

SOUTH TEXAS LAW REVIEW

SYMPOSIUM: ASBESTOS LITIGATION

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CONGRESS SHOULD ACT TO RESOLVE THE NATIONAL ASBESTOS CRISIS: THE BASIS IN LAW AND PUBLIC POLICY FOR MEANINGFUL PROGRESS

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State courts have traditionally been the primary source of American tort law. Unlike commercial law, securities law, tax, criminal law, and other legal fields that are statutory or regulatory in nature, tort law has mostly evolved through the state courts by the "common law" process.¹ Nevertheless, judicial lawmaking is confined to individual disputes concerning discrete issues and parties.² The

1. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS 1 (10th ed. 2000).

2. See *Berger v. Sup. Ct. of Ohio*, 598 F. Supp. 69, 76 (S.D. Ohio 1984), *aff'd*,

information that judges receive in the course of litigation is from two advocates who present information in the best interests of their particular client. This is an essential part of the tripartite structure of our system of government. The Founding Fathers recognized this when they drafted the United States Constitution to give the judiciary jurisdiction to decide "cases and controversies."³ This advantage also has its limitations: the focus on individual cases does not provide comprehensive access to broad scale information, and judicial changes in tort law apply retroactively rather than prospectively.

In contrast to judicial lawmaking, Congress can gather information from a variety of sources, which is why the responsibility for formulating public policy issues has traditionally and properly been vested in the legislative branch. Through the hearing process, Congress has access to a wealth of information, including the ability to receive testimony from persons and groups representing a multiplicity of perspectives. This process allows Congress to engage in broad policy deliberations and to carefully formulate public policy. This is important in the context of liability law, because the impacts may extend nationwide and go far beyond the litigants in a particular case. Furthermore, legislative enactments give the public advance notice of significant changes affecting rights and duties, and the time to comport behavior accordingly.

Federal civil justice reform thus invariably requires a balancing of two sometimes competing interests—basic principles of federalism and respect for states' rights versus the need for predictable, national rules that promote interstate commerce. The fact that tort law traditionally has been the province of the states does not mean that it should be off-limits to any reform at the federal level. Federal legislation can provide an effective means of addressing liability problems that are rooted in interstate commerce and are national in scope. Indeed, there have been many situations—as this article will demonstrate—where federal legislation has been enacted to address national liability problems.

When is federal tort or civil justice reform legislation appropriate? First, we believe that there must be a serious problem that requires the attention of national policymakers. Second, we believe that federal legislation should be narrowly tailored to limit its intrusion upon matters that otherwise would be subject to state

861 F.2d 719 (6th Cir. 1988) (explaining that "[a] judge acts on individual cases, not broad programs.").

3. U.S. CONST. art. III, § 2, cl. 1.

authority. Third, the federal solution must be superior to other efforts to solve the problem. Fourth, the federal solution should be in the public interest, and not simply reflect a "bailout" for an alleged wrongdoer. The article provides examples where these criteria have been met and federal legislation has been successful. Finally, the article will show how the criteria support federal action to address the current "asbestos-litigation crisis."⁴

I. EXAMPLES OF SUCCESSFUL FEDERAL ACTION

Congress has utilized its power under the Commerce Clause to enact laws preempting state tort law for almost a century.⁵ These laws, discussed below, chronicle Congress's active, longstanding participation in setting tort liability rules to address specific, national liability problems.

A. *Early Federal Laws Addressing Liability Law*

1. *The Limitation of Vessel Owner's Liability Act*

The Limitation of Vessel Owner's Liability Act ("LVLA")⁶ was one of the first major federal tort policy statutes. Congress enacted the LVLA in 1851 to promote commercial shipping by limiting the liability of ship owners for loss or damage to cargo. The Act exempted ship owners from liability for any loss or damage to goods on board ship resulting from fire, unless the fire was caused by the design or neglect of a ship owner. In addition, the LVLA provided ship owners with limited liability for any loss or destruction of goods on board ship. The United States Supreme Court upheld the constitutionality of the LVLA in *Providence & New York Steamship Co. v. Hill Manufacturing Co.*⁷

4. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

5. See Victor E. Schwartz, Mark A. Behrens, & Leavy Mathews III, *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269, 274 (1999). Maritime law is generally beyond the scope of this article, but that is another field in which Congress has been active in setting tort policy rules. See generally GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* Ch. VI (2d ed. 1975) (discussing how the Supreme Court rewrote laws which affected how harbor and crew members recovered for injuries).

6. 46 U.S.C. app. §§ 181-196 (2000).

7. 109 U.S. 578, 590-94 (1883).

2. *Federal Employers' Liability Act*

Early in the last century, Congress enacted the Federal Employers' Liability Act of 1908 ("FELA"),⁸ a federal statute that established rules governing personal injury and wrongful death actions brought by railroad workers and their families against railroads engaged in interstate commerce. FELA is a "tort substitute" for workers' compensation in the railroad field. FELA, among other things: (1) abolished the fellow-servant rule, a common law rule which shielded employers from liability where one employee negligently caused harm to another; (2) abrogated the contributory negligence defense and replaced it with a pure comparative fault rule where the employer's violation of a safety statute contributed to the employee's injury; (3) abrogated the assumption of risk defense where the employer's violation of a safety statute contributed to the employee's injury; (4) voided any contract or device that would enable any common carrier to exempt itself from liability under the Act; and (5) established a two-year statute of limitations for actions governed by the Act. Federal and state courts were given concurrent jurisdiction to decide FELA cases.⁹ The FELA statute was upheld by the United States Supreme Court in *Mondou v. New York, New Haven & Hartford Railroad Co.* (commonly known as the "*Second Employers' Liability Cases*").¹⁰

3. *The Longshoremen's and Harbor Workers' Compensation Act*

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"),¹¹ a FELA-like statute that provides fixed awards to employees or their dependents in cases of employment-related injuries or deaths occurring upon the navigable waters of the United States.¹² Congress enacted the LHWCA to "provide injured employees with more immediate and less expensive relief than that available in a common law tort action,"¹³ and to provide employers with liability that was "limited and

8. 45 U.S.C. §§ 51-69 (2000). A 1906 version of FELA was declared unconstitutional in *The Employers' Liability Cases*, 207 U.S. 463, 499 (1908).

9. The Jones Act, a FELA-like statute that permits seamen injured "in the course of his employment" to "maintain an action for damages at law," 46 U.S.C. § 688 (2000), also has been interpreted to provide federal and state courts with concurrent jurisdiction. See *Engel v. Davenport*, 271 U.S. 33, 37 (1926).

10. 223 U.S. 1, 53 (1912).

11. 33 U.S.C. §§ 901-950 (2000).

12. See *Kane v. United States*, 43 F.3d 1446, 1449 (Fed. Cir. 1994).

13. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051 (5th Cir. 1983).

determinative."¹⁴ The LHWCA was upheld by the United States Supreme Court in *Crowell v. Benson*.¹⁵

4. *The Federal Drivers Act*

The Federal Drivers Act ("Drivers Act")¹⁶ was enacted in 1961 to relieve government drivers from the burden of personal liability for claims arising from vehicular accidents occurring during their course of employment. Unlike many employers, the United States neither maintained liability insurance to protect its employees nor assisted them in paying for their own insurance against on-the-job accidents. "[M]oved by the fact that automobile accident insurance placed such a heavy financial burden on government drivers that it was adversely affecting morale and making it difficult for the government to attract competent drivers into its employ,"¹⁷ Congress decided to immunize individual federal drivers from tort liability arising out of accidents caused by their negligence. In lieu thereof, the Drivers Act limited persons injured by federal drivers to statutory remedies against the United States.¹⁸ The Drivers Act has been declared constitutional.¹⁹

5. *Black Lung Benefits Act of 1972*

In 1972, Congress amended Title IV of the Federal Coal Mine Health and Safety Act of 1969 to add the Black Lung Benefits Act.²⁰ The Black Lung benefits provisions established a compensation scheme for coal miners allegedly suffering from "black lung disease" (pneumoconiosis) and the survivors of miners who died from or were "totally disabled" by the disease. Under the Black Lung program, a claimant seeking benefits files a claim with the District Director of the Department of Labor's Office of Workers' Compensation Benefits. The District Director investigates the claim and determines whether the claimant is eligible for benefits. If the claimant is so eligible, and

14. *Smither & Co., Inc. v. Coles*, 242 F.2d 220, 222 (D.C. Cir. 1957) (citing *Bradford Elec. Co. v. Clapper*, 286 U.S. 145, 159 (1932)).

15. 285 U.S. 22, 65 (1932).

16. 28 U.S.C. § 2679(b)-(e) (2000).

17. *Carr v. United States*, 422 F.2d 1007, 1012 (4th Cir. 1970).

18. *See* 28 U.S.C. § 2679(b), (d).

19. *See Thomason v. Sanchez*, 539 F.2d 955, 958 (3d Cir. 1976); *Carr*, 422 F.2d at 1010-11; *Nistendirck v. McGee*, 225 F. Supp. 881, 882 (W.D. Mo. 1963).

20. *See* Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 667 & n.4 (1989) (discussing the Black Lung Benefits Act as "the only single industry, single disease compensation law ever attempted" at the time of its passage).

no employer can be held responsible for the claimant's illness, the claimant is paid from a Black Lung Disability Trust Fund, derived from an excise tax paid by coal mine operators based on the tonnage and price of coal sold. The scheme was upheld by the United States Supreme Court in *Usery v. Turner Elkhorn Mining Co.*²¹

6. *The Price-Anderson Act*

The Price-Anderson Act,²² as amended in 1975, limited the aggregate liability for a single "nuclear incident" to \$560 million to be paid from contributions from nuclear power plant operators, private insurance, and the Federal Government.²³ In addition, the amended Act required operators to waive certain legal defenses in the event of a substantial nuclear incident.²⁴ The Act was critical to the development of the "private nuclear power industry" in the United States.²⁵ Congress appreciated that, even though the risk of a major nuclear accident was extremely remote, the "potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk."²⁶ Without reasonable and defined limits on liability, there would probably be no nuclear power industry in the United States.²⁷ The Act was declared constitutional by the United States Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*²⁸

21. 428 U.S. 1, 14 (1976).

22. 42 U.S.C. § 2210 (2000).

23. See 42 U.S.C. § 2210(a)-(g); see also 42 U.S.C. § 2214(q) (2000) (defining a "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material . . .").

24. See *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 65 n.5 (1978) ("The defenses of negligence, contributory negligence, charitable or governmental immunity and assumption of the risk are all waived in the event of an extraordinary nuclear occurrence . . .").

25. *Id.* at 64.

26. *Id.*

27. The 1988 Amendments to the Price-Anderson Act created a federal cause of action for nuclear accident claims and provided that public liability actions filed in state courts were retroactively subject to removal. 42 U.S.C. §§ 2014(w), 2210(n)(2). Several courts have held that retroactive application of the 1988 Price-Anderson Act Amendments did not violate due process. See *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 861 (3d Cir. 1991); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1102 (7th Cir. 1994).

28. 438 U.S. 59, 84 (1978).

7. *Swine Flu Act*

The National Swine Flu Immunization Program of 1976 ("Swine Flu Act")²⁹ was enacted to deal with the collapse of the commercial liability insurance market for vaccine manufacturers and distributors following judicial decisions holding polio vaccine manufacturers strictly liable for vaccine-related injuries.³⁰ In addition, Congress was concerned about the devastating economic impact that would occur due to lost wages if the population were not inoculated before the start of the flu season.³¹ Modeled after the Drivers Act, the Swine Flu Act barred common law tort actions against swine flu vaccine manufacturers and providers and created a Federal Tort Claims Act remedy against the United States as the exclusive means of recovery for swine flu-related injuries.³² Courts have upheld the Swine Flu Act.³³

8. *Atomic Weapons Testing Liability Act*

In 1985, Congress passed the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act (known as the "Atomic Weapons Testing Liability Act") to address liability issues affecting the testing of nuclear weapons critical for the security of the United States.³⁴ The Act created a cause of action against the United States for radiation injuries arising from federal atomic weapons testing programs, retroactively abolished private tort actions against government contractors for such injuries, and made the Federal Tort Claims Act the sole remedy for those injuries.³⁵ The Act has passed constitutional muster.³⁶

29. 42 U.S.C. § 247b(j)-(l) (1976) (repealed 1978); see *Weldon v. United States*, 70 F.3d 1, 1 n.1 (2d Cir. 1995).

30. See *Davis v. Wyeth Labs., Inc.*, 399 F.2d 121, 130 (9th Cir. 1968); *Reyes v. Wyeth Labs., Inc.*, 498 F.2d 1264, 1295 (5th Cir. 1974).

31. *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411, 415 (W.D. Okla. 1977).

32. 42 U.S.C. § 247b(k).

33. See *DiPappa v. United States*, 687 F.2d 14, 19 (3d Cir. 1982); *Ducharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1311 (5th Cir. 1978); *Jones v. Wyeth Labs., Inc.*, 457 F. Supp. 35, 38 (W.D. Ark. 1978), *aff'd*, 583 F.2d 1070 (8th Cir. 1978); *Sparks*, 431 F. Supp. at 418; *Wolfe v. Merrill Nat'l Labs., Inc.*, 433 F. Supp. 231, 238 (M.D. Tenn. 1977).

34. 42 U.S.C. § 2212 (1988) (repealed 1990).

35. See *id.*; *Hammond v. United States*, 786 F.2d 8, 9 (1st Cir. 1986).

36. *In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982, 990-92 (9th Cir. 1987); *Hammond*, 786 F.2d at 13-16.

9. National Childhood Vaccine Injury Act of 1986

One year later, Congress enacted the National Childhood Vaccine Injury Act of 1986³⁷ to address manufacturers' liability concerns relating to the distribution of vaccines and to minimize the public health dangers posed by low vaccine supplies.³⁸ The Act created a no-fault compensation program for childhood vaccine-injury victims to be funded by an excise tax on each dose of vaccine. As a predicate to receiving compensation under the Act, injured persons were required to file a petition in the United States Court of Federal Claims demonstrating, among other things, that he or she "incurred unreimbursable expenses . . . in an amount greater than \$1,000."³⁹ The law was upheld in *Black v. Secretary of Health and Human Services*.⁴⁰

10. Federal Employees Liability Reform and Tort Compensation Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") amended the Federal Tort Claims Act to provide for the substitution of the United States as a defendant in any action where one of its employees is sued for damages as a result of an alleged common law tort committed by the employee within the scope of his or her employment.⁴¹ Congress enacted the Westfall Act to respond to the United States Supreme Court's decision in *Westfall v. Erwin*,⁴² which limited a federal official's absolute immunity from tort claims to situations where the official's actions were "within the outer perimeter of an official's duties and . . . discretionary in nature."⁴³ Congress saw the *Westfall* decision as an erosion of the common law tort immunity formerly available to federal employees. The Westfall Act has been declared constitutional.⁴⁴

37. 42 U.S.C. §§ 300aa-1 to 300aa-34 (2000).

38. Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future*, 48 OHIO ST. L.J. 387, 394 (1987).

39. 42 U.S.C. § 300aa-11(c)(1)(D)(i) (amended 1998).

40. 93 F.3d 781, 787 (Fed. Cir. 1996).

41. 28 U.S.C. § 2679(d)(3) (2000).

42. 484 U.S. 292 (1988).

43. *Id.* at 300.

44. See *Salmon v. Schwarz*, 948 F.2d 1131, 1142 (10th Cir. 1991); *Sowell v. Am. Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Connell v. United States*, 737 F. Supp. 61, 64 (S.D. Iowa 1990).

B. Recent Laws Setting National Tort Policy Rules

More recently, Congress has shown an even greater willingness to tackle national liability issues through federal legislation. Below we discuss some of the more significant major congressional enactments in this area and summarize others.

1. The General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA")⁴⁵ created an eighteen-year statute of repose for manufacturers of general aviation aircraft (i.e., aircraft with less than twenty seats that are not involved in scheduled passenger-carrying operations) and their component parts suppliers.⁴⁶ GARA addressed a serious decline in the manufacture and sale of general aviation aircraft.⁴⁷ This industry's decline had been caused, in part, by an extraordinary increase in the cost of liability insurance.⁴⁸ Liability costs for the industry increased from \$24 million in 1978 to more than \$200 million per year in the years preceding GARA's enactment despite the fact that the industry's safety record was improving.⁴⁹ The heart of the problem was that manufacturers were being sued for tragic incidents involving planes that were decades old.

It was clear that federal action was necessary for a number of reasons. First, many pilots were unable to purchase new planes due to the cost of "long-tail" liability being factored into the cost of general aviation aircraft. Pilots wanted to be able to buy newer planes rather than be forced to fly older, more affordable aircraft. Second, federal action was needed to restore and create jobs. Between 1978 and 1994 when GARA was passed, general aviation manufacturers lost 20,000

45. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. § 40101).

46. *Id.* at §§ 2(c)-(d), 3(3), 108 Stat. 1553. GARA did not provide a new basis for federal court jurisdiction. Cases that would have been decided by a state court before GARA's August 1994 effective date remain in state court today, subject to the federal limit on tort liability. GARA also does not preempt state statutes of repose that may be more restrictive to claimants than GARA's 18-year limit. *See generally* Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269 (2002) (discussing the background and constitutionality of GARA) [hereinafter Schwartz & Lorber]; David Moffitt, Note, *The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215 (1995) (discussing background and effects of GARA).

47. H.R. REP. NO. 103-525, pt. 1, at 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1639.

48. *Id.*

49. *Id.*

jobs and another 80,000 jobs in related fields were lost.⁵⁰ Safety innovation in the industry was stifled. Finally, the federal government, through the Federal Aviation Administration, had already established extensive rules regulating the aviation industry. Liability was one of the only areas of aviation that had not been addressed by the Federal Government.⁵¹

The Association of Trial Lawyers of America ("ATLA") and Ralph Nader vigorously opposed GARA.⁵² They argued that the threat of litigation encouraged safety and that planes would be less safe if Congress limited the liability of aircraft manufacturers and their parts suppliers.⁵³ GARA was enacted over their objections.

Enough time has passed to conclude that GARA has been a success and that its goals could not have been accomplished by state action alone. A March 1997 hearing by the Consumer Affairs Subcommittee of the Senate Commerce Committee explored GARA's effects.⁵⁴ John Moore, Senior Vice President of Human Resources for Cessna Aircraft Company, testified that Cessna withdrew from the single engine aircraft market in 1986.⁵⁵ As a result of GARA, Cessna is back in the single engine aircraft business.⁵⁶ At the time of the Subcommittee's hearing, Cessna's small aircraft division had over 650 employees and had plans to double employment.⁵⁷ Paul Newman, Chief Financial Officer of the New Piper Aircraft Corporation, testified that GARA permitted New Piper to emerge from a Chapter 11 bankruptcy that had idled 1,000 workers.⁵⁸ John Yodice, General Counsel of the Aircraft Owners and Pilots Association ("AOPA"), testified that his members supported GARA, even though it limited their rights to sue.⁵⁹ AOPA members realized that they were paying an extraordinary amount for new aircraft due to manufacturers' "long tail" liability exposure for very old planes—aircraft that had flown safely for more than two decades.

50. *Id.*

51. See H.R. REP. NO. 103-525, pt. 2, at 6 (1994), reprinted in 1994 U.S.C.C.A.N. 1638, 1647.

52. See Patrick J. Shea, Note, *Solving America's General Aviation Crisis: The Advantages of Federal Preemption Over Tort Reform*, 80 CORNELL L. REV. 747, 781-83 (1995).

53. *Id.* at 782.

54. See S. REP. NO. 105-32, at 41-42 (1997).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

John Peterson of the Montgomery County Action Council of Coffeyville, Kansas—the home of Cessna's new small aircraft plant—testified that, prior to 1995, Montgomery County ranked ninety-eighth out of 105 Kansas counties in economic indicators.⁶⁰ The county's population was dropping, employment was on the decline, per capita income was down, and property values were depressed.⁶¹ After GARA, new housing starts were up 260 percent, the value of new homes doubled, retail sales were up five percent, per capita income nearly doubled, and nearly 500 people per year were moving into the county.⁶²

Moreover, contrary to ATLA's prediction, safety records have improved since GARA's enactment, both in terms of numbers of accidents and accidents per flight hours.⁶³ Over 25,000 new jobs have been created as a result of the law.⁶⁴ GARA has been declared constitutional.⁶⁵

2. *The Biomaterials Access Assurance Act of 1998*

The Biomaterials Access Assurance Act of 1998⁶⁶ ("Biomaterials Act") was enacted in response to a liability crisis that threatened the availability of implantable medical devices such as pacemakers, heart valves, artificial blood vessels, and hip and knee joints.⁶⁷ Suppliers of the raw materials and component parts used to make such devices had stopped supplying their products to medical device manufacturers because they were finding that the cost of responding to litigation far exceeded potential sales revenues—even though courts were not finding the suppliers liable for alleged defects in the finished devices.⁶⁸ As the House of Representatives Commerce Committee found, "[e]ven though in almost every case the biomaterials suppliers have been ultimately able to establish their lack of culpability, the legal fees and employee resources involved in obtaining a judgment or dismissal

60. *Id.* at 42.

61. *Id.*

62. *See id.*

63. *See* Schwartz & Lorber, *supra* note 46, at 1283–84.

64. *See id.* at 1282.

65. *See id.* at 1326–40 (discussing cases upholding GARA under various constitutional challenges).

66. Pub. L. No. 105-230, 112 Stat. 1519 (1998).

67. *See* H.R. REP. NO. 105-549, pt. 2, at 9 (1998).

68. *See id.*; *see also* Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 623 (1997).

usually outweigh any profits to be gained.”⁶⁹ The Biomaterials Act allows suppliers of the raw materials and component parts used to make implantable medical devices to obtain dismissal, without extensive discovery or other legal costs, in certain tort suits in which plaintiffs allege harm from a finished medical implant.

In the case of the Biomaterials Act, the problem facing the biomaterials industry and consumers was clear, as was the need for congressional legislation. The shortage of raw materials threatened to lead to shortages of lifesaving and life-enhancing medical devices. For example, a 1997 study by Aronoff Associates revealed that at least seventy-five percent of the suppliers of biomaterials used to make medical implants had banned sales to U.S. implant manufacturers.⁷⁰ Congress also heard from consumers like nine-year old Tara Ranson of Phoenix, Arizona.⁷¹ Tara had a shunt (a small plastic tube) implanted in her head to relieve a severe condition called hydrocephalus—sometimes called “water on the brain.”⁷² Without the Biomaterials Act, Tara may not have had access to this lifesaving device.⁷³ Phyllis Greenberger, Executive Director for the Society for the Advancement of Women’s Health Research, told Congress that passage of the legislation was especially important to women “because they live longer than men, and as a result, suffer more from chronic disease, increasing their chances of needing a medical device, such as hip or joint replacements.”⁷⁴

The biomaterials supply crisis constituted an adverse issue inextricably linked with interstate commerce. Tort reform at the state level was unlikely to solve the problem because biomaterials suppliers were subject to litigation in any state.⁷⁵ As was true in the case of GARA, ATLA, Ralph Nader’s Public Citizen, and other consumer groups fervently opposed the Act.⁷⁶

3. *The Paul D. Coverdell Teacher Protection Act of 2001*

In the year 2000, not many people realized how severely teachers

69. H.R. REP. NO. 105-549, pt. 2, at 11.

70. See S. REP. NO. 105-32, at 58 (1997).

71. See *id.* at 58–59.

72. *Id.* at 59.

73. See *id.*

74. *Id.*

75. See H.R. REP. NO. 105-549, pt. 2, at 11 (1998).

76. See Deirdre Shesgreen & Sam Loewenberg, *Can Tree-Cutters Be Tree-Huggers?*, LEGAL TIMES, Aug. 3, 1998, at 4 (discussing Public Citizen’s opposition to the Biomaterials Access Assurance Act).

and principals of elementary and high schools had been adversely affected by the liability system. Nevertheless, a survey conducted by the American Tort Reform Association ("ATRA") indicated that elementary and high school principals were spending a substantial amount of time away from school responding to junk lawsuits.⁷⁷ The lawsuits were undermining their efforts to improve the education of their students. ATRA's survey also showed that principals and teachers were hamstrung in exercising reasonable discipline in the classroom because of excessive litigation. The survey found that twenty percent of principals who responded reported spending from five to ten hours per week in meetings and documenting events to avoid litigation.⁷⁸ Six percent of respondents spent ten to twenty hours per week on those tasks.⁷⁹ Fifty-seven percent of respondents reported that lawsuits affected school-related programs for students or teachers.⁸⁰

ATRA's survey demonstrated that excessive litigation against educators was a costly, nationwide problem. Federal dollars targeted toward education were being diverted to deal with tort lawsuits. It was in the interests of the public to allow principals and teachers to focus on running their schools, educating their students, and to act to assure that reasonable discipline would not lead to frivolous litigation. It was clear to Congress that excessive litigation involving our nation's teachers was a real problem and needed federal action.

The Paul D. Coverdell Teacher Protection Act of 2001 (named after the late Democratic Senator from Georgia who had introduced the Act in a prior Congress) was included in the "No Child Left Behind" education bill signed by President George W. Bush on January 8, 2002.⁸¹ The Teacher Protection Act amendment to the broader education reform bill had passed the House of Representatives by a wide margin and received ninety-eight votes in the Senate. The Act states that if teachers and principals follow school rules they will not be subject to liability.⁸² It also states that tough standards should be applied before punitive damages are allowed, and that teachers and principals should be liable only for their "fair share"

77. See Press Release, Am. Tort Reform Ass'n, School Principal Survey Reveals Fear of Liability Limits Educational Opportunities for America's Children (Sept. 1, 1999), available at <http://www.atra.org>.

78. *Id.*

79. *Id.*

80. *Id.*

81. Pub. L. No. 107-110, § 2361, 115 Stat. 1425, 1667.

82. *Id.* § 2366, 115 Stat. at 1668-69.

of fault for a harm and not for injuries caused by others.⁸³

4. *Laws Relating to the Events of September 11th and Future Acts of Terrorism*

a. The Airline Transportation Safety and System Stabilization Act of 2001

Shortly after the terrorist attacks on America on September 11, 2001, Congress enacted the Airline Transportation Safety and System Stabilization Act of 2001⁸⁴ to establish an administrative fund to provide a quick, no-fault recovery to persons injured or killed in the attacks.⁸⁵ The Act also provided airline carriers whose planes were involved in the attacks with civil liability protections from September 11th terrorism-related lawsuits. These protections included:

- (1) Limiting the liability for all claims arising from the September 11th attacks to the limits of the carriers' liability insurance coverage;
- (2) Creating an exclusive federal cause of action for damages arising out of the September 11th-related hijackings and air crashes, based on the substantive law of the state where the crashes occurred; and
- (3) Vesting exclusive jurisdiction for all September 11th terrorism-related claims in the United States District Court for the Southern District of New York.⁸⁶

b. The Aviation and Transportation Security Act of 2001

Next, Congress passed the Aviation and Transportation Security Act of 2001⁸⁷ to limit the liability of other potential parties to September 11th terrorism-related lawsuits, including aircraft manufacturers, airport sponsors, persons with a property interest in the World Trade Center, and the City of New York. These liability protections are not available to any person who was a knowing participant in any conspiracy to hijack an aircraft or commit a terrorist act.

83. *Id.* § 2366(c), 115 Stat. at 1669-70.

84. Pub. L. No. 107-42, 115 Stat. 230 (codified at 49 U.S.C. 40101).

85. *Id.* § 403, 115 Stat. at 237.

86. *Id.* § 408, 115 Stat. at 240-41.

87. Pub. L. No. 107-71, 115 Stat. 597.

c. The Homeland Security Act of 2002

The Homeland Security Act of 2002⁸⁸ extended to air security companies the same civil liability protections from terrorism-related lawsuits that were extended to the airline industry and others in the Air Transportation Safety and System Stabilization Act and the Aviation Transportation and Security Act. The Homeland Security Act also provided manufacturers, distributors, and other suppliers of certain anti-terrorism products with civil liability protections, including exclusive federal jurisdiction over personal injury and property damage claims against product sellers arising out of an act of terrorism, limits on liability and punitive damages, "fair share" apportionment of non-economic damages, and a rebuttable presumption that the government contractor defense applies to any claims against a covered defendant.⁸⁹ The liability provisions apply whether a public or private entity purchased the products.

There are a number of preliminary requirements that must be met before these liability protections are available. The Secretary of the Department of Homeland Security must certify products as "qualified anti-terrorism technologies" before a product supplier is eligible for the civil liability protections.⁹⁰ The product suppliers also must maintain a certain amount of insurance.⁹¹ Moreover, the products must have been used against an act of terrorism, and the act of terrorism must have been designated as such by the Secretary.⁹² The bill would not limit the liability of people who knowingly help terrorists or conspire to commit acts of terrorism.⁹³

d. Terrorism Risk Insurance Act of 2002

To stabilize insurance markets after the September 11th events, Congress required insurance companies to make available coverage for insured losses in all property and casualty programs, despite any pre-existing exclusion for claims arising out of an act of terrorism, and to offer insurance for insured losses that are similar to coverage applicable to losses from other events.⁹⁴ In turn, Congress provided that the Federal Government would, in effect, act as an excess insurer

88. Pub. L. No. 107-296, § 1, 116 Stat. 2135.

89. *Id.* §§ 862-63, 1201-02, 1204, 116 Stat. at 2238-40, 2286-87.

90. *Id.* § 863(d)(2), 116 Stat. at 2240.

91. *Id.* § 864(a), 116 Stat. at 2241.

92. *Id.* §§ 864(c), 865(2), 116 Stat. at 2241-42.

93. *Id.* § 863(e), 116 Stat. at 2240.

94. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 101, 116 Stat. 2322, 2323.

and reimburse insurance companies up to ninety percent of their losses above insurer deductibles.⁹⁵ Congress also capped at \$100 billion the annual aggregate insured losses for which the Federal Government or an insurer which had met its limits would be liable.⁹⁶ The program is to last for three years.⁹⁷

In addition, the Terrorism Risk Insurance Act provided that causes of action for personal injury, property damage, or death arising out of an act of terrorism are to be brought exclusively in federal court.⁹⁸ The substantive law for the cause of action is to be derived from the law of the state where the act of terrorism occurred.⁹⁹ This provision does not apply to any person who knowingly participates in, conspires to commit, aids and abets, or commits an act of terrorism.¹⁰⁰

5. *Other Recent Federal Civil Justice Reform Laws*

In addition to the laws discussed above, a number of other recent laws demonstrate Congress's active involvement in setting federal liability rules to address national liability problems:¹⁰¹

- (1) The Year 2000 Readiness and Responsibility Act¹⁰² ("Y2K Act") addressed liability issues that were undermining urgent efforts to avoid the potential of computers breaking down upon the arrival of the Year 2000.
- (2) The Year 2000 Information and Readiness Disclosure Act¹⁰³ generally banned the use of "Year 2000 readiness disclosure" statements by plaintiffs as evidence in court to prove the truth or accuracy of a company's assertions about dealing with the Year

95. *See id.* § 103, 116 Stat. at 2327-32 (outlining reimbursement program).

96. *Id.* § 103(e)(2)(A), 116 Stat. at 2328-29.

97. *Id.* § 108(a), 116 Stat. at 2336.

98. *Id.* § 107(a)(4), 116 Stat. at 2335.

99. *Id.* § 107(a)(3), 116 Stat. at 2335.

100. *Id.* § 107(b), 116 Stat. at 2335.

101. A product liability reform bill cleared the 104th Congress, but was vetoed by President William Jefferson Clinton on May 2, 1996. That legislation capped punitive damage awards at the greater of two times the plaintiff's compensatory damages award or \$250,000; abolished joint liability for non-economic damages; limited the liability of product sellers to their own negligence or failure to comply with an express warranty; established a complete defense to liability if the principal cause of an accident was the claimant's abuse of alcohol or illicit drugs; reduced a defendant's liability to the extent the plaintiff's harm was due to the misuse or alteration of a product; and set a fifteen-year time limit (statute of repose) on litigation involving workplace durable goods (e.g., machine tools). *See* H.R. REP. NO. 104-481 (1996); John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST, May 3, 1996, at A14, available at 1996 WL 3077518.

102. Pub. L. No. 106-37, 106 Stat. 185 (1999).

103. Pub. L. No. 105-271, 112 Stat. 2386 (1998).

2000 computer problem. The law also protected companies from liability for Year 2000 statements they made that were alleged to be false, inaccurate, or misleading, unless it was proven that the company knew the statement was false, inaccurate, or misleading and made it with an intent to deceive or mislead.

- (3) The Aviation Medical Assistance Act of 1998¹⁰⁴ established liability limitations to encourage air carriers and qualified passengers to provide in-flight assistance during medical emergencies.
- (4) The Securities Litigation Uniform Standards Act of 1998¹⁰⁵ made federal courts the sole venue for most securities class action lawsuits involving fifty or more parties. The law was enacted to close a loophole in the Private Securities Litigation Reform Act of 1995. That law raised the standard for filing such suits in federal courts, but was undermined when plaintiffs' lawyers shifted their filings to state courts.
- (5) The Amtrak Reform and Accountability Act of 1997¹⁰⁶ created a federal standard for punitive damages awards in tort cases brought against Amtrak by its passengers and capped Amtrak's tort liability at \$200 million per rail accident.
- (6) The Volunteer Protection Act of 1997¹⁰⁷ provided limited immunity for volunteers acting on behalf of a nonprofit organization. It created a national standard of punitive damages liability for volunteers, and abolished joint liability for non-economic damages in tort actions involving volunteers. Studies had indicated that before the law's passage, individuals often were reluctant to participate in community service activities due to fear of legal liability.
- (7) The Bill Emerson Good Samaritan Food Donation Act of 1996¹⁰⁸ provided limited tort immunity to encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals. Despite the fact that millions of Americans go hungry, organizations had been reluctant to donate food due to liability concerns. Congress enacted the Food Donation Act to allow retailers, farmers, restaurants, and nonprofit feeding programs to donate safe food and grocery products to food banks and soup kitchens.

104. Pub. L. No. 105-170, 112 Stat. 47.

105. Pub. L. No. 105-353, 112 Stat. 3227.

106. Pub. L. No. 105-134, 111 Stat. 2570.

107. Pub. L. No. 105-19, 111 Stat. 218.

108. Pub. L. No. 104-210, 110 Stat. 3011.

- (8) The Aviation Disaster Family Assistance Act of 1996¹⁰⁹ limited unsolicited contacts by lawyers and insurance company representatives with airline crash victims or their families so that the families can act when they are no longer under extreme duress and, therefore, more capable of making fully informed decisions.
- (9) The Private Securities Litigation Reform Act of 1995¹¹⁰ placed limits on private lawsuits brought under the Securities Act of 1933 and the Securities Exchange Act of 1934. Investors' securities-fraud lawsuits against public companies and accounting firms were deterring companies from voluntarily disclosing information to their investors or shareholders. Additionally, these suits were resulting in loss of productivity and jobs. The legislation was vetoed by President Clinton and passed on a veto override.
- (10) The Federally Supported Health Centers Assistance Act of 1995¹¹¹ extended Federal Tort Claims Act coverage to community, migrant, and homeless health centers.
- (11) The Bankruptcy Reform Act of 1994¹¹² responded to the asbestos litigation crisis by enabling a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability.¹¹³
- (12) The Federal Credit Union Act of 1989 limited damage awards stemming from the liquidation of federal credit unions to "actual direct compensatory damages" (i.e., the Act does not permit recovery of punitive or exemplary damages, damages for lost profits or opportunity, or damages for pain and suffering in such cases.)¹¹⁴

II. APPLYING FEDERAL ACTION CRITERIA TO THE NATIONWIDE ASBESTOS PROBLEM

A. A Serious Problem

Lawsuit abuse and litigation problems affect almost every aspect of American life. There are a number of liability and litigation-related issues that have recently made headlines: media stories have focused a

109. Pub. L. No. 104-264, 110 Stat. 3213 (codified in pertinent part at 49 U.S.C. § 1136(g)(2) (1996)).

110. Pub. L. No. 104-67, 109 Stat. 737.

111. Pub. L. No. 104-73, 109 Stat. 777.

112. Pub. L. No. 103-394, § 1, 108 Stat. 4106.

113. 111 U.S.C. § 524(g), (h) (2000).

114. 12 U.S.C. § 1787(c)(3)(A)-(B).

new type of lawsuit brought against fast food chains, where individuals who have gained substantial weight blame McDonald's and other purveyors of fast food for their health problems.¹¹⁵ Almost everyone who drives an automobile in the United States has seen an increase in his or her insurance premiums in recent years.¹¹⁶ The medical liability problem has captured headlines because in some areas people cannot access affordable health care.¹¹⁷ This problem has reached a point where it has garnered attention from President Bush and the United States Congress.

Does asbestos raise itself above other general liability issues that face those who provide services and products to the American public? Apart from the crisis confronting the medical profession, which is severe—we believe that it does. This is why.

1. *The Scope of the Problem*

For over a decade, courts and commentators have recognized the extraordinary problems created by the “elephantine mass”¹¹⁸ of asbestos cases in this country.¹¹⁹ In 1997, the Supreme Court of the United States described the litigation as a “crisis.”¹²⁰ Recently, the litigation has taken on even greater proportions.¹²¹ Former United

115. See, e.g., Steve Chapman, *A Fast Track for Fast Food Lawsuits?*, CHI. TRIB., Feb. 13, 2003, at 23, available at 2003 WL 13236648; James V. Grimaldi, *Legal Kibitzers See Little Merit in Lawsuit Over Fatty Food at McDonald's*, WASH. POST, Jan. 27, 2003, at E10, available at 2003 WL 10893263; *CBS Evening News with Dan Rather: Lawsuit Hold Fast-Food Industry Liable for Obesity* (CBS television broadcast, Aug. 8, 2002), available at 2002 WL 6517249.

116. See Terrie Morgan-Besecker, *Auto, Home Insurance Rates Soar Nationwide*, TIMES LEADER, July 24, 2002, available at 2002 WL 24838979.

117. See, e.g., Gary J. Andres & Michael McKenna, *Malpractice Remedies; Voters Know System Ails from Litigation Costs*, WASH. TIMES, Mar. 3, 2003, at A19, available at 2003 WL 7706780; Ronald T. Burkman, *Good Doctors Are Leaving*, BOSTON GLOBE, Apr. 6, 2003, at C12, available at 2003 WL 3389301; Bruce Jaspen, *Doctors Curtail Practices to Fight Insurance Costs*, CHI. TRIB., Feb. 16, 2003, at 1, available at 2003 WL 13237884; Sarah Skidmore, *Group of Cardiac Surgeons Decides to Suspend Its Practice: Non-emergency Care Will Stop Indefinitely*, FLA. TIMES UNION, Apr. 16, 2003, at A1, available at 2003 WL 8375930. See also U.S. DEP'T HEALTH & HUMAN SERVS., ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE 3 (2003).

118. *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).

119. See, e.g., Judicial Conference Ad Hoc Committee on Asbestos Litigation, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5, 6-4 MEALEY'S LITIG. REPORT: ASBESTOS (Mar. 15, 1991) [hereinafter *Judicial Conference Rep.*].

120. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

121. See, e.g., Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 91, 95,

States Attorney General Griffin Bell has said that "the crisis is worsening at a much more rapid pace than even the most pessimistic projections."¹²²

The number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000 during the 1990s.¹²³ Ninety thousand new cases were filed in 2001 alone.¹²⁴ Most of these claimants are not sick and may never develop an asbestos-related disease.¹²⁵ The RAND Institute for Civil Justice ("RAND") predicts that there will be between one million and three million asbestos claims filed before the litigation is over.¹²⁶ This number of pending and future claims dwarfs any liability exposure for any service or any industry in America.

Moreover, the asbestos problem affects a broad spectrum of American businesses.¹²⁷ In the early 1980s, approximately 300 defendants had been named in asbestos actions.¹²⁸ Today, over 8,400 defendants have been named.¹²⁹ Many of these defendants never made or sold a product containing asbestos.¹³⁰ Personal injury lawyers

available at 2002 WL 2214449; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1, available at 2001 WL 28937452; Eric Roston, *The Asbestos Pit; An Old Issue is Back, and the Lawsuits are Killing Shares*, TIME, Mar. 11, 2002, at Y9, available at 2002 WL 8385920; Amity Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, FIN. TIMES, May 14, 2002, at 15, available at 2002 WL 20299748; Susan Warren, *Swamped Courts Practice Plaintiff Triage*, WALL ST. J., Jan. 27, 2003, at B1, available at 2003 WL-WSJ 3957498.

122. Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, BRIEFLY, Vol. 6, No. 6, June 2002, at 7 (Nat'l Legal Center for the Pub. Interest), available at <http://www.nlcpi.org> (last visited Sept. 21, 2003).

123. See *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 4 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Edley Testimony].

124. Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1, abstract available at 2002 WL 18538000.

125. See JENNIFER BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3, 6 (Dec. 2001), available at <http://www.actuary.org/mono.htm> (last visited Sept. 21, 2003) [hereinafter BIGGS]; Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report 20* (RAND Inst. for Civil Justice, Sept. 2002, at vii, 19) [hereinafter RAND]. See also James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 815-22 (2002) (discussing negative impact of anticipatory claims on behalf of asymptomatic plaintiffs).

126. See RAND, *supra* note 125, at 77.

127. See Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, available at 2002 WL-WSJ 3383766.

128. See RAND, *supra* note 125, at 6.

129. See *The Fairness in Asbestos Injury Resolution Act of 2003: Hearing on S. 1125 Before the S. Comm. on the Judiciary*, 107th Cong. 3 (2003) (statement of Laurence H. Tribe, Professor, Harvard Law School) [hereinafter Tribe testimony].

130. See Susan Warren, *Asbestos Quagmire; Plaintiffs Target Companies Whose*

have continually evolved new theories to try to pin at least some responsibility on companies that in some way may have had some passing connection to asbestos, including having asbestos on their premises.¹³¹ As a result, lawsuits are now piling up against companies with only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners.¹³² Virtually all those who have studied this problem believe that the expanding ring of asbestos defendants will continue to grow. Will the list of defendants expand to 10,000 or even 20,000 in the next several years? No one knows—the only thing certain is the trend toward expansion.

As more and more companies—both large and small businesses—are affected by the asbestos litigation crisis, this adversely impacts an already weakened economy.¹³³ Already, at least seventy-eight companies have filed for bankruptcy with adverse consequences for employees, shareholders, pensioners and retirees with investments in those companies.¹³⁴ Almost one-half of these bankruptcies occurred within the past two years.¹³⁵ While some of the companies in bankruptcy have quietly and steadfastly moved out of that situation and back into profitability, most have done so with severe costs, layoffs and adverse economic consequences.

For example, a study released in December 2002 by Columbia Professor and Nobel-prize winning economist Joseph Stiglitz and two colleagues estimated that approximately 60,000 Americans (many of

Premises Contained Any Form of Deadly Material, WALL ST. J., Jan. 27, 2003, at B1, available at 2003 WL-WSJ 3957497.

131. See *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 300 (E.D.N.Y. 2002) (stating that, “Particularly noticeable is the involvement of more peripheral players—plaintiffs who are asymptomatic, those less seriously injured, and defendants who were not major manufacturers or distributors of asbestos.”; Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, available at 2001 WL-WSJ 2859560 (“[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”).

132. See Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, available at 2001 WL-WSJ 2856111.

133. See RAND, *supra* note 125, at 50 (noting that asbestos litigation “has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy.”); *id.* at 82 (asbestos litigation “imposes substantial indirect costs on the economy.”). See also *The State of the Economy Before the Sen. Comm. on the Budget*, 107th Cong. 2 (Jan. 29, 2003) (statement of Michael Baroody, Executive Vice President of the National Association of Manufacturers) (noting asbestos litigation as factor hurting the economy).

134. See Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at A10, available at 2003 WL-WSJ 3982978.

135. See Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, 18-3 MEALEY’S LITIG. REPORT: ASBESTOS 21 (March 7, 2003), at 35.

them union workers) lost jobs between 1997 and 2000 as a result of asbestos-related bankruptcies.¹³⁶ While some laid-off employees recovered jobs in new places, lost wages have been estimated as high as \$2 billion.¹³⁷ Losses of employee 401(k) pension plans in bankrupted companies have averaged \$8,307 per worker.¹³⁸ A study by the Economic Consulting division of the National Economic Research Associates (“NERA”) estimates there will be as much as \$2 billion in additional costs due to the indirect impacts of company closings.¹³⁹ Estimates of the total future cost of the litigation range from \$200 to \$275 billion.¹⁴⁰ To put these sums into perspective, Judge Griffin Bell has explained that they exceed current estimates of the cost of “all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks.”¹⁴¹

Perhaps most disturbing, lawyers who represent asbestos cancer victims have said that current trends in the litigation threaten payments to the truly sick.¹⁴² For example, Oakland, California asbestos cancer victims’ attorney Steven Kazan has expressed concern that recoveries by the unimpaired may so deplete available resources that his clients will be left without compensation.¹⁴³ Dallas, Texas lawyer Peter Kraus, who represents asbestos cancer victims, has said

136. See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, at 9 (Sebago Assoc., Dec. 2002), available at <http://www.asbestossolution.org>.

137. See *id.* at 10.

138. See *id.* at 12.

139. See JESSE DAVID, U.S. CHAMBER OF COMMERCE, *THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES* (NERA Econ. Consulting, Jan. 23, 2003); see also *The Fairness in Asbestos Injury Resolution Act of 2003: Hearing on S. 1125 Before the S. Comm. on the Judiciary*, 107th Cong. (2003) (statement of Dr. Frederick C. Dunbar, Senior Vice President, NERA) (stating that when multiplier effects are scaled to a nationwide impact, the result is estimated between \$0.6 and \$2.1 billion in costs to adversely affected communities).

140. See RAND, *supra* note 125, at vii; BIGGS, *supra* note 125, at 4.

141. Bell, *supra* note 122, at 4.

142. See, e.g., Trisha L. Howard, *Plaintiffs’ Lawyers Seek Limits on Asbestos Suits by People with Nonmalignant Illnesses*, ST. LOUIS POST-DISPATCH, Dec. 11, 2001, at C4 available at 2001 WL 4499314 (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken “to preserve the integrity of these companies and their assets for people who are truly sick.”).

143. See *The Asbestos Litigation Crisis Continues – It is Time for Congress to Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2003) (statement of Steven Kazan, Partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise) [hereinafter Kazan Testimony]; see also Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36 (citing Mr. Kazan’s statement that weak asbestos cases result in recoveries that could have gone to legitimate mesothelioma victims).

that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."¹⁴⁴ Another plaintiffs' lawyer who represents sick and dying plaintiffs, Matthew Bergman of Seattle, Washington, has written: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. As a result of these bankruptcies, the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."¹⁴⁵ Randy Bono, a prominent Madison County, Illinois, asbestos plaintiffs' attorney has said, "I welcome change. Getting people who aren't sick out of the system, that's a good idea."¹⁴⁶

These facts reveal that the current asbestos litigation system is not working for anyone: neither the truly sick victims nor the defendants, the judicial system, or the unemployed workers or retirees whose retirement savings have fallen precipitously as a result of the avalanche of claims against their former employers.

2. *The Asbestos Crisis Is Unlikely to Abate If the Status Quo Is Maintained*

Some persons who were wrongfully exposed to asbestos have developed very severe injuries. The most severe injury is a cancer known as mesothelioma, which almost always is an incurable and painfully devastating illness. Others exposed to asbestos suffer from other types of lung cancer. More have asbestosis, a health impediment that may compromise their daily routines.

144. Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, available at 2002 WL-WSJ 3392934; see also Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683 ("According to a letter Manville trustees sent to Judge Weinstein on Dec. 5 [2001], a 'disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.'").

145. Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, available at 2002 WL 5934774.

146. Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties; Bill Would Substitute Trust Fund for Lawsuits*, ST. LOUIS POST-DISPATCH, July 23, 2003, at A1, available at 2003 WL 3596458. In addition, Mississippi lawyer Richard Scruggs has said, "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy." "Medical Monitoring and Asbestos Litigation"—A Discussion with Richard Scruggs and Victor Schwartz, Vol. 17, No. 3, MEALEY'S LITIG. REP.: ASBESTOS 39 (Mar. 1, 2002).

On the other hand, a substantial majority of current asbestos claimants suffer little or no physical impairment. Some estimates put the number of claims filed by unimpaired or only mildly impaired claimants as high as ninety percent.¹⁴⁷ If the current system remains unchecked, assets needed for severely injured victims could be exhausted by claims brought by those who are not ill.¹⁴⁸ In 2003, the United States Supreme Court recognized the need to distinguish between those who have been exposed to asbestos and have become injured and those who have been exposed and are now asymptomatic.¹⁴⁹

Congressional hearings about asbestos litigation reform have been filled with many disputes but, generally, there is a consensus, including among knowledgeable leaders of the personal injury bar, that asbestos litigation is a major liability problem—perhaps the major liability problem—in the United States today.¹⁵⁰

B. The Need for Federal Action

A number of judges have struggled to develop thoughtful approaches to the asbestos crisis.¹⁵¹ For example, some judges have acted to preserve assets for the truly sick by barring multiple punitive damages awards in asbestos cases.¹⁵² Other judges have created inactive dockets, also known as deferral registries or pleural registries, so that persons who are not ill can have their claims held in abeyance but not extinguished over time.¹⁵³ Under this approach, a claimant's right to pursue his or her claim is preserved because the statute of limitations is tolled.¹⁵⁴ Cases are not set for trial unless, and until, the

147. See RAND, *supra* note 125, at 20; BIGGS, *supra* note 125, at 3.

148. See RAND, *supra* note 125, at 82 (stating that “the current system . . . may leave little or no funds available to pay future asbestos victims.”).

149. See *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003).

150. See Kazan Testimony, *supra* note 143 (describing asbestos litigation as a “nightmare” and noting that “[a]sbestos is unique, even by mass tort standards.”).

151. See Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 334 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 1 (2001).

152. See Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 146–47 (2001).

153. See Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1, 6–7 (2001).

154. *Id.* at 7.

claimant develops an actual asbestos-related impairment.¹⁵⁵

Inactive dockets have existed for over a decade in several large cities—Boston, Chicago and Baltimore. According to a recent article in HarrisMartin's *Columns: Asbestos*, judges in all three jurisdictions believe that the plans are working well for all parties involved.¹⁵⁶ The benefits of these plans have been widely recognized.¹⁵⁷

For example, Cook County (Chicago) Circuit Judge Dean Trafelet decided to establish an inactive docket after concluding that "[t]he volume of asbestos-related personal injury claims now pending in the Circuit Court of Cook County presents a serious threat of calendar congestion to the Court. A substantial number of cases filed in this Court involve plaintiffs who claim significant asbestos exposure, but who are not now physically ill."¹⁵⁸ Judge Trafelet explained that many defendants "have had their available resources severely strained" and "that their resources can be better expended if focused on those cases that involve claims of actual and current conditions of impairment."¹⁵⁹ Maryland Circuit Court Judge Richard Rombro, who oversees the asbestos litigation in Baltimore, recently stated: "With the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos."¹⁶⁰ New York trial court Judge Helen Freedman observed that as of December, 2002, "the great majority of plaintiffs and decedents" with asbestos-related personal injury or wrongful death claims pending in New York City had "no discernable physical impairment."¹⁶¹ Judge Freedman went on to summarize the public policy problems created by this situation:

The large number of claims brought by or on behalf of the

155. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 (1992).

156. See *Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, HARRISMARTIN'S COLUMNS: ASBESTOS, Feb. 2002, at 2-4.

157. See, e.g., *In re USG Corp.*, 290 B.R. 223, 226 n.3 (Bankr. D. Del. 2003) ("The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in many jurisdictions.").

158. See *In re Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters).

159. *Id.* at 2-3.

160. *In re Pers. Injury and Wrongful Death Asbestos Cases*, Mem. Op. and Order Denying Modification to Inactive Docket Medical Removal Criteria, No. 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002).

161. *In re New York City Asbestos Litig.*, Order Amending Prior Case Mgmt. Orders, at 1 (S. Ct. N.Y. City, N.Y. Dec. 19, 2002).

unimpaired or minimally impaired impedes the ability of the much smaller group of seriously ill plaintiffs and decedents to recover for their injuries. Recoveries by unimpaired or minimally impaired claimants deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are dwindling as the elephantine mass of asbestos cases nationwide drives large numbers of potentially culpable parties into bankruptcy.¹⁶²

Judge Freedman, therefore, amended the existing New York City asbestos case management order to establish a “deferred docket” for claimants with little or no present physical impairment.¹⁶³

At the federal level, orders to prioritize the treatment of asbestos claims have been issued by the Judicial Panel on Multidistrict Litigation, MDL No. 875 (the federal “MDL panel”), managed by Senior United States District Judge Charles Weiner of the Eastern District of Pennsylvania, and by United States District Court Judge Alfred Wolin, who oversees the bankruptcy proceeding in Delaware involving USG Corporation and its major domestic subsidiaries (“USG”).

In January of 2002, Judge Weiner found that “the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.”¹⁶⁴ Accordingly, he has acted to administratively dismiss without prejudice (and toll the applicable statutes of limitations), all asbestos cases initiated through mass screenings.¹⁶⁵

Judge Wolin also has appreciated that allowing claims on behalf of those who are not sick may exhaust the assets of a company in bankruptcy, no matter how careful they were marshaled.¹⁶⁶ In February 2003, he responded to USG’s request to establish procedures to resolve the asbestos personal injury liability in its bankruptcy case by ordering that claimants with legitimate asbestos-related cancer claims shall be processed and compensated in the bankruptcy proceeding before other claimants.¹⁶⁷ Importantly, he recognized that for claims to be allowed, facts must be provided to ensure their reliability. Under his order, claimants are required to

162. *Id.* at 1–2 (internal citations omitted).

163. *See id.* at 2.

164. *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL 875, Admin. Order No. 8, at 1–2 (E.D. Pa. Jan. 14, 2002).

165. *See id.* at 2.

166. *See In re USG Corp.*, 290 B.R. 223, 224 (Bankr. D. Del. 2003).

167. *See id.* at 226–27.

provide the court with "a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist" demonstrating a diagnosis of "a primary cancer" that was "caused by asbestos exposure."¹⁶⁸ Each claimant must also provide additional information regarding his or her claim, including the claimant's occupational exposure to USG products and smoking history.¹⁶⁹

Unfortunately, not all jurisdictions have exhibited the same type of stewardship for the truly sick. The American Tort Reform Association ("ATRA") has classified some of these jurisdictions as "judicial hellholes."¹⁷⁰ For example, in one highly publicized case from October 2001, a Mississippi jury awarded \$150 million to six plaintiffs "who are not now sick from asbestos and may never become so."¹⁷¹ One of the lawyers boasted that most of his clients had never missed a day of work.¹⁷²

Another notorious case occurred in West Virginia in late 2002. In September 2002, a mass trial was held to decide the liability of hundreds of defendants to approximately 8,000 plaintiffs.¹⁷³ As West Virginia Supreme Court of Appeals Justice Elliott Maynard explained:

[T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.¹⁷⁴

The first phase of the West Virginia consolidation called for three trials to determine the alleged "fault" of three different groupings of defendants: premises owners, employers, and manufacturers.¹⁷⁵ The

168. *Id.* at 227.

169. *See id.* at 228.

170. *See* AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003).

171. Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES, Nov. 15, 2001, at 16.

172. The Associated Press, *Jury Awards \$150 Million in Asbestos Case*, ASSOC. PRESS NEWSWIRES Oct. 28, 2001.

173. *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va. 2002).

174. *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring).

175. *State ex rel. Mobil Corp.*, 563 S.E.2d at 422.

“fault” phase was to be followed by the determination of punitive damages issues—before any determination of causation or injury.¹⁷⁶ For any defendant whose conduct would give rise to punitive damages liability, the jury would be asked to set a “punitive damages multiplier”—that is the number by which any subsequent award of compensatory damages would be multiplied to arrive at a punitive damages award.¹⁷⁷ Causation and compensatory damages would be decided only after the fault phase was completed.¹⁷⁸

On its face, the mass trial plan “so depart[ed] from [the] accepted norm as to be presumptively violative of due process.”¹⁷⁹ It is apparent that the plan assumed that the otherwise confusing trial process would be simplified, and that post-trial review would be precluded, by the forced settlement of large numbers of claims. In that regard, the plan worked as the court seemed to intend. Within days after the United States Supreme Court declined to stay the trial or grant certiorari to review the plan, all but one of the original 259 defendants were forced to settle for reportedly huge sums of money.¹⁸⁰

As it turns out, bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains.¹⁸¹ Rather than making cases go away, it invites new ones.¹⁸² As mass tort expert Francis McGovern of Duke University Law School has recognized: “Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.”¹⁸³ Indeed, RAND recently concluded that “it is highly likely that the steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved.”¹⁸⁴ One West

176. *See id.* at 423–28.

177. *See In re Asbestos Litig.*, Civil Action No. 02-C-9004 (Cir. Ct. Kanawha County, W. Va. Aug. 12, 2002) (transcript of hearing before Judges Arthur Recht, Booker Stephens, and Alan Moats).

178. *State ex rel. Mobil Corp.*, 563 S.E.2d at 423.

179. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993).

180. *See Mobil Settles, Leaving Carbide as Lone Asbestos Defendant*, ASSOC. PRESS NEWSWIRE, Oct. 10, 2002.

181. *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 544–45 (2001).

182. *See id.* at 544.

183. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

184. RAND, *supra* note 125, at 26.

Virginia trial judge involved in that state's asbestos litigation ruefully acknowledged this fact. He said: "I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases."¹⁸⁵

Federal legislation is needed to help ensure that state courts that work outside of the mainstream will not continue to undermine the responsible efforts of other courts to improve the current asbestos litigation environment. National policy must prevail over rules that favor in-state plaintiffs to the detriment of claimants and defendants in other states.¹⁸⁶

Federal legislation is also needed because, to date, the Supreme Court of the United States has been unwilling to resolve the litigation, despite recognizing the existence of a crisis. For example, as stated, the Court declined to step in to prevent the West Virginia mass trial. The Court also declined to halt a similar mass trial held about the

185. *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000) (statement of West Virginia Judge A. Andrew MacQueen in hearing before Judge John Hutchinson). See also Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts - View from the Bench*, 15 *TOURO L. REV.* 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

186. The pressure on state courts, particularly elected state judges, to favor in-state plaintiffs at the expense of sound, national public policy was explained in two separate opinions by the West Virginia Supreme Court of Appeals. In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the court stated:

State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the *national* economy and *national* welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum.

Id. at 905. Earlier, in *Blankenship v. General Motors Corp.*, 406 S.E.2d 781 (W. Va. 1991), the court wrote:

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Id. at 786.

same time in Virginia, even though the trial court judge found "that consolidation of all of [1,300] cases would adversely affect the rights of the parties to a fair trial."¹⁸⁷

More recently, in the context of a case arising under the FELA, a 5-4 majority of the Court held that courts should not limit liability rules as a means to address the asbestos liability crisis. Speaking for the majority, Justice Ruth Bader Ginsberg stated that "[c]ourts . . . must resist pleas . . . essentially to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis."¹⁸⁸ Nevertheless, Justice Ginsberg recognized that asbestos litigation was a national crisis and the Court made an unprecedented third call for federal congressional action, stating that "[t]he elephantine mess of asbestos cases lodged in state and federal courts defies customary judicial administration and calls for national legislation."¹⁸⁹

There are compelling reasons to agree with the Court's call for congressional action. While courts can make significant headway in abating the asbestos crisis, individual judges are not in a position to be national policymakers. Courts are not equipped to resolve national liability crises. They cannot hold hearings, cannot assemble testimony from the various interest groups adversely affected by the asbestos litigation crisis, nor can they develop a constituency to provide a national solution.

State legislatures can provide significant assistance to limit the asbestos crisis. For example, if courts (or not all courts) in a particular state have failed to establish an inactive docket, a state legislature can do so. State legislatures also can modify venue rules to cut down on the rampant forum-shopping that has become commonplace in many asbestos cases. Forum shopping can bring about results that insult our judicial system. For example, one county in Mississippi has had twice the number of litigants as its population.¹⁹⁰ While the State of Mississippi has enacted new venue rules,¹⁹¹ most state legislatures have not acted. Fair rule changes can limit the filing of a case to the forum having the most logical connection to the claims.

State legislatures and courts can also act to prevent inappropriate

187. *In re Hopeman Bros., Inc.*, 569 S.E.2d 409, 409 (Va.), *cert. denied*, 537 U.S. 1083, 1083 (2002) (Lemons & Lacy, JJ., dissenting).

188. *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003).

189. *Id.* (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).

190. See Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1, A14.

191. See MISS. CODE ANN. §11-11-3 (2002).

consolidation of cases, such as the recent mass consolidations in West Virginia and Virginia. Such consolidations are inappropriate because they group together people who are really sick with those who are not.¹⁹² This approach may devalue claims of those who are ill and substantially inflate the cost of claims of those who are not ill.¹⁹³ Consolidation should be apples and apples, not apples and oranges. Nevertheless, some courts have been reluctant to hold improper such consolidations of cases or state legislation may not allow them to do so. State legislatures can enact appropriate measures limiting consolidation to appropriate circumstances but, thus far, there have not been a significant number of enactments in this area.

While progress has been, and will continue to be, made by some state courts and legislatures, individual states cannot formulate consistent, clear national policy to address the national asbestos problem. For example, one state cannot mandate that the criteria for a registry in their state be utilized elsewhere. The same issue is true for venue rules, consolidation rules, and other measures that directly affect the outcome of asbestos cases.

In sum, the asbestos litigation crisis is not one that can be handled either by state courts or state legislatures alone. Federal action is required.

C. Federal Action Can Produce Asbestos Legislation in the Public Interest, and Not a Bailout for Wrongdoers

In hearings conducted in 2000 by the United States Senate on the topic of asbestos crisis, the principal focus was on whether there is a problem and whether there is a need for federal intervention. We have followed that format in this article. As we have indicated, we believe these points have been well-established.¹⁹⁴

The United States Supreme Court has now stated three times that asbestos litigation has reached a crisis point requiring congressional action.¹⁹⁵ The Judicial Conference of the United

192. See *In re Asbestos Prods. Liab. Litig.* (No. VI), Civ. A. No. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996) (stating that “[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases.”).

193. See Edley Testimony, *supra* note 123, at 11.

194. See H.R. REP. NO. 106-782, 15-16 (2000); S. REP. NO. 108-118 (2003).

195. See *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (“[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation.”); *id.* at 865 (“[T]he elephantine mass of asbestos cases’ cries out for a legislative solution.”) (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring) (internal citation omitted);

States,¹⁹⁶ federal courts,¹⁹⁷ commentators,¹⁹⁸ and numerous editorial boards¹⁹⁹ have also called on Congress to act.²⁰⁰ Even prominent Texas asbestos plaintiffs' lawyer and former ATLA president Fred Baron has publicly agreed with the need for federal legislation to address the asbestos litigation problem.²⁰¹ The focus of Congress, therefore, will now be placed on solutions. This will not be an easy road to travel, but success is possible.

1. *The Medical Criteria Approach*

To date, Congress has focused on a few approaches to help solve the problem.²⁰² Early in 2003, Senator Don Nickles (R-OK)

Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997) (“The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.”).

196. See Judicial Conference Rep., *supra* note 119, at 3 (concluding that federal legislation is needed to solve the asbestos litigation problem).

197. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. 2002) (“The most appropriate resolution to the asbestos problem may be through federal legislation.”); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) (“There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.”) (quoting *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985); *id.* at 339 (Garza, J., concurring) (“I implore Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved [in the asbestos litigation crisis].”); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) (“Asbestos litigation has burdened the dockets of many state and federal courts, and has particularly challenged the capacity of the federal judicial system.”); *id.* at 634 (“The most direct and encompassing solution would be legislative action.”); *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (“Unquestionably, a national solution is needed.”).

198. See, e.g., Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 386 (1993) (arguing Congress should focus its energy on solving the asbestos crisis, a “tragedy with human, financial, and legal costs” that dwarfs other civil justice problems).

199. See, e.g., *First, Help the Sick*, L.A. TIMES, Feb. 27, 2003, at B16, available at 2003 WL 2388250 (“The continuing flood of asbestos injury lawsuits clogging courts around the country now represents the longest-running legal saga in American history. That unhappy distinction should prod Congress to step in at last.”); *Making Justice Work*, WASH. POST, Nov. 25, 2002, at A14, available at 2002 WL 103571808 (“[N]umerous companies have gone bankrupt, and money that should be used to compensate sick people is going to lawyers for people who are still asymptomatic and may never grow ill. Congress should put a stop to this and make sure that those whom asbestos has harmed are taken care of.”); *‘Elephantine Mass’ Still Growing*, CHI. TRIB., July 22, 2001, at 16, available at 2001 WL 4096170 (“The only way out of this mess is for Congress to act.”).

200. See *In re Joint E. & S. Dist. Asbestos Litig.*, 237 F. Supp. 2d at 335–36.

201. See Marcia Coyle, *Spurred by Orrin Hatch Deadline, Outlook Brightens For Bipartisan Effort on Asbestos Litigation*, MIAMI DAILY BUS. REV., March 19, 2003, Vol. 77, No. 195, at 7, available at WESTLAW 3/19/03 MIAMIDBR 7 (quoting Mr. Baron as saying, “There is a real belief on the part of all parties that something needs to be done.”).

202. In the 106th Congress, the U.S. House of Representatives Committee on the

introduced legislation to manage asbestos litigation utilizing objective medical criteria based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment* and the recommendations of the American Bar Association.²⁰³ Under the Nickles proposal, claimants who are currently deemed "unimpaired" or "asymptomatic" would have their claims preserved.²⁰⁴ Claimants suffering from an asbestos-related impairment would have their cases tried in the ordinary tort system.

The Nickles approach would substantially relieve courts of claims initiated by the non-sick. It would help preserve assets of a dwindling number of corporations who have been involved in asbestos for use by people who are really sick and impaired in their life functioning. The most seriously ill of these claimants have mesothelioma or lung cancer; others may be impaired by asbestosis when it affects normal, everyday functions.

Legislation that separates claims of the sick from the unimpaired has legal precedent. First, as described, several state courts as well as the federal MDL Panel and Judge Wolin in the USG bankruptcy proceeding have established inactive dockets or other docket management plans that basically accomplish the same public policy goals through similar means as the Nickles bill.²⁰⁵

Furthermore, when tort law is pushed to the edge, courts have applied rules of reason and taken steps to place sensible limits on what might otherwise be theoretically viable causes of action.²⁰⁶ Issues

Judiciary favorably reported a bill to establish in the Department of Justice the Office of Asbestos Compensation and authorize the formation of an asbestos compensation fund to provide payments to medically eligible claimants. *See* H.R. REP. NO. 106-782, at 22 (2000) (committee report on H.R. 1283, the Asbestos Compensation Act of 2000). That effort became closely identified with a particular defendant, which is now in bankruptcy. Representative Mark Kirk (R-IL) introduced legislation in 2003 that tried to resuscitate that bill, but his effort did not gain any momentum. *See* Asbestos Compensation Act of 2003, H.R. 1114, at 1-2, 108th Cong. (2003).

203. *See* Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. §§ 1, 3, 4 (2003); *see also* AMERICAN MEDICAL ASSOCIATION, *GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT* 87-115 (5th ed. 2001); *The Asbestos Litigation Crises—It is Time for Congress to Act: Hearing before the Sen. Comm. on the Judiciary*, 107th Cong. (2003) (statement of the Hon. Dennis Archer, President-elect, American Bar Association).

204. *See* Asbestos Claims Criteria and Compensation Act of 2003, S. 413, 108th Cong. § 6.

205. *See supra* notes 151-69, and accompanying text.

206. *See, e.g.,* *Amphitheatres, Inc. v. Portland Meadows*, 198 P.2d 847, 850 (Or. 1948) (finding no tort where the defendant's race track lights reflected on the plaintiff's outdoor movie theater even though the court recognized that "every unauthorized entry upon land of another, although without damage, constitutes actionable trespass."). Specifically, the Oregon court recognized that it was necessary to "[h]armoniz[e] the ancient rule with the

concerning unimpaired or asymptomatic claimants are on the borderline of tort law. Some persons were exposed to asbestos but have endured no pain or objective change in their appearance or well-being. According to some x-rays, they have an asymptomatic, non-malignant indication on their lungs that suggests possible exposure to asbestos at some point; this indication has not been shown, on a probability basis, to lead to more serious injury. Proof of actual injury in these cases involves highly disputed questions of fact.

Fundamental principles of tort law should lead courts to conclude that conduct which results in an unimpairing condition is non-tortuous. The rationale for such a dividing line is that tort law exists to compensate individuals for actual harm—objectively manifested injuries people can see, touch, or feel. Public policy and sound reasoning suggest that, in the context of asbestos litigation, a tort claim should not be allowed unless an individual has a present physical impairment.²⁰⁷ There is learned case law supporting congressional action that encompasses a medical criteria bill.²⁰⁸

The dividing line between asymptomatic and symptomatic plaintiffs has now gained support from the Supreme Court of the United States.²⁰⁹ Thus, while the Court has not tried to solve the

necessities of modern life." *Id.* (emphasis added); *Anderson v. Okla. Temp. Servs., Inc.*, 925 P.2d 574, 577 (Okla. App. 1996) (supervisor's use of profanity, smoking around employee after being asked to stop, and vulgar behavior not enough to state a cause of action for extreme and outrageous conduct); *Jones v. Clinton*, 990 F. Supp. 657, 677 (E.D. Ark. 1998) (sexual proposition accompanied by the unwelcome exposure of an intimate private body part, though offensive, did not give rise to a claim of outrageous conduct).

207. See *Asbestos Games*, WALL ST. J., Apr. 9, 2003, at A12, available at 2003 WL-WSJ 3964325.

208. See, e.g., *Giffear v. Johns-Manville Corp.*, 632 A.2d 880, 886 (Pa. Super. Ct. 1993), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 29-30 (Ariz. App. 1987) (viewing asbestos exposure alone as a "subclinical injury . . . insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.") (quoting *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534, 543 (Me. 1986) (holding that subclinical injury from asbestos exposure is insufficient to state a cause of action); *Owens-Illinois, Inc. v. Armstrong*, 591 A.2d 544, 561 (Md. Ct. App. 1991) (finding that because "the medical evidence was clear and uncontradicted that pleural scarring does not cause a functional impairment or harm," plaintiffs suffered no compensable injury), *aff'd in part and rev'd on other grounds*, 604 A.2d 47 (Md. 1992); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (finding that "[i]n virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring" and thus do not have an injury warranting compensation).

209. See *Norfolk & W. Ry. Co. v. Ayers*, 123 S. Ct. 1210, 1228 (2003) (citing *Henderson & Twerski*, *supra* note 125, at 830, 833-34).

asbestos litigation crisis itself, it has set forth an approach that has been built upon by the Nickles bill. That bill is a viable way to address, at least in part, the national asbestos litigation problem.

2. *Medical Criteria "Plus"*

Some believe that a medical criteria approach, alone, will not do enough to solve the asbestos litigation crisis. They contend that more effort is required. Bills adopting the "medical criteria plus" approach have been introduced in the United States House of Representatives by Representatives Christopher Cannon (R-UT), and Calvin Dooley (D-CA).²¹⁰

a. Venue

Both the Cannon and Dooley bills appreciate that even if sound medical criteria to filter out meritless or unripe claims are well articulated, some courts may try to find creative ways around the criteria to permit thousands of claims to proceed. In order to prevent the federal criteria approach from being manipulated by a few wayward courts, Representatives Cannon and Dooley have included "venue fairness" provisions in their bills.²¹¹ Their bills would limit venue to the state where the claimant lives or was exposed to asbestos to such an extent that the exposure was a substantial contributing factor to the physical impairment on which the plaintiff's asbestos claim is based. Logic and experience support the insertion of a venue provision in a federal medical criteria bill. It might even be appropriate to limit venue to the county where the plaintiff lives or was substantially exposed to prevent intrastate forum-shopping abuse.

b. Consolidation

The Cannon and Dooley bills also contain fair rules to prevent improper consolidations of cases.²¹² The Cannon bill provides that "[a] court may consolidate for trial any number and type of asbestos claims

210. See H.R. 1586, 108th Cong. § 2 (2003); H.R. 1737, 108th Cong. § 2 (2003). In addition to the reforms discussed in this article, the Cannon bill generally would limit non-economic loss recoveries in asbestos cases to the greater of \$250,000 or three times the plaintiff's economic damages. H.R. 1586, at § 6(b). Mesothelioma claimants could receive non-economic loss recoveries up to the greater of \$500,000 or three times the plaintiff's economic damages. *Id.* The bill would also require plaintiffs to provide courts with information regarding collateral source payments received, or that will be received by the plaintiff, based upon the same claim giving rise to the tort action. *Id.* at § 6(d).

211. See H.R. 1586, at § 4(b); H.R. 1737, at § 6.

212. See H.R. 1586, at § 4(a); H.R. 1737, at § 5.

with consent of all the parties. In the absence of such consent, the court may consolidate for trial only asbestos claims relating to the same exposed person and members of his or her household.”²¹³ The Dooley bill provides that “[u]nless all parties otherwise consent, a court may not consolidate for trial (1) asbestos claims relating to more than 20 different exposed persons, and (2) a nonmalignant claim relating to one exposed person with a cancer claim relating to another exposed person.”²¹⁴

c. Product Seller Fairness

In addition, the Cannon bill appreciates that product liability rules in many states encourage “fraudulent joinder”—the naming of local product sellers as defendants in asbestos cases to oust the federal courts of diversity-of-citizenship jurisdiction; this allows plaintiffs’ lawyers to keep their cases before state courts (often before elected judges) perceived to be more friendly to plaintiffs.²¹⁵ Currently, under the law in about thirty states, product sellers, such as wholesalers, distributors, and retailers, are potentially liable for defects that they are neither aware of nor able to discover. They rarely pay the judgment, however, because in over ninety-five percent of the cases where any liability is present, the product’s manufacturer is held responsible for the harm.²¹⁶ Based on this showing, the seller gets contribution or indemnity from the manufacturer, and the manufacturer ultimately pays the damages.²¹⁷ This approach generates substantial, unnecessary legal costs, which are passed on to consumers in the form of a “tort tax.” It also permits unfair “gaming” of the civil justice system.

The Cannon bill would address “the unfairness and illogic of imposing ‘strict’ liability upon retailers and wholesalers [in asbestos cases] who neither participate in the design process for products they

213. H.R. 1586, at § 4(a).

214. H.R. 1737, at § 5.

215. See Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341, 368 (2002) (finding that awards in states with partisan elections are higher relative to other states, particularly against out-of-state businesses, and concluding that “the primary reason” for this phenomenon “is not differences in law across the states, but rather that partisan elected judges decide cases differently than judges selected in other ways.”); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (“We have strong evidence that in cases with out-of-state defendants awards are much higher in partisan elected states than in other types of judicial systems.”).

216. S. REP. NO. 105-32, at 33 (1997).

217. *Id.*

sell, nor create warnings or instructions for a product."²¹⁸ The bill would subject product sellers to liability only if they are directly at fault for a harm (e.g., misassembled the product or failed to convey appropriate warnings to customers). There is strong support for product seller fair treatment legislation. Over twenty states have enacted such laws.²¹⁹ Some of these laws have existed for almost two decades, and none have been repealed. A federal law would work well too.

d. Punitive Damages

The Cannon bill also seeks to preserve resources for the truly sick by ending punitive damages in asbestos cases. Punitive damages are not standard civil damages; they are awarded "over and above compensatory damages,"²²⁰ and provide a "windfall recovery" to plaintiffs.²²¹ Punitive damages play an important role in speeding corporate defendants down the path to bankruptcy, threatening the availability of funds needed to compensate sick plaintiffs now and in the future.²²² There is strong support for their view that punitive damages have performed their function in asbestos cases.²²³ At this

218. M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L. REV. 555, 570 (1996).

219. See COLO. REV. STAT. § 13-21-402 (1997); DEL. CODE ANN. tit. 18 § 7001 (1999); GA. CODE ANN. § 51-1-11.1 (2000); IDAHO CODE § 6-1407 (Michie 1998); 735 ILL. COMP. STAT. ANN. 5/2-621 (West 1992); IOWA CODE ANN. § 613.18 (West 1999); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie 1992); LA. REV. STAT. ANN. § 9:2800.53 (West 1997); MD. CODE ANN., CTS. & JUD. PROC. § 5-405 (2002); MICH. COMP. LAWS ANN. § 600.2947(6) (West 2000); MINN. STAT. ANN. § 544.41 (West 2000); MO. ANN. STAT. § 537.762 (West 2000); NEB. REV. STAT. ANN. § 25-21,181 (Michie 1995); N.J. STAT. ANN. § 2A:58C-9 (West 2000); N.C. GEN. STAT. § 99B-2 (2002); N.D. CENT. CODE § 28-01.3-04 (1991); OHIO REV. CODE ANN. § 2307.78 (Anderson 2001); S.D. CODIFIED LAWS § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106 (2000); WASH. REV. CODE ANN. § 7.72.040 (West 1992).

220. *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000). See also Victor E. Schwartz, Mark A. Behrens, & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1004 (1999).

221. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981).

222. See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims . . ."); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs."); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. App. Ct. 1982) (Sullivan, J., concurring) ("[I]t cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.").

223. See *Collins*, 233 F.3d at 812 ("The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos

point, more deterrence is overkill.²²⁴ The companies that made asbestos-containing products are almost all bankrupt. The persons who made decisions regarding asbestos and the failure to properly inform workers about its dangers are no longer operating companies. It is clear that punitive damages have run their course in the asbestos litigation context.

Unfortunately, most judges have not yet appreciated that the time to impose punitive damages in asbestos cases has come to an end.²²⁵ The potential for punitive damages in many jurisdictions has unreasonably raised the settlement value of claims.²²⁶ The threat of punitive damages and the imposition of punitive damages can create further bankruptcies, leaving fewer and fewer entities to respond to an increasing number of claims. Federal legislation would provide a national consensus that existing funds for claims should be focused on compensating victims, not overpunishment. This is a sensible approach, not only from the perspective of victims, but it also provides fairness to defendants.

e. Joint Liability

The Cannon Bill also includes a joint liability reform provision to slow the spread of asbestos litigation to peripheral, attenuated defendants. The legislation would abolish joint liability with respect to any defendant determined to be less than fifty percent responsible for the plaintiff's harm.²²⁷

defendants disclose that the process is accelerating. *It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls.*") (emphasis added); Judicial Conference Rep., *supra* note 119, at 32.

224. See Behrens & Parsons, *supra* note 152, at 152.

225. See *Collins*, 233 F.3d at 812 ("It is discouraging that . . . some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.").

226. See *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting) ("[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.").

227. See FLA. STAT. ANN. § 768.81 (West 2002) (permitting various levels of recovery under joint liability depending on defendant's level of fault); IOWA CODE ANN. § 668.4 (West 2001) (abolishing joint liability for economic damages for defendants less than 50% at fault); Minn. S.F. 872 (signed by Gov. on May 19, 2003) (amending MINN. STAT. ANN. § 604.02 Subd. 1) (joint liability for defendants 50% or less at fault); N.J. STAT. ANN. § 2A:15-5.3 (West 2002) (abolishing joint liability for defendants less than 60% at fault); N.H. REV. STAT. ANN. § 507:7-e (2001) (abolishing joint liability for defendants less than 50% at fault); OHIO REV. CODE ANN. § 2307.22 (West 2001) (effective Apr. 9, 2003) (joint

For many years, Committees in both the House and Senate have received numerous testimonies about the extreme and unwanted consequences of joint liability. The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages.²²⁸ The need to reform the doctrine of joint liability was a driving force behind the Biomaterials Access Assurance Act of 1998, discussed earlier.

Recognizing the need for reform, approximately thirty-five states have abolished or modified the principle of joint liability.²²⁹ They have done so, however, in a great variety of ways and, thereby, have contributed to the already serious problem of inconsistency among our nation's tort laws. That is why federal legislation is needed.

Past federal bills have proposed holding defendants liable only for their "fair share" of responsibility for a claimant's non-economic damages (e.g., damages for pain and suffering or emotional distress).²³⁰ States could permit the rule of joint liability to apply to economic damages (e.g., medical expenses and lost wages and the cost of substitute domestic services in the case of injury to a homemaker), so that claimants could recover full compensation for those losses. This fair approach provides a good model for future legislation.

The approach finds direct support in a California law that was adopted by voter referendum in 1986.²³¹ The "California rule" has been adopted in other states, because of its basic fairness and ease of application.²³² The approach also finds direct support at the federal

liability abolished for economic damages for defendants less than 50% at fault); S.D. CODIFIED LAWS § 15-8-15.1 (Michie 2001) (limiting joint liability to two times the percentage of fault of any defendant found to be less than 50% at fault); Tex. H.B. 4, 78th Leg, R.S. (2003) (amending TEX. CIV. PRAC. & REM. CODE ANN. § 33.013) (Vernon 2002) (abolishing joint liability except for defendants found to be more than 50% at fault); WASH. REV. CODE. ANN. § 4.22.070(1)(b) (West 2002); WIS. STAT. ANN. § 895.045(1) (West 2002) (abolishing joint liability for defendants found to be less than 51% at fault); see also W.VA. CODE ANN. § 55-7B-9 (Michie 2002) (abolishing joint liability for defendants found to be less than 25% at fault in medical malpractice cases).

228. See *Coney v. J.L.G. Indus., Inc.*, 454 N.E.2d 197, 204 (Ill. 1983).

229. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000) (surveying state joint liability laws).

230. See H.R. REP. NO. 106-494, pt. 1, at 1 (2000) (civil actions involving individuals and small businesses); H.R. REP. NO. 105-101, pt. 1, at 1 (1997) (volunteer liability); S. REP. NO. 105-32, at 19 (1997) (product liability); H.R. REP. NO. 104-63, pt. 1, at 1 (1995) (product liability); H.R. REP. NO. 104-64, pt. 1, at 1 (1995) (product liability); S. REP. NO. 104-69, at 11 (1995) (product liability); S. REP. NO. 103-203, at 1 (1993) (product liability).

231. See CAL. CIV. CODE § 1431.2 (West 2003).

232. See IOWA CODE ANN. § 668.4 (West 2003) (joint liability abolished for non-

level. The Volunteer Protection Act of 1997²³³ abolished joint liability for non-economic damages for volunteers of nonprofit organizations. The Paul D. Coverdell Teacher Protection Act of 2001, discussed earlier, abolished joint liability for non-economic damages for teachers and principals.²³⁴ Both laws were overwhelmingly supported by a bipartisan majority of Congress.

3. *The Trust Fund Approach*

Some have suggested that Congress should establish a federally managed, privately financed, "no-fault" trust fund to pay asbestos claims. The benefits of this approach would include potential savings of litigation costs on issues relating to product identification and proving "fault," and the hope for finality in asbestos litigation. If a trust fund approach fulfilled all of its goals, then members who contributed to the fund could advise Wall Street analysts that they have complete closure on their asbestos liability exposure. Obviously, these are very worthwhile goals.

Legislation adopting the trust fund approach was introduced in March, 2003 by Senate Judiciary Committee Chairman Orrin Hatch. His bill, the "Fairness in Asbestos Injury Resolution Act of 2003" (or "FAIR Act"),²³⁵ would establish a \$108 billion national trust fund to be privately financed by corporate defendants and insurance companies.²³⁶ The legislation also would establish medical criteria and a federal administrative mechanism for compensation of asbestos-related diseases.²³⁷ In July of 2003, the FAIR Act was favorably reported by the Senate Judiciary Committee; the vote was decided largely along party lines.²³⁸ Amendments made to the bill at mark up,

economic damages; joint liability for economic damages abolished for defendants less than 50% at fault); NEB. REV. STAT. § 25-21,185.10 (2002); N.Y. C.P.L.R. §§ 1601-1602 (McKinney 2003) (abolishing joint liability for non-economic damages for defendants less than 50% at fault in certain situations).

233. Pub. L. No. 105-19, 111 Stat. 218 (1997).

234. Pub. L. No 107-110, 115 Stat. 1425 (2001)

235. See S. 1125, 108th Cong. (2003).

236. After the FAIR Act was favorably reported out of the Senate Judiciary Committee, Senate negotiators announced plans to increase the amount of the trust fund to \$114 billion. See Shailagh Murray, *Insurers Back Funding Revision In Asbestos Plan*, WALL ST. J., Oct. 16, 2003, at C14, available at 2003 WL-WSJ 3982774.

237. See Tribe testimony, *supra* note 129.

238. See Hampel & Dine, *supra* note 146. The bill was reported out of Committee by a vote of 10-8-1. Senator Diane Feinstein (D-CA), who was key in finding bipartisan agreement throughout the Committee markup, was the only Democrat to support the bill. Senator Jon Kyl (R-AZ) abstained. See *id.*; Alex Berenson, *Senate Panel Approves Bill to Establish Asbestos Trust*, N.Y. TIMES, July 11, 2003, at C1.

however, resulted in the bill being severely criticized.²³⁹

The concept of a trust fund has been treated favorably in statements by Fred Baron. Some other lawyers representing unions have suggested that this concept might be a viable option. On the other hand, both Mr. Baron—speaking for ATLA—and union representatives have said that they cannot support any trust fund unless there would be recourse in the tort system for those claimants (e.g., if they are dissatisfied with the compensation they receive from the trust fund).²⁴⁰ The political weight of both groups suggests that it is highly likely that an “escape valve” from the trust fund to the tort system would be included in any bill that would muster the necessary sixty votes needed to overcome a likely filibuster in the United States Senate.

Past experience with trust funds that have bypasses to the tort system have not had sanguine results. For example, a \$4.2 billion trust that was established for so-called “victims” in breast implant litigation with a bypass to the tort system ultimately went broke.²⁴¹ As common-sense would suggest, the weaker claims went to the trust and the stronger claims went back into the tort system. Similar results have occurred in early attempts to have an automobile no-fault system, with escape valves into the tort system.²⁴²

If it were possible to have a politically viable bill without a bypass, proposals put forth so far suggest that a great deal of time and energy may be needed for them to be developed into a finished legislative proposal. For example, significant contention persists with regard to award values, particularly with respect to “mixed causation”

239. See, e.g., Editorial, *Asbestos Takes the Senate*, WALL ST. J., July 1, 2003, at A10, available at 2003 WL-WSJ 3972747 (commenting that Chairman Hatch is “so eager to do something—anything—to ‘solve’ this [asbestos] problem that he’s abandoning the legal reform principles that really would clean up the mess.”); see also Shailagh Murray & Kathryn Kranhold, *Asbestos Factions Struggle to Settle Their 30-Year War*, WALL ST. J., Oct. 15, 2003, at A1, available at 2003 WL-WSJ 3982726.

240. See *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Frederick Baron, partner, Baron & Budd, former president of the Association of Trial Lawyers of America, presenting ATLA’s views on asbestos litigation); *Hearing on “Asbestos Litigation,” Before the S. Comm. on the Judiciary*, 107th Cong. (2003) (statement of Jonathan Hiatt, General Counsel, American Federation of Labor and Congress of Industrial Organizations); see also Hon. Bill Frist & Hon. Orrin Hatch, Editorial, *Fairness for Asbestos Victims*, WASH. POST, Nov. 4, 2003, at A24 (explaining that under the FAIR Act, claims would “revert to the tort system if funding proved inadequate—a provision Democrats insisted be part of the bill.”).

241. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1404–10 (1995).

242. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 1243 (10th ed. 2000).

cases, where the claimant was both exposed to asbestos and a smoker. In addition, the amount of expected contributions into the fund by insurers and defendants, and the potential for required “contingent” contributions should the fund run dry, are also sticking points. Moreover, agreements have not been reached among insurers as to how much money each would be required to deposit into the fund. Trust proposals to-date also have not achieved clear consensus regarding the eligibility requirements for payment from the fund or the amount of compensation to be paid.

Some proposals suggest that the private trust, although privately funded, would establish an asbestos injury compensation board within the United States Department of Justice, and that a government-appointed board would promulgate regulations to process claims and make awards. There is no indication at this time that the Bush Administration—or any Administration—would support a new entity within the federal government that would have responsibility for weighing or addressing asbestos claims, particularly if the Federal Government is called upon to be a “backstop” or guarantor of the trust if the funds in the trust are depleted.²⁴³

The purpose of this article is not to provide a detailed analysis of any of the trust proposals before Congress, only to suggest their positive and negative aspects. While it is clear that a federal legislative solution is needed, it is unclear whether sufficient support has developed behind any particular proposal.²⁴⁴

D. Our Experience With Federal Civil Justice Reform Legislation

In the federal civil justice reform arena, our experience has been that proposals that do not entail federal costs and are relatively simple in their content work best, such as the examples discussed earlier in this article—the General Aviation Revitalization Act, the Biomaterials Access Assurance Act, and the Teacher Protection Act, among others. The asbestos litigation problem is more complex than those resolved by prior legislative activity. Nevertheless, we believe it is a true maxim that federal civil justice reform proposals are most

243. See Shailagh Murray, U.S. Stands Aside on Asbestos, *Wall St. J.*, Nov. 11, 2003, at A4, available at 2003 WL-WSJ 3985317 (reporting that Senate Judiciary Committee Chairman Hatch has said that Republicans will not support an asbestos trust fund bill that includes federal funding, because of concern about driving up the federal deficit and the precedent it could set for other liability cases).

244. See Editorial, *Asbestos Dreams*, *WALL ST. J.*, Oct. 17, 2003, at A10, available at 2003 WL-WSJ 3982978.

effective, and are more likely to pass, in inverse relation to their complexity and size.

III. CONCLUSION

Virtually all interested parties agree that asbestos litigation has reached a crisis. If left unchecked, it will have severe consequences for sick claimants, employers, employees, shareholders, and the American economy. The Supreme Court has made clear that it will not utilize existing law to resolve the asbestos problem. While individual courts and state legislatures can help abate the problem, they cannot cure it across the nation. The problem will remain. Only Congress, acting with strong will and sound judgment, can put an end to the asbestos litigation mess.