage their asbestos caseloads. Initially, attorneys from some plaintiff firms made very large financial investments in this litigation and faced the considerable risk of securing a minimal return
on that investment. By the time of our fieldwork, such large financial investments were no longer required. Many of those same attorneys, who now have large asbestos caseloads, can process their cases with limited resources and maximize the return on their earlier investments by coordinating and cooperating with court efforts to streamline the litigation. Defense firms have also been able to manage their clients' large inventories of cases with reduced resources because of the way in which the litigation has been organized by the courts.

Relationship Between Pretrial Management and Disposition

The pretrial management activity described above has introduced order into asbestos litigation, but it has generally failed to accelerate dispositions. That failure appears to stem from four quite different but cumulatively complementary reasons. One reason is that the incentives that affect pretrial behavior are different from those that influence dispositions. All active participants in asbestos litigation benefit from the order and efficiency introduced by efficient management of pretrial activities. Streamlining the process enables lawyers to adequately service their large caseloads, reduces the costs to the defendants and/or their insurers, and permits the courts to deal with these cases without having to provide the judicial attention that their numbers seem to warrant. But disposition brings other incentives into play. Often, lawyers on both sides, the defendants, their insurers, and plaintiffs with marginal injuries who are not currently disabled may in fact benefit from delayed dispositions. Consequently, these participants are not driven by self-interest to transform the potential created by pretrial activity into a high rate of disposition.

A second reason that explains why disposition rates in many courts may not be enhanced by efficient pretrial activity is the widespread use of junior personnel by both sides in the pretrial stage of the litigation. In ordinary litigation, by focusing the attention of lawyers on both sides onto the case, any pretrial activity can prove to be the occasion for negotiations and settlement. The number of asbestos cases at each firm is so high, however, that lawyers with the requisite experience and authority are unable and after a while disinclined to participate in much routine pretrial work. Standardizing cases brings about the delegation of this work to junior staff. Settlement, however, frequently requires senior staff. Because they do not participate directly in many pretrial activities, opportunities for settlement may be lost.

The third reason that pretrial preparations have not optimally promoted dispositions is that more attention has been paid to organizing paper than to organizing personnel. The same 15 to 20 defendants are
involved in most asbestos cases in each court. Pretrial areas in which labor could be conserved by cooperation are discovery and negotiations. However, for various reasons, such cooperation has been limited. Since the cost of failing to organize such cooperation is substantial, one of the chief aims of the Asbestos Claims Facility is to recapture such costs.

The fourth and most important reason for the failure of pretrial preparation to promote disposition lies in the difference between the role of pretrial preparation in ordinary cases and its role in asbestos litigation. In an ordinary case, disposition may occur at any stage of the litigation process. Consequently, the earlier a case is organized and important discovery is conducted, the earlier a case may be completed. But asbestos cases are almost never disposed of until the case is about to go to trial, regardless of when discovery is completed. Early discovery of some information (e.g., work history) may produce some efficiencies. But if the information to be discovered is likely to change over time (e.g., medical condition), early discovery may be pointless, unless it is explicitly directed at settlement.

DISPOSITION

Two types of problems arise in asbestos cases that make their disposition more difficult than that of other civil cases. One set of problems arises from the intrinsic nature of asbestos cases, the other from the organizational context of asbestos litigation. Because of these problems, courts are able to dispose of cases at a rate that maintains control of the asbestos caseload only if they force settlement of cases by imposing a credible threat of trial. That threat is produced either by a capacity and willingness to devote judicial resources to these cases or by organizing the disposition process in such a way that a small number of judges can threaten to try relatively large numbers of cases. Most courts have not allocated the resources to their asbestos cases that would be necessary to produce a credible threat of trial with traditional individualized disposition practices. As a result, in most of the jurisdictions we studied, cases are either disposed of at a rate that lags behind that of other civil cases, or they are disposed of through the application of disposition practices that resemble group administrative processes.
The Effects of Case Characteristics on Disposition

Asbestos cases are hard to dispose of because they are difficult to evaluate, troublesome to negotiate, and frequently considered complicated to try. The evaluation problem arises from the following factors:

- Difficulties in diagnosing asbestos-related diseases.
- The progressive nature of the disease.
- Changes in the rules that govern asbestos litigation.
- Changes in the legal personnel involved in the litigation.
- The possibilities of punitive damages.
- Wide swings in jury verdicts in cases that have been tried.
- The uncertain status of legal issues affecting the conduct of trials.

Negotiation is complicated because of the large number of defendants and the diversity of interests among them.

The Effects of Organization on Disposition

The concentration of large numbers of asbestos cases within a small number of law firms appears to produce several complicated effects. First, because the possibility exists that the courts could expect these law firms to simultaneously try more cases than they could possibly handle, the incentive to get cases ready for trial as quickly as possible is reduced. Second, if cases are actually scheduled for trial in large numbers, the limited capacity of the law firms means that most of the cases must be settled even though the terms of prospective settlements are different than they would be if trial were a feasible alternative. Third, the concentration of cases reduces the financial incentives of the major participants to dispose of cases expeditiously.

In plaintiff law firms not involved with asbestos litigation, cases arrive in a fairly steady stream and are processed and disposed of in a steady progression. Growth or shrinkage of the caseload is usually gradual and can be handled by periodic adjustments in staff. With asbestos litigation, however, large numbers of cases frequently arrived in lawyers' offices almost simultaneously. Although new staff members could be acquired quickly, two factors made it unwise to expand enough to fully absorb the growth in caseload. First, there was no guarantee that the high rate of new cases would be sustained, and there was a natural reluctance to recruit and train large numbers of new people for what might prove to be a short-run increase in caseload. Added to this was the natural disinclination of the lawyers who first became involved to share profitable business with new colleagues when, if the
disposition of cases could be stretched over a long enough period, it would be unnecessary to do so.

When plaintiff lawyer interests do not exactly parallel those of their clients, why do the clients not do more to promote their own affairs? The answer begins with the demographic characteristics of asbestos plaintiffs—blue collar, frequently laborers who have worked at many sites, middle-aged or older, and often ill. These clients have little experience with lawyers and the legal system and are frequently obtained en masse through union referrals and sometimes through direct solicitation. They often have little contact with their lawyer and communicate instead with the paralegals and junior associates widely used in the bureaucratic processing of asbestos cases. Finally, asbestos plaintiffs are not the employers of their lawyers in the sense that they have paid for their services. They are more likely to be in debt to their lawyers, who have advanced money for filing fees, medical exams, and discovery costs. For this reason, when inaction and lack of results ought to alert the plaintiffs to spur their lawyers to get on with their cases, they are unlikely to act because of their inexperience, their debtor position, their lack of a personal relationship with their lawyers, or the social gulf between them. In this context, they are not socially, psychologically, or experientially equipped to promote their own interests.

Many of the defendants' insurers and their lawyers are even less interested in rapid disposition than are the plaintiff lawyers. Their behavior can be understood by three different incentive structures: factors that affect insurance carriers generally, factors that affect carriers in asbestos cases, and factors that affect their lawyers in asbestos cases. First, casualty insurance companies will profit from litigation delays, at least in cases involving large financial stakes, if they can make effective interim use of the funds that are eventually paid to plaintiffs. More important, there are special reasons not to bring asbestos cases to closure quickly. As time passes, some plaintiffs die from asbestos-related causes, and the wrongful death actions that follow are usually worth less than the original claims. Additionally, open cases may eventually be processed through alternative systems such as the Asbestos Claims Facility, which promises lower defendant transaction costs and awards that are no more, on average, than those to date. The fewer the number of cases completed in the courts, the greater the potential savings will be.

At the same time, stretching out settlements and trials over long periods reduces insurance company cash-flow problems generated by the exposure that comes with thousands of asbestos cases: we were told by judges and defense lawyers that cash-flow concerns reduce the
pace of asbestos dispositions. Moreover, the death of a plaintiff from an unconnected cause (not unlikely, given the age profile of asbestos plaintiffs) substantially reduces the value of an asbestos case. In addition, there is some evidence that carriers believe they can minimize processing costs by keeping a tight rein on the time that claims personnel spend on asbestos cases, a policy that may impede active settlement negotiations before trial.

When lawyers represent defendants who have adopted a strategy of refusing to negotiate until trial is approaching or has begun, we were told that they are simply carrying out their clients’ objectives. We were also led to believe, primarily through comments by judges and clerks, that defense lawyers have interests, independent of those of their clients, in resisting rapid dispositions. According to these judges and clerks, many defense firms have developed routines and personnel assignments to process their very large case inventories that would be upset by a program to accelerate dispositions. Several firms that had represented the Manville Corporation before the introduction of the Chapter 11 petition were subsequently forced to dismiss some lawyers whom they had hired to handle the increase in business that Manville had provided. This lesson was not lost on other defense firms, which were therefore reluctant to make the increases in staff or additional allocations of senior lawyers that faster dispositions would require. One manifestation of this defense approach to disposition is the common complaint heard from judges and plaintiff lawyers that inexperienced lawyers who have neither the authority nor skill to conduct serious bargaining are frequently sent to settlement conferences.

This posture is not monolithic. Other defendants and insurers have different attitudes and practices toward accelerating the pace of dispositions. Many defendants and insurers try to settle asbestos cases quickly, and their lawyers have developed relationships and routines with plaintiff lawyers to achieve this goal.

Disposition Practices

In the jurisdictions studied, we found a variety of group disposition practices.\(^7\) The first method is the block settlement. In a block settlement, the plaintiff lawyer negotiates a single value for a large number

\(^7\)Many cases are negotiated, one by one, in a perfectly straightforward manner. Both plaintiffs and defendants estimate the value of a case if it went to trial, adjust these figures in response to ordinary factors such as the costs of trial and preparation for trial, the quality of witnesses, local jury verdict norms, the ability of counsel, and the risks of a defendant’s verdict, punitive damages, or a runaway jury. The plaintiff’s lawyer then tries to persuade the defendants to meet this value, seeking a contribution from each according to its culpability, market share, or problems of proof.
of cases with one or more defendants. Allocating amounts to specific plaintiffs can then be done without defendant participation. This allocation may be made by the lawyer, according to the demands of the moment or his experience in other asbestos cases, or it may be made with the participation of judges, special masters appointed by judges, doctors, or other experts who review the plaintiffs' files and evaluate the relative values of the cases.

A second variant of group dispositions is a deal between a plaintiff lawyer and a defendant in which the defendant, frequently a peripheral party, pays a certain amount per case, or a certain amount per case of a certain type, regardless of the particulars of the case. This type of settlement is an administrative procedure closer in spirit to workers' compensation than to tort litigation. The plaintiff lawyer must simply allege the exposure of his client during a period when the defendant's products were used at a site at which the plaintiff worked and some minimal injury to the plaintiff. The defendant then pays an amount that has been fixed in advance with that lawyer.

A third type of group disposition occurs when a plaintiff lawyer and a defendant settle large batches of claims one at a time but within a short period. Scores of cases may be settled in a day, hundreds in a week. With such numbers, the amount of individual attention given to each case can only be perfunctory, and categorization schemes or rules of thumb must be employed to make this process work. This common method of settlement facilitates trading favors between cases; that is, it enables lawyers on both sides to compensate for underpayment or overpayment in one case by its opposite in another case.

Court Approaches to Disposition

Given these features of the litigation, when and how asbestos cases are actually terminated is determined by individual court procedures and the behavior of lawyers in response to these procedures. Variation in the pace of disposition across courts is thus more a matter of judicial behavior than of lawyer or litigant efforts. This situation contrasts sharply with the typical pattern of civil case disposition in which, more often than not, cases are terminated with no judicial involvement.

From the standpoint of disposition, the courts in our sample can be considered along two dimensions: (1) a description of the approaches they have adopted to deal with their asbestos caseloads, and (2) the results they have achieved with these approaches. With regard to approaches to disposition, the courts fall roughly into three categories: (1) traditional case-by-case disposition, (2) group processing, and (3) administrative processing. With regard to outcomes, the courts are
arrayed along a broad dimension. At one extreme are courts that have
terminated a large proportion of their asbestos filings, with good pros-
spects that the remainder will be completed at a pace approximating
that of other cases. At the other extreme are courts in which disposi-
tion rates are low, new filings (to the extent that they can be mea-
sured) tend to outnumber dispositions, and the likelihood of prompt
disposition of the existing asbestos caseload is small. Most courts fall
somewhere between these two extremes.

In five of the courts in our sample, the rate at which asbestos cases
were being completed was low. In the Massachusetts and New Jersey
federal courts, no cases were being terminated at the time of our field-
work. After six or more years of asbestos litigation, only 11 percent of
cases had been completed in the state court in San Francisco, and no
plans had been devised to deal with the large number of cases that
were about to come up against a statutory five-year limit on litigation
time. Only 20 percent of the active cases in the New Jersey state
courts had been disposed of at the time of our study; and at the current
rate, the Philadelphia court will not dispose of all its cases for decades.

In contrast, four courts in our sample appear to be disposing of
asbestos cases at moderate rates. At the time of our fieldwork, the
federal courts in Pennsylvania and California had disposed of 57 and
39 percent of their cases, respectively, and the balance of cases in Califor-
nia was less than two years old. The Texas federal court and the
Los Angeles state court had disposed of over one-quarter of their cases.
In fact, the Los Angeles court had terminated almost as many cases as
all five courts with low disposition rates combined.

Three factors seem to explain the differences in disposition patterns.
These factors are (a) the general pattern of dispositions in each court,
which in turn reflects resource constraints and overall court manage-
ment style, (b) judicial attitudes toward asbestos cases, and (c) the
readiness, or lack of it, to group cases for disposition. Courts that are
slow to conduct their usual business will also be slow to process asbes-
tos cases and vice versa. But judicial attitudes can overshadow the
effect of general disposition patterns. Although the median time for a
case to move from being "at issue" to trial for all cases in Los Angeles
is more than double that in San Francisco, the Los Angeles court has a
much higher rate of asbestos dispositions. Cases get completed in Los
Angeles and not in San Francisco because the judges in charge of
asbestos in Los Angeles assume responsibility for pushing the cases to
disposition; the San Francisco judges make no special effort to do so.
Beyond general court behavior and judicial attitudes is the issue of
claim-by-claim vs. group dispositions. This issue is prompted by the
experience of the Philadelphia state court, which has devoted
considerable judicial effort to processing asbestos cases, but has not
disposed of a sizeable fraction of its asbestos caseload. The delay seems
to be caused by the court's insistence on processing asbestos cases one
by one, in accord with traditional due process standards, rather than
establishing a framework that will lead to disposition of groups of
cases. Asbestos cases, then, are efficiently terminated in courts that
are good at disposition generally or have judges that assume particular
responsibility for asbestos disposition and are willing to consider these
cases in groups rather than one by one.

Effects of Pace and Process

Questions about the effect of the pace of dispositions arise because
in some jurisdictions many, and in all places a few defendants settle
long before cases are fully disposed of and on a schedule that is not
necessarily dictated by the general pace of dispositions. If these early
settling defendants also paid the bulk of recoveries, when the last
defendants eventually contributed their share would not be so impor-
tant. It is doubtful, however, that defendants that settle before the last
stages of litigation in any jurisdiction represent a major portion of the
eventual total recovery. In many jurisdictions, most major defendants
are still involved in the case at the time of trial, judicial settlement
conferences, non-jury trials, or if none of these events has yet occurred,
are simply still in the case. Thus, the problem of disposition is not just
a matter of tidying up court dockets; it also involves the crucial ques-
tion of how long injured plaintiffs must wait under current conditions
to be compensated for asbestos injuries by defendants and their insur-
ers.

We do not know the actual effect of group settlement processes on
outcomes. Data for the period following Manville's August 1982 bank-
ruptcy filing are not available, so we cannot investigate whether group
outcomes are different from the outcomes of claims individually settled,
how they differ, or the conditions under which these differences occur.
Nevertheless, the preliminary signals that do exist suggest important
differences.

In block settlements, intragroup equity depends on the allocation
procedure used. If allocation is left up to the plaintiff lawyer, more
assertive claimants will likely profit at the expense of passive claimants
unless some formal scheme for allocation has been agreed to by the
plaintiffs in advance. Whatever the allocation strategy, block settle-
ments create the possibility of a major conflict of interest between the
lawyer and the group. This conflict may arise because in economic
terms, given the greater financial stakes for the lawyer than for any
single client, his marginal utility of additional dollars is less than that of his individual clients. After controlling for obvious factors such as type of injury, Kakalik et al. (1984:61–63) found that the greater the number of plaintiffs involved in an asbestos lawsuit, the lower the average plaintiff recovery would be.

Batch sessions are vulnerable to the same conflict of interest as block settlements. The aggregated fee may diminish the lawyer's incentive to bargain as hard as possible for each individual case. Moreover, many times during the course of this research, we were told that cases were "traded" in group settlements, that lawyers agreed to overcompensate some plaintiffs and undercompensate others, and that in these trades the more seriously ill plaintiffs received less and the less seriously ill received more than they would have if the claims had been settled individually. In sum, the possible consequences of group dispositions on outcomes seem serious enough to warrant concern about the process that produces them.

IMPLICATIONS FOR POLICYMAKING

The future of asbestos litigation, at least for injured workers, may already have been decided. The social, political, and financial investments that have been made by the main participants may present such strong barriers to change that it is unreasonable to expect major shifts in the litigation process. But the question of how we as a society will or should respond to mass toxic torts is still open. Our examination of asbestos litigation provides some insights into the strengths and weaknesses of current approaches to resolving mass toxic injury cases, and suggests issues that need to be considered if we are to improve the operation of the litigation system for this new class of claims.

The Positive Side of Litigation

The tort system is commonly criticized for its high costs, delays, and erratic results. Resolving mass latent torts through litigation, however, has several important positive aspects. Litigation provides incentives to lawyers to pursue compensation for injured parties, even when the initial costs of developing the case against defendants and the risks of failing in the effort are high. The tort system is open to innovation in litigation practices and is responsive to new information. The system also holds out the promise of deterring future injurious behavior.

A major lesson of asbestos litigation is that the process by which a reasonably accurate history of corporate behavior with respect to toxic
substances is developed can be extremely complicated. It involves discovering the products that manufacturers made, the dangers that different products pose, the extent to which and the times at which the manufacturers and their insurers were aware of these dangers, and the measures that they did or did not take to protect workers and consumers. Developing this picture for asbestos litigation required sustained efforts over many years by plaintiff lawyers who followed up numerous leads at considerable expense. However much their efforts may have been motivated by concern for the victims of asbestos exposure or outrage at the manufacturers’ behavior, it is unrealistic to believe that efforts of this scope and intensity would have been sustained over time were it not obvious to the lawyers involved that with a successful discovery program, their rewards would be substantial. Moreover, it is precisely the conventional contingent fee arrangements and jury trials, basic constituents of the tort system as we know it, that have provided incentives to motivate the lawyers.

A second major lesson of asbestos litigation is that latent mass torts present uncommon procedural, substantive, and evidentiary issues. Solutions to these problems have been suggested, adopted, refined, rejected, and renovated by different courts at different times, and sometimes by the same court at different times. The openness of the tort system and its responsiveness to often unprecedented situations allow it to reach solutions to unique problems more flexibly and creatively than would workers’ compensation or other codified systems.

The third positive effect of the tort system on mass torts is deterrence, an important component in any compensation scheme. Since little empirical evidence exists on deterrence in the tort system, it would be a mistake to make claims about certain or direct connections between tort compensation and the care with which dangerous products are designed, manufactured, and sold. Nevertheless, asbestos and other toxic tort litigation do have components that promise deterrent effects over and above those that the tort system may provide for ordinary cases.

Weaknesses in the Litigation System

The strengths of the tort system were seen in the early phases of asbestos litigation. But in the current mature phase of the litigation which we have observed, it is the weaknesses of the system that seem to be most vividly displayed. Injured workers have little power, lawyers have conflicting interests, courts defer to other priorities, dispositions are slow, recoveries are inconsistent, medical discovery is tailored to trials that do not take place rather than settlements that do, legal
battles are repetitive, and transaction costs are high. Of these problems, the most serious are the high costs, slow pace, variation in outcomes, limits to individualized responses, and the ad hoc process through which group dispositions have been adopted.

Transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available. Given the nature of the cases, some of these costs may be unavoidable. A substantial portion could be reduced or eliminated, however, if settlements could be negotiated before or in the early phases of suit, if defendants cooperated more effectively, if common issues were litigated less frequently, if statutes of limitation and recruitment practices did not force premature claims, and if contingent fees bore a more direct relationship to lawyer efforts expended and risks incurred.

Across the 10 courts we studied, only a small proportion of cases reach full disposition at the same pace as that of other civil cases; a larger proportion obtain partial settlements, reaching full disposition only after a four- to five-year wait or even longer after filing. Finally, in a few courts the rate of disposition is so low that it is impossible to predict when current asbestos cases will reach disposition.

The variation in outcome from one asbestos victim to another, all of whose lives have been similarly disrupted, is a much more complex problem. At one level, it appears unfair to deny recovery to one worker with mesothelioma and grant another with serious but not yet disabling asbestosis a verdict of a million dollars or more. But by relying on private settlements and lay juries that need not account for their decisions, the American tort system places a low priority on consistency across cases. Moreover, the law of liability varies across jurisdictions for all kinds of cases, as do rules of evidence and even the conduct of trials. The issue then seems to be whether there are elements peculiar to toxic torts that militate for more consistency than generally results from litigation.

A basic problem with asbestos litigation is that through group disposition processes it has sacrificed attention to individualized injuries and needs that supposedly characterizes our litigation process without achieving the reduction in transaction costs that usually accompanies less individualized administrative processes. This transformation of the historical case-by-case posture of litigation into a partially administered group approach is significant not only because it focuses attention on the trade-offs in any system between consistency and individualization, but also because it has come about in such a remarkable fashion—without plan, without debate, and without much public awareness. The rather sudden and unpublicized nature of this important alteration in the character of litigation seems to fly in the face of
the slow, careful, incremental, and public way of change that has been characteristic of Anglo-American common law for centuries.

Problems Posed by Latent Injuries

Some of the weaknesses in the civil justice system's handling of mass toxic torts result from its attempts to fit substantive rules designed for traumatic injuries to cases involving latent injuries. The tolling of statutes of limitations and requirements that individual claims must cover all injuries from asbestos exposure led to the surge of filings that occurred between 1978 and 1982, which in turn led to court overload, a mass of claims that present widely varying degrees of injury, and, ultimately, to the problematic disposition practices described in this Report. Applying legal standards of causation to probabilistic evidence of latent disease involved in asbestos claims seems to have contributed to the extreme variation in jury verdicts that has characterized asbestos trials. Judicial rulings on issues related to causation, for example, the evidentiary requirements for identifying specific asbestos products as the cause of injury, have also contributed to the variation in outcomes. Together, legal rules on the timing of filing claims and on causation increase the probability that some seriously injured plaintiffs will be undercompensated or denied compensation entirely, while less seriously injured parties will be overcompensated.

Latent injuries require compensation systems to deal with historical data. In cases involving toxic substances that were manufactured by more than one company, the lack of practical standards for determining liability and apportioning damages among tortfeasors for injuries that occurred 10 to 40 years ago deprives some plaintiffs with legitimate claims from recovering damages. It also creates incentives for extensive litigation among the targeted defendants and their insurers, and complicates an already difficult settlement.

In cases of latent injury, when the objectionable behavior occurred decades ago, and especially when it was carried out by individuals long since deceased on behalf of companies that do not much resemble the firms now being sued, the applicability of punitive damages is called into question. The potential for awarding punitive damages has impeded coordination of defendants' activities, further complicating and postponing settlements, and raises the issue of availability of compensation for future plaintiffs.
Problems Posed by Mass Litigation

Other flaws develop in the tort system’s compensation for asbestos injuries because asbestos litigation is mass litigation. Mass litigation tends to produce a concentration of cases in both courts and law firms. That concentration in turn leads to the delay that originates with overburdened courts, lawyers who have taken on more cases than they can handle, and ultimately to the need and opportunity for group dispositions.

The mass nature of toxic torts also accentuates the lack of some form of national tort law. Without attempting to pass judgment on the legal issues involved in such a departure from contemporary doctrine, in practical terms, the absence of uniform substantive rules means that similarly injured workers are treated quite differently. The level of compensation awarded (indeed, whether or not compensation is even available through the tort system) depends more on the rules regarding liability, causation, and proof in the jurisdictions in which their suits are brought than on their exposure or injuries. Lack of uniformity is the price for experimentation and innovation, which is preserved in its purest form by the multiple, independent court systems of our current jurisprudence. But one might question the justness of a system that asks injured parties to pay the price for such experimentation. Lack of uniformity is of course not exclusive to mass torts, but the inequities are more dramatic in mass litigation. Since the business enterprises that create the risks of toxic torts operate nationally, making decisions that affect workers and consumers everywhere, a stronger rationale exists to establish rules that apply wherever these businesses may be sued.

Because the cases can have identical or similar as well as quite different elements, mass litigation invites duplicative efforts. Redundancy in asbestos litigation means that many steps in the process must be repeated, and many almost identical issues in the lawsuits must be decided over and over again.

Finally, the problem of punitive damages is related both to the large number of cases and to the latent injury issue. The problem that punitive damages pose for the tort system, as distinguished from the burden they impose on defendants, is the lack of a connection between the social function that an assessment of punitive damages is presumed to play and the haphazard way in which punitive damages are actually secured in mass litigation. Although there are controls over the level of punitive damages in certain individual cases, there are no controls over the cumulative effect of these cases. Therefore, there can be no even vague assurance that the social function of punitive damages has
Alternatives to Litigation

The critical problems that result from the tort system's handling of latent injury litigation have led some to advocate taking these cases out of the court system. Such proposals presume that alternative systems would successfully resolve the problems that currently beset the tort system. But it is highly uncertain that administrative compensation systems patterned after current models, government subsidized or not, would improve the delivery of compensation to injured asbestos workers. Moreover, substituting an administrative compensation system for the litigation of asbestos claims might significantly affect the future ability of other industrial workers to gain compensation for toxic injuries. If such administrative solutions were to become the preferred or exclusive remedy for toxic injury cases, incentives for lawyers to develop a firm evidentiary basis for such claims might decrease, possibly reducing any deterrent effect that the tort system might have on producer behavior. Of course, other mechanisms might be developed for bringing dangerous toxic exposure situations to light and for determining their development. But substituting administrative compensation for litigation without considering these larger social issues would be trading one set of problems for another.

The Asbestos Claims Facility represents a somewhat different alternative. As it has evolved, it is more an adjunct to than a substitute for the tort system. It promises substantial costs savings: it may settle claims before suits are required, or after suit, it may settle claims in the early or middle stages of litigation rather than just before trial (the typical current pattern). Once on trial, all members would be represented by counsel for the group rather than by separate lawyers for each defendant. But the facility is the manifestation of a mature system at work. It is the product of over ten years of litigation involving one of the most extensive discovery efforts in the history of American tort law, the settlement of thousands of cases, and the trial of hundreds. It comes into operation after the litigation experience has apparently convinced its members that their interests are better served by paying claims administratively rather than litigating them, and after defendants have had extensive experience in informally allocating responsibility among themselves in several different sites. In future mass litigation marked by uncertainty over whether claimants can
make their cases stick at trial, a claims facility may not be workable, at least not until the potential gains of plaintiffs and defendants, as well as the relative burdens of the defendants, have been established through sufficient experience with ordinary litigation.

Changing the Tort System

Each alternative to the tort system that has been proposed to date has its own problems. Also, no hard empirical evidence exists that any alternative could effectively resolve the range of problems that we have observed in asbestos litigation. For these reasons it seems prudent to turn our attention to the tort system itself and consider how it might be strengthened.

At least six major issues must be addressed to improve the "fit" between the tort system and mass toxic tort claims:

- Proper timing for filing claims.
- Barriers to incorporating scientific standards of causation into the legal process.
- Theories of liability and damages apportionment that do not match the latent nature of toxic tort exposure.
- Inadequate judicial resources.
- Redundant litigation.
- The national character of many mas toxic torts.

Devising rules and procedures that address these issues without diminishing the strengths of the tort compensation system is not easy. On close examination, even those solutions that seem simple present difficult problems. Selecting the best approach to mass latent injuries requires a careful balancing of competing interests between key participants (workers vs. manufacturers, consumers vs. producers, society vs. individual) and competing concerns (compensation vs. costs, compensation vs. insurance availability).

Even a cursory review of approaches to improving the fit between the tort system and mass toxic tort claims demonstrates the difficult problems that confront those who seek to reform the process. This may in part explain the temptation to consider removing such claims from the tort system altogether. But many of the same problems would arise in any solution proposed for the processing of mass toxic claims. In considering alternatives to the tort system, the key question is whether any alternative would provide better mechanisms for solving the complex problems we have described without impairing the strengths of the traditional tort process.
A Proposal for Action

A close analysis of asbestos litigation, its problems and alternatives, offers strong evidence that as a society we have not thought enough about the issues that mass latent injury torts pose for the civil justice system and for us all. We need to clarify our objectives regarding deterrence, compensation, and punishment. We must determine how we want to treat victims and defendants and how we want to discriminate among them. We must decide upon the costs that we are willing to bear and how we wish to allocate them. We must go about these difficult tasks with a sensitivity to the traditions of our legal system even as we consider arrangements beyond the conventional set of responses.

Because these are challenges of a fundamentally moral and political nature, it is not easy to identify the institution most appropriate to mobilize the necessary effort. We lack the ready vehicle of the British Royal Commission, which can combine high prestige and political influence while overcoming parochial perspectives. What is required is a mechanism equivalent to the National Commission on Causes and Prevention of Violence, or the National Advisory Commission on Civil Disorders of the late 1960s. Whatever its origin, the individuals that make up this group must represent the important industrial, worker, consumer, governmental, and professional interests that have something at stake in the outcome, with the experience and wisdom to offer workable solutions. The group must include physical scientists, social scientists, legal scholars, and others to help bridge the gap between law and science, to clarify the choices that can be made, to predict the consequences of different institutional and normative arrangements, and to make us aware of the ways in which other societies have reacted to the complexities of latent torts. Given the pathbreaking dimension of asbestos litigation, the commission must include members who are familiar with that history. But it must not be controlled by representatives of participants in the asbestos crisis; for them the stakes are too high to expect sufficient attention to a promotion of the general welfare.

Without such an approach, we will likely continue to struggle through the current thicket of the civil justice system: overcompensating some victims, but leaving many more ill-attended, deterring manufacturers an unknown amount in unknown directions, rewarding lawyers generously without attention to the risks they have borne or the work they have done, perhaps compromising our capacity to estimate risk and insure against it, and running a high risk of jeopardizing the ability of the courts to deliver individualized justice to individual plaintiffs.
Acknowledgments

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We would also like to thank the technical reviewers of this report, Paul Hill and Judith Resnik, who carefully read successive drafts, offered numerous helpful suggestions for improvement, and encouraged us to persevere in our efforts to understand the challenges posed to the civil justice system by asbestos litigation. Stephen Carroll and Gustave Shubert provided us with support and encouragement throughout, and offered many helpful suggestions for presentation of the results. Laural Hill provided useful research assistance in the early stages of the project. We also thank Sue Arkosy for her patient preparation of the final manuscript.
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I. INTRODUCTION

BACKGROUND

For decades, asbestos has been used in numerous industrial settings, in ships, in schools, and in homes across the country. But asbestos is now known to cause a variety of diseases. Many workers who were exposed to asbestos years ago now have seriously disabling injuries, and many have died of asbestos-related diseases. Estimates of the number of “excess deaths” due to asbestos exposure through the end of the century range from between 200,000 and 450,000 (Selikoff, 1981; MacAvoy et al., 1982). Although medical knowledge of the nature and extent of the association between asbestos exposure and disease has developed gradually, by the 1930s, studies had established a link between exposure and disease. Moreover, there is substantial evidence that at least some producers knew then about the dangers of asbestos exposure (Castleman, 1984; Brodeur, 1985a-d).

Since the early 1970s, over 30,000 claims seeking compensation for injuries due to asbestos exposure have been filed in courts around the country against asbestos manufacturers. Over the coming decades, tens of thousands more may be filed (Selikoff, 1981; Walker, 1982; MacAvoy et al., 1982). The average amount of compensation paid on claims settled through 1982 was $54,000 for asbestosis (a respiratory disease), $83,000 for lung cancer, and $265,000 for mesothelioma (a form of cancer that is specially linked to asbestos) (Kakalik et al., 1984:vii). On average, the total cost to plaintiffs and defendants of litigating a claim was considerably greater than the amount paid in compensation. In all, about $1 billion was paid to compensate and litigate asbestos claims between 1970 and 1982 (Kakalik et al., 1983:38). Estimates of future costs range between $4 billion and $87 billion (MacAvoy et al., 1982; Conning & Company, 1982). In response to these financial demands, several asbestos manufacturers have filed for reorganization under Chapter 11 of the federal Bankruptcy Act of 1979.

The large number of claims, the severity of injuries, the financial stakes involved, and the social issues raised by the past behavior of asbestos manufacturers and by the possibility that the resources available for compensation will be insufficient have led many observers to view asbestos litigation as a test of the civil justice system’s ability to efficiently and equitably compensate injured parties and to deter future injurious behavior by manufacturers. This view is underlined by the widespread belief that asbestos injury cases represent a new class of
lawsuits that pose special problems for the tort system. This class of suits differs from traditional personal injury litigation in several important ways:

- The injuries are medically complex—they may be difficult to detect, are associated with multiple causes, and have an uncertain prognosis.
- The injuries are attributed to exposure to toxic substances or products that occurred many years previously.
- The circumstances of injury apply to a large group of plaintiffs.
- A relatively small number of producers and suppliers were implicated in the behavior that led to the plaintiffs' injuries, and many of these firms are named in nearly every case.

Lawsuits arising out of exposure to Agent Orange and the use of Diethylstilbestrol (DES), Bendectin, and the Dalkon Shield are recent examples of this class of litigation. Suits filed against toxic waste sites are another example of this new class of complex court cases. Some argue that compensation for such injuries cannot be efficiently and equitably provided and that damages cannot be fairly and reasonably apportioned by the tort system. In lieu of the tort system, some manufacturers and insurance companies have proposed that the workers' compensation system should provide an exclusive remedy to injured asbestos workers; alternatively, they have suggested that Congress authorize a special federal administrative compensation system subsidized by the federal government, similar to the Black Lung program. In the absence of either approach, many manufacturers and insurers have supported the establishment of a claims processing mechanism outside the court system, called the Asbestos Claims Facility, which will be subsidized by them. This facility will use an administrative approach to providing compensation to asbestos workers.

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1 Agent Orange was used as a defoliant during the Vietnam war. It contains dioxin, which has been isolated as a carcinogen in rats but whose threat to human health is still under investigation. A class action suit by veterans who claimed injury due to exposure to Agent Orange was settled in 1984 for $180 million. DES is a synthetic hormone that was prescribed for pregnant women to deter spontaneous abortion. It is associated with a higher risk of uterine cancer in users' daughters. About 1000 claims have been brought against drug manufacturers by the daughters of DES victims (Corrigan, 1984, 599). Bendectin, a morning-sickness drug used by millions of women, is alleged to cause birth defects. The manufacturer took it off the market for non-medical reasons, including litigation costs (National Law Journal, March 25, 1985). The Dalkon Shield is an intrauterine birth control device that has caused pelvic infections in some users and has been blamed for infertility in some women and birth defects in children born to others. More than 12,000 claims have been brought against its manufacturer, A.H. Robbins, which has recently sought protection under Chapter 11 of the Bankruptcy Act (The Washington Post, April 7, 1985, Sec. A1, pp. 1, 6).
In contrast, plaintiff lawyers who led the fight to bring worker injury claims as third-party lawsuits against manufacturers, and other advocates of stronger social policies to deter corporate misconduct argue that the tort system offers the only practical means of providing adequate compensation for asbestos-related injuries, and is still the most powerful tool for ensuring that manufacturers give adequate attention to the potentially harmful side effects of their products. They also assert that the inefficiencies of the tort system are exaggerated.

Despite the attention that asbestos litigation has attracted and the variety of proposals that have been made for modifying the system's approach to dealing with asbestos claims, until recently, little empirical information has been available about the nature of asbestos lawsuits and how they are currently being handled. Past estimates of the numbers of claims and the costs of compensating and litigating them varied considerably, depending on the source. Moreover, information about how the courts were dealing with the claims was largely anecdotal.

In the past few years, a number of major studies of asbestos litigation have appeared. But rather than clarifying the picture of court processing of asbestos claims, these reports have complicated the debate by presenting data that appear to support contradictory views of the litigation process.

In 1983 and 1984, Rand's Institute for Civil Justice (ICJ) published two reports detailing the costs of litigating asbestos claims (Kakalik et al., 1983) and examining the factors associated with variations in compensation levels (Kakalik et al., 1984). The ICJ research indicated that plaintiffs receive 39 cents (on average) of every dollar expended for asbestos claims processing, while attorneys on both sides receive most of the remainder. This research was interpreted by many as strong support for the view that compensation of asbestos claims within the current tort system is inefficient.

Within the same time period, a special working group established by the National Center for State Courts (NCSC) reviewed the problems associated with court processing of asbestos claims (NCSC, 1984). The working group's suggestion that courts with large asbestos caseloads adopt a variety of innovative procedures to cut processing costs and time, and their judgment that "the asbestos situation stands out in stark contrast to the usual private resolution of the vast majority of tort claims" (NCSC, 1984:3) lent credence to the belief that asbestos litigation poses unique problems for the civil court system. The NCSC working group also supported the establishment of the Asbestos Claims Facility by the manufacturers and insurers.
More recently, the Federal Judicial Center (FJC) published an overview of asbestos case processing in the federal district court system that seemed to offer a more positive picture of the litigation (Willging, 1985). Drawing on the proceedings of a conference of judges and other officials from federal district courts with sizable asbestos caseloads, the FJC report summarized the status of federal court efforts to deal with the litigation, highlighting approaches that the conference participants judged particularly useful. Although the FJC noted that it had not conducted a research investigation of the asbestos litigation problem, its report provided support for those who believe that asbestos litigation can be handled, without great difficulty, within the current tort system. In response to the question, "Is there currently a crisis in the federal courts caused by asbestos litigation?" the author concluded, "Reports of the demise of the federal judicial system, like the reports of the early demise of Samuel Clemens, are greatly exaggerated" (Willging, 1985:2). The report went on to state:

Asbestos cases, however complex they may have been at first, have become relatively routine product liability cases that involve a large number of parties. The major complications that remain relate to (1) disposition of claims against multiple defendants, who frequently have cross-claims against each other, and (2) disputes among defendants and their insurers about coverage (Willging, 1985:5).

Most recently, The New Yorker magazine published a series of articles by Paul Brodeur that describe in detail the efforts of leading asbestos plaintiff lawyers to develop legal and evidentiary grounds for bringing third-party suits against asbestos manufacturers. The articles praise the tort system for providing the means to discover and punish corporate misconduct and to adequately compensate injured parties (Brodeur, 1985a-d). Brodeur discounts concerns about the tort system's ability to deliver this compensation in a timely fashion and at a reasonable cost, citing the FJC study in support of his position (Brodeur, 1985d:64).²

Policymakers considering the implications of asbestos litigation in dealing with future mass toxic claims must assess the validity of these contrasting pictures. Whether one believes that alternatives to the tort system, such as those proposed in recent legislation³ introduced by

² The New Yorker articles were the third in a series of investigative research reports authored by Brodeur on asbestos and occupational disease. The previous work focused on the battle to develop effective regulation of worker exposure to asbestos (see Brodeur, 1974 and 1972).

³ Introduced in 1983, the Occupational Disease Compensation Act would have made compensation from a National Toxic Substances Employee Compensation Pool the exclusive remedy for injured asbestos workers (see Section II).
Congressman George Miller and others, are necessary, should rest in part on an assessment of how well the tort system has processed asbestos claims. Alternative designs for such systems or for modifications in the tort system itself should be based on careful consideration of how the civil justice system has dealt with the challenges presented by asbestos litigation.

OVERVIEW OF THIS STUDY

In 1983, we undertook a study of court procedures for processing asbestos worker claims that ultimately became an examination of this larger issue. When the study began, we planned to focus on fairly narrow questions related to court management techniques for resolving asbestos claims. We visited 10 courts with large asbestos caseloads. We interviewed judges, court administrative officials, and leading plaintiff and defense attorneys about their approaches to managing and litigating asbestos claims. As the study progressed, we realized that there were more important issues to investigate than those associated with the adoption of formal procedures for managing cases.

In most of the jurisdictions we visited, despite the success of innovative procedures for streamlining the pretrial preparation process, courts were having serious difficulties in disposing of asbestos claims. In some jurisdictions with large asbestos caseloads, we found that few or no cases had been disposed of, although a significant number were judged ready for disposition. In others, the courts had been able to dispose of a substantial portion of their caseload only by treating cases in groups rather than on an individual basis. In a few jurisdictions that have persisted in dealing with cases in the traditional one-by-one fashion, it appeared that the courts would not dispose of their current asbestos caseloads until well into the twenty-first century. In only one major jurisdiction had a court managed to stay on top of its asbestos caseload by using traditional, individualized judicial management and settlement approaches. We found that whatever the approach to disposition, in most major jurisdictions, plaintiffs are required to wait at least three and often as many as five or more years before their cases are resolved. Some claimants find this wait beneficial, since with time their injuries develop, and they are likely to receive fuller compensation. Others wait for years without receiving full compensation for existing injuries. Some die before their cases reach disposition.

Although some juries have awarded extremely large verdicts to asbestos workers, and some attorneys have obtained large settlements, there is considerable variation in the amount of compensation awarded
to plaintiffs. In some jurisdictions, workers are barred by law from obtaining any compensation through the tort system. In most others, legal rules fashioned to fit traumatic injuries require that cases be brought prematurely, before the seriousness of injury is really known. It is uncertain whether the amounts of money that these plaintiffs obtain in settlements or verdicts are commensurate with the financial and emotional costs that they will incur from future disabilities. In addition, the use of group settlement practices to dispose of batches of cases is thought by many to blur the differences that exist between claimants with very serious diseases and those with relatively less serious diseases, increasing the likelihood that the former will be undercompensated and the latter overcompensated for their injuries.

The location of injured asbestos workers around the country and the evolution of the litigation has led to a concentration of cases in the hands of relatively few attorneys. This concentration has contributed both to the problems that courts face in attempting to dispose of asbestos claims and to the development of group disposition practices. But despite the concentration of cases, defendants in most jurisdictions continue to pursue the litigation in a relatively uncoordinated fashion. (This situation may change if the Asbestos Claims Facility proves successful.)

This picture of lengthy waits for compensation and group justice, coupled with continuing high costs, is far more problematic than the picture of the tort process that is presented by Brodeur. To understand the differences between these pictures, it is necessary to understand the evolution of asbestos litigation. Much of Brodeur's discussion of workers' lawsuits focuses on the early phase of asbestos litigation, when plaintiff attorneys were investing substantial resources in developing evidence on the links between asbestos exposure and injury, and producer knowledge of these links, and winning significant victories for asbestos workers' right to bring third-party lawsuits against the manufacturers. In this phase, the tort system demonstrated many of its strengths: it provided the financial incentives for attorneys to pursue compensation for injured workers and the legal tools to make this possible. By so doing, it may also have sent an important signal to manufacturers regarding the level of care required in the design, manufacture, and marketing of products.

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*We do not mean to suggest that Brodeur approves of the entire course of asbestos litigation. There is a strong negative tone to his discussion of the insurance coverage litigation and defendant bankruptcies. But his picture of worker personal injury litigation highlights the large verdicts won by some, ignores the fact that others get little or no compensation, discounts concerns about costs, and rarely deals with the length of time to disposition.*
In contrast, our research focused on the more pedestrian aspects of the litigation as it entered a more mature stage. We talked with judges who were confronted with asbestos caseloads that they found unmanageable under current resource constraints, and with attorneys who struck bargains with judges on trial schedules in return for being permitted to take time off from dealing with their asbestos cases. We heard of judges who did not want to try asbestos cases because they are too "dirty," too complicated, or do not present significant questions of federal law. We learned of administrative arrangements in which defendants offer and plaintiffs accept fixed amounts for different case types, with little attention to individual case characteristics. We spoke to lawyers who have inventories of cases in multiple jurisdictions, and to other lawyers in those jurisdictions who said that the cases did not move there because those lawyers were occupied elsewhere. We read judicial opinions in which trial judges expressed their frustration about a legal system that tries to fit "square pegs into round holes" or likened the results of asbestos litigation to those of a gambling casino. In this stage of the litigation, it was the weaknesses of the tort system, rather than its strengths, that were most vividly illustrated.

**RESEARCH METHOD**

The analytic technique we used in this research is usually referred to as the case study method. It is a standard approach for analyzing complex policy problems that is used in numerous studies at Rand and elsewhere. It combines an analysis of available statistical data with the collection and interpretation of descriptive and evaluative information obtained from key officials and other policymakers. It is particularly appropriate when the problem under study involves issues of process and implementation (Yin, 1984).

We began by reviewing the incomplete statistics on the size of asbestos caseloads in trial court jurisdictions around the country. We quickly determined and in the course of subsequent interviews confirmed that the majority of asbestos claims to date have been brought in fewer than 20 jurisdictions on the Atlantic, Pacific, and Gulf coasts. These major asbestos jurisdictions are listed in Table 1.1. From these jurisdictions, we selected 10 courts for study (indicated by asterisks in Table 1.1), chosen to represent different regions and to include both state and federal trial court systems. We focused on courts with heavy asbestos caseloads because we decided that if this litigation does present problems to the civil justice system, the problems should appear in these courts.
Table 1.1
MAJOR ASBESTOS LITIGATION JURISDICTIONS

<table>
<thead>
<tr>
<th>Federal District Courts</th>
<th>State Trial Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northern California*</td>
<td>Alameda, California*</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Barnwell, South Carolina</td>
</tr>
<tr>
<td>Southern Georgia</td>
<td>King, Washington</td>
</tr>
<tr>
<td>Massachusetts*</td>
<td>Los Angeles, California*</td>
</tr>
<tr>
<td>Southern Mississippi</td>
<td>Middlesex, New Jersey*</td>
</tr>
<tr>
<td>New Jersey*</td>
<td>Philadelphia, Pennsylvania*</td>
</tr>
<tr>
<td>Eastern Pennsylvania*</td>
<td>San Francisco, California*</td>
</tr>
<tr>
<td>Eastern Tennessee</td>
<td></td>
</tr>
<tr>
<td>Eastern Texas*</td>
<td></td>
</tr>
<tr>
<td>Eastern Virginia</td>
<td></td>
</tr>
</tbody>
</table>

*Jurisdictions selected for study.

The study was conducted by four researchers: a lawyer, a legal historian, a political scientist, and a sociologist. We visited each court and interviewed the key court officials involved with asbestos litigation and lawyers for both plaintiffs and defendants. Interviews were rarely completed in less than an hour; we found that many respondents were willing to spend several hours detailing their experiences and opinions on asbestos litigation. We also reviewed court orders and opinions, various standardized forms used in the pretrial process, and when available, statistical reports. In several jurisdictions, we were able to observe trials, pretrial conferences of asbestos cases, and depositions of witnesses. In one federal district, we were also able to interview jury members after they had reached verdicts on four cases that had been consolidated for trial.

A team of two researchers spent at least three days in each jurisdiction; in most instances, we made multiple trips to a jurisdiction and frequently followed up our interviews by telephone or mail to confirm the information we had obtained. After the interviews, each research team prepared written case reports to communicate their findings to the other project researchers. In all, we interviewed 81 key participants in asbestos litigation, including 24 judges and magistrates, 17 other court officials, 22 plaintiff attorneys, and 18 defense attorneys. A number of attorneys (and one court official) who participate in

*Because the study focused on court procedures that are not usually familiar to litigants, we did not attempt to interview plaintiffs or defendants. The results of our study, however, raise a number of questions concerning the parties to mass litigation that should be the subject of future research.
litigation in several courts provided us with information about each of those courts. Table 1.2 shows the distribution of interviews across respondent position, by federal and state court systems.

We had originally expected to collect aggregate statistics on asbestos caseloads, judicial resources allocated to asbestos litigation, time to disposition, and patterns of disposition (e.g., settlement rates and outcomes) from each jurisdiction. We quickly discovered, however, that these data are generally unavailable. Among the courts we studied, only a few routinely tabulated the number of asbestos cases filed per year. Many had no official mechanism for reporting the number of asbestos cases pending at any particular time. But most courts had some system for identifying asbestos cases and assigning them to a particular judge or judges for pretrial management and/or settlement. These judges or their clerks often kept their own unofficial tabulations of the number of cases pending before them, which they were willing to share with us. By supplementing these reports with estimates obtained from plaintiff and defense attorneys, we were usually able to obtain a reasonably good estimate of the size of the asbestos caseload at the time of our interviews. But it was virtually impossible to obtain records on the length of time to disposition and on disposition patterns. For the former, we were totally dependent on estimates provided by court officials and practitioners. We also depended on interviews to obtain estimates of the number of cases disposed of by settlement in

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Federal District Court</th>
<th>State Trial Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges and magistrates</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>Other court officials</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Plaintiff attorneys</td>
<td>11</td>
<td>13</td>
</tr>
<tr>
<td>Defense attorneys</td>
<td>13</td>
<td>14</td>
</tr>
<tr>
<td>Total*</td>
<td>44</td>
<td>49</td>
</tr>
</tbody>
</table>

*The actual number of respondents was 61. Because some respondents who practice in several jurisdictions provided information about each of these jurisdictions, the number of interviews shown exceeds 61.
each jurisdiction. In most jurisdictions, the estimates we obtained from court officials and attorneys on both sides of the litigation were fairly consistent. If we were unable to obtain consistent estimates, we have either reported the range of estimates or simply noted that the data were unavailable. Although our estimates of numbers of asbestos cases filed and disposed of are rarely as precise as we would like, this report does present the most complete statistical picture yet of asbestos litigation in major jurisdictions.

Most of the fieldwork was carried out between December 1983 and June 1984. Asbestos litigation is a continually evolving process: personnel, attitudes, procedures, and outcomes change frequently. We have tried to stay current with events in the courts selected for study by reviewing the Asbestos Litigation Reporter (a biweekly newsletter that reports nationwide asbestos litigation developments; hereafter referred to as ALR), and by follow-up telephone calls and correspondence with court personnel. Some court officials who reviewed an earlier draft of this Report provided us with updated information on caseloads and disposition rates. But readers should keep in mind that our description of the situation in each court is based on observations made at the time we visited that court. Estimates of court caseloads and disposition patterns particularly reflect the status of the litigation at a single point in time. In addition, since estimates were obtained from different courts at different times, they are not precisely comparable across courts.

As we write this Report, asbestos litigation is moving into a new phase. The establishment of the Asbestos Claims Facility has been announced, and the Manville Corporation, the largest of the six asbestos manufacturers that have filed for bankruptcy, is reported closer to settling the asbestos worker claims pending against it. But as we will show in the pages that follow, the issues raised by the litigation remain.

ORGANIZATION OF THE REPORT

This Report presents the results of our study. Section II discusses the evolution of asbestos worker litigation and describes the characteristics of asbestos litigation, both at the individual case level and at the aggregate level, that differentiate it from ordinary tort litigation. Sections III through V describe what we learned about the way in which the court system has approached the three critical tasks of litigation: substantive decisionmaking, preparing cases for trial, and

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We did compile, from various sources, a list of asbestos cases that have reached trial verdicts nationwide.
disposing of cases. In each section we consider whether asbestos cases
pose special problems for the tort system and how the system has dealt
with these problems to date. Section VI considers the implications of
our findings. Based on our observations of the asbestos litigation pro-
cess, we review the strengths and weaknesses of the tort system as a
mechanism for resolving mass toxic torts, consider changes that might
strengthen the system, and suggest a mechanism for formulating new
policies.
II. PROFILE OF THE ASBESTOS LITIGATION PROBLEM

SUMMARY

On the surface, asbestos suits appear to be similar to other types of product liability litigation. Although some involve dozens or hundreds of claimants, most asbestos cases seek damages on behalf of one, sometimes two people (usually a husband and wife), and like many contemporary product liability suits, direct their claim against more than one defendant.

On closer examination, however, asbestos product liability suits display characteristics quite unlike those of other product liability cases. These characteristics pertain to the asbestos caseload as a whole, to individual asbestos lawsuits, to the litigants, and to their insurers and lawyers. Taken together, these characteristics have not only set asbestos cases apart from other suits involving traumatic torts, they have also made this litigation a major test of the tort system.

We have identified three phases in the history of asbestos litigation. During the first two phases, from the early to mid-1970s, and from the late 1970s through the early 1980s, the number of cases pending in individual courts, though growing, was still relatively small. The strengths of the tort system were more apparent than its weaknesses during those years. The tools of the system allowed innovative plaintiff attorneys to identify corporate misbehavior and secure recoveries based upon it. As a result, those attorneys steadily expanded both the types of asbestos workers who could maintain suits for personal injuries and the legal theories upon which those suits were based.

We conducted the fieldwork for this Report during the mid-1980s. As we interviewed judges, lawyers, and court administrators in jurisdictions with large pending caseloads, we realized that we were observing a third phase in the evolution of asbestos litigation. During this period, the concentration of claims, the characteristics of individual asbestos cases, the behavior of parties and lawyers, and the attributes of judges created a situation in which dispositions are slow, costs are high, and outcomes are variable. Our research during this third phase leads us to predict that the disposition of asbestos claims will continue to be a major problem for most of the courts in our sample well into the future. More important, this historical view of the complex asbestos experience raises serious questions about the ability of the tort
system to respond to claimants in other toxic tort litigation in a timely, efficient, and equitable manner.

As asbestos cases and costs have multiplied, various participants in the litigation have sought alternative approaches to compensating workers for their injuries. Not surprisingly, the proposed alternatives reflect the interests of their supporters, all of whom have enormous stakes in the current litigation. To date, no substitute for the tort system that is acceptable to all major participants has been found, although one, the Asbestos Claims Facility, has obtained substantial support from defendants.

The challenge that asbestos cases in particular and future toxic tort litigation in general pose to the civil justice system is perhaps best understood by presenting a profile of asbestos litigation problems. This section describes the features that set the asbestos issue apart, traces the history of its litigation, outlines the major proposals for alternative approaches, and looks at the challenges that lie ahead.

**UNIQUE FEATURES OF ASBESTOS LITIGATION**

**The Individual Case**

Two characteristics of *individual* asbestos cases, both of which are associated with the nature of the injuries claimed, set them apart from other tort cases. One or both of these characteristics is shared by other toxic tort cases such as those involving Agent Orange, Bendectin, DES, and Dalkon Shields. But these characteristics distinguish asbestos cases from more traditional product liability litigation, which may involve, for example, a defect in the manufacture of machinery.

*Medical causation and disability.* First, asbestos cases present a number of particularly difficult medical issues. Inhalation of asbestos fibers can cause asbestosis, lung cancer, and mesothelioma, although not everyone exposed to asbestos develops one of these diseases.

Asbestosis occurs as a result of the slow growth of fibrous or scar tissue between air cells of the lungs where the inhaled asbestos dust comes to rest. As the scar tissue increases, pulmonary function decreases until the “fibrous tissue . . . gradually, and literally strangles the essential tissues of the lungs” (Castleman, 1984:11). This process can continue long after exposure to asbestos dust has ended. The incidence rate of asbestosis among asbestos workers and their families is difficult to estimate, in part because dust standards have changed
over time, and the length of exposure varies greatly among the population at risk.¹

Lung cancer can result from exposure to many carcinogens, one of them being asbestos. However, lung tumors among individuals exposed to asbestos usually develop in the lower lobes of the lungs, whereas in the general population such tumors are more commonly found in the upper lobes. Mesothelioma begins in the epithelium or lining of the lungs, abdominal cavity, or heart. The vast majority of mesothelioma victims have been exposed to asbestos, although some individuals developed these tumors without a history of asbestos exposure. Although there is typically a long period of time between exposure to asbestos and the development of these cancers, the amount of asbestos exposure among cancer victims varies considerably. Asbestos-related cancers have occurred both in individuals whose exposure to asbestos was relatively brief and in those exposed over a long period of time. In addition, lung cancer or mesothelioma frequently occurs in combination with asbestosis.²

With the beginning of the modern asbestos industry in the 1870s, factory inspectors and physicians in Britain, Canada, Germany, and the United States began noting the high incidence of pulmonary illness and death among workers. By 1935, asbestosis was identified, and according to Castleman was “widely recognized as a mortal threat affecting a large fraction of those who had regularly worked with [asbestos]” (1984:31). Shortly after the first published case reports from Germany, England, and the United States in the late 1930s, physicians recognized that asbestos also causes cancer (Castleman, 1984:37).  

Cases with common but not identical characteristics. A second characteristic of individual asbestos cases is that they display many common but not identical characteristics. Because these attributes are

¹Selikoff reports that in locations where high levels of asbestos dust prevailed 10 to 20 years ago, “a high incidence of asbestosis can be expected, even up to 100 percent of those exposed for more than 10 years, but more usually at the rate of 50 percent of those exposed for more than 20 years, with increasing frequency for longer employment.” As the exposure level decreases, the incidence of asbestosis is expected to fall. But even at the lower dust standards of recent years, Selikoff predicts “some disease” after 20 years of exposure (Selikoff, 1976:226).

²Medical data indicate that lung cancer occurs from two to eight times more frequently in persons exposed to asbestos than in those in a comparable unexposed population. One reason lung cancer has increased over the past 20 years is that people exposed to asbestos are not dying at middle age cancer as frequently as in the past (Selikoff, 1976:326). The prevalence of mesothelioma is more difficult to measure; but Selikoff does report that the incidence is still increasing. Once a rare disease, mesothelioma has become much more common. Moreover, “from the incomplete data available...the prevalence among certain groups of workers in the United States is higher than anywhere else” (Selikoff, 1976:294).
not identical, the discovery and disposition of these cases, as with other toxic tort litigation such as DES or Dalkon Shield cases, have been complicated.

Many plaintiffs were exposed to asbestos at the same shipyards, refineries, and other worksites. They worked with the same asbestos products. They have similar work histories. Yet few shipyard or refinery worker plaintiffs have identical employment histories or identical histories of product exposure. Moreover, many plaintiffs frequently changed jobs. Because many plaintiffs were first exposed to asbestos products during the 1940s, it has been difficult for some to accurately recall the products they used at each job site. In addition, wives and children of some asbestos workers have brought suit. These plaintiffs claim that indirect exposure to asbestos dust on their husbands' or fathers' work clothes caused them injuries.

The Parties

Certain characteristics of the parties involved in asbestos litigation have also complicated the processing of these cases, setting them apart from traumatic tort litigation. Asbestos defendants, though usually the same from case to case, are numerous: individual lawsuits name an average of 20 asbestos manufacturers. These multiple defendants have different and often conflicting interests. Over the years, individual asbestos manufacturers each controlled a changing share of the local markets for their product. The product mix of each manufacturer and the toxicity of each product may also have changed over time and place. Finally, for each manufacturer, product usage varied across worksites. Not surprisingly, asbestos defendants disagree with each other about their relative liability with regard to individual cases. Because most plaintiffs worked at more than one site during their employment history, the problems of identifying the responsible manufacturers and apportioning damages among them are difficult ones.

Although some defendants are partially self-insured, most have outside insurance carriers. Insurance coverage arrangements for any one defendant may have changed over time. Consequently, the desire of individual defendants or insurers to settle claims or hold on to their cash reserves may be different at any one time and may change over time.

As a group, asbestos plaintiffs are unsophisticated clients. Although workers in many industries have been exposed to asbestos, the vast majority of asbestos plaintiffs fall into three major categories. Many claimants worked in shipyards, frequently for federal contractors
during and after World War II. The two other major categories of plaintiffs are asbestos products factory workers and insulation workers (Kakalik et al., 1983:15). Previous ICJ research, using a sample of claims closed between January 1980 and August 1982, indicates that only 5 percent of claimants were women filing for their own injuries. About 20 percent of those closed claims were filed by spouses, dependents, and estates of deceased workers. Because of the long latency periods of asbestos diseases, most claimants (or claimants' decedents) were over 50 years old at the time of filing suit (Kakalik et al., 1983:15). Union representatives often referred these claimants to their attorneys in groups. Because of their social status, their relative inexperience with attorneys, and the large number of claimants represented by each attorney, asbestos plaintiffs have historically exerted little control over their attorneys.

The Attorneys

Lawyers for both asbestos plaintiffs and defendants share important characteristics. In each jurisdiction we studied, there are relatively few lawyers on each side and most of those attorneys handle a large number of individual cases. We estimate that there are currently 15 to 20 defense attorney firms in each jurisdiction, each of which may be handling a few hundred to a few thousand asbestos cases. Across the country, a small number of plaintiff firms specialize in asbestos litigation. Some of these firms practice regionally or even nationally, with a large inventory of cases in several states. Most claimants in each of the major asbestos jurisdictions are represented by a local, regional, or national specialist; few are represented by firms that infrequently handle this kind of litigation. Among the jurisdictions we studied, the number of plaintiff firms actively involved in asbestos litigation varies between 3 and 10. Most of these firms represent several hundred asbestos claimants, with a few representing more than a thousand.

It is not difficult to understand how asbestos cases became concentrated in the hands of a few law firms. Union representatives initially referred many asbestos plaintiffs to a few local attorneys, often those who had been handling workers' compensation cases. Other attorneys

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3Because these workers installed asbestos in ships according to federal contract specifications, some plaintiff and defense attorneys have tried to include the federal government as a defendant in this litigation. To date, these efforts have been largely unsuccessful.

4Kakalik et al. report that of the claims pending in 1983, 51 percent were brought by shipyard workers, 12 percent by asbestos products workers, and 14 percent by insulation workers.
with some experience in asbestos litigation acquired clients through referrals from local lawyers, or on occasion, through mass solicitation. Each defendant has retained one firm in each jurisdiction to handle all of its asbestos litigation. If the same defendant is consistently named in most lawsuits, as is common, the size of its law firm's caseload is coincident with the size of the asbestos caseload for the entire jurisdiction.

On the plaintiff side, this concentration has had a snowballing effect. The major asbestos law firms in each jurisdiction are usually those that began the work in the early stages of the litigation. Most lawyers with whom we spoke agreed that the costs of asbestos litigation that were initially borne by plaintiff lawyers were substantial: more than $100,000 per firm. Also, asbestos litigation was originally viewed as a high-risk enterprise. With time, as the basic discovery on defendant culpability and product identification was developed and the processing of cases was routinized, conducting such a practice required less additional investment. But the information and expertise associated with success in asbestos claims is closely held within the small group of asbestos plaintiff lawyers. Therefore, firms that have been associated the longest with this litigation have both a real and a perceived advantage over newcomers. Consequently, new plaintiffs are referred to one of the established plaintiff firms in the area.

In addition, the newer, locally-based plaintiff firms informally seek assistance from or have established a formal co-counsel arrangement with one of the regionally or nationally based firms. In Massachusetts, for example, two of the major plaintiff firms have entered into co-counsel relationships with two of the largest regional plaintiff firms on the Eastern Seaboard.

Although it does appear to be characteristic of toxic tort litigation, this pattern of concentration in asbestos litigation is not typical of product liability lawsuits. This concentration has important implications for the pretrial processing and disposition of these cases, which will be discussed in Secs. IV and V, respectively.

Besides this pattern of concentration, there is another important characteristic of asbestos lawyers, particularly plaintiff lawyers. Plaintiff attorneys have a broad range of motivations for pursuing this litigation. For some, asbestos cases are just another form of personal injury or product liability litigation, though more numerous and lucrative than the typical case. Others seem to view the work in moral terms, referring to the plight of the asbestos victim. Lawyers in several jurisdictions report that they engaged in this litigation to change social policy. They not only sought to secure adequate compensation for claimants but also to change corporate practice and policy on the
production of asbestos and the widespread exposure of industrial workers to toxic substances. They also sought to punish manufacturers for their past actions. These efforts have uncovered much evidence of corporate irresponsibility (Brodur, 1985a-d; Castleman, 1984:C.9). Although the motivations described here are not unique, they do seem particularly pronounced in this area of toxic tort litigation.

EVOLUTION OF THE LITIGATION

Phase One: Establishing the Right to Recover

During the 1970s, plaintiff lawyers won several important victories by applying the theory of strict liability to latent torts and successfully challenging the exclusivity of the workers' compensation system. They also uncovered a wide range of damaging evidence regarding manufacturer knowledge of the dangers of asbestos exposure and their actions toward individual employees who developed asbestos disease.

Plaintiff lawyers first established a toehold for insulators against asbestos manufacturers in Borel v. Fibreboard. The court in Borel applied strict liability to latent torts, held that contributory negligence was not a defense to strict liability, found the defendants jointly and severally liable (although it was not possible to determine which exposure resulted in injury to Borel), and decided that extant medical studies demonstrated that the defendants should have foreseen the dangers to which they had exposed Borel.

Unlike Borel, many workers injured by asbestos insulation were not insulators. Instead they worked directly for the companies that produced the insulation products. For years their rights to recovery had been limited exclusively to the workers' compensation system. Beginning in 1978, lawyers in several states, employing different strategies, mounted successful challenges to the exclusivity of the workers' compensation system, enabling plaintiffs to recover damages against asbestos defendants in the tort system.

In these early cases, the plaintiff attorneys relied on documents and depositions that established that several major manufacturers knew about the dangers of asbestos exposure as early as the 1930s, that they concealed this knowledge from their employees, and that they had a policy of not informing their employees when these individuals developed asbestos-related diseases. This information included the papers of Sumner Simpson, former chief executive officer of Raybestos-Manhattan, minutes of the Asbestos Textile Institute

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5Borel v. Fibreboard et al., 493 F.2d 1076 (5th Circuit, 1973).
meetings since 1944, and records of industrial relations managers' meetings during the 1960s for the Manville Corporation (previously known as Johns-Manville).

By the late 1970s, plaintiff victories in Borel and the other early insulator cases gave way to some significant defense victories. In a number of cases, attorneys for asbestos manufacturers successfully persuaded juries that prior to 1964, research on the hazards of asbestos exposure was conducted using high concentrations of asbestos—conditions under which asbestos factory employees worked, but not those of insulators who were exposed to products with lower asbestos concentrations. Consequently, the asbestos manufacturers claimed that before the publication of Selikoff's research, they had no knowledge that insulators were at risk for asbestos disease.

In response to these defense victories, during the late 1970s and early 1980s, plaintiff lawyers concentrated on establishing that well before Selikoff's 1964 study, manufacturers were aware that asbestos exposure was causing disease among insulation workers. In fact, plaintiff lawyers uncovered workers' compensation claims as early as the 1950s, brought by insulators working for subsidiaries of several major manufacturing companies. Those records reveal that the companies notified their insurance carriers of the claims. In addition, the "Kaylo Documents" indicate that Owens-Illinois and Owens-Corning knew, before 1964, that insulators as well as asbestos factory workers were at risk of disease from exposure to asbestos insulation products.

By early 1981, the weight of this new evidence, combined with earlier documents on manufacturers' knowledge of the dangers of asbestos inhalation and the concealment of disease findings in individual employees, prompted juries to award punitive damages to asbestos

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6In 1964, the newly published epidemiological studies of Dr. Irving Selikoff and his colleagues at Mount Sinai School of Medicine generated widespread publicity. Selikoff's research shows that insulation workers had a startlingly high likelihood of dying from asbestos, lung cancer, mesothelioma, and gastrointestinal cancer (Selikoff et al., 1964, 152:22-26). Later that year, the New York Academy of Sciences held a large conference on asbestos disease. Once again, Selikoff's findings created a stir (Selikoff et al., 1965:139-155). At that meeting, Selikoff and his co-workers reported that they found radiological evidence of asbestosis in 86 percent of the 392 insulators examined who had 20 years or more exposure.

7See, for example, Bumgardner v. Johns-Manville, USDC-D.S.C.1984:77-9953C.

8Kaylo is an insulating product containing approximately 15 percent asbestos. Kaylo was manufactured by Owens-Illinois beginning in the 1940s. Owens-Corning Fiberglas Corporation began distributing Kaylo in 1953, and bought the entire Kaylo line from Owens-Illinois in 1968. The "Kaylo Documents," acquired by plaintiff attorneys during 1979 and 1980, report on laboratory inhalation experiments using animals exposed to this product beginning in 1943. Those experiments found that when the dust produced by cutting and applying Kaylo was injected into the lungs of animals, fibrosis and lesions developed.
plaintiffs. The first punitive damages were awarded in February 1981 against the North American Asbestos Company, a small firm set up by Cape Industries of London to act as agent for the sale of South African asbestos in the United States. During 1981 and the first half of 1982, juries awarded punitive damages totaling more than $6 million against the Manville Corporation alone.

Phase Two: The System Reacts

The success of the early plaintiff attorney strategies produced a decline in workers' compensation filings (Workers' Compensation Research Institute, 1986) and a surge in tort filings between 1978 and 1982. Defendants continued to challenge the right of plaintiffs to sue in the tort system, winning some significant victories. But at the same time, the defendants and their insurers, tacitly acknowledging the mounting costs of repeated trial leases, initiated actions that have profoundly influenced the pace and outcome of suits brought by asbestos claimants.

Pattern of Filings. Most asbestos claimants have access to the workers' compensation system, yet very few have sought benefits from its programs (Boden, 1984:513; Barth, 1982). Instead, asbestos claimants have overwhelmingly sought compensation from the tort system. Several factors contribute to plaintiffs' apparent choice of the tort system over the workers' compensation system. First and perhaps most important, tort awards are usually higher than those in workers' compensation programs. A second incentive for filing within the tort system is the coordination of tort damage and workers' compensation awards: currently, an employer can recover compensation benefits paid to a worker who subsequently obtains a tort recovery against a third-party defendant. The employer's recovery of the compensation award

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9Plaintiff attorneys had sought punitive damages as early as the Borel case. Frequently, however, judges refused to allow plaintiffs to raise the issue of punitive damages in the pleadings.

10Hammond v. North American Asbestos Co., Illinois Circuit Court, McLean County/80-L-52. The plaintiff was the widow of an insulation worker who died of mesothelioma. The punitive award in this case was subsequently rescinded when an appeals court ruled that under Illinois law, punitive damages could not be awarded in a derivative lawsuit.

11Brodeur calls these verdicts "a direct result" of the information produced during discovery (Brodeur, 1985:109).

12Workers' compensation awards usually do not compensate asbestos claimants for pain and suffering, loss of consortium, and fear of cancer, all of which can be valuable elements of tort awards in asbestos cases. In addition, while workers' compensation awards and settlements usually reimburse a claimant's actual medical expenses, payments for lost wages and loss of bodily function have ceilings in several states.
is usually allowed, even though the employer may have been at fault (Epstein, 1984:485-86). In addition, contingent fee restrictions in workers' compensation are often very severe and generally lower than those in tort claims.\textsuperscript{13}

Because of this preference for the tort system, tens of thousands of asbestos suits have been filed to date. By March 1983, 24,000 claimants had filed lawsuits nationally (Kakalik et al., 1983:3) and thousands more have been filed in the intervening two years. The Los Angeles Times estimated the number of cases filed as of July 1985 at about 33,000 (Los Angeles Times: Aug. 3, 1985:Part 1, p. 12). These cases were distributed fairly evenly between state and federal courts (Williging, 1985:11).\textsuperscript{14} After a few sporadic asbestos tort cases were filed from 1975 on, the number of filings increased rapidly beginning in 1978. For example, the first asbestos cases in the New Jersey federal court were filed in 1975. Those eight or nine cases involved between 200 and 300 plaintiffs. By January 1980, however, there were 1200 pending claims in that New Jersey court. In 1976 and 1977, approximately 40 asbestos cases were filed in the Philadelphia state court. Thereafter, between 50 and 60 cases were filed each month, until by 1979, about 1000 cases were ready for trial. As of December 1984, 3660 asbestos cases were pending in that court. In the Los Angeles state court, only 100 to 200 cases were filed in 1977, compared to 450 in 1978, 500 in 1979, 750 in 1980, and 1000 in 1981. Other courts in our sample exhibit the same pattern of accelerated filings between 1978 and 1982.

Since 1982, the number of new filings has begun to decline in some jurisdictions, but has remained high in others. In the Los Angeles state court, 420 claims were filed in 1983, down from 775 in 1982, and 1000 in 1981. In 1983, asbestos case filings in the San Francisco state court had dropped to approximately 500 from a high of 656 in 1982. In the Philadelphia state court, the rate of filings has continued at a pace of 40 to 60 complaints per month, and the court expects that rate to continue. During 1982, 593 new asbestos cases were filed in the Massachusetts federal court. That figure dipped only slightly—to 553—in 1983, and held steady between January and June of 1984.\textsuperscript{15}

\textsuperscript{13}Epstein (1984) also notes that compensation claims are usually tried not before juries but before specialized commissions. These commissions, quite different from common-law juries, might impose stricter standards of proof on plaintiffs.

\textsuperscript{14}As of April 31, 1986, Williging estimated there were 7170 asbestos cases in the federal system, representing 12,378 individual claimants.

\textsuperscript{15}In 1982, the Massachusetts federal court began reporting the number of asbestos cases pending. We calculated the number of new cases filed during this year by subtracting the figure for January 1982 from the January 1983 figure. Similarly, we subtracted the January 1983 figure from the January 1984 figure to obtain filings for 1983. During March 1984, the court began to report the number of plaintiffs whose cases were pending.
The Bankruptcies. As the number of claims against them mounted during this period, defendants and their insurers tried to mitigate the mounting financial impact of the increasing number of plaintiff victories. Undoubtedly, the most dramatic of these actions has been the filing by six asbestos producers for corporate reorganization under Chapter 11 of the federal Bankruptcy Act of 1979. Advocate Mines of Canada filed first, in 1981; UNR Industries followed in January 1982. Manville Corporation petitioned in August 1982. Thereafter, Amatex Corporation and Continental Producers filed (Parrish, 1984:8–9); and most recently, Forty-Eight Insulations petitioned, in March 1985.16 These bankruptcies have profoundly influenced major aspects of the litigation, including the pace of disposition, the amount of compensation some claimants have received, and the availability of punitive damage awards.

In the first months after Manville filed, delay and confusion prevailed. The bankruptcy filings automatically stayed litigation against the debtor corporations, and the co-defendants argued that the litigation should be stayed against them as well. Appellate courts in every jurisdiction ultimately decided against the non-bankrupt defendants. In the interim, however, all cases were initially stayed in all courts for various periods of time.

If the bankrupt defendants are reorganized, existing plaintiffs can pursue their claims against some form of the reorganized entity if they wish. Since nearly all asbestos cases have named the Manville Corporation in their suits, and since Manville had settled relatively few cases before filing for protection under Chapter 11, almost all of the thousands of cases that have been disposed of with respect to the other defendants are still theoretically unresolved.

The effect of bankruptcies on the level of recovery to claimants is unclear. Because claims against Manville and the other bankrupt defendants were stayed, the amount of recovery in cases that have been settled has allegedly been lower in some jurisdictions than if Manville were still involved. That is because the remaining defendants at times appear to have been successful in avoiding the funding of Manville's

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16The Associated Press recently reported that some members of Lloyds of London face possible financial ruin in part because of large damage awards granted to asbestos victims in the United States. (Los Angeles Times, May 14, 1985, Part IV, p. 6.)
share of the claim. According to some attorneys that we interviewed, in some jurisdictions, settlement awards are up to 30 percent less than they would have been had Manville still been involved. In other jurisdictions, there is disagreement on this point.

Besides the pace of the litigation and levels of recovery, the defendant bankruptcies, particularly Manville's, have also affected the availability of punitive damages. With Manville and UNR in bankruptcy, plaintiff attorneys cannot use much of the information they had uncovered regarding manufacturer knowledge of the dangers of asbestos exposure to recover punitive awards from these defendants.

**Insurance Coverage Litigation.** As the number of claims mounted, five manufacturers reacted by bringing suit against their insurers to compel them to provide coverage of those compensation claims. Those manufacturers—the Manville Corporation, Fibreboard Corporation, GAF Corporation, Nicolet Inc., and Armstrong World Industries Inc.—have sued more than 65 insurance companies in one lawsuit, accusing them of wrongfully denying coverage for asbestos claims.17 The stakes in this case are enormous; for example, the Manville Corporation has already settled with six of its insurers for $427 million.

At issue is this question: Which of a manufacturer's past or present insurance carriers is liable for paying the compensation claims of asbestos workers? Many asbestos manufacturers held policies with several different insurance companies over time. Is a defendant protected by the carrier who insured the company at the time a claimant was first exposed to asbestos? By the carrier who insured the company at the time the claimant first manifested his disease? By all carriers who insured that defendant? Or should the defendant be protected by coverage from some combination of those carriers? The trial in this "coverage case," which was filed in the San Francisco Superior Court, began in March 1986, and is expected to last up to 18 months. As many as 150 lawyers are expected to participate in the trial.

The outcome of the coverage case will significantly influence the disposition of asbestos cases currently pending. It may also speed the resolution of these suits by clarifying the financial obligations of the insurers to the manufacturers. Until this case is resolved, however, uncertainty as to its outcome may continue to influence the behavior of some insurers and defendants.

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Phase Three: The Current Problem

By the mid-1980s, the period of our study, the surge in filings that began in 1978 had ended. Filings of new cases continue, but at somewhat diminished rates. Yet during this period, we found that the machinery of asbestos litigation was faltering, creating major problems with disposition, costs, and equity. The same substantive issues have been resolved several times, yet many courts insist on requiring plaintiffs and defendants to continue to litigate them. The courts and attorneys in our sample have developed procedures to routinize the litigation, yet the number of dispositions continues to fall behind the number of new filings. At the same time, defendants and insurers continue their earlier efforts to reduce the transaction costs of tort litigation. They have advocated new proposals to institute federally-funded compensation and have supported creation of the Asbestos Claims Facility (described in a subsection that follows, Alternatives to Litigation).

Large Caseloads. The total number of pending asbestos claims is estimated to have reached 33,000. Clearly, 33,000 product liability claims—even complex product liability claims—would not pose a problem for courts, lawyers, and litigants if they were distributed evenly across the country. In fact, NCSC estimates that "given . . . that approximately 13,126,000 civil cases were processed through the state judicial systems [in 1981], asbestos cases comprise a very small portion of civil filings overall—11,000 cases in state courts or approximately 0.1 percent of the total civil caseload" (Parrish, 1984:5). But for several reasons, the NCSC estimate is misleading. First, asbestos cases are not distributed evenly across the country. They are concentrated in only a few state and federal trial courts in locations where asbestos exposure was common. Second, asbestos cases frequently involve multiple claims that are filed together for efficiency, but must be disposed of separately. Many jurisdictions that appear to have only a few pending asbestos cases actually have 1000 or more claims awaiting disposition. Finally, the mere number of asbestos cases or claims does not accurately indicate the size of the asbestos workload, because asbestos cases require a disproportionate amount of judicial resources compared to other civil cases.

18Section III discusses this practice and its consequences for the cost, time to disposition, and outcome of claims.
19Section IV describes these procedures and the relationship between this routinization and disposition of cases.
20Section V describes the dimensions of the disposition problem and the absence of incentives to lawyers to speed disposition.
Typically, courts do not tabulate civil cases by type.\textsuperscript{21} As a result, few courts can provide official reports on the number of asbestos cases pending. But some courts with large numbers of asbestos cases have attempted to keep special track of them. The standard unit of accounting, however, is the case docket number. When that number represents multiple asbestos claims, even those courts that tabulate asbestos cases may not have an official count of asbestos claims. By interviewing court officials and attorneys, we obtained estimates of the number of pending asbestos cases in each court studied as well as the total number of claims that these cases involve.\textsuperscript{22} Table 2.1 presents these estimates. Although cases surged into these courts over roughly the same time period, there were differences in the rate of flow, and as described below, in the rate of disposition across courts. For some courts, then, the number of cumulative case filings that existed at the time of our site visits provides a better measure of asbestos caseload than does the size of pending caseloads. Table 2.1 presents these cumulative figures as well.

**How Asbestos Cases Contribute to Total Caseload.** In most of the courts we studied, the number of asbestos claims pending at the time of our study was well over 1000. Three courts had 3000 or more claims pending, and in two of these, the cumulative filings topped 4000. But many of these courts are large, with sizable criminal and civil caseloads and many judges. Thus, even in courts with a large absolute number of asbestos claims, asbestos litigation could represent only a small fraction of the judicial caseload.

Comparing the contribution of asbestos claims to judicial caseload across courts is difficult because courts have different jurisdictional limits, organizational structures, and methods for counting cases. Table 2.2 presents our estimates of the contribution of asbestos claims to judicial caseload. The first two columns show the proportion of the pending civil caseload accounted for by asbestos cases and asbestos claims, respectively. These percentages vary from a low of about 5 percent to highs of more than 25 percent; in 6 of the courts for which the

\textsuperscript{21} State courts sometimes report the number of civil damage suits separately from the number of other civil cases, but only rarely do they publish breakdowns by category of damage suit (e.g., malpractice, product liability, etc.). Federal trial courts do tabulate categories of lawsuits, but until recently they have not tallied asbestos cases separately.

\textsuperscript{22} Since each of the major asbestos defendants is named in all or almost all suits brought in any particular jurisdiction, the law firm representing each defendant has a total count of all asbestos claims pending in that jurisdiction. Therefore, when defense attorneys in a particular jurisdiction provided us with the same information about the number of pending lawsuits—as was almost always true—and when these estimates were consistent with the court’s estimates, we could be highly confident that the tabulation was accurate.
Table 2.1
ESTIMATED ASBESTOS CASELOAD IN THE COURTS

<table>
<thead>
<tr>
<th>Court</th>
<th>Pending</th>
<th>Cumulative</th>
<th>Pending</th>
<th>Cumulative</th>
<th>Date of Report</th>
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<tbody>
<tr>
<td>Federal District Courts</td>
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<tr>
<td>Northern California</td>
<td>311&lt;sup&gt;b&lt;/sup&gt;</td>
<td>460&lt;sup&gt;b&lt;/sup&gt;</td>
<td>388&lt;sup&gt;b&lt;/sup&gt;</td>
<td>1145&lt;sup&gt;b&lt;/sup&gt;</td>
<td>Dec. 1983/June 1984</td>
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<tr>
<td>Massachusetts</td>
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<td>1427</td>
<td>2141</td>
<td>2141</td>
<td>June 1984</td>
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<tr>
<td>New Jersey</td>
<td>130&lt;sup&gt;b&lt;/sup&gt;</td>
<td>140&lt;sup&gt;b&lt;/sup&gt;</td>
<td>1400-1600</td>
<td>2400</td>
<td>Mar. 1984</td>
</tr>
<tr>
<td>Eastern Pennsylvania</td>
<td>556&lt;sup&gt;b&lt;/sup&gt;</td>
<td>618&lt;sup&gt;b&lt;/sup&gt;</td>
<td>703&lt;sup&gt;b&lt;/sup&gt;</td>
<td>1802</td>
<td>June 1984</td>
</tr>
<tr>
<td>Eastern Texas</td>
<td>1200</td>
<td>2200</td>
<td>1200</td>
<td>2200</td>
<td>Dec. 1984</td>
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<tr>
<td>State Trial Courts:</td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alameda, CA</td>
<td>415&lt;sup&gt;c&lt;/sup&gt;</td>
<td>850&lt;sup&gt;c&lt;/sup&gt;</td>
<td><em>d</em></td>
<td><em>d</em></td>
<td>Nov. 1984</td>
</tr>
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<td>4800</td>
<td>2800-3300</td>
<td>4600</td>
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<td>_</td>
<td>1129&lt;sup&gt;e&lt;/sup&gt;</td>
<td>1200&lt;sup&gt;e&lt;/sup&gt;</td>
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<td>3660</td>
<td>4310</td>
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</tr>
<tr>
<td>San Francisco, CA</td>
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<td>2494</td>
<td>3500</td>
<td>3560</td>
<td>Nov. 1984/Mar. 1984</td>
</tr>
</tbody>
</table>

Note: Caseload estimates were obtained from interviews we conducted with court officials and attorneys in each jurisdiction. Section I discusses the problem of obtaining statistical data related to asbestos litigation.

<sup>a</sup>Where two dates are indicated, the first applies to the number of cases, the second to the number of claims.

<sup>b</sup>Excludes cases and claims in "suspense."

<sup>c</sup>Excludes filed cases for which at-issue memos have not yet been submitted. The number of such cases is not known.

<sup>d</sup>Multiple claims per case are permitted, but the court does not tabulate claims. According to court officials, there may be from 2 to 30 claims per case in Alameda.

<sup>e</sup>About 500-600 of these claims are apparently stayed, pending the outcome of bankruptcy proceedings.

data were available, asbestos claims represented at least 10 percent of the pending civil caseload. The estimates shown in the final column of Table 2.2 take the criminal and other non-civil caseloads and judicial manpower factors into account. They indicate that even in courts with very large non-civil caseloads and/or large numbers of judges, asbestos litigation appears to account for between 10 and 20 percent of the average judicial caseload. (Note that we are speaking here of the statistical average. Because many of these courts assign asbestos cases to one or a few specialist judges, the average judge is not responsible for any asbestos cases, whereas a single specialist judge may devote half or more of his time to asbestos.)
Table 2.2
ESTIMATED CONTRIBUTION OF ASBESTOS LITIGATION TO COURT CASELOAD

<table>
<thead>
<tr>
<th>Court</th>
<th>Pending Asbestos Cases, as % of Pending Civil Caseload</th>
<th>Pending Asbestos Claims, as % of Pending Civil Caseload</th>
<th>Pending Asbestos Claims Per Judge as % of Total Cases Per Judge</th>
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<tbody>
<tr>
<td>Federal District Courts</td>
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<td>Northern California</td>
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<td>7</td>
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<td>Massachusetts</td>
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<td>New Jersey</td>
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</tr>
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<td>Eastern Pennsylvania</td>
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<td>Eastern Texas</td>
<td>29</td>
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<tr>
<td>State Trial Courts</td>
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<tr>
<td>Alameda, CA</td>
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<td>Middlesex, NJ</td>
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<td>3</td>
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<tr>
<td>San Francisco, CA</td>
<td>18</td>
<td>[43](^b)</td>
<td>[42](^b)</td>
</tr>
</tbody>
</table>

\(^a\)Definitions of civil caseload vary across courts. For federal district courts, we used the official tabulation of "pending civil cases," reported by the Administrative Office of the U.S. Federal Courts, Table C:1 (1983, 1984). For California state trial courts, we used the tabulation of civil cases "awaiting trial" reported by the California Judicial Council, Table T-22 (1984, 1985). For Middlesex, New Jersey, we used the tabulation of total "active pending" civil cases reported by the New Jersey Administrative Office of the Courts, "Annual Report-Vinings Profile," 1983. For the Philadelphia Court of Common Pleas, we used the total of major civil cases pending and appeals from court arbitration, Court of Common Pleas Statistical Summary, 1985. When the date of the asbestos caseload counted differs from the date of the civil caseload count, we used the civil case count for the closest (available) date; if the asbestos count date was equidistant from two civil caseload counts, we used the average of the latter.

\(^b\)Where multiple claims per case are permitted, we performed the following calculations:

\[ X = \# \text{ of asbestos claims} - \text{total} \# \text{ of civil cases} - \# \text{ of asbestos cases} + \# \text{ of asbestos claims} \]

where \( X \) = % of caseload accounted for by asbestos claims.

This calculation does not take into account the possible presence of other non-asbestos multiple claim cases in the civil caseload. If there is a large number of such cases, our estimate of the relative size of the asbestos caseload will be too high. This may explain the anomalous estimate for San Francisco.

\(^c\)We used total authorized judgeships (including senior judges) to calculate asbestos claims per judge and total cases per judge. To calculate total pending cases for U.S. district courts and for Middlesex, NJ, and Philadelphia, PA, we summed all categories of pending cases, including civil and criminal and, as appropriate, family law and other matters. For California state courts, we summed total civil and criminal cases awaiting trial at the end of the reporting year.
The figures presented in Table 2.2 provide only a rough estimate of the burden on the courts posed by asbestos cases. But they clearly indicate that in courts seriously affected by asbestos litigation, these cases account for more than the small fraction cited by the NCSC study. More important, perhaps, than the discrepancies between our estimates and the NCSC figure is the fact that neither set of statistics indicates the workload represented by these cases. The workload is a product of the paperwork generated by filing multiple complaints and cross-complaints, motions associated with discovery and other pretrial issues, and court activities required to dispose of asbestos cases. The typical personal injury dispute involves a single complaint against one or two defendants and a small amount of discovery. It is usually resolved without judicial intervention by settlement between the parties. In contrast, a typical asbestos case involves a claim against an average of 20 defendants who file cross-claims against each other; a lengthy discovery process, including record searches and specialized medical exams, regulated by judicial orders issued after several judicial conferences with attorneys representing all parties; and a settlement that occurs after one or more conferences with a judge. These activities are not reflected in the statistics presented in Tables 2.1 and 2.2; for asbestos litigation, such statistics reflect only a small fraction of the actual workload imposed by asbestos cases.

**Slow Dispositions.** The concentration of claims and the characteristics of the litigation make disposition of asbestos cases a major problem for most of the courts in our sample. Previous ICJ research estimated that as of March 1983, only about 3800 of the 24,000 claims filed had been fully closed by all defendants (Kakalik et al., 1984:4). In 9 of the 10 courts studied, approximately 23,000 claims had been filed by the second half of 1984; of these, about 6000 had been terminated.

The courts in our sample fall roughly into two groups. In some courts, a substantial portion of asbestos filings has been terminated, and prospects that the remainder will be completed at a pace approximating that of the other cases in those courts are good. In the other courts, however, disposition rates are low; new filings, to the extent that they can be measured, tend to outnumber dispositions; and the likelihood that the existing asbestos caseload will be disposed of in the near future is small. Section V examines the factors that we believe explain the differences in these disposition patterns.

**High Litigation Costs.** Asbestos litigation is a problem for the civil justice system not only because of the concentration of claims and the slow pace of disposition, but also because of its high cost compared to other types of tort litigation. An earlier ICJ study, relying largely on
closed claim surveys, compared ratios of allocated defense expenses to compensation paid in three tort areas (product liability, malpractice, and auto accidents) with those in asbestos (Kakalik et al., 1984:75–76). The ratio for asbestos litigation was higher than all others. Information on plaintiff costs for asbestos and other tort litigation is less accessible. However, the characteristics of the cases and the historical development of the litigation also suggest marginally higher plaintiff costs for asbestos than for other types of tort litigation. The large number of defendants in each case, the often time-consuming task of reconstructing each plaintiff’s employment and medical history, and the need to provide recent medical tests generate costs not usually present in most tort litigation. Moreover, in the early stages of this litigation, plaintiff costs were undoubtedly even higher than they are today.

ALTERNATIVES TO LITIGATION

Proposed Legislative Solutions

From the late 1970s to the early 1980s, asbestos defendants sought relief from mounting product liability damage awards through the creation of a federally-funded compensation system for asbestos injuries. Three bills were introduced in Congress in the early 1980s; one is currently pending. This legislation has generally been supported by asbestos manufacturers and their insurers and opposed by claimant organizations.

Proposals for Federal Compensation. The first such legislative scheme was the Asbestos Health Hazards Compensation Act of 1981, introduced by Senator Gary Hart of Colorado. This unsuccessful Senate bill would have made existing workers’ compensation programs the exclusive remedy for injured asbestos workers against their employers and asbestos manufacturers. The bill would also have established federal minimum standards for compensation levels (Mark, 1983:903–907). The second unsuccessful attempt to institute federal compensation for asbestos victims was proposed in 1983 by George Miller (D-California). The Occupational Disease Compensation Act of 1983 would have made compensation from a national Toxic Substances Employee Compensation Insurance Pool the exclusive remedy for injured asbestos workers against their employers. Employers of

25The ratio of allocated defense expenses to compensation paid for asbestos cases is 0.45; for product liability, 0.36; for malpractice, between 0.27 and 0.30; and for auto accident cases, 0.95.
exposed workers and the enterprises of those employers at any stage of asbestos production would have funded this pool.

One piece of federal legislation is still pending. In March 1985, Congressman Austin J. Murphy (D-Pennsylvania) introduced the Asbestos Workers’ Recovery Act (HR 1626), which would establish a government/industry compensation fund for injured asbestos workers. As with previous proposed legislation, the fund established by this bill would be the exclusive remedy for injured workers against their employers and asbestos manufacturers. In July 1985, the legislation was referred to the House Committee on Education and Labor, which has been holding hearings on the bill (ALR, 1985:246–248).

Proposed Federal Product Liability Law. Mounting product liability damage awards in recent decades against a host of manufacturers, including the asbestos defendants, have prompted efforts to enact a federal product liability law. Most notable is Senate Bill 100, “A Bill to Regulate Interstate Commerce by Providing for a Uniform Product Liability Law.” First introduced in 1983, and reintroduced by Senator Bob Kasten (R-Wisconsin) in January 1985, the bill would affect several major legal issues pertinent to asbestos litigation (and future mass toxic torts), including the standard for legal liability (strict liability) and the availability of punitive damages. Its passage could significantly lower the value of asbestos claims.

The Kasten bill would “soften” the strict liability standards to which many states currently adhere. Asbestos suits typically claim failure to warn of the dangers of exposure to the product and are often litigated under a strict liability standard. The Kasten bill proposes that for cases involving an individual product with a construction defect or a violation of an express warranty, a manufacturer would be held to a strict liability standard. But in two other types of cases, those involving a design defect and those involving failure to warn of a defect, the plaintiff would be obliged to prove negligence on the part of the manufacturer.

The Kasten bill would also change existing state standards on punitive damages. Under current state laws, “a preponderance of evidence” is required to show wrongful acts that justify punitive damages, and the jury sets the amounts. Kasten’s bill would raise the plaintiff’s burden of proof to “clear and convincing evidence.” And although juries would still determine whether to award punitives, the judge would set the amount (Congressional Quarterly, 1984:3067–3068).²⁴

²⁴Earlier versions of the Kasten bill limited punitive damages to only one victim, even though a firm may face multiple claims. As of June 1985, Senate Bill 100 had been referred to the Senate Commerce, Science, and Transportation Committee.
Similar legislation has been proposed in the past three Congresses. Originally introduced at the start of the 98th Congress, the Kasten bill was finally approved by the Senate Commerce, Science, and Transportation Committee in March 1984, but no further action was taken during the 98th Congress (Congressional Quarterly, 1984:3067, 3071).

Asbestos Claims Facility

The Asbestos Claims Facility is intended to represent subscribing asbestos manufacturers and their insurers in resolving claims by injured workers. Ideally, all claims, including those pending in court and others not yet filed, would be directed to the facility. A single lawyer would represent all participating companies and insurers.

The amount of compensation for each claim to be paid through the facility will be determined either through negotiation, arbitration, or minitrial. Asbestos producers and insurers have both made concessions: participating insurers must agree to pay regardless of when a claimant's symptoms first occurred. In return, manufacturers have agreed to drop coverage suits against those insurers. Each company's share of the damages would be based on the number and average cost of past claims against it. Each individual insurer's share of the manufacturer's share in a particular case would then be based on how much coverage they provided between the time of the claimant's first exposure to asbestos and the time of the first diagnosis of injury. Thus, once the compensation is agreed upon, allocation of damages could be arrived at by simply applying a formula.

The concept of such a facility grew out of the efforts of several insurers to find a way to cut the overhead costs of resolving asbestos claims. The agreement was engineered by Harry Wellington, former dean of the Yale Law School, who was employed by the Center for Public Resources, a New York group that promotes non-judicial resolution of disputes (ALR, 1984:3356-3357; New York Times, May 19, 1984:22-23; and Fortune Magazine, November 12, 1984:165).

At this writing, the Asbestos Claims Facility has been inaugurated and negotiations continue to broaden its membership. By June 1985, 28 asbestos producers, 17 insurers, and 5 unidentified companies have agreed to participate. Wade N. Coleman of Citibank has been named the facility's chief executive officer (ALR, 1985:10227-10228). Plaintiff lawyers with whom we spoke are divided over support for the Claims Facility.
FUTURE CHALLENGES

The asbestos crisis is far from ending: new personal injury case filings resulting from exposure to insulation products are projected to continue into the next century. In addition, new types of asbestos personal injury and property damage cases will continue to be filed in uncertain numbers into the future. The success of the Asbestos Claims Facility is unclear, and new legislation to provide federal compensation to victims is still pending. At the same time, Congress is contemplating major changes in federal product liability law. This legislation is just one manifestation of the concern that asbestos litigation has generated with regard to future mass toxic torts.

Estimates of Future Claims

The problems that asbestos cases, because of their numbers and slow pace of dispositions, have posed for civil courts will be compounded in coming years if predictions of the number of future case filings are accurate. Estimates of new personal injury asbestos lawsuits to be filed in the next 30 years by “traditional” asbestos plaintiffs—shipyard, plant, and insulation workers—range from 32,000 to 200,000 (Kakalik et al., 1984:4).25 Indeed, the rate at which new cases of this type are being filed remains high in some of the jurisdictions we studied. More important, the number of new filings in most major jurisdictions continues to outpace the number of asbestos case dispositions.

New Classes of Claims

In addition to the traditional shipyard, plant worker, and insulation worker cases, new types of asbestos-related personal injury lawsuits, each involving potentially thousands of plaintiffs, are appearing. The plaintiffs in some of these new suits will be shipyard and insulation workers. For example, one lawyer in the San Francisco Bay Area has brought suit against the tobacco industry both separately and together with asbestos manufacturers to recover damages for the synergistic effect between smoking and asbestos exposure. At least one lawyer has brought suit against industrial manufacturers, the so-called “fume

25The Manville Corporation, the investment firm of Conning & Company, Paul W. MacAvoy, and Peter S. Barth have each calculated the number of deaths and/or lawsuits that will result from asbestos exposure in the future. These estimates were made before the decline in filings began.
defendants," and against the usual asbestos defendants on the theory that a synergistic effect exists between welding fumes and asbestos.26

Other recent asbestos suits involve new plaintiffs and claim property damage rather than personal injury. In the "rip-out cases," school districts across the country have brought suit against asbestos manufacturers to recover the cost of replacing asbestos products in schools. In September 1984, Judge James M. Kelly of the eastern Pennsylvania federal court certified a voluntary national class of all public and private non-profit elementary and secondary schools in the nation for compensatory damages, and a mandatory class action names 54 defendants (ALR, 1984:9185). More recently, lawyers have filed a class action suit in the Contra Costa state court on behalf of more than 100,000 California homeowners whose homes contain asbestos building products. The suit seeks the cost of inspection and analysis of asbestos materials within the homes, $2000 to $6000 per home to remove asbestos, as well as the cost to plaintiffs of living elsewhere while repairs are made (ALR, 1985:9658-9659).27

CONCLUSION

In the preceding pages, we have taken a historical view of the current asbestos litigation crisis. We explored the early plaintiff attorney victories, establishing that victims could recover damages in the tort system, and uncovering strong evidence of manufacturer misconduct. We described the surge in asbestos case filings, beginning in the late 1970s, that resulted from the success of the strategies of plaintiff attorneys. We also saw how mounting damage awards and high transaction costs prompted continuing efforts by defendants to remove these cases from the tort system. And we noted that suits claiming damages due to asbestos are continuing to flow into the system.

Much of the early history of asbestos litigation—which we have labeled Phases One and Two—has been carefully recounted in a recent series of articles by Paul Brodeur in The New Yorker. Brodeur argues persuasively that it is the existing tort system that has provided the mechanism for exposing the negligence of the asbestos manufacturers

26The "fume defendants" include Westinghouse, General Electric, and U.S. Steel. There are currently 25 fume plaintiffs who have filed suit in Contra Costa state court. The first two plaintiff verdicts, based on inhaling asbestos fibers from brake linings, were secured in different courts on May 10, 1985. Three days earlier, a jury in a third state had found for the defendants in that state's first brake-lining trial (ALR, 1985:10088-10090).

27In June 1985, the Manville Corporation reported that the 9500 property damage claims filed against the company for removal of asbestos seek a total of $69 billion in damages (ALR, 1985:10248-10244).
and their insurers. Moreover, he insists that the tort system is the only vehicle that can adequately compensate victims, and with the threat of punitive damages, punish and deter reckless and egregious corporate behavior.

Brodsur's account focuses on the early plaintiff victories and the defendants' strategic response to these victories. Our fieldwork focused instead on the everyday processing of the mass of cases, as the litigation entered a more mature phase. Based on this difference in perspective, we have a more guarded view of the ability of the tort system to resolve asbestos claims in a timely fashion and to equitably compensate claimants. In the next three sections, we discuss the challenge that asbestos cases have posed for the tort system because of the substantive issues involved, the pretrial organization of this litigation, and the disposition of cases.
III. DECIDING SUBSTANTIVE LEGAL ISSUES

SUMMARY

All lawsuits involve factual or legal issues that must be resolved either before trial, during trial, or on appeal. Because of the long latency period between exposure to asbestos and injury, the characteristics of the diseases associated with asbestos exposure, and the multiplicity of defendants who are named in each suit, asbestos cases raise a set of particularly complicated issues. When should a claim be brought? How can it be determined whether an injury has actually occurred? What grounds are appropriate for a finding of liability? Who should contribute to compensation payments? What share should each defendant that has been found liable pay? All of these are questions that the tort system handles fairly easily for traumatic injury cases. But they pose special problems for cases involving latent injuries resulting from exposure to toxic substances. Because of the large volume of asbestos claims and the perception that this is bellwether litigation, how these questions are answered by the courts and legislatures for asbestos cases has enormous social and financial consequences.

Not surprisingly, parties on both sides of the asbestos litigation question have invested considerable resources in legal battles over these issues. Plaintiffs in many jurisdictions have argued for changes in the legal rules to fit the special characteristics of asbestos-related injuries and claims. Defendants have called for the application of current rules, most of which were originally devised to deal with traumatic injuries. With few exceptions, the civil justice system has adopted the more conservative position and as yet has been unwilling to change.

To decide substantive legal issues, common law tradition, operating within the American federal system, provides a case-by-case, deliberative process that may proceed in several jurisdictions simultaneously. Trial judges and juries consider the legal and factual issues raised by particular cases and arrive at decisions specific to those cases. Challenges to these decisions are considered independently by appellate courts within the various jurisdictions, which then issue decisions that bind the lower courts within their separate jurisdictions.¹ Legal rules

¹Of course, if a federal question arises during this process, the United States Supreme Court may issue a decision that is binding across jurisdictions.
emerge slowly from this process, as the product of the deliberations of many judges and lawyers who have considered a variety of cases with different combinations of legal issues and facts. The ultimate rules may differ from state to state, and sometimes between state and federal court systems. In theory, this slow, deliberate, and often redundant process reduces the potential for error (Cover, 1981), provides an opportunity for each party to have a “day in court,” and preserves the values of federalism.

However, this process also has both direct and indirect costs, which are magnified when the system is asked to absorb a large volume of parallel litigation, as with asbestos claims. Resolving substantive issues on a case-by-case basis requires considerable judicial time. If sufficient resources are not allocated to this task, backlogs develop at both the trial and appellate levels. Such backlogs are common in jurisdictions with heavy asbestos caseloads. The pace of the decision-making process has delayed the resolution of asbestos cases and postponed compensation of injured claimants. Disposition of cases has also been delayed by the multistage character of the process, which by increasing uncertainty about the ultimate resolution of legal issues, has made the assessment of the monetary value of specific claims more difficult. The potential for different legal rules emerging in different states has also made it more difficult for defendants and their insurers, who operate across these boundaries, to predict and manage the course of the litigation. Of course, these same features also offer strategic opportunities to parties on both sides who may sometimes benefit from delay and uncertainty.

To reduce the costs of litigating mass claims, over the years the courts have devised several formal and informal strategies for treating similar cases collectively, and for limiting redundant litigation of common substantive issues. But the courts have generally not used these strategies for asbestos litigation, at least not in any formal way, although asbestos cases do raise many common issues. In the early stages of the litigation, attorneys were just beginning to develop strategies for applying legal doctrine to latent injuries due to toxic exposure, and plaintiff attorneys were still uncovering evidence of defendants’ knowledge of the links between asbestos exposure and workers’ injuries (Brodeur, 1985b). During this period, uncertainty about the ultimate outcomes of specific substantive disputes probably discouraged parties on both sides from seeking definitive judgments on key issues for large blocks of cases. At this stage of the litigation, when treating cases collectively and reaching closure on key substantive issues have arguably become more appropriate, attorneys on both sides have estab-
lished well-developed routines and incentives for continuing to litigate common substantive issues on a case-by-case basis.

Without pressure from attorneys or parties, most judges have not considered it appropriate to adopt formal mechanisms for treating cases collectively. Instead, informal strategies for applying substantive judicial rulings to the mass of cases have been adopted in many jurisdictions, usually at the initiative of the trial judge and with the support of attorneys on both sides. Informal strategies permit the court, the parties, and their attorneys to obtain some of the efficiencies associated with collective judgment, at the same time allowing the parties to challenge the application of rulings to specific cases when they think it might be productive to do so. Although this open-ended situation contributes to uncertainty about the ultimate outcome of substantive disputes, maintaining a certain level of uncertainty may be seen by attorneys on both sides as a means of facilitating favorable settlement outcomes. But failure to reach closure on common substantive issues after more than a decade of litigation contributes to the high costs and delays that characterize the asbestos litigation process.

In this section, we first describe the major substantive questions raised by asbestos litigation and the civil justice system's response to those questions. We then turn our attention to the process of deciding substantive issues, focusing on formal and informal procedures for treating cases collectively and reducing repetitive litigation. We consider the costs and benefits of case-by-case decisionmaking and redundant litigation, and report what we learned from our interviews about why collective decisionmaking and issue preclusion procedures have not, by and large, been formally applied to asbestos litigation.

MAJOR SUBSTANTIVE QUESTIONS

When Should Claims Be Filed?

Most jurisdictions place limits on when a plaintiff may file a claim for injury. In principle, a claim should be filed soon after an injury occurs, when the facts surrounding the injury are fresh in the minds of all concerned. Most states allow a period of two to three years after injury for the filing of a tort claim. Applying the principle of when to file is straightforward for most cases involving traumatic injuries, but it becomes problematic when the plaintiff does not immediately recognize that an injury has occurred. In the case of asbestos-related diseases,

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2For a more detailed discussion of the application of statutes of limitations in product liability cases, see McGovem, 1980.
for which the latency period between exposure and appearance of the disease may be 20 years or more, plaintiffs often do not know they have been injured until many years after the initial exposure.

Deciding when, as a matter of law, asbestos claimants must file their suits, and whether, as a matter of fact, individual claimants have met this requirement, has been a source of considerable litigation. Each state has its own statute of limitations that specifies the amount of time a plaintiff has to file a claim, and its own rule about when the clock starts running.\(^3\) In some states, the courts have ruled that the statute of limitation begins to run at the point of last exposure (e.g., in New York), or when the damage first occurred (e.g., in Virginia),\(^4\) or when the disease was first medically diagnosable (e.g., in Wisconsin) (Mark, 1983:882). In those jurisdictions, plaintiffs have effectively been barred from bringing asbestos injury claims unless they find alternative grounds for filing under which they can claim that a more liberal statute of limitations prevails. For example, in some coastal states with restrictive statutes, shipyard workers have tried to invoke admiralty jurisdiction because it offered a more favorable rule on the timing of filing.\(^5\)

Most states have adopted a "discovery" interpretation of their statutes of limitations, holding that the statutory period does not begin to run until the plaintiff either discovers, or could reasonably have been expected to discover, that he has been injured (Kahan, 1978:129). The latter interpretation has proved problematic for many asbestos plaintiffs who have only recently become disabled due to asbestos-related diseases. Whether a plaintiff could have discovered earlier that he was injured may be argued before a jury, and injured plaintiffs sometimes do lose cases on statute of limitations grounds.

The state of California has enacted a special statute of limitations for asbestos claims that starts the period running when the plaintiff first experiences disability (defined as loss of time from work) or dis-

\(^3\)Currently, federal district court judges must apply state statutes of limitation when hearing asbestos cases. State legislatures have usually specified the length of the period for filing, but have left it to the judiciary to decide what event should start the period running (Kahan, 1978).

\(^4\)A new Virginia statute for asbestos claims allows suits to be filed for a period of two years after the claimant was first notified by a physician that he has suffered an asbestos-related injury (ALR, 1985:936).

\(^5\)In 1980, Congress imposed a three-year statute of limitations for admiralty cases. Before that, a more flexible doctrine prevailed. The availability of admiralty jurisdiction has itself been a subject of litigation. Although some early rulings granted admiralty jurisdiction to asbestos shipyard workers, most circuits have since denied it (National Law Journal, June 24, 1985:3).
covers that a disability was caused by exposure to asbestos. Defendants initially took the position that under the new statute a plaintiff did not have grounds for a claim until he became disabled. Under this interpretation, many asbestos suits filed on behalf of plaintiffs who claim injuries but not loss of time from work (i.e., disability) would have been dismissed by the California courts. Trial judges, however, have generally rejected this interpretation and continue to permit claims that simply allege injury as a result of exposure. The net result, according to one judge involved in the litigation, is to improve the plaintiffs' overall position, an outcome that most judges believe was intended by the state legislature.

Another question of timing is raised by the progressive and multiple character of asbestos injuries. A single asbestos worker may develop several medically distinct asbestos-related diseases, each of which may become apparent at a different time. Often, asbestosis develops earlier than the various types of cancer associated with asbestos exposure. Defendants in some jurisdictions have argued that plaintiffs have only one “indivisible” cause of action for “all past, present, and future injuries” resulting from exposure to asbestos (see Wilson v. Johns-Manville Sales Corp., 684 F.2nd 111 [D.C. Circuit, 1982]). According to this theory, when the statutory filing period has elapsed for the disease that first manifests itself, it has elapsed for all asbestos injury claims.

Courts have reached contradictory conclusions on this point. The federal appellate courts for the District of Columbia and the 3rd Circuit, and the Maryland Court of Appeals have ruled that diagnosis of one asbestos disease does not start the statutory period running for a separate and distinct disease. Thus, these courts have permitted the filing of claims for cancer in cases in which a claim for asbestosis would be barred by the applicable statute of limitations. The Pennsylvania Superior Court, on the other hand, has held that “a new limitation period does not start each time a new disease develops from the same tortious conduct of the defendant” (Staiano v. Johns-Manville Corp., PA Superior Ct., 450 A.2d 681, 684 [1982]).

A further complication arises if a claim for one injury resulting from asbestos exposure is tried to verdict, and the plaintiff later develops another injury. A claim for this injury might be barred under the legal doctrine of res judicata, which holds that a final judgment on a claim

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6 CCP 340.2. Cal. Stats. 1979, Ch.513.

The argument against the California approach is that it extends the period in which claims may be filed. This conflicts with another principle, expressed in statutes of repose, which limits the time for filing product liability claims to some number of years following the manufacture of the product (see Mc Govern, 1980).
precludes subsequent action involving the same claim (see Black's Law Dictionary, 1979:1174).8

Because of these various doctrines, asbestos claimants frequently try to obtain compensation for medical conditions that could develop in the future, as well as for their current diseases. But they may be restricted by rules governing the recovery of damages for future consequences. The traditional legal doctrine holds that compensation for future injuries is only possible if those injuries are "reasonably certain," and defines reasonable certainty as a "greater than 50% chance" (see Wilson v. Johns-Manville Sales Corp. 684 F.2d 111, 119 [D.C. Circuit, 1982]). Since medical research indicates that less than 50 percent of asbestos victims later develop cancerous conditions, it is difficult for plaintiffs to meet this standard in jurisdictions where it prevails. In some of these jurisdictions, however, trial judges have held that a plaintiff may obtain compensation for current "fear of cancer," although he might not be able to obtain compensation for the possibility of future cancers.9 By asserting such a claim, the plaintiff attorney can also ensure that if the case goes to trial, the jury will hear evidence concerning the links between asbestos exposure and cancer. Some judges, however, do not permit such claims.10

Together these doctrines provide a powerful incentive for attorneys to file claims on behalf of workers who have been exposed to asbestos and show some medical signs of injury, but to date have experienced little or no impairment. This incentive was the driving force behind the surge of filings between 1978 and 1982. It also created a rationale for unions to refer large numbers of potential asbestos claimants, with widely varying degrees of current disability, to plaintiff attorneys en masse, thus setting the stage for the pattern of disposition practices that we describe in Sec. V.

Although the courts have applied these various doctrines to asbestos disease cases, courts in several jurisdictions have expressed frustration over their inappropriateness for latent injury claims. For example, in Blue et al. v. Johns-Manville Corp. et al. (10 Phila. 23, 1983), the Philadelphia Court of Common Pleas wrote:

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8The court in Wilson noted that it was not deciding the issue of how a prior judgment on an asbestos claim would affect the viability of future claims.

9If introducing fear of cancer is the only way to provide plaintiffs with compensation for cancers that develop after their cases are disposed of, one might reasonably expect that those who do not develop cancer will be overcompensated for their injuries, relative to others, while those who do will be undercompensated.

10Whatever the applicable rule, defendants frequently require plaintiffs who accept settlement offers to release them from liability for future injuries. How the likelihood of these injuries enters into the settlement agreement is a matter for private negotiation.
[Reconsideration of the Statute of Limitations question] is necessary because... the present system just is not working. The civil court calendar in Philadelphia cannot cope with the volume of over 3,000 asbestos cases that have been filed. Results of jury verdicts are capricious and uncertain. Sick people and people who have died a terrible death from asbestos are being turned away from the courts, while people with minimal injuries who may never suffer severe asbestos disease are being awarded hundreds of thousands of dollars, and even in excess of a million dollars. The asbestos litigation often resembles the casinos sixty miles east of Philadelphia more than a courtroom procedure. And just as the casinos are the winners in Atlantic City, the lawyers are the winners in asbestos litigation since the costs of litigation far exceed benefits paid to claimants. (emphasis in original)

Similarly, the trial court judge in the Wilson case is reported to have concluded his hearing by saying:

I am sure [Mrs. Wilson] will appeal... and if [she] succeed[s] in reversing me, I certainly won't be unhappy. 

How Should the Cause and Extent of Injury Be Determined?

Determining the cause of an injury is a central issue in all tort litigation. The traditional tort law standards for proving causation require evidence of a direct link between a specific individual condition or event and the case at hand. In many tort cases, this can be accomplished fairly easily if the injury was caused by an automobile crash, a fall, or some other single event. (But who was at fault may nevertheless be an issue.) In proving causation, asbestos claims, like other claims involving latent injuries due to toxic substances, pose special problems.

Epidemiological research indicates that a large fraction of asbestos workers will contract asbestosis sometime during their life, and that smaller fractions of workers will contract various cancers. This research also indicates a multiplicative relationship between asbestos exposure and smoking that leads to higher rates of certain kinds of respiratory diseases and cancer for smokers. By the time of suit, some asbestos plaintiffs have already developed clear and unambiguous signs that they have contracted a disease closely linked to asbestos exposure (e.g., mesothelioma). For the reasons discussed above, others show less clear signs of disease, or have contracted diseases (e.g., lung cancer) that are linked to many different sources. Large numbers of asbestos

claimants have smoked at some time in their life. For many of these
claimants, the evidence of cause and degree of injury is probabilistic.
It clearly establishes the likelihood that particular claimants, with par-
ticular histories of asbestos exposure, will develop specific diseases.
It may not, however, absolutely establish that a particular plaintiff is
injured, that his injury was caused by asbestos, or that he will develop
more serious disabilities in the future.

Juries must decide whether the facts meet legal standards of causa-
tion, based on medical evidence and expert testimony. Some observers
have suggested that the wide variation in jury verdicts in asbestos cases
reflects, in part, the difficulty they have in dealing with probabilistic
Judge Klein offered this illustration of the point:

In two cases before this judge, two men had similar physical
problems. They each had pleural thickening and some shortness of
breath. In the case involving the man who most counsel believed to
be the sicker of the two, the jury awarded $15,000. For the other
plaintiff, the jury awarded $1,200,000. These results make this litiga-
tion more like roulette than jurisprudence. (cites omitted)

A recent, consolidated trial in eastern Texas, which we observed during
fieldwork, provides a different illustration of the same point. The jury
was asked to decide four cases involving asbestos claimants. One
plaintiff, a former asbestos worker, was visibly disabled by asbestosis.
The remaining three claimants, including a spouse of a deceased asbes-
tos worker, had some physiological signs consistent with asbestosis, but
the medical experts disagreed about whether or not asbestosis was
present, and the plaintiffs themselves were not visibly impaired. Many
of those involved in the trial expected the jury to grant a substantial
award to the disabled plaintiff, and to grant considerably less compen-
sation to the remaining plaintiffs, who, at least in appearance, were not ill.
Instead, the jury, awarded close to $1 million in compensation, plus
about $1 million in punitive damages to each plaintiff. Our interviews
of the jury members indicate that their decision was based on the belief
that all of the plaintiffs would eventually become as sick as the single
disabled plaintiff. Of course, the jury's judgment may turn out to be
correct. But their explanation of the decision they made suggests that
they treated the probabilistic evidence that was presented to them in an
absolute fashion.

To meet legal standards of causation, plaintiffs must not only
demonstrate a link between exposure to asbestos and injury, they must
also be able to show that particular asbestos products caused these
injuries, for only those manufacturers whose products they used will be
held liable. This standard is consistent with the traditional notion of fairness, which holds that a person (or organization) should not be liable for injury to another unless that person did the thing that was the proximate cause of the injury. But identifying the specific products that caused their injuries, which might be relatively easy for a plaintiff in a product liability suit involving a recent incident, is more difficult for workers who were exposed to a variety of products over a long period of time, and for whom the identity of those products was then of little import. In practice, what constitutes adequate product identification varies from court to court, and even from judge to judge. Some judges require that a plaintiff present evidence identifying specific products, and/or witnesses who testify that they saw him use these products. Other judges will accept more general evidence that certain specified products were in use in the plaintiff’s workplace during his time of employment. In some jurisdictions, evidence on product identification must be presented in person at each trial; in others, depositions (in videotape or written form) from earlier trials may be incorporated into the new trial record. Disputes over the proper application of the jurisdiction’s evidentiary rules to the realities of asbestos litigation have been the subject of numerous pretrial motions and hearings. Among plaintiffs who have the same sort of evidence against particular defendants, those located in jurisdictions with “liberal” standards will be permitted to present this evidence at trial, while those located in jurisdictions with stricter standards may not. Differences in pretrial rulings on this point may contribute to differences in settlement values across jurisdictions.

To diminish the product identification burden placed on plaintiffs, some plaintiff attorneys in asbestos and other toxic tort cases have argued that it should be sufficient for a plaintiff to demonstrate use of a generic product. All defendants who manufactured the product, they argue, should be held liable for injuries caused by the product, and should contribute to settlement and trial outcomes in proportion to their share of the market. This “market share” doctrine was adopted by the California Supreme Court in Sindell v. Abbott Laboratories, in which the plaintiff claimed injuries resulting from her mother’s use of DES many years before the suit. To date, plaintiff attorneys have been generally unsuccessful in their attempts to apply this doctrine to asbestos cases, but many expect to see a reversal of this trend in the coming years.

Although appellate courts have been reluctant to confront the challenge to traditional standards of causation presented by asbestos and other toxic torts (Brennan and Carter, 1985), some courts have expressed concern about the effects of these standards. An Ohio state trial judge, dismissing a complaint asserting market share liability, wrote:

While the Court is not unmindful of the consequences of its position to the innocently injured plaintiff, it cannot create a remedy by abandoning the traditional concept of causation. The solution to the complex issues generated by asbestos litigation is more within the province of the legislature. (ALR, 1985:9460)

In Florida, an intermediate court of appeals that sustained a complaint asserting market share liability, wrote:14

Traditional theories of causation may not be realistic in light of contemporary advances in science and technology and the complexity of an industrialized society such as ours which creates harmful products that cannot be traced to a specific producer. [Between adhering to prior doctrine or fashioning remedies to meet changing needs] the response of a state of Florida's prominence at the close of the Twentieth Century must be to choose the latter path. (Copeland v. Celotex, 447 So.2d 908, 913 [Fla. App. 1984])

As toxic tort cases become more common, the treatment of statistical evidence on causation and rules for linking specific products to injuries become large issues for the civil justice system. By failing to recast the rules of causation so that they more accurately fit the realities of latent injury cases, the courts may have contributed to the wide variation in compensation outcomes for similarly situated plaintiffs, a response that many consider inequitable.

What Are The Appropriate Grounds for Determining Liability?

Regardless of the evidence on causation and extent of injury, defendants who contest asbestos cases argue that they should not be held liable for damages. In negligence cases, the defendants' position is that they should not be held liable because they could not have foreseen the injuries, given the information available to them (i.e., the "state of the art") at the time of manufacture. Plaintiffs counter by presenting information on the industry's knowledge of the links between asbestos

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14The case has been appealed to the Florida Supreme Court (ALR, 1985:9523).
exposure and worker disease. Many recent product liability suits, however, have been brought on a theory of strict liability, rather than negligence. Under strict liability, a defendant is held liable if he is shown to have manufactured (or sold) a "defective" product that caused the plaintiff's injury. Product defects have been defined to include defects in design and manufacture, as well as inadequate product warnings (Robb, 1982:10).

Whether, as a matter of law, the state-of-the-art defense ought to be admissible in strict liability cases has been litigated in numerous jurisdictions. Some attorneys and legal theorists have argued that state-of-the-art evidence should not be admissible, since such evidence refers to the defendants' level of care, which is not at issue in such cases. Others have argued to the contrary, claiming that state-of-the-art evidence pertains to the issue of design defects and inadequate warnings. Courts disagree on this issue. The New Jersey Supreme Court's ruling in Beshada v. Johns-Manville Prod. Corp. is usually cited as the landmark decision that eliminates the state-of-the-art defense in strict liability cases. Similar court rulings have been made in Pennsylvania, Texas, and California, and other jurisdictions.

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16What evidence is admissible has also been a matter of considerable litigation. Key documents indicating industry knowledge (e.g., the Sumner Simpson papers) have been admitted in some jurisdictions, where they have apparently been a factor in winning large compensatory awards, and in some cases punitive damages as well. In other jurisdictions, the same documents have been ruled inadmissible. The role of the state-of-the-art defense in strict liability product cases is discussed in Robb, 1982.

17In practice, plaintiffs usually assert both theories.

18In some jurisdictions, the courts have eliminated consideration of defects altogether, permitting plaintiffs to establish a prima facie case by showing that the product caused the injury (Robb, 1982:17).


20In Pati v. Johns-Manville Sales Corp., 468 F. Supp. 836, 841--842 (E.D. Tex. 1980), the court held that "regardless of what was reasonably foreseeable to the defendants at the time of manufacture, asbestos products should have been accompanied by adequate warnings. The nature of this strict liability action makes the defendant's state of knowledge at the time of manufacture irrelevant." However, the Texas Supreme Court has held that state-of-the-art evidence is admissible under strict liability in design defect cases. Pennsylvania, Colorado, and Kentucky have held that "the defendant manufacturer's knowledge is irrelevant as warning liability is not predicated on negligence" (Robb, 1982:23). California (Barker v. Lull Engineering Co., 1978) treats "an injury-causing design as per se defective. With the defect issue out of the picture, state-of-the-art evidence has no door to enter the strict products liability case" (Robb, 1982:20). According to Mark, "the recent trend of court decisions is to strike the state-of-the-art defense in asbestos suits when plaintiffs assert a strict liability theory based on failure to warn." He cites the Eastern District of Pennsylvania, the Eastern District of Texas, Philadelphia Court of Common Pleas, and the Boulder County District Court in Colorado in support of this statement, but also notes contrary cases, including the 5th Circuit opinion in Mijares v. Fibreboard Corp., 662 F.2d 1182 (5th Circuit, 1981), (Mark, 1983:888).
Evidence on what defendants knew about asbestos-related injuries and when they first knew it has played a central role in asbestos litigation. In the initial phase of the litigation, plaintiff attorneys were successful in part because of the evidence they introduced regarding industry knowledge of asbestos-related disease. As suits became more common, defendants were able to successfully counter this evidence with expert testimony. This reaction in turn stimulated plaintiff attorneys to further investigate and assemble new materials bearing on this issue. In recent years, defendants have been unsuccessful in persuading juries that they should not be judged liable for failing to warn plaintiffs on state-of-the-art grounds (Brodeur, 1985a). Several judges told us that they could not think of an instance in which an asbestos manufacturer had won a case based on this defense. We were also told that lawyers on both sides do not discount the settlement value of cases simply because the defendants are asserting a state-of-the-art defense.20

This defense continues, however, to be asserted at trials in some jurisdictions. Some defendants may continue to present this argument, not because they believe they can win their case on this issue, but because they truly believe they are not culpable, and they want to demonstrate this publicly and formally. Plaintiff attorneys may not be reluctant to have state-of-the-art evidence introduced at trial if they believe that they can counter it successfully and in so doing establish a basis for punitive damages.

How Should Damages Be Apportioned?

If multiple defendants are judged liable for a plaintiff's injuries, there must be some way of deciding how much each defendant should contribute to the total amount paid to the plaintiff, often termed "apportionment of damages." How this issue is resolved depends on whether the case is settled before trial or tried to verdict. If the case is disposed of without trial, the plaintiff may either make separate settlement agreements with each defendant, or settle with a group of some or all defendants. In the case of one-on-one settlements, defendants are free to pay any share of the damages they wish. If a settlement is

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20Reacting to a defense victory in the first trial of an asbestos property damage case, where state-of-the-art evidence apparently did influence the jury's decision, a defense attorney recently commented: "[Prior to this decision] the general view [within the asbestos litigation bar] had been that you couldn't sell our arguments to a jury" (Legal Times, March 25, 1985:1).
reached with a group of defendants, those defendants are free to adopt any rules they wish for apportioning damages among themselves. In theory, how much of the financial burden of payment is shouldered by each defendant should not matter to the plaintiff, as long as he ultimately obtains the desired total amount. In practice, however, a plaintiff attorney may have a strategic plan for apportioning damages that is intended to obtain the maximum amount possible for his client.

If a case is tried or if some defendants settle before trial, while others contest the suit to verdict, the situation is more complex. Under the traditional common law doctrine of "joint and several liability," a plaintiff who obtained a judgment against joint wrongdoers could decide how much to collect from each; defendants had no legal mechanism for pursuing a "fair" allocation of the damages among each other. Settlement by one defendant could free other defendants from liability. However, most states have adopted statutory rules that specify how damages must be apportioned, and how settlement affects other defendants' liability. Some statutes call for a pro rata allocation of damages, while others permit allocation according to relative fault of the defendants, as determined by a jury. In most states, amounts paid to a plaintiff in settlement are subtracted from his damages, reducing his total recovery from nonsettling defendants. However, under certain conditions, in a few states, a plaintiff who settles with some defendants and tries his case against others to verdict may recover a larger amount than if he had tried his case against all of the defendants (Easterbrook, 1980:335). On the other hand, in some states a defendant may obtain a better outcome by persisting to trial and paying his pro rata share rather than settling before trial. Thus, in some jurisdictions, the legal rules for apportioning damages may impede settlement of asbestos cases.

Although defendants formally oppose the spread of the "market share" liability theory, in practice, in many jurisdictions, they have adopted the concept as a basis for apportioning damages among themselves. Informal agreements based on local market shares were temporarily upset when the Manville Corporation declared bankruptcy. But in some jurisdictions, new agreements based on the remaining defendants' shares of the market were eventually reached. Most judges we interviewed believed that dispositions could be achieved more quickly if defendants could work out a formula for apportioning damages that they would be willing to stick with over time.
HOW SUBSTANTIVE QUESTIONS ARE DECIDED

The substantive questions raised by asbestos litigation can be sorted into three categories: (1) questions that are common to all or most asbestos claims, (2) questions that are common to large subsets of claims, and (3) questions that are specific to individual claims. There are numerous questions about the link between asbestos exposure and asbestos diseases. Does asbestos exposure cause injuries? What kinds of injuries are caused by asbestos? How much exposure is necessary to produce particular diseases? What factors other than asbestos exposure contribute to these diseases? These questions apply to all asbestos claims. Questions about how much various manufacturers knew about the links between asbestos exposure and asbestos disease apply to all claims against those manufacturers whose degree of knowledge is at issue. Questions about the authenticity of various documents bearing on the issue of manufacturer knowledge are common to all claims attempting to introduce that evidence. Questions about the specific products used at various worksites, and the amounts of these products in use at various times, pertain to all claims brought by workers at that site. Questions about whether and how much a particular claimant is injured, whether and for how many years he was exposed to asbestos, and what his medical and other damages have been are specific to individual claims.

For the most part, the civil justice system has dealt with the substantive issues that asbestos cases have in common (categories 1 and 2 above) in a particularistic, case-by-case fashion, deciding the same issues in every jurisdiction every time a new case comes to court. At the same time, disposition of cases has often proceeded on a “batch” or “block settlement” basis in which individuals’ amounts of compensation are set without close attention to the factors that differentiate cases (category 3 above).

The process by which major substantive issues that arise in asbestos litigation have been resolved is grounded in our common law tradition and in the structure of our judicial system. It is also supported by the incentives of the major participants in the litigation. In theory, this process provides an individually crafted form of justice and protects the rights of the parties to their day in court. In practice, however, it has contributed to differences in appellate decisions that permit similarly injured plaintiffs to recover enormous awards in some jurisdictions, modest awards in others, and no awards in still others. It has also contributed to substantial delays in formulating the guidelines that should govern the resolution of cases and higher-than-average costs to the litigants. Finally, it has created the rationale for disposition practices
that look more like an administrative compensation system operating without formal regulations than an individualized adjudicative system. In this section we first discuss the traditional substantive decisionmaking process and then describe efforts to modify the process for asbestos litigation.

The Traditional Decisionmaking Process

Common law requires judges to decide issues on a case-by-case basis. In theory, each case is regarded as unique, and each person has an individual right to pursue a claim. Decisionmaking approaches that group cases according to a shared characteristic are viewed warily, because (a) such a grouping might lead to discounting significant factors that differentiate one or more cases from the others and bring about inequitable outcomes, and (b) such approaches constrain the individual's ability to proceed autonomously.

Even when individual cases appear to present the same substantive legal issue, the system is slow to apply a decision derived from one adversarial encounter to another. Repetitive litigation of substantive legal issues is valued because it increases the probability that all relevant arguments will be made and considered before a critical legal decision is made, reducing the opportunity for error (Cover, 1981).

The tradition of judicial independence contributes to redundant decisionmaking. Each trial judge must interpret and apply the statutory rules and appellate court decisions of his own jurisdiction to the cases that come before him; he is usually not bound by the decisions of his colleagues on the trial bench. Therefore, until the appellate courts in the jurisdiction see fit to issue a binding decision on a legal issue, diversity of rulings is acceptable.

Redundant litigation and diversity of substantive legal outcomes is also a consequence of federalism. A state judge may look to his counterparts in other states for ideas about how to apply basic legal theories, but he must always operate within the constraints of his own state's statutory and case law. In theory, each substantive issue could be resolved 50 different ways, according to the separate rules of the 50 states. In practice, of course, many states have adopted similar or identical statutes of limitation and repose, product liability laws, rules of evidence, and so on, so that the outcomes of litigation on these issues are not widely different across the country.

This process of deciding legal issues consumes a vast amount of time and resources. Decisions can only be made by judges; but especially in the federal system, they are often assisted by other officials and legal
staff, including magistrates and law clerks. If the judicial decisions to be made are dispositive, and/or the financial stakes are perceived to be high, senior plaintiff and defense attorneys are assigned the tasks of preparing briefs and presenting oral arguments. Specialists may be called in to prepare and argue cases at the appellate level.

As a case proceeds up the appellate level, months or even years elapse. More time may pass while the attorneys for each side prepare their pretrial or appellate briefs. At both the trial and appellate court level, the demand for judicial time frequently outstrips the supply. Judges must fit the time for deliberating these issues into already crowded schedules. At appellate levels, many jurisdictions have sizable queues of cases awaiting disposition. The average time to disposition for appeals is six months to a year in most state and federal appellate courts.22

Costs of Applying Traditional Procedures to Asbestos Litigation

One consequence of the large differences in substantive decisions made within and across jurisdictions is the potential for wide variation in outcomes for similarly situated parties. We have already discussed the effects of different statutes of limitation and different definitions of legal standards of causation on outcomes of asbestos claims.

The process of decisionmaking breeds other consequences. Lengthy periods of uncertainty regarding the ultimate resolution of substantive issues have been characteristic of asbestos litigation. Disposition of asbestos claims came to a halt in many jurisdictions around the country when Manville declared bankruptcy and other defendants moved to stay the litigation pending resolution of the bankruptcy issue. In the federal district of New Jersey, for example, dispositions were stayed for nine months while the trial court awaited the 3rd Circuit’s ruling.

21At the federal trial court level, magistrates may recommend rulings on dispositive motions to trial judges, but judges must make final decisions. Magistrates’ rulings on non-dispositive matters (e.g., discovery motions) are usually final, but are appealable to the trial judge (28 USC 636(b)).
22In California’s intermediate appellate courts, the average waiting time for disposition of civil appeals (from the time they were judged ready for judicial action) in 1983, ranged from 1 to 26 months across appellate divisions; about half had waiting times of five months or more (Judicial Council of California, 1984:111). Cases are judged ready for action when the last brief is filed or when the time for its filing has passed. The U.S. Court of Appeals for the 3rd Circuit (which handles appeals from the district courts of New Jersey and eastern Pennsylvania) had an average waiting time from filing a “complete record” (i.e., a case ready for judicial action) to disposition of 7.3 months in 1984. The 9th Circuit, which handles appeals from eastern Texas, had a median wait of 7.8 months during the same period (Administrative Office of the U.S. Courts, 1984).
But other less dramatic actions have also led to interruptions in disposing of asbestos claims in certain jurisdictions. The non-jury trial program for asbestos cases in the Philadelphia Court of Common Pleas was challenged by both plaintiff and defense attorneys, leading to a lull of about six months in formal court activities until a decision was handed down by the appellate court. In Maine, 145 asbestos cases were delayed for 22 months, pending appeal of a jury verdict in a case that called into question the appropriate interpretation of that state's new strict liability law (ALR, 1984:9325–26). Several attorneys told us that unresolved substantive issues are an important source of uncertainty about the dollar value of current claims. In Philadelphia, plaintiff attorneys took the unusual step of petitioning the appellate court for a declaratory judgment on open issues regarding asbestos cases. The state appeals court denied the motion.  

The process of deciding substantive issues is also expensive for courts and litigants alike. Several trial judges told us that they had heard more than a 1000 motions related to asbestos in the course of a year. The ratio of defense costs to compensation for asbestos claims (i.e., the “overhead” expense) in the period before the Manville bankruptcy has been estimated at 20 percent higher than the ratio for other types of product liability cases, and 50 percent higher than the ratio for medical malpractice cases (Kakalik et al., 1983:27).  

The effects of the decisionmaking process on asbestos case outcomes, time to disposition, and costs were dramatically illustrated in a recent report that the 4th Circuit, sitting en banc, has denied admiralty jurisdiction to asbestos shipyard workers. In 1981, a panel of 4th Circuit judges had granted admiralty jurisdiction to these workers. After that ruling, four asbestos workers won a $344,000 jury award. By reversing itself on the issue of admiralty jurisdiction, the 4th Circuit overturned that award. In addition, a substantial fraction of the 500 to 600 asbestos workers who currently have suits pending in Virginia (many of whom presumably would have obtained monetary awards from juries or settlements) may now find themselves with vastly altered chances of recovery. A leading defense attorney catalogued the factors affecting outcomes as follows: under Virginia state law, many claimants in these cases may be barred from bringing suit on statute of limitations grounds, or they may be barred from suing manufacturers under a previous law that forbid such claims by “remote” users. If their suits are

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9The NCSC's working group on asbestos litigation has recommended that appellate courts in each state establish a "fast track" for decisions on asbestos test cases (NCSC, 1984:18). To our knowledge, no appellate court has adopted the NCSC recommendation.

24A substantial fraction of these are discovery related.

25Comparative data on overhead expenses for plaintiffs are not available.
not barred, they may be denied recovery of any damages on the grounds that they partially contributed to their injuries (e.g., by failing to follow safety guidelines). Further, if they settled claims against some defendants while awaiting the resolution of others, they may be barred from recovering damages from the other defendants. This reading of Virginia state law, however, is not universal. In the wake of the 4th Circuit’s ruling, plaintiff attorneys predicted a “medical free-for-all” over the statute of limitations, and took issue with every other defense interpretation of Virginia statutes (National Law Journal, June 24, 1985:5–6).

How the 4th Circuit’s ruling will actually affect the outcome of cases is highly uncertain. But it seems likely to lead to further delays and costs in litigating the hundreds of asbestos claims still outstanding there. Meanwhile, in other jurisdictions, injured shipyard workers whose employment experience and medical history are not vastly dissimilar to that of the Virginia workers are prevailing in their suits against asbestos manufacturers.

**Modifications in the Traditional Individualized Process**

Attorneys who have been schooled in the traditional decisionmaking process may find little that is remarkable in the application of common law and federalist principles to asbestos litigation. And many who support the plaintiffs’ cause could argue that the victories they have won on key substantial questions have been well worth the costs incurred in litigating these issues. But some attorneys and trial judges believe that significant departures from the traditional individualized process are necessary to efficiently and equitably resolve the common substantive issues that are raised by asbestos cases. Several formal and informal mechanisms for accomplishing this objective in certain types of litigation have evolved over time. One set of procedures permits collective treatment of similar claims; another limits parties’ rights to relitigate issues. Some of these procedures, such as the “class action” and “multidistricting,” have been codified in federal and state rules and manuals for managing complex litigation. Others, such as “omnibus” or “master” pretrial orders, have been developed informally at the local level and differ from judge to judge. Appellate courts have often rejected the application of available formal mechanisms to asbestos suits, but at the trial court level, successful experimentation has been conducted with informal strategies for reducing repetitive litigation of common issues.

**Class Actions.** The class action is a mechanism that enables one or more plaintiffs, under certain specified conditions, to bring a suit on behalf of a larger number of parties (the “class”) and obtain a decision
that will apply to all members of the class. Rule 23 of the Federal Rules of Civil Procedure specifies, among other criteria, that the members of the proposed class must be numerous, the claims of the representative plaintiffs must be typical of those of other class members, and the questions of law or fact that are common to the class must outweigh differences among class members. To proceed with a class action, plaintiffs must obtain the approval ("certification") of the trial court. State rules for bringing class actions usually follow the federal model.

For several decades, class actions have been used by consumers, stockholders, and workers. But class actions for damages due to personal injury are rare. The reluctance of courts to certify class actions for personal injury cases has been traced to an Advisory Committee Note to the 1966 Amendments to Rule 23 of the Federal Rules, stating:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways.26

Following this advice, appellate courts during the 1970s vacated class action certifications that had been granted by trial judges in a number of mass tort suits, including the Hyatt Skywalks and Dalkon Shield cases.27 Class action certification for Agent Orange claims, granted at the federal trial court level, was never subjected to appellate review. Class certification of DES claims was upheld in one jurisdiction, but denied in several others.28 Several trial judges, whose rulings were overturned by these appellate decisions, have made strong arguments in favor of using the class action device for managing mass tort litigation. For example, in its ruling on the Dalkon Shield case, the northern California federal trial court wrote:

26 A recent redraft of the Manual for Complex Litigation, now in the final revision process, apparently repeats this advice (Legal Times, May 27, 1982:3).
27 After a mandatory class action certification under Rule 23b(1) in the Skywalks case was vacated by the appellate court, voluntary class actions under Rule 23b(3) were certified in both the federal and state courts (Wright and Colussi, 1984). The difference between mandatory and voluntary class certification is that the former is binding on all parties deemed by the court to be class members, whereas the latter does not bind those who choose to exclude themselves. In the Dalkon Shield cases, the trial court, acting on its own motion, had certified a nationwide class action for the punitive damages portion of the case only. The 9th Circuit vacated the certification, noting that it was "not necessarily ruling out the class action tool as a means for expediting multiparty product liability actions (Corrigan, 1984:586).
In a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent. The judicial system's response to such repetitive litigation has often been blind adherence to the common law's traditional notion of civil litigation as necessarily private dispute resolution (see Corrigan, 1984:586).

Regarding his experiences in the Hyatt Skywalks case, the trial judge observed:

The experience of the Skywalks litigation has made clear that the mandatory class action device is the only procedure presently available to state and federal courts which allows for the equitable and efficient management of mass tort litigation...the [appellate court] ruling...unwittingly sanctioned forum shopping and inequitably parceled the burden of mass tort litigation management between state and federal courts (Wright and Colussi, 1984:141).\(^{25}\)

The history of class certification of asbestos claims, however, is consistent with the general line of appellate rulings. Early in the litigation, class certification was formally sought and denied, at the trial or appellate court level, in the Eastern District of Texas and in the New Jersey Federal District.\(^{30}\) In some jurisdictions we visited, trial judges told us that local attorneys had never even broached the issue; in others, judges reported that they had been asked informally to indicate their reaction to a motion for class certification. Whether or not the attorneys had actively sought class certification, the judges we asked in each major asbestos jurisdiction said they did not feel that their asbestos cases met the prerequisites for a class action: The similarities among the claims were outweighed, in their opinion, by the differences in the nature and extent of injuries claimed, in the context in which the injury occurred (e.g., shipyard, factory, etc.), and in the characteristics of the plaintiffs.\(^{31}\)

\(^{25}\) The efficiency of class actions for judicial administration has been much debated. Some argue that class actions increase judicial workload by encouraging claims that would not be supportable if they were brought individually. For mass disasters and mass toxic injuries, in which suits are certain, the issue may be more narrowly drawn: is it more efficient to administer these cases individually or collectively? Bernstein (1978:362-363) presents data suggesting that the average class action takes two to four times as much judicial time to administer as a single claim. This ratio seems appealing on efficiency grounds when the court is faced with the possibility of thousands of individual claims.


\(^{31}\) Class certification for property damage claims arising out of the use of asbestos in school buildings has recently been granted at the trial court level in the Eastern District of Pennsylvania. Judge James McGirr Kelly certified a voluntary national class for com-
In a sharp break with past practice, two major plaintiff attorneys recently filed a motion for class certification of asbestos claims in the Eastern District of Texas. The petition proposed two alternative definitions of the class: (1) about 1200 plaintiffs with cases currently pending in the Eastern District, or (2) all plaintiffs with cases pending in the state of Texas. The attorneys argued that common questions of law and fact outweigh individual differences among the cases, and that separate actions would create, in the language of Rule 23, "a risk of inconsistent and varying adjudications ... [leading to] incompatible standards of conduct." In addition, the attorneys noted, "because of the volume of cases filed [in Texas] . . . it has been impossible to prosecute in any speedy manner any appreciable volume of the cases—and this has been to a large extent contributed to by the different approaches to the asbestos litigation in the different jurisdictions within the state" (ALR, 1985:9458). This motion is currently pending.

Why has the class action approach not been adopted to date for asbestos injury litigation? The reasons for rejecting class actions have probably changed over time. Most plaintiff attorneys involved in asbestos litigation began by representing either a few individual workers or a larger group of workers from a single worksite (Brodeur, 1985a). Thus, in the initial stage of litigation, plaintiff attorneys underestimated the size of the potential population of claimants. During those early years, when it was highly uncertain how the appellate courts would rule on key substantive issues, and when important evidence on the issue of industry knowledge was still being uncovered, the risks of reaching closure on important issues for any large group of plaintiffs were great. By 1978, however, the government had announced that millions of Americans had been exposed to asbestos on the job, and the Surgeon General formally notified several hundred thousand physicians of the risks of asbestos exposure (Brodeur, 1985c:62). Over the next four years, appellate courts in some jurisdictions made substantial progress in resolving key issues. Nevertheless, until recently, there was apparently little effort on either side to press for class certification.

The failure of plaintiff attorneys to seek class certification for asbestos cases is consistent with the traditionally negative posture of personal injury lawyers toward class actions. Some argue that class

penetary damages and a mandatory national class for punitive damages. The certification has been appealed to the U.S. Court of Appeals for the 3rd Circuit (ALR, 1984:9317).

32 Plaintiff attorneys’ views on this subject have received a great deal of attention in the wake of the Bhopal tragedy and its attendant litigation. (See, for example, Legal Times, February 4, 1986:1, 8–9; National Law Journal, March 19, 1986:1, 24–26; and May 6, 1986:3, 10).
litigation deprives individual claimants of their "due process rights." Others believe that individual claimants obtain higher monetary settlements than do class action plaintiffs. And knowing the extent of differences among their clients' injuries, plaintiff attorneys may judge it particularly appropriate in asbestos cases to heed the Advisory Committee's warning.

Plaintiff attorneys also chafe under the procedures for managing class actions, which usually involve placing control over the litigation into the hands of a small committee of attorneys. Some observers cite fear of losing fees as a source of plaintiff attorneys' hostility toward class actions. A federal class action suit cannot be settled without the approval of the court; in such a case, the court usually also reviews and approves fees paid to attorneys representing the class. In recent years, judges have demonstrated a growing unwillingness to grant wholesale approval to attorneys' fee requests, especially in cases involving large amounts of money. For example, in the recently settled Agent Orange class action suit, the federal district trial judge awarded $9 million in attorneys' fees, about 5 percent of the total settlement fund. The judge rejected fee requests of three-quarters of the attorneys who submitted them, and sharply reduced the amount of compensation for the others. Members of the plaintiff attorney management committee were awarded about $6 million, less than one-quarter of the total $26 million they had originally requested (National Law Journal, January 21, 1985).

For defendants, opposition to class actions, which are often brought by consumers and employees, has also been traditional. In addition, some asbestos defendants (and their insurers) may have opposed class certification because they saw that their potential liability would be substantially less than that of Manville, and for that reason did not want to be definitively classed with Manville. Such marginal defendants may have foreseen that under a case-by-case disposition system, they would be able to reach low cost settlements with plaintiffs. Had

30 Bernstein (1978:359–360) found that class actions usually produce lower per person recoveries than do individual damage actions. His data refer mainly to actions that would not have been maintainable as individual claims (e.g., consumer antitrust actions). But the recent settlement of the Agent Orange suit in which class members will apparently obtain no more than $25,000 each illustrates the potential for relatively small individual recoveries in class action personal injury suits. On the other hand, the acceptability of block settlements to many plaintiff attorneys (see Section V) seems inconsistent with concerns about individual due process.

31 It is possible, however, to decide some issues on a class basis (e.g., liability questions or punitive damages) and reserve others (e.g., compensatory damages) for individual action.

32 Federal Rules of Civil Procedure, Rule 23(e).
the cases been certified as a class, they might have had to shoulder a larger portion of the compensation bill. Some attorneys and court officials whom we interviewed speculated that major defendants may have believed that their ultimate financial position would be better if they accepted the transaction costs associated with a case-by-case disposition process, stretching out compensation payments over time, than if they were forced to pay out an enormous class action award or awards within a relatively short time period. Other respondents noted that defense attorneys had no financial incentives to press the class certification issue. Repetitive litigation, they noted, is a way to "keep the meter running."

Clearly there is room for disagreement on the appropriateness of class certification for asbestos claims. In theory, there seems to be no reason why certain substantive issues that are common to all claims (the category 1 questions listed above) could not have been litigated a single time for the entire class of claims. Many observers would agree that the question of an association between asbestos exposure and disease is a good candidate for a "class" disposition. In practice, however, after cases were filed in state courts, certifying a national class was not possible because no legal mechanism currently exists for consolidating cases pending in federal and state courts. Certifying a statewide class, recently proposed in Texas, was an option. But the history of asbestos litigation demonstrates the potential dangers of the class approach. Had a class disposition been certified and a judgment reached early in the litigation, certain critical information on industry knowledge of the links between asbestos exposure and disease, which has influenced jury awards and settlements in many jurisdictions, might never have been developed. Class certification for subsets of claims, for example, all those arising out of a certain worksite, might be less problematic. These groups of claims raise category 2 questions about work conditions and product use. Although the amount of information about these factors also increased over time, at some stage in the litigation, the information base used for disposing of cases stabilized, and class certification should have become more attractive. By that time, however, judges had developed informal procedures for achieving some of the objectives of class certification, and attorneys had developed routines and incentives for continuing to litigate on a case-by-case basis.

Multidistricting. When cases involving "common questions of fact" are brought in roughly the same time period in multiple federal district courts, they may be brought together in a single district by assigning
responsibility for managing some or all phases of the litigation to a single federal judge. Thus, within the federal system, multidistricting provides a mechanism for grouping cases and deciding common issues. The authority for reassigning cases in this fashion is lodged by law in the Judicial Panel on Multidistrict Litigation. The Panel, a committee of seven circuit and district court judges appointed by the Chief Justice of the United States, may act on its own accord (over any objections by the parties) or in response to a motion by the parties. Typically, a motion is filed by the party or parties whose interests are affected. For example, a defendant who is sued in multiple jurisdictions for injuries resulting from a mass accident might move for "multidistricting" to reduce the costs of defending these claims. The Multidistrict Litigation Panel (MDL), established in 1968, had by 1984 considered more than 600 requests for multidistricting. Among those approved were mass toxic tort claims arising out of the use of Dalkon Shield and Bendectin, exposure to Agent Orange, and Swine Flu vaccine inoculation.

The MDL Panel first considered asbestos claims in 1976, when it issued an "order [to the parties] to show cause" why 103 asbestos claims (including 6 attempted class actions on behalf of more than 2500 plaintiffs) brought in 19 districts should not be transferred to a single district for pretrial management. The files of the MDL Panel do not indicate why it chose to issue the order at that time. MDL staff members hypothesized that the MDL Panel judges may have received complaints from one or more judges regarding duplication of effort in the cases.

In response to its order, the MDL Panel received 53 negative responses from attorneys on both the plaintiff and defense sides. Attorneys argued that multidistricting would delay case processing, since some cases had already been set for trial in their home districts, that it was unnecessary because parties in each district were already voluntarily coordinating their activities, and that it was inappropriate because there was a lack of commonality among the parties. In the absence of arguments to the contrary, in 1977, the MDL Panel vacated its own order and denied multidistricting. In its written opinion, the Panel noted that "[t]he parties were virtually unanimous in opposition to transfer and [that] the only questions of fact common to all actions related to the state of scientific and medical knowledge at different

35In the federal system, cases are sometimes multidistricted and then certified as a class, as with Agent Orange claims.
37Title 28 U.S. Code, Sec. 1407.
38None of the proposed class actions was certified.
points in time concerning the risk of exposure to asbestos. The Panel noted differences in occupation and circumstances of exposure among the plaintiffs, differences in named defendants (despite the fact that some defendants were named on all or almost all cases), and the fact that "local" arrangements for discovery were already in place in many districts.

In 1980, the MDL Panel again considered multidistricting asbestos cases, this time in response to a motion filed by attorney Thomas Henderson, who represented plaintiffs on 34 claims filed in six districts. Henderson specified that he wanted to transfer pretrial management of the claims to the federal court for the Western District of Pennsylvania, where he practices. In his motion, Henderson referred to discussions about multidistricting that had been held by the Asbestos Litigation Group (a national group of asbestos plaintiff attorneys), and indicated that his motion was supported by several other leading plaintiff attorneys.

Henderson's motion generated a storm of opposition from both plaintiff and defense attorneys. A leading member of the Asbestos Litigation Group submitted the results of a survey of 78 plaintiff attorneys, said to include all those representing asbestos claimants, which showed that 73 of the 78 opposed multidistricting. One of the plaintiff attorneys, cited as supporting Henderson's motion, filed a statement in opposition. Within three months, the Panel had denied transfer, citing their earlier disposition of the issue and noting that the plaintiffs had offered no basis for distinguishing these cases from those it had considered earlier.

Some court officials involved in managing asbestos litigation believe the MDL Panel erred in its decisions. They believe that if the cases had been multidistricted, decisions could have been made regarding liability, punitive damages, and key evidentiary issues, and then applied to federal cases nationwide. Individual cases could have been remanded to the local courts for determination of damages and causation. Such a bifurcated system, these officials argue, could have processed cases more efficiently. They also question the Panel's reasons for denying multidistricting to asbestos litigation, since they granted it for DES, Bendectin, and Swine Flu vaccine cases. These officials suggested to us that the MDL Panel members had backed away from their...
original proposal to multidistrict the cases because they were not ready to "take on" the lawyers on this issue.

Multidistricting cases filed in the federal system would have been at least an inconvenience for all attorneys practicing outside the district to which the cases were assigned. Had the MDL Panel shifted all asbestos cases to a single district, over time, attorneys outside that district might have found themselves with a smaller share of the asbestos litigation business. Most important, it would have placed the responsibility for deciding key substantive issues in the hands of a single judge. As in the case of class certification, the conservative strategy for attorneys and judges alike was to reject this approach.

**Issue Preclusion.** Another approach to limiting repetitive litigation is to grant, under certain circumstances, authority to the courts to prohibit parties from raising anew issues that have been decided in a previous case. The legal doctrines that provide for this include *stare decisis*, *collateral estoppel*, and judicial notice. Issue preclusion is a serious step in the litigation process, one that raises questions about due process and equity.\(^{41}\) Judicial interpretations of when it is appropriate to bar relitigation of substantive issues vary from jurisdiction to jurisdiction.

The federal court in east Texas has made the most vigorous and sustained attempts to apply issue preclusion doctrines to asbestos litigation. In *Migues v. Fibreboard Corp.*, applying the doctrine of *stare decisis*, Judge Robert Parker held that the dangerousness of asbestos products was an issue of law that had been decided against the defendants in a previous asbestos case, had subsequently been upheld by the U.S. Court of Appeals for the Fifth Circuit (*Borel v. Fibreboard Paper Products Corporation*),\(^{42}\) and was therefore not subject to further litigation. The 5th Circuit firmly rejected Judge Parker's position, stating:

> This Court held in Borel only that the Borel jury, on the evidence presented to it, could have found that asbestos products accompanied by adequate warnings were unreasonably dangerous. The proposition that all juries presented with similar evidence regarding asbestos products would be compelled to find those products unreasonably dangerous was not presented in Borel, and therefore, this Court did not reach it. Since *stare decisis* is accorded only those issues necessarily decided by a court in reaching its result, the District Court erred in overrating the holding of our opinion in Borel.\(^{43}\)

\(^{41}\)For a summary of the legal arguments for and against the application of *collateral estoppel* to mass product liability litigation, see Weinberger (1979). For an examination of its use in asbestos litigation specifically, see Green (1984).

\(^{42}\)493 F.2d 1076 (5th Circuit, 1973).

In a series of cases decided in 1980 and 1981, Judge Parker and Judge Fisher (also of the Eastern District of Texas) applied the doctrine of *collateral estoppel* to asbestos litigation. In one illustrative case, Judge Parker held that the adverse verdict on liability in *Borel* precluded the defendants in a new case involving 58 separate claims from presenting evidence regarding their state of knowledge about dangers associated with asbestos exposure (i.e., the “state-of-the-art” defense). Judge Parker’s order applied to all defendants in the new case, including those who had not been parties to the previous case, on the grounds that the latter were similarly situated to the defendants in that case. Had Judge Parker’s view prevailed, the 58 asbestos claimants to whom the pretrial order applied would not have been required to present evidence regarding the dangers of asbestos exposure or the defendants’ knowledge of these dangers. Moreover, the defendants would not have had an opportunity to defend themselves on these issues, and the issues presented to the jury would have dealt with the plaintiffs’ exposure to various products and extent of injury, if any. Trial time would have been reduced (according to one judge’s estimate, by as much as 50 percent), and more cases might have been disposed of by settlement before trial.

The Court of Appeals for the 5th Circuit, however, reversed Judge Parker’s ruling. The court held that the defendants who were not parties to the earlier case could not be bound by the liability decision in that case since they had not had a “full and fair” opportunity to litigate the issue. Judge Parker applied his ruling to these defendants on

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45According to this doctrine, once a factual issue has been resolved for or against a party that had a “full and fair” opportunity to litigate the matter, that specific party, in the interests of judicial economy, may be precluded (“estopped”) from raising the issue again in a new case. Until recently, most courts required that the parties in the second suit must have been “mutually” affected by the outcome of the first (termed “mutuality of estoppel”). In 1979, however, the U.S. Supreme Court provided for collateral estoppel, under certain circumstances, in federal cases with parties who were not mutually affected by the outcome of the previous case. The requirements set forth for application of nonmutual collateral estoppel were: (1) the party to be estopped must have had an adequate opportunity and incentives to litigate the issue in the previous case, (2) the issue must have been actually decided by the court in the first case, and (3) there could be no reasons to distrust the first judgment (Farkas *v.* History Co. v. Shore, 489 U.S. 322, 332 (1988)). Some states (e.g., California) had previously adopted the principle of nonmutual collateral estoppel, but others (e.g., Texas) have maintained the older doctrine requiring mutuality.

46Hardy *v.* Johns-Manville et al., 681 F.2d 384 (5th Circuit, 1982).

47Other federal trial courts judges have also declined to follow Judges Fisher and Parker’s lead (see Wilner, 1981:199-200).
the grounds that their interests had been adequately represented by the defendants who were parties to that case; the 5th Circuit rejected this contention.48 The court further held that Judge Parker erred in applying collateral estoppel to the defendants who had been parties to the previous case, because that verdict was ambiguous with regard to certain "key issues" related to the defendants' duty to warn, because there was a history of inconsistent verdicts on liability in asbestos suits, and because the defendants in the first suit did not have adequate incentives to vigorously litigate the issue.49

As an alternate justification for his omnibus pretrial order, Judge Parker had cited the evidentiary doctrine of "judicial notice," which permits judges to base their decisions on "self-evident truths that no reasonable person could question."50 The 5th Circuit rejected the application of this doctrine as well, stating that "the proposition that asbestos causes cancer . . . is not at present so self-evident a proposition as to be subject to judicial notice." Explaining its decision further, the 5th Circuit noted: "we sympathize with the district court's efforts to streamline the enormous asbestos caseload it faces." [However, to rule differently on the issues] "would be to elevate judicial expedience over considerations of justice and fair play."51

Many court officials whom we interviewed agreed that repetitive litigation of common substantive issues ought to be reduced. As one judge put it: "how many times [does] one have to litigate the question of whether asbestos dust is the cause of the plaintiff's injuries . . . how many times [do you] have to litigate the question of whether asbestos is unreasonably dangerous?" But the appropriateness of offensive collateral estoppel (non-mutual collateral estoppel asserted by the plaintiff) and other issue preclusion devices for asbestos litigation is still hotly debated. Some commentators have noted that the efficiencies that are supposed to flow from issue preclusion have yet to be demonstrated empirically (Green, 1984:178-183). As with the other devices for reducing repetitive litigation discussed here, perspectives on issue preclusion are often formed by whether or not it is expected to work in

48The disagreement on this point hinges on the definition of "privity." The doctrine of collateral estoppel provides for estopping a party that, while not directly involved in a previous case, was "in privity" with that party. The appellate court held that privity requires a direct connection between the parties; Judge Parker held that the "identity of interests" among asbestos manufacturers was sufficient to constitute privity.

49In citing these factors, the 5th Circuit was applying the conditions for non-mutual collateral estoppel set forth by the Supreme Court in Parklane. Although Texas has not adopted non-mutual collateral estoppel, the court held that the federal doctrine does apply to asbestos litigation.


one's favor. But this is not always the case. We would not expect defendants to favor the use of offensive collateral estoppel to help establish their liability, for instance. But a few defense attorneys told us that at this stage of the litigation it might make sense to consider applying collateral estoppel or res judicata to resolve the state-of-the-art issue. Plaintiff attorneys have sometimes argued for issue preclusion when they believe the record favors the plaintiffs. But some plaintiff attorneys whom we interviewed noted that uncertainty produces benefits as well as costs, and that clarifying the law is not always in their clients’ interests.

Even disinterested parties might be uncomfortable with the notion that key substantive issues whose outcome could affect thousands of claims ought to be decided by a single judge or jury hearing a single case, especially given the degree of variation in jury verdicts on asbestos cases to date. From this perspective, asbestos litigation seems to provide a good illustration of the dangers of collateral estoppel. Applying the principle of judicial notice to the question of the link between asbestos exposure and asbestos disease, however, makes sense to many observers who believe that the medical evidence on this point is overwhelming. Within specific jurisdictions, a rationale might also exist for applying this doctrine to other issues, such as the amounts of various products in use during specific time periods.

Informal Approaches to Reducing Repetitive Litigation. Despite the general unwillingness of state and federal appellate courts to sustain modifications in formal rules and procedures that could reduce repetitive litigation of asbestos issues, considerable innovation toward this objective has been achieved in informal practices at the local level. With the assistance of local counsel, judges in federal and state trial courts have developed a variety of informal mechanisms for treating asbestos claims collectively during certain phases of the litigation to preclude redundant litigation of certain issues. Among the most common mechanisms are assigning an all-purpose asbestos judge, creating a “lead case,” issuing “master” pretrial orders, and consolidating cases for trial.

As claims surged into the courts in major asbestos jurisdictions, attorneys on both sides and trial judges quickly realized that there were advantages to achieving consistency in rulings across cases that outweighed the benefits of repetitive litigation, at least on some issues. The most straightforward way to achieve this was to appoint a single judge or magistrate to whom all asbestos cases were assigned, for some or all phases of the litigation. Having a single judge decide substantive motions by itself ensures a certain amount of consistency. Although the rulings are formally applicable only to the cases in which they are
made, they may be extended to other cases through “case management”
orders issued by the judge or magistrate. In some major asbestos jurisdic-
tions, consistency is further enhanced through the creation of a
“lead” or “master” case file. Motions brought and decided with the
caption of this case apply to all asbestos cases pending in that court.52
Judges may also issue “master” or “omnibus” pretrial orders, deciding
selected procedural and substantive matters that apply to a list of
pending cases, which may include several hundred claims. The claims
may be grouped by worksite, by attorney representing the plaintiffs, or
by time of filing. In some jurisdictions, after holding extensive pretrial
hearings with all of the major attorneys present, judges have ruled on
such key issues as market share liability and state of the art, and have
applied these rulings to groups of 50 cases or more. Most of the jurisdic-
tions we studied use one or more of these pretrial management
approaches. But most courts exclude certain key issues, particularly
evidentiary disputes, from these procedures, believing that they are
more properly decided by trial judges for specific cases.

For issues that have not been ruled on formally, consistency may be
achieved informally. As one federal court official explained to us, the
decision of the trial judge on a “heavy, dispositive matter” has “the
force of the law of the district. Technically, the matter could be
decided differently by a different judge, but it never happens.” In
another jurisdiction, where several different judges are hearing
numerous asbestos cases, each indicated that he was responsible for
making his own substantive rulings. But one noted that once he has
made a significant ruling, it is unlikely to change from case to case.
Because the lawyers know how he will rule, they are unlikely to raise
the same issue again on subsequent cases. Although this judge does
not incorporate his rulings in a master order, the knowledge about how
he has ruled is informally exchanged among attorneys.

Cases have been consolidated for trial in several jurisdictions, with
varying degrees of success. Consolidation of “actions involving a com-
mon question of law or fact” is authorized by Rule 42 of the Federal
Rules of Civil Procedure. Although the implicit objective of consolidat-
ing asbestos claims may be to spur settlements, its explicit purpose is
to reduce trial time by eliminating redundant presentations of evidence
on liability.

Cases can be consolidated for trial in many different ways. In two
of the jurisdictions we studied, the federal court in eastern Texas and
the state court in Philadelphia, judges have empanelled several juries at

52In Los Angeles, there is also a lead case for each plaintiff attorney firm. Motions
with that caption apply to all cases brought by that law firm.
once and had all of the jury members, sitting in a single courtroom at the same time, listen to the liability evidence. The juries were then separated; each heard evidence on injuries and damages, deliberated, and returned a verdict for a single plaintiff. Unhappily for those who argue that liability of asbestos defendants is clear, in both jurisdictions, the several juries who heard the same presentation of liability evidence arrived at different verdicts on liability.

In both jurisdictions, there was some dissatisfaction with the procedure on the grounds that it was difficult to manage (some said "chaotic"), and it was not attempted again. But another approach to consolidation has been used fairly often. In this approach, a single jury hears a group of cases (thereby avoiding the possibility of inconsistent liability verdicts). The federal courts in eastern Texas and eastern Pennsylvania have both used this procedure. The usual approach is to select a small number of cases (perhaps five or six) that are similar in injury, exposure, parties, and place of employment. Often the attorneys on both sides are involved in deciding which cases to group for trial. The liability evidence is heard once for the entire group of cases, and the evidence on damages is then heard seriatim for the individual cases.

Recently, in the Eastern District of Texas, Judge Parker empanelled a six-person jury to hear 30 asbestos cases. The jury was asked to decide the liability of the defendants for the entire group of cases. Evidence on damages was to be presented, in turn, for smaller subsets of this group. After the jury delivered liability verdicts against all of the defendants and awarded compensatory and punitive damages totaling $3.9 million to the first four plaintiffs, a settlement was reached for the entire group of 30 cases. It is not known whether the 5th Circuit would have approved the consolidation procedure or sustained the verdict had the settlement not been reached.

In a sense, then, courts have achieved collective decisionmaking and issue preclusion on an informal basis in the same litigation context for which class certification, multidistricting, judicial notice, and collateral estoppel have been formally rejected. Why have these informal mechanisms for reducing repetitive litigation been acceptable to attorneys, parties, and trial judges when the more formal devices have not? One reason is that the informal mechanisms have been applied either to non-dispositive issues, or to dispositive issues that likely have only a modest effect on case value. Second, attorneys may view informal issue preclusion as a way of expediting disposition without placing a definitive answer to a key substantive issue on the appellate record. Third, devices such as the "lead case" preserve the attorneys' freedom to file claims outside that case when they do not wish the "lead case"
ruling to apply to it. Finally, attorneys may feel that an innovative procedure, which serves them well when implemented by a specific judge, could have a negative effect if it was adopted by other, less trusted judges. Attorneys we interviewed often told us of approaches that they had accepted primarily because they had confidence in the judge who had adopted the approach. Similarly, although consolidation of cases for trial does have the appearance of declaring a class, it is a class that can be custom-tailored to meet attorney and litigant needs. Frequently, trial judges either allow attorneys to decide which cases should be consolidated for trial or permit them to have input into this decision. Informal issue preclusion and grouping of cases also reduce the amount of judicial resources required for substantive decisionmaking. Judges who use case management procedures for achieving this objective run less risk of appeal than do those who have formally attempted to apply issue preclusion doctrines to asbestos litigation. Judges who are concerned about their record on appeal may be more comfortable with informal agreements with attorneys than with formal revisions in rules and procedures. Thus, informal mechanisms for limiting litigation of substantive issues are attractive because they produce benefits for all participants without limiting their options.

The fact that these informal understandings depend on the relationships between specific judges and attorneys, however, illustrates their inherent weakness as mechanisms for reducing litigation. As the specific participants change, so may the informal understandings about the set of issues that are “settled.”

CONCLUSION

With regard to deciding substantive legal issues at the national and state levels, the civil justice system’s response to the special characteristics of asbestos litigation can best be characterized as “business as usual.” Some substantive rules have been changed in some jurisdictions to improve their applicability to latent injuries. But for the most part, the courts have insisted on applying traditional notions of claim definition, causation, and liability. According to some observers, the difficulty of fitting these notions, which evolved out of a consideration of traumatic injuries, to asbestos injury claims increases transaction costs and leads to a greater degree of variation in outcomes than occurs in other injury claims.

The traditional approach to resolving such issues inevitably leads to great variation in substantive rules. In asbestos litigation, the variation in appellate decisions on these issues has created a situation in
which similarly situated plaintiffs in different jurisdictions have widely
different chances of recovery. Although this variation is not unique to
asbestos litigation and derives from our federal system of government,
it seems peculiarly inappropriate when applied to a problem with such
a commonality of features nationwide.

The traditional approach to decisionmaking also leads to substantial
repetitive litigation, resulting in increased transaction costs, delay, and
uncertainty about the value of individual cases. But changing the
decisionmaking process to reduce inefficiencies associated with repeti-
tive litigation while at the same time protecting due process is a com-
licated problem. Retrospectively, class action certification of asbestos
cases appears attractive along some dimensions. Issue preclusion
seems appropriate to many in the scientific community who view the
statistical evidence linking asbestos to certain diseases as incontrovert-
able. But when would it have been appropriate to try causation and
liability issues for the class, or preclude litigation of these issues for
individual cases? With the introduction of new medical evidence, the
strength of the plaintiff’s case has clearly improved over time. Con-
tinuing wide-ranging discovery has produced new evidence on liability
against different defendants.

Some repetitive litigation of substantive issues can be intuitively
sound. From the perspective of the plaintiffs and their lawyers, such
repetition avoids risking hundreds of millions of dollars in compensa-
tion in a single or a few trials. For defendants and their insurers, there
is the prospect of allowing variation in trial recoveries to create a
market for various kinds of cases. But these considerations do not
require that the common issues remain open forever. The problem is
that by the time class action certification and/or issue preclusion
becomes appropriate, the interests of attorneys on both sides in main-
taining the status quo may be sufficiently fixed so that they are
unlikely to take the initiative in eliminating redundancy.

Appellate courts clearly play a key role in determining the civil jus-
tice system’s response to new forms of litigation. With regard to asbes-
tos litigation, they have generally adopted a conservative orientation,
maintaining traditional standards for deciding and disposing of cases.
It is at the trial court level that we can observe the consequences as
well as the costs of this stance, for it is at this level that judges and
attorneys must find ways of fitting the realities of the litigation to the
rules they have been given. In the next two sections, we discuss the
practical strategies that courts and attorneys have adopted for trying to
fit “square peg” asbestos cases into the “round holes” of the traditional
tort system.
IV. PRETRIAL PREPARATION

SUMMARY

The pretrial process begins by identifying the parties to the litigation, securing jurisdiction over them, and defining the basis for the claims they make against each other. This pleadings stage is usually followed by discovery, the process through which the parties build their factual cases and learn about their opponents’ evidence. Disputes between the parties occur and rulings on substantive issues are made throughout this process. American trial courts have approached pretrial preparation in two basic ways. In the laissez-faire model, the pace of preparation is left up to the lawyers; judges do not become involved until the case has been certified as ready for trial or the parties request an interim hearing or order. In the judicial management model, judges assume early and continuing responsibility for establishing and enforcing a schedule for all pretrial preparations. The courts in our sample include both types.

When judges get involved in asbestos cases, they face tremendous problems in organizing the litigation. The difficulties initially arose from the characteristics of the litigation that we have described and from the unsettled status of many of the rules involved in litigation about latent injuries. The discovery issues generated by the cases during the 1970s were unusual in scope and required substantial court involvement to resolve. As caseloads grew, the problems were exacerbated. It was imperative that the courts impose some structure on the process before the problem of coordinating such large caseloads became unmanageable. The small number of lawyers involved in such high-volume litigation made coordination easier, but it also meant that failure to coordinate activities had high costs in terms of delay.

Four techniques have been used in the courts that we studied to cope with the burden of pretrial preparations. Although there has been little explicit communication between the judges on these courts, each technique has been used to a significant degree in all of them. The efficiency devices used are specialization of judicial personnel, standardization of pleadings, discovery and some legal rulings, coordination of lawyer efforts through active caseload management by judges, and

1 Of course, the defendants and insurers (but not necessarily their lawyers) and some of the plaintiff lawyers are aware of developments in all courts. But the most likely source of the parallel response to pretrial problems, especially in the federal courts, is the common reference to procedures described in the Manual for Complex Litigation.
cooperation among the asbestos bar. We do not mean to imply that a single set of management practices has been adopted by each court. There are important differences between courts and important differences within courts over time. But despite these differences, the general nature and effect of management practices adopted by the courts has been much more uniform than the disposition patterns to which they are, or at least ought to be, a prelude.

In some courts, these measures were adopted after the courts had tried unsuccessfully to cope with asbestos cases as a normal fraction of a normal caseload. In others, the techniques were adopted as soon as it became apparent that the court was faced with a large number of asbestos cases. Some measures were suggested by lawyers, some by judges. Generally, the level of cooperation between lawyers and judges in pretrial management has been high. Also, almost everyone we interviewed believed that the streamlining procedures had produced significant savings in court and attorney time.

In this section we describe each of these measures in turn and discuss how the courts and attorneys have managed to process this caseload through pretrial while using limited resources. The section ends with an examination of the relationship between pretrial preparation and the disposition of asbestos cases.

SPECIALIZATION

Specialization in asbestos litigation involves both judicial personnel and lawyers. We first discuss the way that the courts have chosen to use judges and magistrates in asbestos cases and then focus on the development and use of expertise among lawyers.

The federal courts in our sample follow an individual calendar system in which each case is randomly assigned to a specific judge at the time of filing and remains his or her responsibility until it is disposed of, either by settlement or judgment. All but one of the courts in our sample have modified this system somewhat for asbestos cases. In San Francisco, the chief judge has assigned all asbestos cases to his own calendar for pretrial supervision. In New Jersey and Massachusetts, the asbestos cases are all assigned at the time of filing to a judge who in turn delegates responsibility for case management during the pretrial period to a magistrate who works under his supervision. Asbestos cases have been assigned to almost all judges in eastern Pennsylvania, but responsibility for coordinating and expediting pretrial processing has been informally delegated to a single judge. The Eastern District of Texas is the only federal court in our sample that has not designated a specialist to supervise pretrial preparation.
Ordinary pretrial management procedures vary among the state courts in our sample. Some of these courts assign civil cases by using a master calendar in which a case is assigned to the next available judge when its place in the motions or trial queue is reached. In other courts, cases are assigned at the time of filing to one judge who processes them through the pretrial stage, after which they are assigned to the next available judge for trial. To manage asbestos cases, the state courts that we studied (except San Francisco and at times Alameda) have modified their regular civil case-assignment system. These courts have established an “all-purpose” asbestos judge who is responsible for all the asbestos cases throughout the pretrial period. This position has been held by a number of judges in Los Angeles, but has remained with the same judge since it was introduced in the New Jersey and Philadelphia courts.

The asbestos specialist in each court is expected to develop expertise in the litigation, provide consistency in rulings across cases, and establish procedures to coordinate and expedite discovery activities. These efforts have largely succeeded. At the very least, asbestos judges have become familiar with the legal issues that arise in the pretrial phase of asbestos cases, with the parties and interests involved, and with the idiosyncrasies of the repeat players. With this background, the specialists have been able to act without the repeated education process that would be necessary if these issues were presented serially to many different judges. In some courts, these judges have also become expert at valuing asbestos cases and aiding in their settlement. In courts where asbestos trials are not extremely rare events, these judges have become familiar with their basic components, and by providing a form of technical assistance, have sometimes been able to reduce the disinclination of other judges to try them.

This consistency of personnel produces both primary and secondary benefits. Of course, a single source of rulings tends to avoid conflicting opinions. But consistent rulings also increase the ability of asbestos lawyers to predict rulings on related matters and reduce some of the demand for judicial intervention. Asbestos judges have expedited pretrial efforts by providing a central direction for standardization of procedures and by managing the pretrial process as a whole, activities that we discuss in the sections that follow.

But judicial specialization appears to have costs as well as benefits. The unusual treatment accorded asbestos cases, which marks them as different from ordinary cases, appears to have led to some apprehension by other judges about getting involved in asbestos trials. In those courts in which special asbestos functions have been delegated to a
magistrate, there is a gap between responsibility for managing the cases (which was assigned to the magistrate) and responsibility for bringing the cases to trial (which rests with the judge), which has had an inhibiting effect on dispositions, as will be shown in Section V. Finally, in each court, asbestos litigation involves a small number of participants. Consequently, any individual characteristics are likely to loom larger than if the cases were spread over a larger group of lawyers and judges. The potential effect for both good and bad relations is most acute with the asbestos judge, the pivotal figure in pretrial preparation. For the most part, attorneys on both sides believe that asbestos specialists have been effective, although some judges as well as attorneys report that the effectiveness of the specialist tends to diminish over time, especially in settlement negotiations. However, there is little doubt that judicial specialization has been an important instrument in producing efficiency and consistency in pretrial preparation.

Lawyers involved in asbestos litigation have developed even more expertise than asbestos judges. As a group, the plaintiff lawyers have transformed the litigation from an occasional high-risk case that involved extremely difficult questions of law and proof into a low-risk, mass production process. Without their considerable efforts, there would be no asbestos litigation. Because of them and the efforts made by defense lawyers in response, a large volume of accessible information now exists about the asbestos industry—the practices, products, and culpability of specific manufacturers and suppliers; the products used at various worksites at various times; the medical consequences of asbestos exposure; and the issues involved in medical causation. Not only have the lawyers in asbestos cases organized the complicated raw materials of asbestos litigation, but their long-term involvement has meant that fewer unproductive discovery efforts are being initiated. The lawyers have become expert at predicting judicial reactions and thus require less judicial intervention than in earlier stages and less than would occur if the cases were spread among a much larger group of attorneys.

At least two costs, however, have been attributed to lawyer specialization. Although limiting the numbers of lawyers can lead to organizational efficiency in the pretrial phase, it can also lead to problems, as we shall see, in the disposition phase of asbestos litigation. Less crucial but nonetheless disconcerting was the way that specialization was originally organized on the defense side. As long as the Manville Corporation was active in asbestos litigation, its lawyers took the lead in coordinating defense activities in almost all courts. But as soon as Manville filed a petition for bankruptcy, its lawyers stopped all activity
in the pending asbestos cases, and some time passed before the defense lawyers were able to regroup and parcel out the functions that Manville's lawyers had been performing.\(^2\)

**STANDARDIZATION**

Specialization in asbestos litigation has enabled the judges and attorneys responsible for asbestos caseloads to identify ways of reducing the paperwork and duplicated effort in the pretrial preparation of individual cases. Although workers exposed to asbestos have nowhere been certified as a class, virtually every court in our sample has worked out standard procedures for dealing collectively with its large volume of cases. To their mutual benefit, attorneys and judges have collaborated on methods to streamline and routinize the pleadings, eliminate much of the duplication in pretrial discovery motions, and reduce the lawyers' burden in discovery.

**Pleadings**

Courts have adopted different procedures for encouraging or ensuring standardization in complaints, answers, and additional pleadings. Typically, the court or the lawyers have published model complaints and answers that are widely used. In some courts there are long-form master complaint and answer forms, the contents of which apply to all cases, so that in individual cases only a short-form must be filed. To reduce paperwork, some courts allow plaintiffs to file one copy of the complaint and a list of all the cases to which it applies. Some courts require the defendants to prepare one coordinated defense answer per case. A few courts have not required standard forms, but as a matter of practice, the pleadings in those jurisdictions have also become standardized over time.

Asbestos cases typically involve a large number of cross-claims among a large number of defendants. To reduce the huge volume of paperwork produced by these cross-complaints,\(^5\) in several courts, all defendants named in an asbestos suit are deemed to have filed cross-claims against all others, and all such complaints are deemed denied. Other courts have taken less comprehensive steps to alleviate the problems associated with cross-complaints, applying a cross-claim in one case.

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\(^2\)Manville's Chapter 11 proceedings were a blow to many of the law firms that had been defending the asbestos claims against it. These firms, which had built up special cadres to handle the asbestos cases, were suddenly left without these cases.

\(^5\)The potential paperwork burden in these courts is hardly insignificant. If we assume that half the normal number of 20 defendants cross-claim against each other, the complaints and answers in 2000 cases in one court would constitute 400,000 pleadings alone.
case to all other cases pending at the time or filed thereafter, or ordering that paperwork associated with these claims not be filed with the clerk.

Whatever the approach, it is clear that in all sample courts the pleadings stage has been routinized and delegated to junior personnel in the law firms and to the courts' clerical staff. Most people we interviewed seemed pleased with the effects of these efficiency measures. A few attorneys, however, were critical of the procedures; they suggested that in specifying the contents of the complaint, the court was trying to force them to prepare their entire case before filing, a practice they believe favors the defense.

Motions

When the standardization process began, courts with large asbestos caseloads were inundated with repetitious pretrial motions. In Section III, we described the problems facing the litigation as a result of the many unresolved substantive motions. Most courts took steps to limit this duplication. Several established a master or lead case with which to apply standard rulings to their entire asbestos caseload; motions decided in the lead case would not be brought again by another defendant or in another case. Other courts ordered the defendants to file motions jointly and appoint a lead attorney to represent them at the hearing. Along with these formal rules limiting repetitive motions, the number of filings has naturally diminished as the courts have resolved issues and established consistency in rulings.

Despite these measures, which in one court reportedly halved the number of motions before the court, motions still consume much court time in asbestos cases. In two different courts, officials who indicated that motions were locally "under control" told us they were currently handling about 1000 asbestos motions a year. Motions continue to produce a large volume of paperwork. One lawyer told us that in his office, to respond to one discovery motion, it takes two person-days to prepare a mailing to all applicable parties.

Discovery

Most jurisdictions have taken steps to limit the duplication that would result if each of the multiple defendants in every case undertook individual discovery. A master or standard set of interrogatories to the plaintiff has been developed in all but one court in our sample. That
one set is sent to the plaintiff on behalf of all the defendants, saving
the plaintiff the enormous burden of answering an average of 20 dif-
ferent sets of interrogatories. In one state court, answers to these
interrogatories must be filed with the complaint. In all others, answers
are provided in the normal sequence of discovery or in accordance with
the court's established schedule for the case.

In a number of courts, standard interrogatories addressed to the
defendants are also used. Further standardization is achieved by hav-
ing each defendant file a master set of answers to these interrogatories,
which then apply to all cases. In Los Angeles, interrogatories
addressed to defendants can be made applicable to an individual plain-
tiff lawyer's total asbestos caseload, or to all asbestos cases, through
notice in the appropriate lead cases. In some courts, depositions and
documents discovered for one case can sometimes be incorporated by
reference in other cases.

Court officials report that most lawyers have cooperated in develop-
ing and using standardized interrogatories. We heard complaints about
the procedure only in the federal court in Massachusetts. One attorney
referred to the defendants' standard interrogatories, which include a
minimum of 242 questions, as "burdensome" and "a disgrace." He
believed the court had favored the defense in approving the standard
interrogatories in this district. In most courts, however, the number of
master interrogatories is much smaller, and although supplemental
interrogatories are allowed, the courts try to limit the use of interroga-
tories as a means of harassment between the plaintiff and defense
sides.

Although many people we interviewed indicated that the pretrial
process still consumed unnecessary resources and caused inordinate
delays, most agreed that real efficiencies resulted from the standardiza-
tion that had been achieved. Individuals complained that certain pro-
cedures created inequities for one side or the other, but overall, the
people we talked to believed that all parties benefited from the use of
the standard forms and procedures that have been adopted.

COORDINATION BETWEEN LAW FIRMS

The concentration of asbestos cases within a small number of law
firms provides an opportunity for coordinating lawyer efforts that has
been exploited in all of our sample courts. The result is a more effi-
cient distribution of work among defense firms, a reduction in the work
imposed on plaintiff firms, and a reduction in the burden on the plain-
tiff. A number of courts have taken steps to ensure that the
production of documents is coordinated. In many jurisdictions, liaison counsel have been appointed for both sides to coordinate pretrial activities. In addition, lead counsel have been appointed to conduct specific aspects of the defense case, particularly medical discovery. As a result, there is often only one request for hospital records, one defense analysis of plaintiffs' medical histories, and one medical examination by a defense doctor. In some jurisdictions, the lawyers themselves created these roles; in others, they were mandated by the court. When a case goes to trial, representation of common aspects of the defense position is divided between the lawyers for defendants still involved in the case.

Plaintiff firms appear to be better organized at the national level than at the local level. The Asbestos Litigation Group, a formal organization of plaintiff lawyers, provides an opportunity to share information about defendants, experts, medical research, and legal developments; and also to consider common positions on matters such as bankruptcy proceedings, the claims facility, and proposed legislation. At the local level, relations between plaintiff lawyers have been more affected by competition for clients, but in some jurisdictions, they are now characterized by a willingness to share information on settlements and product identification, and to assist other firms if multiple trials are scheduled simultaneously.

Liaison Counsel

In most of the courts we studied, liaison counsel have been appointed for defendants and sometimes for plaintiffs as well. Their roles range from a simple conduit of information to and from the asbestos judge to the director of the entire defense effort. The most ambitious liaison arrangement is in the federal court in Massachusetts, where the defendant liaison counsel has set up nine committees to deal with different aspects of discovery. The liaison counsel assigns lawyers to these committees, allocates work, and represents group positions that have been adopted. In the more typical arrangement, for example, in the federal court in eastern Texas, liaison counsel coordinate discovery, motions, responses to motions, and pretrial orders. At the modest end of the range are lawyers in the Philadelphia federal court, for instance, who coordinate scheduling and facilitate communication between the court and the attorneys. With all liaison counsel who perform significant services, all parties on their side of the case are billed for a share of the expenses.

Medical Defense

The major pretrial efficiency introduced in most courts in our sample is some form of coordinated medical defense. In almost all of these
courts, securing medical information from the plaintiff, arranging for examination by defense doctors, and organizing, analyzing, and distributing this information are all conducted once for each case on behalf of all defendants. In several courts this work is conducted by one firm only. In another jurisdiction two firms share the medical defense, and in one court, coordination of cases originating with various plaintiff firms is allocated to different defense firms. Coordinated medical defense is usually limited to discovery. By the time a case reaches trial, several parties have usually settled, and the lead role in presenting the medical defense shifts to counsel for one of the parties remaining in the case. But in two courts, defendants and their attorneys have agreed to an unusual extension of the coordinated medical defense: in the state court in New Jersey and the federal court in Massachusetts, this function includes presentation of the medical evidence at trial by coordinating counsel even if their client is no longer involved in the case.

Coordination among asbestos lawyers has not been without problems. Plaintiff lawyers have taken conflicting positions regarding the bankruptcy proceedings, class actions, and multidistricting; on occasion, they have filed complaints about other lawyers' client recruitment practices. In some courts, coordination has been difficult to initiate because lawyers have not been willing to take the lead; in others, cost-sharing arrangements have been hard to negotiate. But in general, the specialization, standardization, and coordination that we have described are so clearly in the interests of the lawyers and judges involved that techniques to minimize the burden of pretrial activities have been adopted in almost every court.

**CASE MANAGEMENT**

The manner in which the asbestos judge or magistrate tracks and supervises asbestos cases through the pretrial process varies among the courts that we studied. The most common pattern is that of active case management in which the judge assigned closely monitors the progress of pretrial preparation. Typically, this includes setting schedules, establishing deadlines, and controlling the scope of discovery activity. Progress is monitored by conferences with attorneys on both sides of the case. This model is followed in the federal courts in California, Pennsylvania, and Texas, in augmented form in New Jersey and Massachusetts federal courts, and in the state court in New Jersey. A special form of active management has developed in the state court in Pennsylvania. In contrast, California state courts do not initiate
case management until cases have been certified as ready for trial; then the routine varies from court to court.

The special feature of the federal court in New Jersey is its pretrial order, which precludes additional discovery activity on a case after the prescribed activities have been completed. Within 60 days of filing, the magistrate calls a status conference that initiates the first phase of the discovery process. Within 12 to 15 months after the first status conference, a second conference is convened to schedule the discovery required by the defense. After the defendants have completed discovery, the focus shifts to the discovery to be conducted by the plaintiff. The New Jersey magistrate has not formulated a set procedure for discovery. Instead, he reaches an agreement about the timing and range of discovery for each case with the lawyers involved, and then issues an order incorporating that agreement. The order includes a date by which all discovery must be completed, so that discovery costs can be controlled. We found some dissatisfaction among asbestos lawyers in this court about overcontrol of discovery and closing of discovery in cases that had not yet been assigned for trial. The federal court in Massachusetts supplements ordinary management techniques with general status conferences that are held every four to six weeks. These meetings have an open agenda and are intended to help inform the magistrate of changes in the status of the asbestos caseload.

In Philadelphia, case management seems to have had two phases—before and after the initiation of the non-jury trial program. In the first period, completion of discovery was controlled by court orders issued at the time trial dates were assigned. That device seems to have been abandoned when non-jury trials were instituted; thereafter, the non-jury trial itself marked the end of discovery. Some respondents we interviewed argued that the non-jury trial program afforded an opportunity for further discovery as each side presented its case to the judge. It is not clear how much additional discovery took place when a non-jury trial award was appealed and the case went to jury trial. Unlike the federal courts, this state court and those in California have made no attempt to govern the content, as distinguished from the timing, of discovery. Efforts have been made to make depositions admissible when they originated in other cases or even in other courts, but the contents of interrogatories were not prescribed.

In California, once the lawyers have told the court that a case is ready to be assigned for trial, each court follows a different path. In San Francisco, asbestos cases are treated like all other cases. That was

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4In this program, asbestos cases were assigned for bench trials yielding non-binding verdicts prior to being listed for jury trial. See Section V.
also the situation in Alameda until mid-1984, when the court became concerned with the slow rate of disposition and instituted a program that gave close attention to small groups of asbestos cases as they approached the five-year trial limit. In Los Angeles, where asbestos cases have been assigned to a single judge for many years, a tight, integrated system of settlement discussions and trial preparation has been instituted.

**ALLOCATION OF RESOURCES TO ASBESTOS LITIGATION**

Now that the asbestos pretrial process has become routinized, both courts and law firms find that they can allocate relatively low levels of resources to pretrial preparation. With this level of resources, however, streamlined pretrial preparation does not lead inexorably to disposition.

**Judicial Resources**

Many federal and state courts have recently faced increasing civil and criminal caseloads without proportional increases in judicial resources. We were frequently told by court officials that they needed additional judges to meet the demands of their ordinary caseloads. Some courts in our sample also have concentrations of other complex cases that consume a disproportionate amount of judicial efforts. For example, the San Francisco state court has a large number of Dalkon Shield and DES cases, and the New Jersey federal court caseload contains a significant number of cases brought under the Racketeer Influenced and Corrupt Practices Act (RICO).

These demands on limited judicial resources provided the principal incentive for courts to streamline procedures for handling their asbestos caseloads. The specialization and standardization measures they adopted permitted them, for the most part, to incorporate the large influx of new cases into their ordinary routines without diverting substantial amounts of judicial time to asbestos cases. Although the courts we studied were able to provide only rough estimates of how much time they devoted to discovery and other pretrial matters, we were told that the streamlining procedures had produced substantial savings in judicial resources.\(^5\) For example, the magistrate assigned to

\(^5\)We cannot entirely attribute time saved to the efficiency produced by the streamlined procedures. Attorneys also began to routinize the pretrial process and engage in less discovery in individual cases, which produced less demand for court involvement.
prettrial preparation of asbestos cases in the New Jersey federal court told us that prettrial matters had initially consumed about 50 percent of his time. But at the time we interviewed him, after case management procedures had been operating for several years, he was spending no more than 10 to 15 percent of his time on asbestos prettrial management.

In fact, during the time of our fieldwork, the courts in our sample were not allocating significant judicial resources to prettrial management of asbestos litigation. None of the courts we studied had committed as much as one judge working full-time to asbestos case management. In courts where prettrial preparation had been assigned to one judicial officer, we asked him to estimate the amount of time he was currently spending on asbestos cases. Estimates ranged from about 5 percent in the federal courts in northern California and eastern Pennsylvania (which have the smallest asbestos caseloads among these courts); to 50 percent in the Massachusetts federal court, which had a caseload of about 2000 claims; to 60 percent in the Los Angeles state court, in which approximately 4800 claims have been filed.

The extent of judicial resources each court had committed to managing its asbestos caseload was small overall, relative to the size of the court and the percentage contribution of asbestos to the total civil caseload. In Los Angeles, a court with 206 judges, the asbestos caseload accounts for about 8 percent of the pending civil caseload (see Table 2.2). This court’s commitment of 60 percent of one judge’s time to the asbestos caseload constitutes only about one-quarter of 1 percent of that court’s total judicial resources. Los Angeles is not an extreme case. No court for which we have information devotes more than 1 percent of its judicial resources to asbestos case management even when asbestos cases account for a substantial fraction of the civil caseload.

On the other hand, that so many of these courts have assigned judges and magistrates to asbestos cases as a specific group is in itself unusual. Courts do not usually assign judges to specialize in segments of the civil caseload such as malpractice or product liability cases. Moreover, we are aware of only a few courts that have designated

6Several courts, however, have assigned administrative and clerical personnel to work full-time on processing these cases.

7We have no estimates of judicial time spent on asbestos prettrial management in the eastern Texas federal court or in the San Francisco state court, where no single judge is in charge of these activities.

8We cannot separate time spent on prettrial proceedings such as hearing motions from time spent on settlement efforts. Our estimates are for total time devoted to the asbestos caseload, excluding time for conducting trials, which is shared among all judges on the bench in these courts.
specific judges to manage some of the other newer types of tort litigation such as DES or Dalkon Shield.

Attorney Resources

Both plaintiff and defense firms had incentives to limit the number of personnel used to manage their asbestos caseloads. Initially, some plaintiff firms made very large financial investments in this litigation and faced the considerable risk of securing a minimal return from that investment. By the time of our fieldwork, efforts at these levels were no longer required. Many of these same attorneys now have large asbestos caseloads and can process their cases and maximize the return on their earlier investment by coordinating and cooperating with court efforts to streamline the litigation. Defense firms too have been able to manage their clients' large inventories of cases with reduced resources because of the organization of the litigation in the courts. In their efforts to cut costs, defendants and insurers have provided the impetus for defense firms to develop their own coordination efforts such as joint medical discovery.

WHERE PRETRIAL MANAGEMENT FAILS

The pretrial management activity described above has introduced a fair amount of order in asbestos litigation, but as we will show in Section V, it has generally failed to accelerate dispositions. There appear to be four reasons for the failure. First, the incentives that affect pretrial behavior are different from those that influence dispositions. All active participants in asbestos litigation benefit from the order and efficiency introduced by proper management of pretrial activities. Streamlining the process enables the lawyers to service the large caseloads they carry, reduces the costs to the defendants and/or their insurers, and permits the courts to deal with these cases without providing the judicial attention that their numbers seem to warrant. But disposition brings other incentives into play. Under many conditions the lawyers on both sides, the defendants, their insurers, and plaintiffs with marginal injuries who are not currently disabled may in fact benefit from delayed dispositions. Consequently, these players are not driven by self-interest to transform the potential created by pretrial activity into a high rate of disposition.

A second reason why disposition rates in many courts may not be enhanced by efficient pretrial activity is the widespread use of junior personnel on both sides in the pretrial stage of the litigation. In
ordinary litigation, by focusing the attention of the lawyers involved on the case, pretrial activity can be the occasion for negotiation and settlement. With asbestos cases, the caseload at each firm is so high that lawyers with the requisite experience and authority are unable and after a while disinclined to participate in much routine pretrial work. Standardization promotes the delegation of this work to junior staff. But settlement frequently requires senior staff. Consequently, because these senior lawyers do not participate directly in many pretrial activities, opportunities for settlement may be lost.

A third reason that pretrial preparations have not promoted dispositions is that more attention has been paid to organizing personnel. The same 15 to 20 defendants are involved in most asbestos cases in each court. Pretrial areas in which labor could obviously be saved by cooperation are discovery and negotiation. In actuality, there are strict limits to such cooperation. Defendants do not delegate responsibility to one or a few lawyers in the group to attend and conduct depositions, except for medical depositions in the federal courts in New Jersey and Massachusetts. Only in the San Francisco Bay Area do defendants regularly negotiate as a group with plaintiffs. The cost of failing to initiate such cooperation is substantial, and one of the chief aims of the Asbestos Claims Facility is to recapture such costs. But these instances of pretrial non-cooperation also have an effect on dispositions. For courts in which the pace of disposition is linked to the pace of discovery, opportunities lost by not speeding up discovery reduce the pace of disposition. And outside the Bay Area, the pace at which negotiations can proceed is obviously affected by the plaintiff lawyer’s need to deal separately with numerous defendants.

The fourth and most important reason that pretrial preparation has failed to achieve its potential in promoting disposition lies in the difference between the role of pretrial preparation in ordinary cases and its role in asbestos litigation. In an ordinary case, disposition may occur at any stage of the litigation process (Grossman et al., 1981:108). As a result, the earlier the case is organized and important discovery is conducted, the earlier the case may be completed. But asbestos cases are almost never disposed of until the case is about to go to trial.

Although the current practice has been called “an obscenity” by Professor Harry Wellington of the Yale Law School (ALE, 1985:8874), it is not irrational. Given the realities of coverage litigation between asbestos providers and their insurers, it may be wise for insurers to protect against bad faith claims by refusing to cooperate with other defendants on aspects of discovery that present the possibility of a conflict of interests between defendants, such as witness identification. The best pretrial cooperation is achieved on medical issues because all defendants have the same interests, and there is no risk of bad faith claims as a result of work-sharing.
regardless of when discovery is completed. Some discovery can be conducted well in advance of trial. For example, early discovery about defendant culpability makes sense, and information about product identification can be often pinned down in this phase. But other information may change over time, and if the case is not likely to settle until the trial date approaches, early discovery may be a mistake. Efforts to complete medical discovery well in advance of trial (a practice adopted in some of the courts we studied) are too often wasted. A medical examination performed on a plaintiff in year 2 is outdated when the case approaches trial in year 4. With such progressive medical conditions as asbestosis or lung cancer, doctors on both sides ideally need to examine the plaintiff when the case is assigned for trial, whether it is then to be settled or tried, not when an arbitrary time limit is to be met long before disposition is a real possibility. In the courts in our sample, two approaches make sense: the "hands-off" attitude of the state courts in California, where the judges leave discovery to the parties and allow them to complete it as trial approaches; and the strong management attitude of the federal courts in Texas and Pennsylvania, where rigid discovery schedules are followed by rigid trial assignments. In the federal courts in Massachusetts and New Jersey, close judicial control of discovery schedules and the imposition of conventional cut-off dates without assignment of trial dates seem to have expedited a process for its own sake, ignoring the reality about dispositions in those courts.

CONCLUSION

Pretrial preparation is intended to develop the facts and issues in a case, thereby providing the basis for settlement or trial. Pretrial management efforts by courts, which have gained popularity in recent years, are intended to produce more cost-efficient preparation and expedite disposition, preferably by settlement. Pretrial management in asbestos litigation has reduced the chaos created by uncoordinated, often redundant pleadings, discovery, arguments, and rulings. But it has not, by any large, succeeded in expediting dispositions. In the next section, we turn to a discussion of the obstacles to asbestos claims disposition, and the approaches courts have used in attempting to overcome these obstacles.
V. DISPOSITION

SUMMARY

In an earlier ICJ Report, we estimated the proportion of dollars spent on asbestos costs and compensation that eventually reached injured workers (Kakalik et al., 1983). When plaintiffs receive such payments and the process by which they secure compensation may be almost as important as how much they receive. We do not mean to imply that any condition or practice that speeds disposition is good and anything that delays it is bad, but after a point, additional time is hardly required to develop a case adequately. In some of the courts studied, that point is frequently exceeded by a substantial margin.

In general, asbestos cases are intrinsically hard to dispose of because they are difficult to evaluate, troublesome to negotiate, and frequently considered complicated to try. In addition, the organization of the litigation reduces the major participants’ incentives to dispose of cases expeditiously. In the face of these difficulties, courts are able to dispose of cases at a rate that maintains control of the asbestos caseload only if they force the settlement of cases by imposing a credible threat of trial. That threat is produced either by a capacity and willingness to devote substantial judicial resources to these cases, or by organizing the trial process in such a way that a small number of judges can threaten to try relatively large numbers of cases.

Variation in the pace of disposition across courts is thus more a matter of judicial behavior than of lawyer or litigant efforts. This situation contrasts sharply with the usual pattern of civil case disposition in which, more often than not, cases are terminated without any judicial involvement whatsoever. Lawyers on both sides of asbestos cases appear to have little personal incentive to dispose of large numbers of these cases quickly. While the defendants and insurers have an obvious self-interest in avoiding a rush to closure, the behavior of the plaintiffs is more difficult to interpret. Some may perceive that delay serves their interests as well. But even when they are seriously sick and in need of compensation, it does not appear that plaintiffs generally put much pressure on their lawyers to expedite their cases. This passivity probably originates with the large social distances and limited personal relationships between plaintiffs and their lawyers.¹

¹During our fieldwork, we received no indication that the unions, which in many cases were instrumental in directing plaintiffs to lawyers in the first place, were pressing for quicker dispositions.
The courts in our sample have used different approaches to disposition and have had varying degrees of success in completing cases. One set of courts has used a traditional individualized disposition process. Within this group, the court that has assigned significant judicial resources to asbestos cases has also disposed of a substantial proportion of them. However, in courts that have relied on traditional methods, but failed to allocate commensurate resources to these cases, disposition has lagged behind that of other civil cases. Another set of courts has relied on some form of group disposition; these courts have generally been able to complete asbestos cases at a pace approximating that of the rest of their civil caseload. Finally, one court's attempt to secure individualized disposition through a process founded on administrative-type hearings has been unsuccessful in keeping current with its asbestos caseload.

In this section we discuss the distinctive characteristics of asbestos litigation that shape the disposition process, describe the various ways in which courts have responded to these characteristics, and try to account for the differences in disposition patterns.

OVERVIEW OF DISPOSITION PATTERNS

Table 5.1 provides detailed information about dispositions and rates of disposition for each of the courts that we studied. In five of the courts in our sample, the rate at which asbestos cases were being completed was relatively low. In the Massachusetts and New Jersey federal courts, no cases were being terminated at the time of our fieldwork. After six or more years of asbestos litigation, only 11 percent of cases had been completed in the state court in San Francisco. According to state rule, cases that have been pending for five years should be dismissed for failure to prosecute. But no plans had been devised in San Francisco to deal with the large number of cases that was about to reach the five-year limit. Less than 20 percent of active cases in the New Jersey state court had been disposed of. And at the current rate, the Philadelphia court will not get rid of all of its cases for decades.

In contrast, four courts in our sample appeared to be disposing of asbestos cases at moderate rates. The federal courts in eastern

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As we stated in Sec. I, it is difficult to gather precise information about asbestos cases in courts. Frequently, neither judges nor clerks maintain records about the number of asbestos cases filed, partially settled, settled, or tried. As a result, our information about disposition patterns is for the most part based on what we were told by court officials and lawyers. We believe that this information is roughly accurate, but readers should understand that we are generally providing interviewee approximations rather than figures from business records.
### Table 5.1
RATE OF DISPOSITION BY COURT

<table>
<thead>
<tr>
<th>Courts with Low and Moderate Rates</th>
<th>Claims Filed</th>
<th>Claims Compensated</th>
<th>% Completed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low rate:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts (federal)(^a)</td>
<td>2141</td>
<td>&lt; 10</td>
<td>&lt; 1</td>
</tr>
<tr>
<td>San Francisco, CA (state)(^b)</td>
<td>3960</td>
<td>450</td>
<td>11</td>
</tr>
<tr>
<td>Philadelphia, PA (state)(^c)</td>
<td>4310</td>
<td>552</td>
<td>13</td>
</tr>
<tr>
<td>Middlesex, NJ (state)(^a)</td>
<td>600</td>
<td>&lt;100</td>
<td>&lt;29</td>
</tr>
<tr>
<td>New Jersey (federal)(^a)</td>
<td>2400</td>
<td>759</td>
<td>52(^e)</td>
</tr>
<tr>
<td>Moderate rate:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northern California (federal)(^d)</td>
<td>1140</td>
<td>748</td>
<td>65(^a)</td>
</tr>
<tr>
<td>Eastern Pennsylvania (federal)(^a)</td>
<td>1802</td>
<td>909</td>
<td>61</td>
</tr>
<tr>
<td>Eastern Texas (federal)(^e)</td>
<td>2200</td>
<td>1000+</td>
<td>48(^f)</td>
</tr>
<tr>
<td>Los Angeles, CA (state)(^f)</td>
<td>4800</td>
<td>1500 - 2000</td>
<td>37 ± 5</td>
</tr>
</tbody>
</table>

\(^a\)As of June 1984. In Middlesex, NJ, there are 500-600 additional inactive plant worker cases in which Manville is the sole defendant.
\(^b\)As of December 1984.
\(^c\)A single group settlement (the "Austin" case) accounted for 683 of these completed claims. The ratio of completions to filings, omitting this settlement, is .04.
\(^d\)As of January 1984.
\(^e\)Approximately 275 claims pending only against the defendants in Chapter 11 have been suspended. If that number were subtracted from claims filed, the percent completed would be 86.
\(^f\)Approximately 348 claims pending only against the defendants in Chapter 11 have been suspended. If that number were subtracted from claims filed, the percent completed would be 86.

Pennsylvania and northern California had disposed of 51 and 65 percent of their cases, respectively, and the balance of the cases in northern California were less than two years old. The eastern Texas federal court and the Los Angeles state court had disposed of over one-third of their cases. In fact, the Los Angeles court had terminated almost as many cases as all five of the courts with low rates added together.\(^3\)

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\(^3\)We were unable to obtain disposition statistics from the Alameda state court (see footnote 25).
SIGNIFICANCE OF DISPOSITION RATES

Is the pace at which asbestos cases get completed important? This question arises because in some jurisdictions many and in all places a few defendants settle long before the cases are fully disposed of and on a schedule that is not necessarily dictated by the general pace of dispositions. If these early settling defendants also paid the bulk of recoveries, then the time at which the last few defendants eventually contributed their share would not be terribly important.4

For instance, if a plaintiff received 85 percent of his total recovery within three years of filing, then whether he got the remaining 15 percent in the fifth or sixth year or has not yet received it by the seventh is obviously less critical than if the defendants still in the case represent 80 percent of the eventual recovery. It is doubtful, however, that defendants that settle before the last stages of disposition in any jurisdiction represent a major portion of the eventual total recovery. In many jurisdictions, most major defendants are still involved in the case at the time of trial, at the time of judicial settlement conferences, at the time of non-jury trials, or, where none of these events has yet occurred, are simply still in the case. Even in Los Angeles, where only three to five of the defendants are still involved in the case at the time of settlement conferences, plaintiffs lawyers indicate that just 30 percent of the total recovered in a typical case are secured before that point. The balance is recovered later, in the fifth year after filing, when most cases are terminated in Los Angeles. Thus, the problem of dispositions is not just a matter of tidying up court dockets. It also involves the critical question of how long, under current conditions, injured plaintiffs must wait to be compensated for asbestos injuries by the culpable defendants and their insurers.

FACTORS AFFECTING DISPOSITION

Two types of problems arise in asbestos cases that make disposition more difficult than it usually is for other civil cases. One set of problems arises from the intrinsic nature of asbestos cases, the other from the organizational context of asbestos litigation. Some problems must be confronted wherever asbestos cases are brought, whoever brings them, whoever defends them, whatever other demands are made on the resources of the court in which they are brought, and however the

4If plaintiffs secured substantial workers’ compensation awards in some or all jurisdictions, the timing of tort disposition would also be less significant. But most asbestos workers bypass the workers’ compensation system. See Sec. II.
court is organized to deal with them. On the other hand, there are also problems that relate to the organization of this litigation, problems arising from the concentration of cases in a small number of courts and in the hands of a few lawyers.

**Difficulties of Evaluating and Negotiating Individual Cases**

Evaluation and negotiation of personal injury claims are not usually difficult. The process involves assessing in routine ways a small set of factors: plaintiff and defendant culpability, medical expenses, lost earnings, property damage, permanent injuries, and a residual for pain and suffering. The fact that a vast proportion of cases get settled without judicial involvement, and many even without suit, testifies to the degree to which the settlement process has become routinized. Of course, settlement amounts for each case type vary depending on lawyer skills, local conditions, and predictions about the effect of specific witnesses in specific cases. But the task of evaluating concrete injuries is generally conducted by using established rules with little concern about insurance coverage. Transforming evaluations into agreements between lawyers for one or two parties on either side is easily accomplished in tens of thousands of cases annually. In contrast, asbestos cases are hard to settle in part because they are hard to evaluate and negotiate.

**Evaluation Problems.** The evaluation problem arises from the following factors:

- Difficulties in diagnosing asbestos-related diseases.
- The progressive nature of the disease.
- Changes in the rules that govern asbestos litigation.
- Changes in the legal personnel involved in the litigation.
- The possibilities of punitive damages.
- Wide swings in jury verdicts in cases that have been tried.
- The uncertain status of legal issues affecting the conduct of trials.

Most asbestos plaintiffs allege that they suffer from asbestosis, which varies from a condition without symptoms noticeable by the injured worker, without any loss of function and without disability, to a disease involving a crippling, even fatal loss of pulmonary function. Diagnosis of asbestosis primarily depends on reading X-rays that are frequently ambiguous and interpreted in conflicting ways by plaintiff and defense experts. The more the disease has progressed, the easier it is to predict the course that it will run. At the time of the suit, however, most plaintiffs are in the early stages of asbestosis, or may not
even have any clinical signs of illness. Major medical expenses, lost wages, and pain and suffering in a much higher proportion of cases than usual are thus unknown at the time settlement is discussed or trial is held. Moreover, the age and smoking histories of these litigants make it difficult to determine the extent to which any lung problems are attributable to asbestos exposure or to other causes (see Barth, 1984:572). Plaintiff and defense lawyers are of course inclined to view these causes differently.

Nevertheless, the large number of similar cases that have been settled in some courts, and settled or tried in others, should by now have provided a set of benchmarks against which to evaluate these cases as they reach an appropriate stage for settlement. And to some extent, settlement has become routinized, especially in jurisdictions with considerable settlement activity. But counteracting this trend are the destabilizing effects of (a) some very large jury verdicts in cases involving seemingly minimal injuries, and (b) the unpredictable applicability of punitive damages. In addition, in every jurisdiction, the usefulness of previous settlements and trials diminishes as the array of defendants is altered by Chapter 11 proceedings, as the plaintiffs’ case against various defendants improves over time, and as substantive and evidentiary rules change.

The practice of reserving decisions on important evidentiary issues for the trial judge also makes evaluation difficult. In negotiations, lawyers who do not know how the trial judge will rule on crucial issues such as the admissibility of a fear of cancer claim or the Sumner Simpson letters cannot judge the strengths of their cases before trial as precisely as they might want or their clients deserve.

In addition, personnel and party changes on the defense side disrupt the continuity on which the normal, routinizing effect of previous settlement experience is based. In many defense firms, the responsibility for asbestos cases has been transferred one or more times from the lawyers who were originally involved to considerably younger and less experienced lawyers. At the same time, in a series of steps unknown to routine personal injury litigation, as the coverage of defendants by one insurance carrier is exhausted and an excess carrier is substituted, new lawyers may be substituted for the original ones, or the evaluation strategies of those defendants may change, even if their lawyers do not.

Negotiation Problems. When evaluation problems can be overcome, asbestos cases are still more difficult than ordinary cases to settle because it is inefficient for the plaintiff to deal with the defendants one at a time, and even more difficult to persuade the defendants to negotiate as a group. It is not even entirely clear that plaintiff lawyers want to deal with the defendants en masse. They seem prepared to do
so in the San Francisco area and sometimes in east Texas, but in other places, they may believe that they collect more on the whole by negotiating separately with each defendant. It is also not entirely clear why defendants in most jurisdictions do not insist on negotiating collectively. Part of the problem is the difference in the interests of peripheral defendants who can frequently settle cases for small amounts without engaging in substantial discovery, and those of defendants with more significant exposure who must develop a case more completely before they are prepared to engage in settlement discussions. Part of the problem is that defendants in most jurisdictions have not been able to agree on a routine or formula for allocating damages among themselves once they have agreed on a set of case evaluations. We have also been told that another part of the problem of the failure to act in concert is the lack of trust among defense counsel.

Asbestos cases are also difficult to dispose of individually because plaintiff lawyers may be reluctant to settle with major defendants before the plaintiff's condition becomes definitively known. In this perspective, delay increases the probability that more serious injuries (cancer, disabling asbestosis) will have developed by the time a settlement is negotiated or a trial is held. In other words, plaintiff lawyers may be concerned that premature closure will jeopardize full recovery.

**Effects of Concentration of Cases in Law Firms**

In all the courts in our sample, large numbers of asbestos cases are concentrated in a small number of law firms. In fact, the concentration is even more acute since the cases are actually in the hands of a few lawyers, rather than a few firms. This condition exists because most plaintiff firms involved in asbestos cases are small and have only a few experienced trial lawyers. The defense firms are usually larger, but within these firms, asbestos cases tend to be handled by small, specialized groups that approximate small firms.

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5A small change in percentage of contribution involves large sums when applied to a thousand or more cases. Part of the allocation problem is that defendants have varying degrees of exposure to punitive damages. Those whose exposure is less try to get others to pay more toward settlements than would be the case had there been no threat of punitive damages, an effort that, of course, strongly resisted by the latter.

6For instance, six of the nine major asbestos plaintiff firms in Los Angeles average 6.5 lawyers per firm. The other three firms, however, have 16, 17, and 44 lawyers each. Our comments about the effects of concentration are less applicable to the largest firms involved in asbestos litigation.

7But they are not always larger. There are only five lawyers in the firm of the coordinating defense counsel in Los Angeles.
This concentration appears to have several complicated effects. First, the possibility that if they have many cases ready for trial, this small group of lawyers may be expected to try more of these than they could possibly handle at once reduces the incentive to get the cases ready for trial as quickly as possible. Second, when judges actually schedule cases for trial in large numbers, the limited capacity of the law firms means that most of these cases must be settled even though the terms of prospective settlements are different than they might have been if trial were a feasible alternative. If the capacity to try cases simultaneously is different for plaintiff and defense lawyers, settlement values will be influenced by that asymmetry, a factor that has nothing to do with the plaintiffs' injuries, the defendants' behavior, or the normal considerations in litigation of lawyer skill, witness characteristics, and jury predispositions.

Generally, this concentration appears to work against the plaintiff. Plaintiffs who have minimal symptoms, no significant medical expenses, and no loss of function may be unconcerned with delay as they wait to see how asbestos exposure will, in fact, affect their health. But plaintiffs who are definitively sick and have the greatest present need for compensation must wait longer for their cases to be resolved than they would if there were better incentives for lawyers on both sides to accelerate pretrial routines. Moreover, when many cases are ready for trial, the pressure on lawyers to settle because they have inadequate resources to try cases is probably greater for plaintiff lawyers than for defense lawyers because personnel resources on the plaintiff side are usually thinner.

When cases are highly concentrated in a few plaintiff lawyers' firms, the interests of those lawyers may diverge substantially from their clients. To understand why this may occur, it may be useful to think of the plaintiff lawyers' view of asbestos cases as a form of inventory of raw materials. Before the inventory can be sold (cases settled), it must be processed (prepared for trial). But there is a limited amount of processing machinery (lawyers, paralegals). If the supply of raw materials is large, the limits in processing machinery mean that much of the raw material will either sit on the shelf for long periods before it can enter the production line, or move through the production phase more slowly than it would if more machinery were available.

It is here that the analogy between lawsuits and ordinary production breaks down. In the ordinary case, the manufacturer would not permit

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8A common defense view of this relationship runs as follows: A plaintiff lawyer could not justify the large up-front expenses of asbestos litigation unless he had a great many clients, but if he has a great many clients, he cannot give them the individual attention that is conventionally expected.
a large supply of raw materials to build up; it is improvident to invest money in resources that cannot be put to ready use. But in asbestos litigation, a large stock of raw materials is an asset to the lawyer, not a detriment, and an asset for which the lawyer does not initially pay much. Cases are a scarce resource, rather than one generally available, and thus represent future profits rather than current expenses.

In ordinary times in the ordinary law firm, cases arrive in a fairly steady stream, and are processed and disposed of in a steady progression. Growth or shrinkage in the inventory of cases is usually gradual and can be absorbed by periodic adjustments in staff. In asbestos cases, the situation is different. Large numbers of cases frequently arrived in lawyers' offices over a short period of time. Although staff could have been increased rapidly, and sometimes was, two factors made it unwise to expand enough to fully absorb the growth in inventory. First, there was no guarantee that the high rate of new cases would be maintained over any significant period, and there was a natural reluctance to recruit and train large numbers of new people for what might prove to be a short-run increase in caseload. Second, there was a natural disinclination to share profitable business with new colleagues when it was unnecessary to do so, if the disposition of cases could be stretched over a long enough period.

Although plaintiff lawyers could generally push asbestos cases through discovery more quickly than they do, the effect of doing so would vary across jurisdictions. In courts where the completion of discovery automatically places a case in line for assignment for trial, the sooner discovery is complete, the sooner the case is likely to reach disposition. But when completion of discovery is unrelated to trial assignment (as in the Massachusetts and New Jersey federal courts, where for long periods of time no asbestos cases were assigned for trial; or in the Los Angeles state court, where assignment is strictly by time of filing), then the rate of disposition is basically determined by court practices and cannot be influenced by accelerated lawyer activity.

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9Now that the initial phase of asbestos litigation, with its large up-front costs is over, the lawyer usually incurs only modest initial case-specific processing costs; larger expenses are not incurred until cases are closer to trial.

10This disinclination to incur additional overhead may have been reinforced by pressure to cover substantial costs incurred when firms first became involved in asbestos litigation.

11The extent to which plaintiff lawyers with large asbestos caseloads may be strongly motivated by income considerations to push cases as hard as possible is an open question. Consider the economics of the following hypothetical but not exaggerated situation. A plaintiff lawyer has 500 asbestos cases. Assume their average value is $74,000, a conservative figure. (The average closed case was worth $64,000 in mid-1982 [Kakalik et al., 1984:21]. Inflated by 10 percent per year for 3 years = $74,000.) If this lawyer disposes of 50 cases this year, his gross income from these cases, depending on the applicable per-
When the plaintiff lawyers’ interests do not exactly parallel those of their clients, why do the clients not do more to promote their own affairs? We did not interview a sample of plaintiffs during this study, so the argument that follows is based on the ingredients of the situation rather than on direct reports of the participants.

The picture begins with the demographic characteristics of asbestos plaintiffs—blue collar, frequently laborers who have worked at many sites, middle-aged or older, and often ill. These plaintiffs are inexperienced in dealing with lawyers and the legal system and are frequently obtained en masse through union referrals, or on some occasions, through direct solicitation. They have often had little contact with their lawyer, working instead with the paralegals and junior associates widely used in the bureaucratic processing of large numbers of asbestos cases. Finally, asbestos plaintiffs are not the employers of their lawyers in the sense that they have paid for their services. They are more likely to be in debt to their lawyers, who have advanced money for filing fees, medical exams, and discovery costs. Thus, when inaction and lack of results ought to alert the plaintiffs to spur their lawyers to get on with their cases, they are unlikely to act because of their inexperience, their debtor position, their lack of a personal relationship with their lawyers, and the social distance between them and their lawyers. In this setting, they are not socially, psychologically, or experientially equipped to promote their own interests.\(^{12}\)

Many of the defendants’ insurers and their lawyers are even less interested in rapid disposition than are the plaintiff lawyers (Willging, 433 to 45 percent; see Kazalik et al., 1984:82), will be between $1,233,000 and $1,480,000, and he will still have an inventory of 450 cases, even if he has secured no replacements. The point is not that the lawyer is better off than he would be if he disposed of all 500 cases and grossed $12 million to $15 million, but that he can do quite handsomely by disposing of only a fraction of his inventory of cases. We do not have any direct information about the overhead charges incurred and referral fees paid by plaintiff lawyers in asbestos cases. Some, however, did tell us that they recaptured the large threshold costs incurred from their clients pro rata as those clients secured compensation. Even if normal overhead were as high as 50 percent of gross (average law office overhead—all operating expenses less lawyers’ compensation—for all kinds of firms in 1981 ranged between 33.3 percent and 46.8 percent of gross receipts for firms surveyed in six regions of the country (Roy, 1983:36)), the net amount that a plaintiff lawyer would receive on disposing of a fraction of such a large caseload would be considerable. (We were also told that plaintiff lawyers postponed income for tax reasons. However, we know of no tax advantages to have been gained during this period by shifting income at these levels into later years.)

\(^{12}\)We are of course not describing all plaintiffs, but what we believe to be the central tendency. Some plaintiffs are quite assertive and even force their lawyers to try cases that the lawyers want to settle.
Their behavior can be looked at through three different incentive structures: factors that affect insurance carriers generally, factors that affect carriers in asbestos cases, and factors that affect their lawyers in asbestos cases. First, casualty insurance companies will profit from litigation delays (see Brazil, 1980:228), at least in cases involving large sums, if they can make effective interim use of the funds that are eventually paid to plaintiffs. More important, there are special reasons not to bring asbestos cases to closure any more quickly than necessary. As time passes, a proportion of plaintiffs die from asbestos-related causes, and the wrongful death actions that follow are usually worth less than the original claims. Additionally, open cases may eventually be processed through alternative systems, such as the Asbestos Claims Facility, which promise lower defendant transaction costs and awards that are, on average, no more than those to date. The fewer the number of cases completed in the courts, the greater the potential savings will be.

At the same time, stretching out settlements and trials over long periods reduces insurance company cash-flow problems brought about by the large exposure that comes with thousands of asbestos cases: we were told both by judges and defense lawyers that cash-flow concerns reduce the pace of disposition of these cases. Moreover, the death of a plaintiff from an unconnected cause (not unlikely, given the age profile of asbestos plaintiffs) substantially reduces the value of an asbestos case. In addition, there is some evidence that insurers believe they can minimize processing costs by keeping a tight rein on the time that claims personnel spend on asbestos cases, a condition that precludes active settlement negotiations before trial. In east Texas, for instance, we were told by both plaintiff and defense lawyers that claims adjusters were not prepared to discuss settlement until cases were actually assigned for trial.

When lawyers represent defendants who have adopted a strategy of refusing to negotiate until trial is approaching or has begun, they are of course carrying out their clients’ objectives. We were also led to believe, primarily through comments by judges and clerks, that defense lawyers have interests, independent of those of their clients, in resisting rapid dispositions. According to these judges and clerks, many defense firms have developed routines and personnel assignments to

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12The point has recently been made in a general way in the Cardozo Lecture by Judge Jon Newman (1984:10) of the 2nd Circuit Court of Appeals: “The high litigation costs of the present system are fees to the clients, but they are income to the lawyers. Delays have value to at least one side in every litigation and sometimes to both.”

13See Kakalik et al., 1984:59. Among other matters, pain and suffering are not an admissible item of damages in wrongful death actions in many states.
process their very large case inventories that would be upset by a program to accelerate dispositions. Several firms that had represented the Manville Corporation before the Chapter 11 petition were subsequently forced to dismiss many lawyers whom they had hired to deal with the increase in business that Manville had provided. This lesson was not lost on other defense firms, which were reluctant to make the increases in staff or additional allocations of senior lawyers that faster dispositions would have required. One manifestation of this defense approach to disposition is the common complaint heard from judges as well as plaintiff lawyers that defense firms frequently send inexperienced lawyers, with neither the authority nor skill to conduct serious bargaining, to settlement conferences.

This defense posture is not monolithic. Other defendants and insurers have different attitudes and practices concerning the pace of dispositions. Many defendants and insurers actually try to settle asbestos cases quickly, and their lawyers have developed relationships and routines with various plaintiff lawyers to achieve this goal.

**LAWYERS' RESPONSES**

Because of the large number of claims, the large number of defendants, and the small number of plaintiff lawyers in asbestos cases, settlement negotiations are frequently conducted in ways that have no parallel in ordinary litigation. These unusual settlement practices raise questions about the commonality of interest between lawyer and client beyond those traditionally generated by the contingent fee arrangement (see Kritzer et al., 1985).

**Unusual Settlement Practices**

Of course, many asbestos cases are negotiated one at a time, in a perfectly straightforward manner. Both plaintiff and defendants estimate the value of a case if it went to trial, adjusting those figures in response to ordinary factors such as the costs of trial and preparing for trial, the quality of witnesses, local jury verdict norms, the ability of counsel, and the risks of a defendant's verdict, punitive damages, or a runaway jury. The plaintiff lawyer then tries to persuade the defendants to meet this value, seeking a contribution from each according to its culpability and market share, or the plaintiff's problems of proof. Although discussion with specific defendants may be sporadic and spread out over a long period of time, the negotiations themselves are similar to those conducted in ordinary personal injury cases.
But in most asbestos litigation, settlements have been routinized by using several unusual methods of achieving mass dispositions. The first method is the block settlement. In a block settlement, the plaintiff lawyer negotiates a single value for a large number of cases with one or more defendants. The allocation of amounts to specific plaintiffs is then made without defendant participation. This allocation may be made by the lawyer, according to the demands of the moment or his experience in other asbestos cases, or it may be made with the participation of judges, special masters, doctors, or other experts who review the plaintiffs' files and evaluate the relative values of the cases (see Willging, 1985:29; Brodeur, 1985b:77).  

A second method of mass settlement is a deal between a plaintiff lawyer and a specific defendant in which the defendant, frequently a peripheral, pays so much per case, or so much per case of a certain type, regardless of the particulars of the case. This method of settlement is an administrative procedure closer in spirit to workers' compensation than to tort litigation. The plaintiff lawyer must simply allege exposure during a time when the defendant's products were used at a site where the plaintiff worked, and some minimal injury. The defendant then pays the amount fixed in advance with that lawyer. These partial settlements may be executed before discovery is completed or even initiated.  

A third method of mass settlement occurs when a plaintiff lawyer and a defendant settle large batches of claims one at a time, but within a short period. In these sessions, scores of cases may be settled in a day, hundreds in a week. With such numbers, the individual attention devoted to each case is perfunctory, and categorization schemes or rules of thumb must be used to allow this process to work.  

The burden of negotiating with 20 or more defendants is substantially reduced for plaintiff lawyers in all the San Francisco Bay area courts, state and federal, where defendants are often able to negotiate settlements as a unit. In these cases, the settlement amount is allocated by the defendants among themselves. The allocation is not revealed either to the plaintiff lawyer or to the court. If this system somewhat reduces the level of settlements, as most participants acknowledge it does, it also reduces the transaction costs borne by plaintiff lawyers and defendants.

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15 It is possible that block settlements are common in other kinds of cases when the conditions are right—one lawyer representing several or more clients against the same adversaries. But references to such practices in the literature on litigation are scarce.
Issues Raised by Group Settlement Practices

We do not know the actual effect of group settlement processes on outcomes. Data for the period following Manville’s August 1982 bankruptcy filing are not available to investigate whether group outcomes are different from the outcomes of claims settled individually, how they differ if they do, or the conditions under which differences occur. Nevertheless, the signals that do exist suggest important differences.

To explore in a preliminary way the extent of these differences, we look at the two most important kinds of group dispositions: block settlements and batch sessions.\textsuperscript{16}

In block settlements, intragroup equity depends on the allocation procedure that is used. If allocation is left up to the plaintiff lawyer, more assertive claimants may profit at the expense of more passive claimants unless some formal scheme for allocation has been agreed upon by the plaintiffs in advance. Whatever the allocation strategy, block settlements create the possibility of a major conflict of interest between the lawyer and the group. Assume there are 100 clients in the group. The lawyer may be tempted to settle these cases for $5,000,000, securing a $1,666,000 fee, even though asbestos case recoveries average substantially more than $50,000. In economic terms, given the greater interest of the lawyer than of any single client, his marginal utility of additional dollars is less than that of his clients individually. Consistent with this hypothesis, Kakalik et al. (1984:61–63), after controlling for obvious factors such as type of injury, found that the greater the number of plaintiffs involved in an asbestos lawsuit, the lower the average plaintiff recovery would be.

Batch sessions are vulnerable to the same conflict of interest as that of block settlements: the aggregated fee may diminish the lawyer’s incentive to bargain as hard as possible in each individual case. Moreover, we were told many times during the course of this research that cases were “traded” in group settlements, that lawyers agreed to overcompensate some plaintiffs and undercompensate others, and that in these trades the more seriously ill plaintiffs received less and the less

\textsuperscript{16}Prenegotiated deals do not appear to be troublesome in asbestos cases. First, they usually do not mix greatly different injuries; thus, there is less likelihood of intragroup inequity. Second, these deals are most frequently made with peripheral defendants and therefore have a less important effect on outcomes than do block settlements. Consolidated trials, another group-oriented approach, can have two kinds of effects. They may lead the common jury to use information with respect to one plaintiff that was derived from the case of another. (This is what we believe happened in the consolidated trial that we observed in eastern Texas). This process may produce acceptable results, but it violates orthodox notions of due process in civil trials. The second effect of a consolidated trial is that it is likely to lead to a block settlement.
seriously ill received more than they would have if the claims had been settled individually.

In sum, the possible consequences of group dispositions on outcomes seem serious enough to warrant concern about the process that produces them. Another signal that concern may be appropriate comes from the lawyers themselves. Almost every lawyer we talked to who was engaged in such dispositions expressed some worry about the possible appearance of unethical behavior, whatever the reality. And lawyers not engaged in these practices were quite open in expressing their negative views of the potential for conflicts of interests in such approaches.

COURT RESPONSES

Given the intrinsic difficulties of evaluating and negotiating individual asbestos cases and the incentives to delay that result from the organization of the litigation, courts are able to complete these cases within a period that approximates that of other civil cases only if they can produce settlements by threatening trial. When it has been provided, that threat has been produced in two ways: (a) by mobilizing sufficient judicial resources to try these cases in the ordinary way, and (b) by adopting measures to increase the efficiency of a small number of judges. Variation in the pace of disposition across courts is thus more a matter of judicial behavior than of lawyer or litigant efforts.\footnote{This behavior pattern raises the interesting question of how plaintiff lawyers survive in jurisdictions in which very few cases are completed. We have no first-hand information, but we assume that the answer lies in some combination of fees secured from partial recoveries, fees in asbestos cases in other jurisdictions, large fees collected in previous large recoveries, particularly group recoveries, and income derived from non-asbestos practice.}

Constraints on Court Responses

Many ordinary civil cases drop out of the court inventory after filing without further pleadings, discovery, motions, briefs, or conferences. Asbestos suits, however, are collectively different from the normal stream of cases. A disproportionately high number of them involve some discovery\footnote{Almost all asbestos cases compared to less than 50 percent in other civil cases (see Trubek et al., 1983:90).} and some judicial intervention by way of hearing motions and conducting status and pretrial conferences. Unless extraordinary resources are made available, the initiation of several hundred asbestos cases annually leads in a few years to a backlog in
the thousands. All the courts in our sample have had some difficulty in disposing of asbestos cases under these conditions, and at the time of our fieldwork, one court had not disposed of any cases whatsoever.

Despite this sharply increased workload, none of the courts in our sample have received additional judicial resources to deal with their asbestos litigation. Courts depend on legislatures to authorize additional judgeships, and in recent years most legislatures have been reluctant to substantially increase court manpower. Our sample includes some of the busiest courts in the federal and state trial court systems. Two of the five federal district courts (Massachusetts and New Jersey) rank first in their circuits in weighted filings per judgeship (a standardized measure of workload), and all but one (eastern Pennsylvania) rank in the top third in the nation with regard to weighted caseload size. The state court sample includes two jurisdictions, Los Angeles and Philadelphia, that are largest in terms of absolute numbers of cases in their states.

Workload is only one of the factors that legislatures take into account when deciding whether to authorize new judgeships. But even if it were the only factor considered, courts would not generally be in a good position to request additional resources to handle increases in workload due to asbestos cases, since most do not officially tabulate the number of asbestos claims that are filed. Moreover, the burden of the asbestos caseload is not accurately reflected in official statistics because case weights in many jurisdictions do not take into account the unusual burden of cross-claims, discovery, and judicial settlement activity that is imposed by asbestos litigation. Thus, most courts cannot meet added demand for judicial services by adding judicial personnel, and can only meet the demands of an unusual influx of cases by adjusting pretrial procedures, grouping cases for trial, and diverting judicial efforts from other activities.

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19The national rankings (out of 94 trial courts in the federal system) of weighted caseloads for each court are: eastern Pennsylvania, 66; northern California, 26; Massachusetts, 25; New Jersey, 19; eastern Texas, 15 (see Administrative Office of the United States Court, 1984).
20Because there is no standardized system for assigning case weights across state trial court systems, we cannot usefully compare the workloads of the state courts in our sample.
21Some courts can make marginal additions to their available resources by assigning some judicial functions to masters and magistrates, a method adopted most extensively (among the courts in our sample) by the federal court in northern California.
Overview of Court Approaches

From the standpoint of disposition, the courts in our sample can be considered along two dimensions: the approaches they have adopted to deal with their asbestos caseloads, and the results they have achieved with these approaches. With regard to approaches to disposition, the courts fall roughly into three categories: (1) traditional case-by-case disposition, (2) group processing, and (3) administrative processing. With regard to outcomes, the courts are arrayed along a broad dimension. At one extreme are courts in which a substantial proportion of asbestos filings has been terminated and the prospects that the remainder will be completed at a pace approximating that of other cases are good. At the other extreme are courts in which disposition rates are low, new filings (to the extent that they can be measured) tend to outnumber dispositions, and the likelihood that the existing asbestos caseload will be disposed of in the near future is small. Most courts fall somewhere between these two extremes.

When we place the sample courts within the two-dimensional space described by these axes, an interesting pattern appears. Within the traditional approach category, we find a range of outcomes. The court that has been able to allocate a large amount of judicial resources to disposition of its asbestos caseload has also been able to dispose of a large number of those cases. But courts that have attempted to dispose of their asbestos caseload through traditional case-by-case disposition practices without allocating substantial resources to the effort have often been unable to dispose of a significant fraction of the caseload at a pace that keeps up with that of other civil cases. In contrast, courts that have chosen to use less conventional disposition approaches, in which cases are processed in small batches or large groups, have generally been able to dispose of a considerable portion of their cases at a pace that does match that of other civil cases. One court's attempt to maintain individualized case disposition through an administrative hearing-type process seems to have been generally unsuccessful in disposing of cases rapidly. Table 5.2 divides the courts in our sample by approach and shows the overall results for each in terms of rate of disposition. In the next sections we describe these court approaches in more detail.

Traditional Courts

The federal court in Massachusetts has done the least by way of completing asbestos cases. By June 1984, when we conducted our fieldwork, it had not disposed of even one of the more than 3000 cases
Table 5.2

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<th>Approach to Disposition</th>
<th>Rate of Disposition</th>
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<tr>
<td>Middlesex, NJ (state)</td>
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<td>Northern California (federal)</td>
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<tr>
<td>Administrative Processing</td>
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<td>Philadelphia, PA (state)</td>
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*The federal court in New Jersey secured a group disposition in 1981, tried a group approach again in 1988, but otherwise has relied on traditional disposition techniques.

... then pending. Further, there were no signs that this court would mobilize its resources to schedule asbestos cases for trial in large numbers or force them into units for some form of group disposition. Inaction about disposition in Massachusetts appears to be a result of two factors: (a) the court does not want to take responsibility for these cases and has shifted supervision of them to a magistrate who has no power to schedule trials; and (b) lawyers are content to conduct discovery in such a way that after seven years of litigation, only a handful of cases were judged ready for trial.22

At the time of our fieldwork, the federal court in New Jersey was also at a standstill in dispositions. The program in this court has alternated between periods of intense activity directed at producing mass settlements and periods when virtually no disposition efforts were undertaken by the court. Many of the cases in this court involve large

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22When preparing for a site visit to Boston, we were unable to identify a judge who would acknowledge any responsibility for asbestos cases; the judge to whom we were referred by the clerk and magistrate did not consider himself in charge of the asbestos caseload.
blocks of claimants. In 1980, in part by threatening to simultaneously try a block of claims represented by the same set of plaintiff lawyers, the judge then assigned to the asbestos caseload produced a mass settlement of 683 claims. This success apparently became the model for disposing of asbestos claims, and for several years thereafter, little or no effort was made by the judges sitting in Newark to dispose of claims individually. (In the Camden division of the court, however, the judge assigned to the asbestos caseload continued processing cases; by 1985, he had disposed of all 56 claims assigned to him.) It was not until early 1983, about two years after the earlier settlement, that the court assigned four judges to the asbestos caseload, and again attempted to produce a mass settlement by assigning a large number of cases for simultaneous trial. This attempt was frustrated when both plaintiff and defense lawyers appealed the trial schedule to the 3rd Circuit. Case disposition was stayed for nine months, awaiting the Circuit's decision.

Throughout this period, however, pretrial processing of cases continued, under the tight supervision of a magistrate. When we visited the court in early 1984, shortly after the 3rd Circuit's decision affirming the trial court's authority to set its own trial schedule, more than a thousand claims were ready for disposition (i.e., they had completed the pretrial discovery process, and a pretrial order had been filed by the magistrate), but no program had been established for managing the disposition process. The single judge assigned to the asbestos caseload, who had a busy calendar of non-asbestos cases, believed that he faced an impossible task and that the court should look to the outside for a solution to the asbestos litigation problem. Other judges were said to be disinclined to take on a share of the asbestos caseload, believing, some told us, that the claims should more appropriately have been brought in the state court, where speedier disposition might be possible.

Leading asbestos attorneys expressed frustration and, in some cases, anger over the court's apparent policy of pressuring them to process their cases expeditiously through the pretrial stage, closing discovery at the end of this stage, and then failing to provide a mechanism for disposing of the claims.

A third disposition phase began in July 1984, when all pretried cases were for the first time divided among the 11 active judges on the court, and lawyers were given notice that they would be set for trial by those judges beginning in September 1984. But by May 1985, those 11 judges had disposed of only 20 of the claims. Aside from the Camden judge, then, the five-year disposition record of this court is one mass settlement of 683 claims and 20 other claims disposed of individually.
The federal courts in Massachusetts and New Jersey share several idiosyncratic characteristics. In both, pretrial activities in asbestos cases are supervised by magistrates. In both courts over a stretch of years, no credible threat of trial has existed (see Willing, 1985:6). In both courts, the stalemate was rationalized by the prospects of an overnight solution: in New Jersey by further mass settlements; in Massachusetts by a process that will take place outside the regular courts. Together, these factors created the unfortunate situation in which the magistrate who dealt with the cases on a daily basis had no power to force lawyers to settle or try them, while the judges who did have such power, perhaps because they were not regularly involved in the cases, did not feel responsible for bringing them to closure.

Disposition patterns in the two San Francisco Bay Area state courts are roughly parallel to each other. Most cases are not assigned for trial until the five-year limit is about to expire. Thus, most asbestos cases are not “eligible” for settlement until they have been in court for almost five years. The result is that only about 450 claims have been settled in San Francisco; slightly more have been disposed of in Alameda. We know that in San Francisco this figure represents only a small fraction of its asbestos caseload. Because of the age profile of

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23In a move that might have led to clearing all asbestos cases off his docket, on March 19, 1985, the Chief Judge of the New Jersey court issued an order inviting the parties to asbestos suits to show cause why the court should not refrain from adjudicating asbestos claims in which a bankrupt defendant was originally a party. This order was based on the possible effect of the Bankruptcy Amendments and Federal Judgeship Act of 1984 on the standing of the suits from which the bankrupts had been severed, and after argument, was dismissed by the judge who issued it. The Asbestos Litigation Reporter has not reported any similar order in any other court.

24In California, civil cases must be dismissed if no trial begins within five years of filing unless the parties stipulate to an extension. (See Code of Civil Procedure, Section 583.)

25We have omitted any discussion of the rate of disposition in Alameda County, CA (Oakland) because we were unable to obtain the data necessary for computing the disposition rate, and the court officials did not provide us with consistent estimates of this rate. The court does not start keeping track of asbestos cases until an at-issue memo is filed. Therefore, at any given time it does not know the full number of cases that are pending. Further, Alameda does not separately tabulate asbestos claims. Thus, the number of cases at-issue at any given time represents an unknown number of claims. The court administrator noted that an individual case may involve from 2 to 50 claims. Finally, judges we talked to reported widely varying estimates of pending claims. One of the two judges currently most concerned with these cases estimated that there are now 450 claims pending, while the other believes that there are 1000 to 1200 claims at issue. We were able to determine the following: (1) As early as 1978, 200 asbestos cases were at issue. The then presiding judge ordered that they be put in a box to be processed when his successor took over. They were in the box for one year. (2) Between 1978 and February 1985, a total of 471 claims were disposed of. Whether disposition is a minor or major problem in Alameda depends on whether the 471 completed claims represent a small or large fraction of the total number of claims filed. We have been unable to secure any reliable estimate of that number.
asbestos plaintiffs in the San Francisco court,26 even the picture of a
bureaucracy going about its business in a routine and deliberate
manner despite the needs of a large number of seriously injured plain-
tiffs understates the real crisis in asbestos litigation in this court. In
San Francisco, there appear to be over 1000 claims that will be subject
to the five-year rule in 1985 and 1986, equivalent to several times the
number of claims disposed of in the previous five years. As in the
federal courts in New Jersey and Massachusetts, in the spring of 1984,
the chief judge of the San Francisco court did not see how the court
could cope with that volume of cases without some form of external
assistance.

Most asbestos cases in the state courts in New Jersey were filed in
Middlesex County.27 The situation in this court reflects several of the
difficulties that courts face in trying to dispose of asbestos cases. An
energetic judge with the full confidence of the local lawyers invests
considerable time in setting up an expedited pretrial system and real-
izes the connection between assignment for trial and disposition.
Nevertheless, the rate of disposition is low (only 53 of the approxima-
tely 600 active claims then pending were disposed of in 1983), probably
because the court continues to treat asbestos cases like other cases,
that is, one at a time, and either is not willing to or cannot provide the
additional judicial resources required to dispose of cases when a court
adheres to such a plan. In Middlesex county, this shortfall in judicial
resources results in the following scenario. Two of the three major
asbestos plaintiff attorneys in Middlesex typically deal with their cases
on an individual basis; a third has engaged in a substantial amount of
group settlement. Cases are usually settled only after a pretrial settle-
ment conference with the asbestos judge. The conferences themselves
are scheduled immediately before trial. The number of cases that the
judge can schedule for trial, and therefore for settlement conferences
before trial, depends on the time he personally has available to spend
on asbestos cases, since no other judges are assigned to these cases. At
the time of our interviews, 60 percent of the asbestos judge’s time was

26Cases in which the plaintiff is over 70 or terminally ill are taken out of order and
assigned for trial without waiting in the normal queue. (See Code of Civil Procedure,
Section 36.)

27A small number of cases have been filed in Camden, where they appear to have
been folded into the ordinary civil caseload, with assignment to trial occurring five to six
years after filing. After the Manville Corporation filed for bankruptcy, the New Jersey
Supreme Court ruled that each asbestos claim must be reviewed individually and certi-
cified as appropriate to try without Manville, or be placed in suspense. The Middlesex
asbestos judge has been assigned the responsibility for certifying all claims brought in the
state courts.
devoted to non-asbestos cases, and he was still awaiting a response to his request for an additional judge to work on asbestos.

The federal court in Philadelphia is the exceptional traditional court and has disposed of a substantial portion of its asbestos caseload. As of June 30, 1984, that court had disposed of 36 percent of its asbestos cases (199 of 555), and 51 percent of the asbestos claims (909 of 1802) filed. That level of dispositions is even more remarkable than the numbers suggest, since less than 10 percent of the pending cases are more than three years old. It has been achieved by dividing the asbestos caseload among 20 judges for pretrial, settlement, and trial. The court’s effectiveness in implementing such an approach may in part reflect less caseload pressure than in the other federal courts in our sample.

Group Approaches

In the federal court in northern California, asbestos cases were filed in two waves. Almost all of the claims in the first wave that included defendants not involved in Chapter 11 proceedings (748) were terminated by early 1984. Those dispositions were secured by federal judges, magistrates, and a special master who conducted simultaneous settlement negotiations of large blocks of cases, 60 or more. The 293 cases in the second wave were transferred to the district court from the bankruptcy court in October 1983, and are expected by both lawyers and court officials to be cleared in a manner similar to that used in the first wave. As in Philadelphia, cases in northern California were settled because the lawyers knew that the court would require adherence to a realistic pretrial regimen and would schedule the cases for trial as they would any other case if they were not settled.

The general experience in the Los Angeles state court is the same as that in other California state courts that have large numbers of asbestos cases: the court does not exercise scheduling control until the parties certify that they are ready for trial, and the five-year rule provides the predominant impetus for completing trial preparation. But the Los Angeles court does provide a different scenario when faced with scores or hundreds of cases certified for trial. Instead of adopting a “business as usual” strategy coupled to a weak expectation of external assistance, the Los Angeles court constructed a workable scheme to settle large numbers of cases in groups and try the few cases that could not be addressed.

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26 Excluding cases against bankrupt defendants, which have been “suspended.”

27 In addition, this court has on occasion consolidated 10 to 20 cases for trial on liability issues. The only judges to whom asbestos cases are not assigned are those with potential conflicts of interest.
settled. The Los Angeles procedure had two organizing principles. One was that the asbestos judge dealt with all cases brought in a particular year by a particular plaintiff law firm as a group. This does not mean that the judge insisted on group settlements; rather, he scheduled these cases as a group once he became involved in the disposition process. That disposition process consisted of three phases: (1) a long *laissez-faire* stage in which the lawyers were at liberty to decide what to do and when to do it, during which many defendants, especially the peripherals, settled; (2) a second stage of intensive, judge-controlled settlement discussions and trial preparations; and (3) a final stage consisting of an occasional trial.

The key to the system was the second stage. Early in January of each year, the judge assigned three status and settlement conferences and one trial-setting conference for each group of cases for each plaintiff law firm. The schedule covered the entire year. The groups consisted of the cases filed by each firm in a specific year, three or four years previously. For example, the judge might have started with firm X's 1981 cases, assigning status and settlement conferences on those cases for January 9, February 6, and March 5, 1985. Any case in this group that failed to settle within 120 days of the last settlement conference would have been set for trial. This pretrial process covered 6 to 7 months if it ran its full course. The process disposed of cases because (a) the format focused the attention of all outstanding defendants on these cases, (b) the judge had extensive experience in settling asbestos cases, and (c) given the size of the Los Angeles Superior Court, the threat to simultaneously try all unsettled cases in each group was believable. The achievements of this effort have been considerable. By the fall of 1984, between 1500 and 2000 of the 4800 pending asbestos claims had been terminated, all but a handful by settlement.

The federal court in the Eastern District of Texas, although a small court, has also not been paralyzed by a large asbestos caseload. It has disposed of over 1000 claims by a vigorous trial program, one large group settlement, and the capacity to settle many cases for every one tried. Judges Fisher and Parker, the two judges principally concerned with asbestos cases, have tried approximately 30 cases to verdict, many more than any other two judges in the country. One of the reasons for this record is their willingness to consolidate cases for trial, the usual

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30Nine firms have more than 90 percent of the asbestos business.
31Usually about four to six when the second stage began.
32During the period of our fieldwork, the number of judges was 206.
33We describe Los Angeles dispositions in the past tense because a new, all-purpose judge for asbestos cases was appointed on January 1, 1985, and the disposition process of his administration was unknown at the time of our fieldwork.
being 5 at a time, but the total being as high as 30. Other factors that account for this unusual trial rate are the manner in which the trials have been streamlined\(^{34}\) and the wide trial experience of local lawyers, especially plaintiff lawyers. The result of these trials and the pressure for settlement that they create is an average time of three years from filing to disposition.

**Administrative Processing**

The complicated disposition program in the state court in Philadelphia, in which over 4300 asbestos claims have been filed, has consisted of four phases. In the first phase, which ended in January 1983, 245 cases were completed: 101 were settled, 10 were tried to verdict, and the remainder were terminated by summary judgment or other adjudication. This phase was followed by an advisory non-jury trial system, instituted by the asbestos judge because of diminishing results from settlement efforts. The purpose of the non-jury trial procedure is to aid settlements by providing a third-party determination of case value. The evaluations are apparently what the judge believes a jury would award rather than what the plaintiff should secure in settlement. The actual content of the non-jury trial program varies from judge to judge.\(^{35}\) The differences concern whether liability issues are tried before or after damages questions, whether expert qualifications must be proved in each case, whether product identification evidence can be incorporated from one case to others, whether medical records can be introduced without accompanying testimony, and whether the judge provides time for and participates in settlement discussions.

The program did not improve the disposition rate much. Few verdicts were accepted and few settlements were immediately reached, apparently because the size of verdicts was unsatisfactory to defendants, and the trials did not sufficiently mimic jury trials to be persuasive predictions of what juries would do. Consequently, the time from a non-jury trial to assignment for trial quickly ran up to 14 months, and the program was suspended. The program has recently been re instituted, presumably because the period from non-jury trial to assignment for trial can again be reduced so that a trial, rather than a long wait, is a real alternative to rejecting the non-jury award.

\(^{34}\)The trials involve abbreviated jury selection, common for all cases in the district. They also require coordination by defendants and use informal time limitations for evidence and argument.

\(^{35}\)Four to five judges are involved at any one time, but they are not assigned to this program on a full-time basis.
As of December 1984, 405 cases had been assigned to non-jury trials. A total of 178 claimants settled or accepted the judge's determination of value, and 227 claimants appealed for de novo trials. Of that number, 106 settled before trial, 4 were dismissed or withdrawn, 19 were tried to verdict, and 98 were still pending. Thus, the disposition history in Philadelphia from 1977 to 1985 was 29 trials to verdict, 385 settlements, and 138 summary judgments, other adjudications, dismissals, and withdrawals. The 552 cases completely disposed of except for the bankruptcies was 13 percent of the total asbestos caseload. At this rate, assuming no new cases are filed, the current asbestos caseload will be off the court's books in about 55 years.

Explaining Variation Among Courts

Three factors seem to explain most differences in the disposition patterns described above. These factors are (a) the general pattern of dispositions in each court, which may in turn reflect variations in workload, (b) judicial attitudes toward asbestos cases, and (c) the readiness, or lack of it, to group cases for disposition.

Courts that are slow to complete their normal business are also slow to process asbestos cases, and vice versa. This interpretation is supported by data on the federal courts, where comparable statistics are available. Of our five federal courts, the median time for all cases from at-issue to trial is longest for courts that have done the least by way of completing asbestos cases.36

But the situation in the Los Angeles and San Francisco state courts suggests that judicial attitudes can overshadow the effect of general disposition patterns. Although the median time from at-issue to trial for all cases in Los Angeles is more than double that in San Francisco,37 the Los Angeles court has a much higher rate of asbestos dispositions. Cases get completed in Los Angeles and not in San Francisco because the judges in charge of asbestos in Los Angeles assume responsibility for pushing the cases to disposition, while the San Francisco state judges make no special effort to expedite these cases.

Judicial attitudes are also reflected in the allocation of court resources. In the federal courts in eastern Pennsylvania and northern California, the threat of trial for all cases ready for trial is created by dividing or threatening to divide the asbestos caseload among all judges.

36The figures in months for 1983 are: Massachusetts (28); New Jersey (16); eastern Pennsylvania (14); northern California (13); and eastern Texas (10) (Administrative Office of the U.S. Courts, 1983).
37Los Angeles, 34 months; San Francisco, 16 months (Judicial Council of California, 1984, p. 10).
on the court. In Los Angeles, the asbestos judge had a commitment from the presiding judge to deploy as many judges as necessary to try asbestos cases that were ready for trial. Of necessity, the tactics of the Texas federal court are more innovative. Of the four judges on the court, only two have been generally available to try asbestos cases. These two judges have created the requisite judicial manpower through efficiency measures: they have consolidated cases for trial and have streamlined the conduct of trials. Thus, they are able to try five or more cases in one week rather than one case in several weeks, a common situation in courts with low disposition rates. In this way, one might say that they have expanded the level of judicial resources in their court by a factor of between 10 and 15.

Beyond general court behavior and judicial attitudes is the issue of claim-by-claim vs. group dispositions. This issue is prompted by the experience of the Philadelphia state court, which has devoted considerable judicial effort to processing asbestos cases, but has not disposed of a sizable fraction of its asbestos caseload. It seems not to have done so because it has insisted on processing asbestos cases in the traditional one-by-one fashion, rather than establishing a framework that will lead to dispositions in groups. Asbestos cases, then, get terminated in courts that are good at disposition generally or have judges that assume responsibility for disposition and are willing to work on these cases in groups rather than one by one.

CONCLUSION

There is a major irony in the way that asbestos cases are processed. Asbestos claims are litigated. As one asbestos judge has written in a book subtitled, Who Owns the Courts?, “litigation is a one-by-one process” (Forer, 1984:179). At least it is supposed to be. In theory, litigation provides an opportunity for parties to have their rights and obligations determined by jury, judge, or in settlement on the merits of the parties’ own specific situations. This characteristic separates litigation from workers’ compensation or other administrative systems. Yet in

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38We are not asserting that the process used in the quick, consolidated trials in Texas is identical to the process used in the single-plaintiff, more deliberate trials in other courts. But having observed a consolidated trial in Texas and having interviewed the jury afterward, with one exception, we are far from sure that the consequences are very different. The exception is that the combination in the Texas case of a very sick plaintiff and not-so-sick plaintiffs probably gave the jurors a stronger impression of what might be waiting for the not-so-sick plaintiffs than they would get at a single plaintiff trial.
practice, asbestos litigation is either a system that fails to dispose of most cases years after they have been filed or disposes of cases in batches. Given their goals and predicaments, the rational response of participants in asbestos litigation has been to create a system that superficially looks like litigation, frequently behaves like administration, and is often plagued by the snail’s pace of the one and the insensitivity to circumstance of the other.
VI. THE CHALLENGE OF MASS TOXIC TORTS

The future of asbestos litigation, at least in regard to injured workers, may already have been decided. The social, political, and financial investments that have been made by the major participants may present such strong barriers to change that it is unreasonable to expect major shifts in the process. But the question of how we as a society will or should respond to mass toxic torts is still open. In this section, we offer our thoughts on this question, based on our examination of asbestos litigation.

We begin by describing the strengths and weaknesses of the tort system in resolving mass toxic injury cases. We then explore the extent to which the problems with the tort system approach are due to the latent nature of the injuries and the extent to which they can be attributed to the mass nature of the litigation. We discuss some of the consequences of removing this litigation from the tort system and comment on the more obvious alternatives. We describe some of the decisions that must be made to improve the operation of the litigation system for mass toxic torts, and suggest some first steps that might be taken. Finally, we assess the likely consequences of not doing anything at all.

THE POSITIVE SIDE OF LITIGATION

The tort system is commonly criticized for its high costs, delays, and erratic results. Resolving mass latent torts through litigation, however, has several important positive aspects. Litigation provides incentives to lawyers to pursue compensation for injured parties, even when the initial costs of developing the case against defendants and the risks of failing in the effort are high. The tort system is open to innovation in litigation practices and is responsive to new information. The system also holds out the promise of deterring future injurious behavior.

A major lesson of asbestos litigation is that the process by which a reasonably accurate history of corporate behavior with respect to toxic substances is developed can be extremely complicated. It involves discovering the products that manufacturers made, the dangers that different products pose, the extent to which and the times at which the manufacturers and their insurers were aware of these dangers, and the measures they did or did not take to protect workers and consumers. Developing this picture for asbestos required sustained and imaginative
efforts over many years by more than a dozen plaintiff law firms in many parts of the country, which followed up numerous leads at considerable expense.

However much those efforts may have been motivated by concern for the victims of asbestos exposure or by outrage at the manufacturer's behavior, it is unrealistic to believe that efforts of this scope and intensity would have been sustained over time were it not obvious to the lawyers involved (especially after the $20,000,000 settlement in Tyler, Texas in 1977) that with a successful discovery program, their rewards would be substantial. Moreover, it is precisely the conventional contingent fee arrangement and jury trials, basic constituents of the tort system as we know it, that have provided the incentives to motivate the lawyers to reconstruct the history that places the compensation burden on culpable manufacturers. As long as our society remains committed to the principle that victims of product-related injuries should be compensated by manufacturers, we should not discount this incentive system.

A second major lesson of asbestos litigation is that latent mass torts present uncommon procedural, substantive, and evidentiary issues. Solutions to these problems have been suggested, adopted, refined, rejected, and renovated by different courts at different times, and sometimes by the same court at different times. The openness of the tort system, which is grounded in the common law's receptivity to continual adjustment, and its responsiveness to often unprecedented situations allow it to react to unique problems more flexibly and creatively than would workers' compensation or other codified systems.

The third positive effect of using the tort system to compensate mass toxic injuries is deterrence, an important component in any compensation scheme. Since little empirical evidence exists on the deterrent effects of the tort system, it would be a mistake to make claims about certain or direct connections between tort compensation and the care with which dangerous products are designed, manufactured, and sold (see Eads and Reuter, 1983). Nevertheless, asbestos and other toxic tort litigation do have components that promise deterrent effects over and above those that the tort system may provide for ordinary cases. The most important of these is the high level of stakes involved. In this type of litigation, it is not just marginal or even substantial adjustments to insurance premiums that are at stake, but tens of millions of dollars in defense costs that are borne directly by insured manufacturers, settlements and judgments that are not covered by insurance, punitive damages that are frequently uninsurable, substantial goodwill, and on occasion the very existence of the manufacturer (and insurer). If these considerations are insufficient to persuade the
manufacturers of toxic substances to go about their business with care, it is difficult to imagine the indirect incentives that would be adequate.

The way in which deterrence affects manufacturing activities can be considered exactly as it has traditionally been conceptualized in criminal law: as a product of certainty as well as severity of sanction. Here, factors affecting plaintiff lawyers and manufacturers reinforce each other. The incentives that very large numbers of very large recoveries provide for plaintiff lawyers to investigate the business practices of manufacturers of dangerous substances increase the likelihood that substandard corporate behavior will not go unnoticed and, theoretically, that manufacturers will not engage in such behavior in the first place. Moreover, the success of plaintiff lawyers in one industry appears to foster expertise and capital that can be applied to another, raising the likelihood of a shift in attention to any suspect industrial activity.

WEAKNESSES IN THE LITIGATION SYSTEM

The strengths of the tort system were seen in the early phases of asbestos litigation. But in the recent mature phase of the litigation that we have observed, it is the weaknesses of the system that seem to be most vividly displayed. In the main, injured workers have little power, lawyers have conflicted interests, courts defer to other priorities, dispositions are slow, recoveries are inconsistent, medical discovery is tailored to trials that do not take place rather than to settlements that do, legal battles are repetitive, and transaction costs are high. Of these problems, the most serious are the high costs, slow pace, variations in outcome, limits on individualized responses, and the ad hoc process through which group disposition processes have been adopted.

Transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available. Given the nature of the cases, some of these costs may be unavoidable. But a substantial portion could be eliminated or reduced if settlements could be negotiated before or in the early phases of a suit; if defendants cooperated more effectively; if common issues were litigated less frequently; if statutes of limitation and recruitment practices did not force premature claims; and if contingent fees bore a more direct relationship to lawyer efforts expended and risks incurred.

We have discussed the disposition problem in asbestos cases at length. The summary picture is of a small proportion of cases that reach full disposition at the same pace as that of other civil cases, and a larger proportion that reach full disposition only after a four-
five-year wait or even longer, after filing. Moreover, a substantial number of courts have fully disposed of only a trickle of cases: when the remainder will be completed cannot be determined from such incomplete past experience.

In his series of articles in *The New Yorker* magazine, Paul Brodeur makes a strong case that use of the tort system was necessary to expose the negligence of asbestos manufacturers. The tort system, he asserts, is the only vehicle that can provide victims with adequate compensation and the only institution that, through the threat of punitive damages, can control the carelessness and avarice of American business generally. But Brodeur’s picture of asbestos litigation is dangerously incomplete. It ignores the plight of the vast majority of plaintiffs whose claims languish in courts that have not disposed of any appreciable number of asbestos cases, or in courts that take five years or more to bring asbestos cases to a close. Of course, this situation is a consequence of the way that the parties and their lawyers, particularly on the defense side, have chosen to conduct asbestos litigation and the courts have chosen to react to it. But the reality of that behavior is also part of the tort system.

The variation in outcome among asbestos victims whose lives have been similarly disrupted is a complex problem. At one level, it appears unfair to deny recovery to one worker with mesothelioma and grant another with serious but not yet disabling asbestosis a verdict of a million dollars or more. And certainly different rules about ripeness, strict liability, the application of certain defenses, claims of fear of cancer, admissibility of very old evidence, and punitive damages produce such inconsistencies repeatedly in asbestos litigation. But by relying on private settlements and lay juries that need not account for their decisions, the American tort system places a low priority on consistency across cases. Moreover, the law of liability varies across jurisdictions for all kinds of cases, as do rules of evidence and even the conduct of trials. The issue then seems to be whether there are elements peculiar to toxic torts that militate for more consistency than generally results from litigation. That argument would rest on the source of toxic torts, generally large businesses that operate at many sites and distribute products nationally, which make decisions that affect citizens in many locales, and whose behavior ought to be influenced by a set of consistent consequences in all instances in which they have the potential to cause widespread harm.

A basic problem with asbestos litigation is that through group disposition processes it has sacrificed the attention to individualized injuries and needs that characterizes our litigation process without achieving the reduction in transaction costs that usually accompanies less
individualized administrative processes. The opportunity for savings is
missed because group practices are sufficiently ad hoc, partial, and
inconsistent that they cannot be depended on and cannot be incor-
porated into long-range litigation strategy. This transformation of the
historical case-by-case posture of litigation into a partially administra-
tive group approach is significant because it focuses attention on the
trade-offs in any system between consistency and individualization.
But it also has come about in a remarkable fashion—without plan,
without debate, and without much public awareness. The rather
sudden and unpublicized nature of this important alteration in the
character of litigation seems to fly in the face of the slow, careful,
incremental, and public way of change that has been characteristic of
Anglo-American common law for centuries.

PROBLEMS POSED BY LATENT INJURIES

Some of the weaknesses in the civil justice system’s handling of
mass toxic torts result from its attempts to fit substantive rules
designed for traumatic injuries to cases involving latent injuries. In
some states, statutes of limitations deny any tort recovery to victims of
latent injuries. In most states, rules that govern when cases are filed
courage premature filings and recruitment of plaintiffs. In asbestos
litigation, concern about the tolling of statutes of limitations and
requirements that individual claims must cover all injuries from asbes-
tos exposure led to the surge of filings that occurred between 1978 and
1982, which in turn led to court overload, a mass of claims that present
widely varying degrees of injury, and, ultimately, to the problematic
disposition practices described in this report.

Applying legal standards of causation to the probabilistic evidence of
latent disease involved in asbestos claims seems to have contributed to
the extreme variation in jury verdicts that has characterized asbestos
trials. Attorneys and judges attribute difficulties in settling cases in
part to the particularly high level of unpredictability of jury trial out-
comes. Judicial rulings on issues related to causation, for example, the
evidentiary requirements for identifying specific asbestos products as
the cause of injury, have also contributed to variation in outcomes.
Together, legal rules on the timing of filing claims and on causation
increase the probability that seriously injured plaintiffs will be under-
compensated or denied compensation entirely, while less seriously
injured parties will be overcompensated. Since evidence of the links
between causative factors and injuries in many latent injury cases will
be probabilistic, the failure of the tort system to develop scientifically
credible standards for dealing with this evidence is likely to lead to outcomes similar to those we have observed in asbestos litigation.

Latent injuries require compensation systems to deal with historical behavior and data. In cases involving toxic substances manufactured by more than one company, the lack of practical standards for determining liability and apportioning damages among tortfeasors for injuries that occurred 10 to 40 years ago deprives some plaintiffs with legitimate claims from recovering damages. It also creates incentives for extensive litigation among the targeted defendants and their insurers and complicates an already difficult settlement. In asbestos litigation, this phenomenon has contributed substantially to the high transaction costs and lengthy times to disposition that we have observed.

Traditionally, in traumatic injury cases, punitive damages have been applied in situations where the behavior of a culpable defendant is egregious. In cases of latent injury, when the objectionable behavior occurred decades ago, and especially when it was carried out by individuals long since deceased on behalf of companies that do not much resemble the firms now being sued, the applicability of punitive damages is called into question. Arguments against the application of punitive damages and uncertainty about the resolution of this debate have contributed to high costs and delays, and have complicated the assessment of the monetary value of individual asbestos claims. The potential for punitive damages has impeded coordination of defendants’ activities, further complicating and postponing settlements, and raises the issue of availability of compensation for future plaintiffs.

PROBLEMS POSED BY MASS LITIGATION

Many of the flaws in the tort system’s approach to compensating asbestos injuries arise because asbestos litigation is mass litigation. Mass litigation tends to produce a concentration of cases in courts and law firms. Cases are concentrated in courts because often these cases are localized (even if there are many locales), because defendants are amenable to suit in a limited number of locations, or because plaintiff lawyers with expertise in this litigation bring suits in courts that are convenient to them. Concentration in law firms occurs as a result of economies of scale and specialization, lawyer case-referral systems, and client recruitment practices.

Concentration in turn leads to delays that originate with overburdened courts and with lawyers who have taken on more cases than they can handle expeditiously. It also leads to the need and opportunity for group dispositions. On the other hand, it can provide
consistency across claimants, can reduce individual plaintiffs’ out-of-pocket costs, and does reduce defense costs. It is also a necessary condition of the extensive discovery conducted by plaintiff lawyers that is crucial to developing the case for injured parties and providing the threat of exposure on which deterrence is based.

The mass nature of toxic torts also accentuates the effects of the lack of national tort law. Without attempting to pass judgment on the legal issues that would be involved in such a departure from contemporary doctrine, in practical terms, the absence of uniform rules means that similarly injured workers are treated quite differently. The level of compensation awarded (indeed, whether compensation is available through the tort system) depends more on the rules regarding liability, causation, and proof in the jurisdictions in which their suits are brought than on their exposure or injuries. On the other hand, lack of uniformity is the price for experimentation and innovation, which is preserved in its purest form by the multiple, independent court systems of our current jurisprudence. Whether the victims should pay this price is another issue that merits attention.

Lack of uniformity is not exclusive to mass torts; it may also characterize most tort litigation, even ordinary automobile accidents. But a quick review of the Asbestos Litigation Reporter makes it obvious that these inequities are more dramatic in mass litigation. More important, there may be a sense in which toxic torts are more of a national problem calling for national uniformity than are slip-and-fall, motor vehicle, and malpractice cases. Because the business enterprises that create the risks of toxic torts operate nationally, making decisions that affect workers and consumers everywhere, a stronger rationale exists to establish rules that apply uniformly wherever these businesses may be sued.

Since the cases can have identical or similar as well as quite different elements, mass litigation invites duplicative efforts. Redundancy in asbestos litigation means that many steps in the process must be repeated, and many issues in the lawsuits must be decided over and over again. A large amount of redundancy, especially with respect to pleadings and discovery, has been eliminated by the lawyers, judges, and magistrates by using devices that we have described in detail. Some issues that affect the conduct of trials, rather than discovery, have been decided for all cases in some jurisdictions; but most issues that would dispose of an important element of any case are left open for every case. The most critical of these are the relationship between asbestos exposure and diseases, and the extent and timing of defendant knowledge about the dangers of the asbestos products they produced or distributed.
Finally, the problem of punitive damages is related both to the large number of cases as well as to the fact that the cases involve latent injuries. The problem that punitive damages present for the tort system, as distinguished from the burden they impose on defendants, is the lack of a connection between the social function intended for punitive damages and the haphazard way in which they are actually secured in mass litigation such as asbestos cases. Punitive damages are intended to punish civil litigants whose behavior was egregious and to deter similar behavior in the future. Ordinary notions of fairness suggest that at some level the punishment meted out (in the form of repeated high punitive awards), even for particularly egregious behavior, is too much, and that further punishment has no additional deterrent effect. These notions have been incorporated into the law in jurisdictions that require punitive damages to bear some reasonable relationship to compensatory damages or to the assets or profits of the defendant against whom they are assessed. They will also be found in the behavior of judges who, without much explanation, frequently reduce the level of punitive damages awarded by juries. Thus, there are controls over the level of punitive damages in some individual cases, but there are no controls over the cumulative effect of these cases. Therefore, there is no way to even roughly ensure that the social function of punitive damages has not been exceeded many times over, an undesirable result in itself, regardless of its effect on future claimants, owners, employees, and customers of the affected businesses.

ALTERNATIVES TO LITIGATION

The critical problems that result from the tort system’s handling of mass latent injury litigation have led some to advocate taking these cases out of the court system. But such proposals presume that alternative systems would successfully resolve the problems that beset the tort system, a presumption for which there is currently little empirical support, and which ignores the potential costs of giving up the positive aspects of the tort system.

The most obvious alternative to the tort system is some form of federally administered or supervised compensation scheme. Such a scheme has been advocated by the asbestos industry, and in various forms, with and without federal financial participation, these schemes have been incorporated in legislation introduced in each of the last several Congresses. The best indication of how such compensation schemes would deal with mass torts involving latent injuries can be found in their historical treatment of these problems. There are two
past experiences on which we can draw—the treatment of occupational injury claims, including asbestos claims, under state workers’ compensation systems, and the treatment of coal miners’ claims under the federal Black Lung program.

In a recent article on compensation for occupational disease, Leslie I. Bodin of the Harvard University School of Health has argued that many of the problems we have noted about the tort system, including timing of claims, standards for proving causation, and issues arising out of the involvement of multiple defendants, have not been solved by state workers’ compensation systems either. In addition, workers’ compensation systems have usually provided less than full compensation of wage loss, and no compensation for pain and suffering. Lowered compensation rates, Bodin reasons, “dilute employers’ incentives to take care.” Finally, in the area of occupational disease, Bodin says that workers’ compensation has not generally precluded legal contests over claims, but has merely shifted the forum for such battles (Bodin, 1984:510–512; see also Darling-Hammond and Kneser, 1980).

Because of the heated political battles in Congress that have characterized the 16-year history of Black Lung legislation, the manner in which that program has functioned may not be a reliable indicator of how any other federal compensation schemes for injured workers would operate. But Black Lung provides the closest set of arrangements to those proposed for asbestos victims, and its history has not been encouraging. Depending on one’s perspective, it has ranged from too little compensation for too few people, to too much for too many, and perhaps back again.

In sum, it is highly uncertain that administrative compensation systems patterned after the currently available models would improve the delivery of compensation to injured asbestos workers. Moreover, substituting an administrative compensation system for litigation of asbestos claims might significantly affect other industrial workers’ future ability to gain compensation for toxic injuries. If such administrative solutions were to become the preferred or exclusive remedy for toxic injury cases, incentives for lawyers to develop the evidentiary basis for such claims might be decreased, and the presumed deterrent effects of the tort system on producer behavior might also be reduced. Of course, other mechanisms might be developed for bringing dangerous toxic exposure situations to light and for deterring their future development. But substituting administrative compensation for litigation without considering these larger social issues appears to be trading one set of problems for another.

The Asbestos Claims Facility (ACF) represents a somewhat different alternative. As it has evolved, it is more an adjunct to than a
substitute for the tort system. The ACF is a device to coordinate the
defense side of negotiation of asbestos claims. If negotiations prove
futile, the facility will try to arbitrate claims, and when that is not
feasible, it will defend cases in court on behalf of its members. It
promises substantial cost savings: it may settle claims before suits are
required; after suit, it may settle claims in the early or middle stages of
litigation rather than just before trial (the typical current pattern).
Once on trial, all members would be represented by counsel for the
group rather than by separate lawyers for each defendant.

The ACF, however, is the manifestation of a mature system at work.
It is the product of over 10 years of litigation involving one of the most
extensive discovery efforts in the history of American tort law, the set-
tlement of thousands of cases, and the trial of hundreds. It will begin
operation only after this litigation experience has apparently convinced
its members that their interests are better served by paying claims
administratively rather than by litigating them. The ACF appears
after extensive experience has been achieved in an informal allocation
of responsibility among participants in several different asbestos
markets. In this context, coordinated negotiations primarily involve
how much a claim is worth rather than whether it is compensable. In
future mass litigation marked by uncertainty over whether claimants
can make their cases stick at trial, a claims facility may not be work-
able, at least not until the potential gains of plaintiffs and defendants,
as well as the relative burdens of defendants, have been established
through sufficient experience with ordinary litigation. Moreover, at
this date, it is far from clear that the ACF will even work for asbestos.
It is an open question whether asbestos plaintiff lawyers intend to
cooperate with the ACF, especially since the less than 100 percent
membership of defendants and insurers means that lawsuits will have
to be filed in any event, and since negotiating with the ACF involves
giving up punitive damages claims against its members.

CHANGING THE TORT SYSTEM

Given the problems presented by each of the alternatives to the tort
system that has been proposed to date, and the lack of empirical evi-
dence that any of these alternatives would effectively deal with the
range of problems that we have observed in asbestos litigation, it seems
prudent to turn our attention to the tort system itself, and consider
how it might be strengthened.

At least six major issues must be addressed to improve the “fit”
between the tort system and mass toxic tort claims:
• Proper timing for filing claims.
• Barriers to incorporating scientific standards of causation into the legal process.
• Theories of liability and damages apportionment that do not match the latent nature of toxic tort exposure.
• Inadequate judicial resources.
• Redundant litigation.
• The national character of many mass toxic torts.

Devising rules and procedures that address these issues without diminishing the strengths of the tort compensation system is not easy. On close examination, even those solutions that seem simple present difficult problems. For example, extending the statutory period for filing claims from the time of injury to the time of discovery of an injury, obviously fair from the injured party’s perspective, makes it much more difficult for an insurer to determine the risks it is running when it agrees to insure against strict liability for latent injuries. Such a dilemma could lead to an unavailability of insurance. Permitting separate claims to be filed for separate injuries arising out of the same exposure simplifies the task of assessing the damages associated with each claim, but it also increases the total number of claims filed for a single toxic exposure or event. Selecting options for dealing with latent injuries, then, requires a careful balancing of competing interests between key participants (workers vs. manufacturers, consumers vs. producers, society vs. individual) and competing concerns (compensation vs. costs, compensation vs. insurance availability).

As these claims multiply, the need to revise legal standards of causation to fit the realities of toxic exposure becomes more urgent. The question, as Brennan and Carter have recently written, is quite simple: “How can we persuade, educate, or require the trier of fact, in whatever forum, to evaluate adequately the scientific evidence of causation in individual cases?” (1985:56). Besides educating judges (and we would add, lawyers) regarding probabilistic proof of causation, Brennan and Carter advocate statutes “mandating the relevance and admissibility of epidemiological and statistical evidence on the issue of causation of injury or disease by toxic agents,” “legal presumptions of causation in some areas of environmental disease” such as mesothelioma, and the “institutionalization of compensation proportionate to risk” (1985:56, 58). They warn that such innovations could prove problematic and recommend an experimental approach, coupled with careful monitoring of the effects of such changes on outcomes and costs.

Similarly, there are good grounds for rethinking legal standards that require injured parties to positively identify specific products
containing generic toxic substances as the cause of injuries. Once a causal link has been established between a generic substance and an injury, and after evidence has been provided on the relative involvement of defendants in producing and/or distributing the generic product, there may be no practical alternative, other than denying recovery, to a formula approach to the apportionment of damages among defendants. The attraction of this “Sindell” approach is demonstrated by the fact that asbestos defendants in most jurisdictions we studied have informally adopted formulas for apportioning damages that are based on market shares, and by the establishment of the Asbestos Claims Facility, based on an overall agreement for apportioning damages among its members. It may be that the variety of situations in which mass toxic torts arise is too great to devise a formula that could apply across all cases. At some point in the litigation, however, the relative involvement of defendants over time in producing and/or distributing the toxic substance becomes clear. And the societal costs of continuing to litigate liability on a producer-by-producer basis may begin to outweigh the benefits.

Unlike the issues that we have just discussed, the question of judicial resources does not raise novel problems. Delay in the courts and imbalance between the supply of judicial time and the demands of increasing civil litigation have received much attention. As numerous studies have demonstrated, in many major metropolitan trial courts, litigants who want rapid disposition of their disputes have little choice but to negotiate a settlement among themselves. Only those who can afford to wait several years or longer for trial can obtain a formal adjudication of their dispute. Most choose settlement and more rapid disposition.

A sudden influx of a large number of civil claims can only add to the imbalance between the supply of judicial resources and the demand for those resources. As we have observed in the case of asbestos litigation, in most major jurisdictions the result is a long queue to trial. The difference between asbestos cases and more routine tort cases is that to reach settlement, the former appear to require the threat of imminent trial far more often than do the latter. Thus, in the case of asbestos litigation, a long wait for trial translates directly into a long time to disposition.

Our study of asbestos litigation practices suggests that courts could better overcome parties’ and attorneys’ incentives for delay if they had additional judicial resources. Mechanisms are needed for adding such resources on a temporary basis (but extending them over several years) to courts that face sudden increases in demand caused by mass litigation. Obstacles to such temporary increases seem to be more political
than economic. The processes of judicial authorization and appointment do not mesh well with sudden changes in demand for resources. One way to provide temporary judicial assistance without challenging the current system of authorization and appointment would be to create a judicial cadre within the federal system and within hard-pressed state court systems that could move quickly into courts that face heavy but relatively short-term increases in caseload.¹

How can we deal with redundant litigation in a way that properly balances the costs of such litigation against the benefits? This is one of the most important questions facing those who wish to reform tort procedures for mass toxic claims. Current approaches to grouping cases and treating them collectively for some or all phases of litigation (i.e., class actions, and in the federal courts, multidistricting) assume a high degree of similarity among cases. But mass toxic tort litigation is characterized by a complicated mix of common and individualized issues. Asbestos litigation, for example, presents a variety of substantive issues, some of which apply to all cases, some of which apply only to particular subsets of cases, such as those arising out of specific worksites or brought against specific producers, and some of which apply only to individual cases. The challenge is to devise a system that can distinguish among these classes of issues and deal with each class with the proper degree of individualization.

Current issue preclusion approaches—collateral estoppel, judicial notice, and stare decisis—also appear to assume a different form of litigation than that of mass toxic torts. Applying a single jury or judge’s decision on a key issue, such as the relationship between asbestos exposure and disease, in a particular case in a particular trial court, to a mass of cases seems problematic, especially if as we have argued, the ordinary trial process has some difficulty dealing with scientific causation issues. On the other hand, trying the causation issue repeatedly in every jurisdiction in which claims are brought seems unreasonably inefficient. The challenge here is to devise a system that achieves issue preclusion when the time is right, one that contains proper due process safeguards.

Devising a system that permits a mix of collective and individualized decisionmaking and precludes further litigation of certain issues would not be easy. For each mass toxic tort situation, it would be necessary to decide which issues would be treated collectively and at what stage of the litigation a collective judgment would be appropriate. These

¹Most courts already have some means of increasing their judicial resources temporarily, by requesting reassignment of colleagues in other jurisdictions. These temporary assignments, however, are not of a sufficient duration to deal with the problems we discuss here.
decisions might need to be reviewed and changed as the litigation progressed, as new information came to light, or as new issues were added to the list of those considered "sufficiently litigated." A special mechanism for managing and carrying out the process, for example, a special court or judicial assignment, and a specially selected or constructed "test case" that reflected the full range of facts or legal issues might be necessary. Finally, it would be necessary to decide what law would apply to issues treated in this special fashion.

As the civil justice system is increasingly faced with lawsuits that arise out of national situations such as worker and consumer exposure to products sold and used nationwide, the variation in locally determined rules and procedures for resolving these suits is questionable. We have already discussed the issues that are raised by variations in outcomes for asbestos workers. The appropriateness of applying "federal tort law" to multistate torts has arisen in the course of asbestos and Agent Orange litigation. It ought to receive more sustained attention.

This review of approaches to improving the fit between the tort system and mass toxic tort claims illustrates the difficult problems that must be confronted by those who seek to reform the process. Such a review may in part explain why it is so tempting to consider removing such claims from the tort system altogether. But most of the same problems would arise in any context that was developed for processing mass toxic claims. In considering alternatives to the tort system, the key question is whether another alternative would provide better mechanisms for solving the problems we have described without impairing the strengths of the traditional tort process.

A PROPOSAL FOR ACTION

A close analysis of asbestos litigation, its problems and alternatives, offers strong evidence that as a society we have not thought enough about the issues that mass latent injury torts pose for the civil justice system and for us all. We need to clarify the objectives that we hope to achieve in deterrence, compensation, and punishment. We must determine how we want to treat victims and defendants and how we want to discriminate among them. We must decide upon the costs that we are willing to bear and how we wish to allocate them. We must go about these difficult tasks with a sensitivity to the traditions of our legal system even as we consider arrangements beyond the conventional set of responses.
These tasks are not primarily research tasks, and we are not calling for another study. Rather, they are challenges of a fundamentally moral and political nature. For that reason, it is not easy to identify the most appropriate institution to mobilize the necessary effort. We lack the ready vehicle of the British Royal Commission, which can combine high prestige and political influence while overcoming parochial perspectives. What is required is a medium equivalent to the National Commission on the Causes and Prevention of Violence, or the National Advisory Commission on Civil Disorders of the late 1960s. Whatever its origin, the composition of this group must represent the important industrial, worker, consumer, governmental, and professional interests that have something at stake in the outcome as well as the experience and wisdom to suggest innovative solutions. The group must also include and have the advice of physical scientists, social scientists, legal scholars, and others to help bridge the gap between law and science, to clarify the choices that can be made, to predict the consequences of different institutional and normative arrangements, and to make us aware of the ways in which other societies have reacted to the complexities of latent torts. Given the pathbreaking dimension of asbestos litigation, the commission must include members who are familiar with that history. But it must not be controlled by representatives of participants in the asbestos crisis; for them the stakes are too high to expect sufficient attention to promoting the general welfare.

Without such an approach, we will likely continue to struggle through the existing thicket of the civil justice system: overcompensating some victims, but leaving many more ill-attended, deterring manufacturers an unknown amount in unknown directions, rewarding lawyers generously without attention to the risks they have borne or the work they have done, perhaps compromising our capacity to estimate risk and ensure against it, and running a high risk of jeopardizing the ability of the courts to deliver individualized justice to individual plaintiffs.
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