

AN EXPERIMENT IN LAW REFORM: *AMCHEM PRODUCTS V. WINDSOR*

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The Supreme Court's 1997 decision in Amchem Products, Inc. v. Windsor struck down the most ambitious settlement class action ever attempted. The settlement was, however, the logical outgrowth of the federal judiciary's efforts in the early 1990s to resolve a "disaster" of "critical proportions." Many factors, not least the Supreme Court's decision in Amchem, turned the tide against this trend. Ironically, however, the post-Amchem world has come to look a lot like Amchem. The settlement's central feature—deferral of unimpaired claims to assure the availability of resources to compensate the sick—was subsequently incorporated (either by statute or through judicial decision) into the law of most states with heavy asbestos caseloads. Similarly, the bankruptcy of nearly all of the defendants whose cases would have been settled created a series of administrative claims-processing regimes similar to the Amchem settlement. This Article suggests that the Amchem settlement should be understood as a triumph of judicial statesmanship, and the reaction that took place in the late 1990s had tragic consequences. It also surveys what lessons we might learn from the Amchem experiment as we think about facilitating resolution of other mass torts in the future.

INTRODUCTION

On June 25, 1997, the Supreme Court decided *Amchem Products, Inc. v. Windsor*.¹ I remember the day well. My firm, Shea & Gardner, had negotiated the settlement on behalf of the Center for Claims Resolution,² litigated its fairness in the district court, defended it in the Third Circuit, and participated in the effort to revive it in the Supreme Court. We did not expect a win, exactly. We were hoping for something along the line of Justice Breyer's dissent: skeptical, but mindful of the unprecedented challenge to which this settlement responded and respectful of the district court's thorough examination of the record and findings of fact. If the case had remained alive, we would have requested that the Third Circuit send it back to the district court so we could address the criticisms that had undermined the original deal.

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1. 521 U.S. 591 (1997).

2. The Center for Claims Resolution, or "CCR," was an organization of twenty-two defendants (more or less, depending on time) that shared asbestos defense and indemnity costs.

I was on tap to help renegotiate the settlement on remand. That was not to be. But Justice Ginsburg did say: “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. Congress, however, has not adopted such a solution.”³ That afternoon I was asked to attend a meeting of defendants who wanted to explore Justice Ginsburg’s suggestion that we take our case to Congress. I spent much of the next ten years on Capitol Hill.

Our lobbying generated buzz, and not much else. While we soldiered on, most major asbestos defendants went bankrupt and resolved their asbestos liabilities by creating trusts under section 524(g) of the Bankruptcy Code.⁴ These trusts in effect created a huge administrative processing regime—the very thing Justice Ginsburg had thought only Congress could establish. Over the same period, many states adopted medical criteria legislation, which barred recovery for the many people who have physical evidence of exposure but no disability or impairment.⁵ Courts with big asbestos dockets achieved similar results by freezing the cases of unimpaired plaintiffs.⁶ Thus, in the decade after *Amchem*, asbestos litigation underwent two sea-changes. Between 1998 and 2004, it spun desperately out of control. Then, it stabilized and became a hybrid administrative/litigation system.

The final result of this evolution bears a surprising resemblance to the results originally envisioned by the settling parties when they negotiated the *Amchem* settlement. In this Article, I reflect on the *Amchem* settlement as an experiment in law reform. I emphasize three points. First, the *Amchem* settlement was in part the product of judicial leadership, which was in turn inspired by a sense of crisis, openness to active judicial management in mass tort cases, and a sense that asbestos litigation required unique solutions. Second, the basic features of the settlement—its prioritization of the claims of the sick, its definition of objective medical criteria for asbestos disease, its provisions for managing the cash burden of compensation, and the substitution of an efficient administrative mechanism (with control of attorneys’ fees)—were exactly the right elements for a comprehensive solution to the asbestos litigation crisis. Third, the

3. *Amchem*, 521 U.S. at 628–29 (footnote omitted).

4. See generally STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 107–24 (2005) [hereinafter RAND REPORT] (discussing general trends and specific incidents of asbestos-related bankruptcies).

5. See Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. LAW. 525, 564–67 (2007).

6. See *id.*

settlement was undermined by the absence of means to ensure the legitimacy of the outcome. The settling parties and the court had to develop legitimacy-enhancing procedures on the fly, and ultimately, those procedures did not succeed.⁷

The *Amchem* settlement was negotiated two decades ago. It was one of the most ambitious law reforms of the twentieth century. Even after it was struck down by the Supreme Court, the settlement survived as a sort of nursling log for other reforms that were to transform asbestos litigation. Are there any lessons that might help us deal more effectively with the next mass tort crisis that may come along? In the concluding pages of this Article I will suggest a few.

I. THE PUBLIC HEALTH CATASTROPHE

In recent years, conservative commentators have characterized asbestos litigation as a gigantic fraud on American business. Lester Brickman is an eloquent exponent of this view:

When the complete and unexpurgated history of asbestos litigation is finally written, that litigation will surely come to be considered for entry into the pantheon of such great American scandals as the Yazoo land scandals, Credit Mobilier, Teapot Dome, Billy Sol Estes, the salad oil scandals, the Savings & Loan scandals, WorldCom and Enron.⁸

There is much truth in what Professor Brickman says, but it is not the whole story.

Before there was an asbestos litigation crisis, there was an asbestos health crisis. During the twentieth century, asbestos was widely used in the United States.⁹ It was cheap, fire-resistant, and relatively impervious to corrosion. Millions of Americans had substantial occupational exposure to asbestos,¹⁰ which led to an epidemic of disease.

7. *Amchem* was not the only effort to achieve global resolution of asbestos claims through an ambitious class action settlement. The other, involving only one defendant, Fibreboard Corporation, was struck down by the Supreme Court in 1999. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Court again called upon Congress to do something. It would have been instructive to consider *Amchem* and *Ortiz* together, but doing so would take me far beyond the scope of this Article.

8. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 35 (2004).

9. Hanlon & Smetak, *supra* note 5, at 534.

10. William J. Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980–2030*, 3 AM. J. INDUS. MED. 259, 306 (1982).

Asbestos causes two main kinds of cancer: mesothelioma and lung cancer.¹¹ Mesothelioma is a disease only caused by asbestos, which can appear as much as fifty years after first exposure and is almost always fatal.¹² Lung cancer, also usually fatal, is caused by tobacco smoke as well as asbestos. In practice, the cause of lung cancer is often hard to prove.

The most serious non-malignant disease caused by asbestos is asbestosis. The disease was described by Merewether and Price in 1930:

It is helpful to visualise fibrosis of the lungs as it occurs in asbestos workers as the slow growth of fibrous tissue (scar tissue) between the air cells of the lung wherever the inhaled dust comes to rest. While new fibrous tissue is being laid down like a spider's web, that deposited earlier gradually contracts. This fibrous tissue is not only useless as a substitute for air cells, but with continued inhalation of the causative dust, by its invasion of new territory and consolidation of that already occupied, it gradually, and literally, strangles the essential tissues of the lungs.¹³

Although, in serious cases, the advancing disease may result in death, the rate of progression varies with exposure, and people with mild cases may never suffer any impairment of lung function.¹⁴

Asbestos also causes non-malignant conditions of the pleura. The most common are pleural plaques. Plaques are almost always asymptomatic and do not cause cancer (although, of course, the asbestos that causes the plaques may also cause cancer).¹⁵ As markers of exposure, however, plaques often cause anxiety over the potential for development of asbestos disease in the future.¹⁶

11. COMM. ON ASBESTOS: SELECTED HEALTH EFFECTS, INST. OF MED. OF THE NAT'L ACADS., ASBESTOS: SELECTED CANCERS 1 (2006). Asbestos causes cancer of the larynx and may cause other cancers as well. *Id.* at 6–7. The litigation, however, involves very few laryngeal cancers.

12. RICHARD DOLL & JULIAN PETO, EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2–3 (1988). The period from first exposure to onset of disease is called “latency.”

13. E.R.A. MEREWETHER & C.W. PRICE, REPORT ON EFFECTS OF ASBESTOS DUST ON THE LUNGS AND DUST SUPPRESSION IN THE ASBESTOS INDUSTRY 9 (1930).

14. DOLL & PETO, *supra* note 12, at 2.

15. *Id.*

16. See *Rothwell v. Chem. & Insulating Co.*, [2007] UKHL 39, [2007] 3 W.L.R. 876, 878–79 (Lord Hoffinan) (appeal taken from Eng.).

II. THE HEROIC ERA

Deborah Hensler has described the 1960s and 1970s as the “heroic era” of asbestos litigation.¹⁷ Today, when mass tort lawyers have become a well-funded, sophisticated elite in the plaintiffs’ bar, it is easy to forget the challenges faced by the pioneers. Originally, asbestos cases were an uphill struggle, legally and factually. Plaintiffs’ lawyers fought a David-and-Goliath battle against well-funded, sophisticated adversaries and won.¹⁸

The establishment of strict product liability as a basis for obtaining compensation for industrial disease opened the door for mass asbestos litigation. The primary vehicle for compensating workplace injuries should have been workers’ compensation. But in the late 1960s, workers compensation was under fire. It was especially inadequate for long-latency occupational diseases, where statutes of limitations barred relief both in workers’ compensation and in tort.¹⁹ Just the same, workers’ compensation was usually employees’ exclusive remedy against their employers.²⁰

Workers’ compensation did not, however, preclude actions against manufacturers of asbestos products used in their customers’ work places. Traditionally, such actions would be grounded in negligence. But in 1964, the American Law Institute (ALI) adopted § 402A of the Restatement (Second) of Torts, which imposed strict liability on sellers of unreasonably dangerous products.²¹ Nine years later, the Fifth Circuit decided that asbestos producers could be strictly liable under § 402A for selling asbestos products without a warning of their dangers.²² Other courts followed, and by the mid-1970s, strict liability for failure to warn was well established in asbestos cases.²³

Armed with a powerful new legal theory, plaintiffs’ lawyers had to build a factual case. The biggest hurdle was proving liability. Defendants said they did not know about the hazards of asbestos

17. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 259–61 (2006).

18. *Id.* at 260.

19. See Sheila Jassanoff & Dogan Parese, *Welfare State or Welfare Court: Asbestos Litigation in Comparative Perspective*, 12 J.L. & POL’Y 619, 634 (2000); ROBERT I. FIELD & RICHARD B. VICTOR, *ASBESTOS CLAIMS: THE DECISION TO USE WORKERS COMPENSATION OR TORT 2* (1988).

20. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 395 (2000) (effect of common provisions that the employee’s compensation remedy is her exclusive remedy against her employer is “to immunize the employer from tort liability for negligence”).

21. Herbert W. Titus, *Restatement (Second) of Torts §402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 714 (1970).

22. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973). For the background of this case, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 39–70 (1985).

23. See, e.g., *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 813–16 (6th Cir. 1982).

(except at the very high levels of exposure in manufacturers' own plants) until the mid-1960s.²⁴ Plaintiffs' lawyers, however, meticulously assembled evidence showing that the asbestos industry conspired to suppress information about the danger of asbestos products.²⁵ By the end of the 1970s, plaintiffs were winning many cases and increasingly collecting punitive damages.²⁶

The other main factual challenge was proving causation. Most asbestos diseases appear long after first exposure.²⁷ Because of the long latency, lawyers needed to prove causation with epidemiological evidence that was not as familiar in the courts in the 1970s as it later became. In this area, plaintiffs' lawyers received invaluable aid from activist scientists like Irving J. Selikoff's team at Mt. Sinai Medical Center, who provided scientific support and expert testimony where necessary.²⁸ Even after establishing general causation, plaintiffs had to prove exposure to a particular defendant's products. Assembling detailed information about hundreds of work sites was a huge effort.

Having developed a powerful legal and factual case, plaintiffs' lawyers needed to find plaintiffs. Injured people do not automatically sue, and propensity to sue is especially low in workplace injury cases. The trial bar relied heavily on labor unions and their associated medical experts for the systematic mobilization of claims.²⁹ This effective claims mobilization made asbestos a mass tort in the United States.

To achieve all this, the plaintiffs' trial bar needed to work together. Leading asbestos lawyers organized information-sharing

24. BRODEUR, *supra* note 22, at 136–37; *see also* DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 19–20 (1985) [hereinafter ASBESTOS IN THE COURTS].

25. BRODEUR, *supra* note 22, at 97–135.

26. *Id.* at 215–24; ASBESTOS IN THE COURTS, *supra* note 24, at 20.

27. *See* Hanlon & Smetak, *supra* note 5, at 532–33.

28. *See* THOMAS EDWARD DURKIN, CONSTRUCTING LAW: COMPARING LEGAL ACTION IN THE UNITED STATES AND THE UNITED KINGDOM 33, 73–74, 130 (1994). Dr. Selikoff provided assistance in the very first modern asbestos case in 1965. *See* BRODEUR, *supra* note 22, at 26. Moreover, the epidemiological work done by the Mt. Sinai researchers inevitably identified numerous cases of asbestos disease that, through the intermediary of labor unions, would increasingly result in referrals to lawyers.

29. *See generally* Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & Soc'y 400–03 tbl.1 (1991); DEBORAH R. HENSLER, ACCIDENTS AND INJURIES IN THE U.S. COSTS, COMPENSATION, AND CLAIMING BEHAVIOR 121–26 (1991). Certainly the active cooperation of lawyers, trade unions, and medical scientists promoted claiming behavior, both by naming and blaming the manufacturers and by facilitating claiming and the expectation of compensation. *See* DURKIN, *supra* note 28, at 23–28.

networks that provided almost instant dissemination of new information.³⁰ The plaintiffs' bar was highly (and increasingly) concentrated.³¹ Some plaintiffs' lawyers with deep expertise in asbestos cases achieved nationwide stature. None was more prominent than class counsel Ron Motley, whose firm—Ness, Motley—controlled a huge number of cases.³²

III. FROM POETRY TO PROSE

After 1978, the tide began to turn against asbestos producers. Defendants still won many cases, but the losses were big and, from 1981 on, increasingly involved punitive damages. The new litigation environment attracted more and more filings. By the 1980s, the great challenge was to manage an unprecedented number of claims.³³

A. *The Shape of Asbestos Litigation*

1. Bankruptcies

In 1982, with 16,000 claims pending against it, the Johns-Manville Corporation filed for bankruptcy. The Manville bankruptcy was a game-changer.³⁴ Manville was the largest American asbestos manufacturer. It was deeply involved in the alleged conspiracy to suppress information about the dangers of asbestos.³⁵ When it filed for bankruptcy, its liability share was around 30 percent.³⁶ It led the industry's defense of asbestos cases.³⁷

The Manville bankruptcy had two main effects. First, it motivated plaintiffs (and defendants) to find new targets to make up

30. BRODEUR, *supra* note 22, at 104 (noting that the Asbestos Litigation Group, organized in 1978, "would play a tremendously influential role in directing asbestos litigation in the years to come").

31. RAND Report, *supra* note 4, at 23–24.

32. See *infra* notes 107–10 and accompanying text.

33. See generally Hensler, *supra* note 17, at 261–63.

34. The Manville bankruptcy was not the first: that honor probably goes to UNR, which filed earlier in 1982. See BRODEUR, *supra* note 22, at 278–79; RAND REPORT, *supra* note 4, at 152–53 tbl.D.1.

35. BRODEUR, *supra* note 22, at 111–20.

36. *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 912 app. A (E. & S.D.N.Y. 1991) (report of Mark A. Peterson).

37. In 1989, a trust was created to assume Manville's liability for asbestos bodily injury claims. It proved to be seriously underfunded. *Id.* at 751–52. Judge Jack Weinstein of the Eastern District of New York enjoined further claims to provide breathing room to reorganize. The reorganized trust, which paid ten cents on the dollar, resumed operations in 1995.

Manville's liability share.³⁸ Growth in the number and diversity of defendants destabilized agreements on allocation of financial responsibility, and bickering among defendants increased costs.

Second, the Manville bankruptcy was just the beginning. Many defendants considered following Manville's lead, and over time additional defendants filed for Chapter 11 protection. In 1990 and 1991 bankruptcy claimed four of the biggest remaining defendants: Eagle-Picher, National Gypsum, Celotex, and H.K. Porter.³⁹ Some observers became seriously concerned that asbestos litigation would cause the collapse of so many defendants that the cupboard would be bare for future claimants.⁴⁰

2. Claims

Between the Manville bankruptcy in 1982 and the negotiation of the *Amchem* settlement in 1992, the claims environment radically changed.

Filings reached previously unimaginable levels. As Figure 1 shows, before 1980, plaintiffs had filed only about 4,100 asbestos claims *in total*.⁴¹ From 1980 through 1983, between 4,165 and 4,879 claims were filed *every year*. Between 1984 and 1987, filings more than quadrupled (to 21,056 per year). Thereafter, with the exception of 1989, the yearly claims rate fluctuated between 22,752 and 29,883 through 1994.

Many of these new claims were brought on behalf of unimpaired claimants.⁴² The increased proportion of unimpaired claims was probably related to the growth of screening programs in the 1980s.

38. James Stengel, *Comments for the University of Connecticut Asbestos Litigation Symposium*, 12 CONN. INS. L.J. 281, 283 (2006).

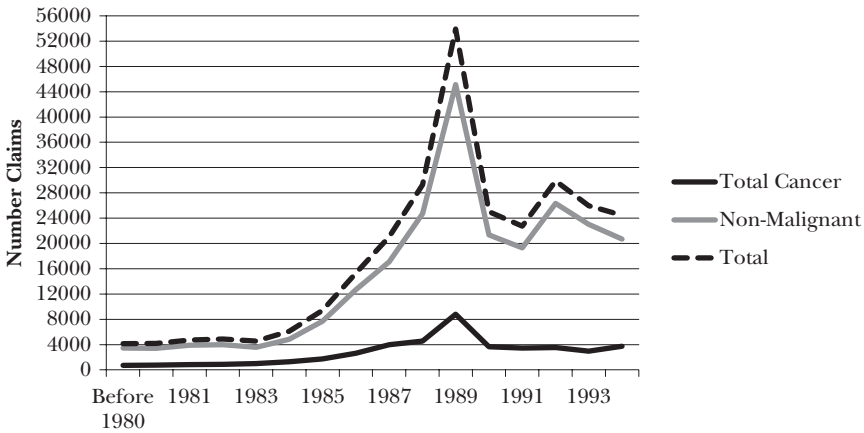
39. RAND REPORT, *supra* note 4, at 152 tbl.D.1.

40. See *infra* note 100 and accompanying text.

41. The chart is drawn from RAND REPORT, *supra* note 4, at 71 tbl.4.1. The sharp surge of filings in 1988, and especially 1989, is probably due to the fact that 1989 was the first full year of operation for the Manville Trust. *Id.* at 72.

42. Manville Trust data show that (unimpaired) pleural claims, which constituted 8 percent of filings through 1982, jumped to 17 percent in 1983–1987 and 18 percent in 1988–August 1991. See Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1982 tbl.1 (1992). Lester Brickman argues that the Manville data understate pleural claims in this period and that 60–70 percent of new claims in 1991 involved pleural plaques. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative*, 13 CARDOZO L. REV. 1819, 1861–62 & n.174 (1992).

FIG. 1 ASBESTOS CLAIMS: CANCER AND NON-MALIGNANT



Even legitimate, union-sponsored screening programs led to discovery of many pleural plaques.⁴³ In most states, that would start the statute of limitations running,⁴⁴ which forced plaintiffs' lawyers to file defensively. Moreover, not all screening programs were legitimate. The end of the 1980s saw the beginning of the screening abuses that would become notorious later.⁴⁵

3. Settlements

In the 1980s, individualized justice yielded almost completely to mass administrative compensation via settlement. Only 2 percent of asbestos cases reached a verdict—only about one quarter the rate in other product liability cases.⁴⁶ Much of the settlement activity was

43. For example, the Sheet Metal Workers International Union (which had ties with Ness, Motley) established the Sheet Metal Occupational Health Trust (SMOHIT) in 1986 to screen union member for asbestos diseases. See *SMOHIT's Mission*, SHEET METAL OCCUPATIONAL HEALTH TRUST, <http://www.smohit.org/About.aspx> (last visited April 6, 2013); see also *Motley/Rice Contact Info*, SHEET METAL OCCUPATIONAL HEALTH TRUST, <http://www.smohit.org/motleyrice.aspx> (last visited April 6, 2013). By "legitimate" I mean only that the screening program elicits the honest judgments of qualified doctors. All litigation screenings, legitimate or not, involve active mobilization of claims, and in the asbestos context this generally means discovering many asymptomatic asbestos-related conditions like pleural plaques. Those conditions would not be noticed in the absence of screening because an asymptomatic claimant would have little reason to consult a health-care provider about them.

44. ASBESTOS IN THE COURTS, *supra* note 24, at 38.

45. The first asbestos screening scandal came to light in the late 1980s, when a federal judge found that asbestos plaintiffs' attorneys representing about 7,000 claimants had committed "fraud on the court." See *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710, at *53 (D. Kan. May 30, 1990). See generally Brickman, *supra* note 8, at 97-102.

46. THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 26-27, tbls.4 & 5 (1987) [hereinafter TRENDS].

based on the results of a small number of jury trials.⁴⁷ Yet, although the system ran on settlements, many defendants would not settle asbestos cases in the absence of a firm, credible trial date.⁴⁸ Courts could keep up with burgeoning filings only by pouring more resources into handling cases one by one or by adopting measures to increase the efficiency of a small number of judges.⁴⁹ Growing backlogs put a great deal of pressure on judges to adopt innovations that would allow aggregated trials.

4. Insurance

Insurance companies were (and are) the bankers for the asbestos compensation system. However, those companies had little experience applying their policies to mass latent injuries. Given the amounts at stake, it is not surprising that massive coverage litigation ensued.⁵⁰ The key question was what triggered coverage. Insurance policies were written annually and covered bodily injury that occurred during the policy period. To decide which carriers were on the hook, it was necessary to decide what constituted “bodily injury” and when it occurred. In asbestos cases, this was a hard question because asbestos diseases developed over a long period of time. By the early 1980s, however, the law on the issue was moving in favor of policy holders.⁵¹ As the ground rules became clearer, insurers, with a duty to defend claims against the insured, had an increasing interest in controlling transaction costs.

47. *Id.* at 27 (matrices of settlement values based on “handful of trials”).

48. *Id.* at 54. This pattern was not universal. ASBESTOS IN THE COURTS, *supra* note 24, at 94–97 (describing three group settlement patterns in this period). Some defendants tried to maintain a low profile by routinely settling cases for a modest amount even before a lawsuit was filed. See Stengel, *supra* note 38, at 284.

49. ASBESTOS IN THE COURTS, *supra* note 24, at 97.

50. For a comprehensive treatment of the insurance wars, see Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Disputes*, 12 CONN. INS. L.J. 349 (2007). The California coverage litigation involved so many lawyers and parties that a 1,000-seat auditorium had to be pressed into services as a courtroom. BRODEUR, *supra* note 22, at 332.

51. In 1980, the Sixth Circuit decided that coverage would be triggered by exposure (as opposed to manifestation of disease) in the policy period. See *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980). The following year, the D.C. Circuit adopted the so-called “triple trigger” theory. See *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981). This meant that any insurer whose policy was in effect at the date of exposure, the date of manifestation, or any time in between was on the risk. *Id.* at 1044–47. *Keene* and *Forty-Eight Insulations* were influential. Those decisions tended to maximize the availability of insurance, not just for indemnity but for defense costs as well.

5. Cost/Delay

Asbestos cases in the 1980s were costly and slow. A 1984 RAND study showed that asbestos plaintiffs received only thirty-nine cents of every dollar spent by defendants and their insurers on asbestos cases.⁵² Twenty-five percent of each dollar spent went for plaintiffs' legal fees and other expenses, and the rest went to defense costs. According to a subsequent report, "transaction costs associated with asbestos cases are higher than for any other type of tort litigation for which figures are available."⁵³ These high transaction costs were driven primarily by the cost of defense.⁵⁴ Many factors entered in, but none were more important than the sheer number of defendants, all of them pursuing their own litigation strategies and many of them pointing their fingers at one another.⁵⁵

Claimants could wait five years or more for their claims to be resolved.⁵⁶ Some of the fault lay with plaintiffs' lawyers, who were few in number and could be overwhelmed by a large and irregular flow of cases.⁵⁷ Defense firms had similar problems,⁵⁸ and the defendants themselves (and their insurers) often benefitted from delay.⁵⁹ Moreover, many courts with high asbestos caseloads did little to address the special problems they presented, and often the measures that were taken facilitated the preparation of cases but not their disposition.⁶⁰

All of this meant that the single most important driver of settlement was a firm, credible trial date. A RAND study concluded (in reference to 1983–84):

In the face of these difficulties [in arriving at settlements], courts are able to dispose of cases at a rate that maintains control of the asbestos caseload only if they force the settlement of cases by imposing a credible threat of trial. That threat is produced either by a capacity and willingness to devote substantial

52. JAMES KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES, xviii fig.S1 (1984).

53. ASBESTOS IN THE COURTS, *supra* note 24, at 112.

54. See KAKALIK ET AL., *supra* note 52, at xviii fig.S1 (showing defense costs accounted for 37 percent of the total outlay for asbestos compensation).

55. See, e.g., BRODEUR, *supra* note 22, at 334.

56. ASBESTOS IN THE COURTS, *supra* note 24, at 86–89. Of course, plaintiffs did not always have an interest in a quick disposition. *Id.* at 89. In particular, some plaintiffs' lawyers preferred to stall unimpaired cases as long as possible in the expectation that they would become more valuable if the plaintiff developed a serious disease.

57. *Id.* at 89–92.

58. *Id.* at 92–94.

59. *Id.*

60. *Id.* at 82, 99–109.

judicial resources to these cases, or by organizing the trial process in such a way that a small number of judges can threaten to try relatively large numbers of cases.⁶¹

As asbestos cases flooded into the courts, the parties developed techniques to settle cases on a mass basis. However, the expanded capacity to settle large numbers of cases did not necessarily increase the motivation to do so, and, in any event, the growing backlog of asbestos cases increased the need for an ever higher rate of dispositions. Thomas E. Willging concluded in 1987, "Scheduling cases in large numbers and at the limits of the court's capacity to conduct trial produces dispositions."⁶²

B. Trying to Solve the Puzzle

In the 1980s, asbestos litigation became a *de facto* administrative compensation system—with many of the defects of such systems and none of the benefits.⁶³ Cases were settled, usually in groups, with little or no individualized justice.⁶⁴ This might have been appropriate if the system actually achieved the advantages promised by administrative compensation regimes. It did not. Dispositions were not quick, not cheap, not consistent. Moreover, the challenge became ever more daunting as the claims rolled in.⁶⁵

61. *Id.* at 83.

62. TRENDS, *supra* note 46, at 131.

63. ASBESTOS IN THE COURTS, *supra* note 24, at 113–14 ("A basic problem with asbestos litigation is that through group disposition processes it has sacrificed the attention to individualized injuries and needs that characterizes our litigation process without achieving the reduction in transaction costs that usually accompanies less individualized administrative processes.")

64. See *id.* at 94–95 (giving concise description and evaluation of the common group settlement practices used in asbestos litigation).

65. *Id.* at 108–09. Professor Hensler described the disguised administrative compensation scheme characteristic of asbestos litigation in the following terms:

In theory, litigation provides an opportunity for parties to have their rights and obligations determined by jury, judge, or in settlement on the merits of the parties' own specific situations. This characteristic separates litigation from workers' compensation or other administrative systems. Yet in practice, asbestos litigation is either a system that fails to dispose of most cases years after they have been filed or disposes of cases in batches. Given their goals and predicaments, the rational response of the participants in asbestos litigation has been to create a system that superficially looks like litigation, frequently behaves like administration, and is often plagued by the snail's pace of the one and the insensitivity to circumstances of the other.

1. Wellington

The first major effort to solve the puzzle grew out of an agreement between insurers and producers, reached under the auspices of Dean Harry Wellington of Yale Law School, which established a framework for resolving insurance coverage issues between insurers and defendants.

In the final stages of the negotiations, the insurers insisted on a joint defense group to handle asbestos claims more efficiently. Counsel for the insured, Scott Gilbert, then at Covington & Burling, called my partner John Aldock with a simple request: to get the defendants in the defense group to agree on a sharing formula. As Aldock recalls:

Gilbert said, “We just solved the insurance coverage piece, how much the insurers are going to pay the companies and for what. The contingency is that the insurers won’t pay a dime unless the companies create an asbestos claims facility, and we can’t create the claims facility until we have a sharing agreement among the companies. You are the facilitator, and you have 90 days to get 30 or so companies to reach an agreement that has eluded them for years. . . . Please call a meeting and solve this problem. Otherwise our agreement with the insurers will go down the tubes.”⁶⁶

Aldock succeeded, and the Wellington agreement became effective in 1985.

The agreement immediately and dramatically reduced the number of defense counsel.⁶⁷ Its full benefits could only be realized when the Asbestos Claims Facility (“ACF”) was fully organized in 1986.⁶⁸ Many members of the ACF favored an early-settlement strategy, which promised discounts on settlements and savings in transaction costs.⁶⁹ The rapidly changing claims environment, however, led some of the more exposed ACF members to favor a harder

66. ORAL HISTORY PROJECT, HISTORICAL SOC’Y OF THE D.C. CIRCUIT, JOHN D. ALDOCK, ESQUIRE, 152–53 (December 24, 2012), *available at* http://www.dcchs.org/JohnDAldock/JohnDAldock_Complete.pdf.

67. Upon its inception, the ACF reduced the number of law firms representing its members from 1,100 to sixty-three. The latter number was later reduced to fifty-five. Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13, 14 (1990).

68. The ACF began operations in September 1985, using lawyers and other personnel that were employed by the member companies. *Id.*

69. *Id.* at 17–18.

line.⁷⁰ Many of those members also challenged the formula for allocating costs, which they thought saddled them with a historical liability share that diminished as new defendants were brought into the litigation.⁷¹

These disagreements led to the ACF's demise in 1988.⁷² Most ACF members wanted to continue some kind of claims facility and called on Aldock to help them bridge their differences. The result was CCR. CCR had a much more flexible procedure for adjusting shares, but it required on-going mediation of share adjustments. Aldock and his partner, Bill Hanlon, helped make that system work and also acted as CCR's national coordinating counsel in the litigation.⁷³

CCR's general strategy was aimed at early resolution of meritorious claims.⁷⁴ This approach accentuated the "administrative processing" side of the asbestos litigation system.

CCR tried to address the growing number of unimpaired claims by expanding the use of "green cards."⁷⁵ Green-card settlements put unimpaired claims on inactive status in return for waiver of the statute of limitations. In the first half of 1988, its last year, the ACF had resolved more claims through green cards than cash payments.⁷⁶ CCR proposed to expand on this program by, among other things, promising to investigate and resolve eventual claims within a specific time after manifestation of an asbestos-related disease.⁷⁷

Finally, CCR expanded the use of limited releases.⁷⁸ It was customary in asbestos litigation to require a claimant who settled a claim for a non-malignant disease (often involving no or minimal impairment) to release all future claims, including cancer claims. By accepting a limited release, CCR would compensate the plaintiff

70. Companies reaching the end of their insurance coverage tended to have different ideas about settlement strategy. As John Aldock recalls: "There were irreconcilable differences [among ACF members], because some big companies were running out of insurance and, when they ran out of insurance, they wanted to litigate every case. The strategy was to slow down the litigation even though, in the long run, that likely would be the more expensive route. There were others who thought that they had more than enough insurance. The last thing they wanted was to try cases and risk a punitive damage award or a blow out verdict that would make them a bigger target than they otherwise would be." ORAL HISTORY PROJECT, *supra* note 66, at 155.

71. See Fitzpatrick, *supra* note 67, at 15.

72. See *id.* at 16–17.

73. ORAL HISTORY PROJECT, *supra* note 66, at 156–57.

74. Fitzpatrick, *supra* note 67, at 18.

75. *Id.*; see also TRENDS, *supra* note 46, at 53.

76. Fitzpatrick, *supra* note 67, at 14.

77. *Id.* at 18–19.

78. *Id.* at 19–20.

for his current condition and allow him to come back if he contracted an asbestos-related cancer.⁷⁹ The idea that claimants should recover only for their current disease, and not for the prospect of future disease, was a major departure from the tort system's usual rule that all damages flowing from a single tort must be recovered in a single action. It was to become a centerpiece of CCR's global settlement strategy and eventually of the *Amchem* settlement.

2. Pleural Registries

The courts also recognized the problems posed by unimpaired claims. In 1985, Judge Rya Zobel (D. Mass.) established the first "pleural registry" or "inactive docket."⁸⁰ The idea was to defer weak claims to allow more compelling claims to be heard first.⁸¹ Many courts followed suit.⁸² Pleural registries were often adopted consensually, since plaintiffs' attorneys and defendants frequently agreed that it would be better to concentrate on the most serious cases.

While many plaintiffs' lawyers welcomed the opportunity to park unimpaired claims in an inactive docket, others did not. Lawyers who specialized in the mass recruitment of claims thought the prospect of thousands of suits would impel defendants to settle, if only for a small amount per case. Such lawyers would richly profit from the volume such a settlement mill provided. Other lawyers on the plaintiffs' side thought that unimpaired claimants should receive substantial compensation for their present fear and the prospect of suffering serious future injuries.⁸³

Pleural registries dovetailed with CCR's settlement policy. To be effective, both required objective impairment criteria that would determine what claims must go onto the pleural registry and what showing needed to be made to reactivate the case. In the late 1980s

79. *Id.*

80. TRENDS, *supra* note 46, at 52.

81. Judge Zobel ordered plaintiffs' attorneys to identify claimants without serious disease. The parties then agreed upon a stipulation under which those claims would be voluntarily dismissed subject to refileing. The defendants agreed to waive any statute of limitations defense that had not been raised already. See TRENDS, *supra* note 46, at 52. Other courts merely placed the claims of the unimpaired on a separate docket, so that they did not need to be refiled. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 542, 568-71 (1992).

82. See Schuck, *supra* note 81, at 568 n.109, for a list of the courts that had pleural registries as of 1992.

83. See TRENDS, *supra* note 46, at 53.

and early 1990s, several courts took that step.⁸⁴ This, of course, was the heart of *Amchem*.

3. Aggregations

If asbestos cases could not settle without a credible trial date, the obvious response was to provide a credible trial date. However, with filings exceeding twenty thousand claims a year, it was impossible to do this without large consolidations. Courts began to experiment with consolidations for trial early in the 1980s.⁸⁵ These consolidations were initially small. With time, however, courts began to consolidate cases in larger and larger numbers.⁸⁶

While consolidations became a standard tool, there was little use of the most drastic aggregative device: the class action.⁸⁷ Most of the action on that front was in the U.S. District Court for the Eastern District of Texas. Early on, Judge Robert Parker took the lead in managing that court's asbestos docket. In *Jenkins v. Raymark* (1985), Judge Parker certified a Rule 23(b)(3) class of 755 plaintiffs who had filed claims in the Eastern District of Texas prior to January 1 of that year.⁸⁸ The plan was to have a single jury decide common issues of liability, causation, and punitive damages. If necessary,

84. On inactive dockets, see RAND Report, *supra* note 4, at 26–28. For a comprehensive overview of both early and recent trends, see Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 CONN. INS. L.J. 477, 489–91 (2007).

85. For a concise description of trial consolidations in the period under discussion, see TRENDS, *supra* note 46, at 90–91; RAND REPORT, *supra* note 4, at 30–34. See also Victor E. Schwartz & Leah Lorber, Commentary, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 256–57 (2000) (noting the emerging practice among trial judges of joining cases despite significant differences between them).

86. See, e.g., TRENDS, *supra* note 46, at 89. By subsequent standards, the consolidations of the late 1980s were small and timid. In the 1990s, Maryland and West Virginia consolidated thousands of cases for trial. The Maryland proceedings are described in *ACandS, Inc. v. Godwin (Abate I)*, 667 A.2d 116 (Md. 1995) and *ACandS, Inc. v. Abate (Abate II)*, 710 A.2d 944 (Md. Ct. Spec. App. 1998). Former Solicitor General Walter E. Dellinger commented, with regard to one of the West Virginia consolidations: “This trial plan doesn’t exist in the same universe as the Due Process Clause of the United States Constitution. It is a trial plan that was never designed to produce a fair result. It is a trial plan that produces settlements.” *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 21 (2002) (testimony of Walter E. Dellinger, Professor, Duke Law School). For a trenchant analysis of the perverse effects of these “jumbo” consolidations, see *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 185–215 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

87. Hensler, *supra* note 17, at 265; see also TRENDS, *supra* note 46, at 93–97.

88. See *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

there would be mini-trials on compensatory damages. The Fifth Circuit, citing the “avalanche” of asbestos cases,⁸⁹ upheld Judge Parker’s order. *Jenkins* was initially thought to have reversed the trend against class certification in asbestos cases.⁹⁰ However, Judge Parker’s next experiment with class certification in *Cimino v. Raymark Industries* was rejected by the Court of Appeals on mandamus.⁹¹ Thereafter, Judge Parker tried a limited number of cases and then used statistical techniques to extrapolate the results to all of the remaining cases. The appellate court invalidated that method as well.⁹²

IV. THE *AMCHEM* SETTLEMENT

By 1990, there was a consensus that asbestos litigation posed an unprecedented challenge to the judicial system. There were three ways to deal with it:

- (1) Congress could replace the tort system with an administrative compensation regime.⁹³
- (2) The parties and courts could strengthen a *de facto* administrative claims regime that would prioritize the claims of the sick and use objective compensation criteria to improve consistency, reduce transaction costs, and speed up the compensation process.
- (3) The courts could aggressively aggregate claims for trial in order to provide a credible, firm trial date, which would drive settlements.

89. See *Jenkins*, 782 F.2d at 472.

90. See TRENDS, *supra* note 46, at 94–95.

91. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

92. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). Judge Reynaldo Garza’s concurrence observed that Judge Parker’s “ingenious but, unfortunately, legally deficient” trial plan was “a striking example of the crisis presented by the state of asbestos litigation in our judicial system” and “urge[d] upon Congress the wisdom and necessity of a legislative solution.” *Id.* at 335 (Garza, J., concurring). On the *Cimino* litigation, see *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 195 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School).

93. Bills were proposed in every Congress from 1979 to 1986. See Christopher F. Edley, Jr., & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 400 n.31 (1993); Louis Treiger, Comment, *Relief for Asbestos Victims: A Legislative Analysis*, 20 HARV. J. ON LEGIS. 179, 181 n.19, 183 n.30 (1983). In addition, asbestos compensation bills were filed by Representatives Peter Frelinghuysen, H.R. 6906, 93d Cong. (1973), Henry Helstoski, H.R. 503, 94th Cong. (1975), and Millicent Fenwick, H.R. 8689, 95th Cong. (1977), all from New Jersey, then Manville’s home state. As the crisis mounted, however, legislative interest seemed to decline.

While the latter two approaches differed in their analysis of the problem, both were premised on the innovative use of judicial power to create an efficient administrative claims process for asbestos cases. Both were unsuccessful because appellate courts—including the Supreme Court in *Amchem*—refused to accept the efforts of trial judges to transcend business as usual. Justice Ginsburg’s reminder that Congress had not established an administrative compensation regime for asbestos claims was tantamount to saying, “Business as usual is what we do; for law reform you need to go across the street.” The Fifth Circuit’s message to Judge Parker was pretty much the same. In effect, the appellate courts threw up their hands, confessed their inability to handle the elephantine mass of asbestos cases, and pleaded with Congress to do something.⁹⁴

A. *Setting the Stage: The Ad Hoc Committee and the MDL*

In early 1990, the Federal Judicial Center convened a conference of judges, academics, and lawyers to discuss what to do about the avalanche of asbestos claims. Everyone came away with the impression that business as usual would no longer be acceptable.⁹⁵

In Texas, Judge Parker redoubled his efforts to take control of a deteriorating situation. Steering committees were formed to discuss a global settlement, but the discussions went nowhere. As the steering committees wrangled, two exceptional judicial initiatives occurred.

First, the U.S. Judicial Conference established an Ad Hoc Committee on Asbestos Litigation, whose members were appointed in September 1990 by Chief Justice Rehnquist. All were experienced federal judges, although only Judge Parker had significant asbestos experience.⁹⁶

The Ad Hoc Committee reported in March 1991. The report generally reflected Judge Parker’s views. Its opening notes emphasized the crisis before the courts:

The committee has struggled with the problems confronting the courts of this nation arising from death and disease attributable to airborne asbestos industrial materials and products.

94. See, e.g., *Cimino*, 151 F.3d at 335 (Garza, J., concurring).

95. See *Georgine v. Amchem Products, Inc.*, 157 F.R.D. 246, 264 (E.D. Pa. 1994) (referring to testimony of Lawrence Fitzpatrick, CCR’s CEO).

96. See JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON ASBESTOS LITIG., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION I (March 1991).

The committee has concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively.⁹⁷

The Committee's preferred solution was "legislation recognizing the national proportions of the problem in both federal and state courts and creating a national asbestos dispute resolution scheme that permits consolidation of all asbestos claims in a single forum—whether judicial or administrative—with jurisdiction over all defendants and appropriate assets."⁹⁸ The Committee also presented a menu of fallback measures (which also might have required legislation) to help the federal courts face up to the challenge. The most prominent of these (not surprisingly, considering Judge Parker's position on the Committee) was revision of Federal Rule of Civil Procedure 23 to allow for class actions in mass tort cases generally, and asbestos cases in particular.⁹⁹

The Committee was particularly worried about the problem of compensating future claimants:

[A] large number of individuals have claims against asbestos manufacturers and distributors that are not yet ripe for adjudication. Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a "real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled."¹⁰⁰

The Ad Hoc Committee Report led to hearings, but no legislation was ever introduced. The report did, however, express an air of judicial desperation that encouraged creativity among lawyers seeking a solution to the asbestos disaster.

The second extraordinary initiative was a November 1990 letter signed by eight federal judges responsible for their courts' asbestos dockets to the Judicial Panel on Multidistrict Litigation (JPML),

97. *Id.* at 1–2.

98. *Id.* at 3.

99. The Committee admiringly described Judge Parker's experiments with class actions in asbestos cases and said of the extrapolation methodology in *Cimino*: "If approved on appeal, this procedure could provide an advanced mechanism for coping with large asbestos dockets . . ." *Id.* at 21.

100. *Id.* at 34–35 (citation omitted).

calling on the Panel to consolidate federal asbestos cases in a single district court for pretrial proceedings. Among the signatories was Judge Charles R. Weiner of the Eastern District of Pennsylvania. Although the Panel had refused to “multidistrict” asbestos cases on five previous occasions, in January 1991 it issued an order to show cause why those cases should not be consolidated now.¹⁰¹

On May 30, the JPML heard arguments. Unlike earlier occasions, multidistricting now had broad (though not unanimous) support.¹⁰² The basic issue was whether to send the cases to the Eastern District of Texas, where they would be handled by Judge Parker, or the Eastern District of Pennsylvania, where they would be managed by Judge Weiner. Behind this choice lay a critical policy issue. Judge Parker’s approach to the resolution of asbestos cases involved what defendants considered unfair aggregative procedures. Defendants were convinced that many of Judge Parker’s techniques prejudiced their ability to defend themselves and greatly inflated their liability.¹⁰³

Judge Weiner was a less well-known figure. He had, however, done an excellent job settling Philadelphia cases, and (from the defendants’ point of view) he was not Judge Parker. CCR strongly supported transferring federal asbestos cases to Philadelphia,¹⁰⁴ which would mean an effort at global settlement that would build on the ideas that CCR had been proposing since 1988.

The Panel sent the asbestos litigation to Philadelphia, which it described as “the district either expressly favored or not objected to in the greatest number of pleadings.”¹⁰⁵ The Panel did not, of course, tell Judge Weiner how to handle the cases that would soon be before him, but settlement would clearly be a top priority.¹⁰⁶

101. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 416–17 & n.3 (J.P.M.L. 1991). In addition, Judge Jack Weinstein (E.D.N.Y.) contacted the Panel on Multidistrict Litigation and asked to be considered a signatory. *Id.* Judge Weinstein was one of the prominent federal asbestos judges.

102. *Id.* at 417.

103. A prime example for defendants was *Cimino*, where the results of a few trials were extrapolated to over 1,000 other claims. The average verdict for pleural cases was \$558,900— which exceeded the jury’s valuation of lung cancer claims and was far more than the usual settlement value of pleural claims. See Fitzpatrick Deposition Exhibit 5: “A Critical Analysis of the Report of the Ad Hoc Committee on Asbestos Litigation,” Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997) (No. 96-270), 1996 WL 33414124 (U.S.) (JA), at *441aa. This document was prepared by CCR’s lawyers shortly after the release of the Ad Hoc Committee Report in March of 1991.

104. ORAL HISTORY PROJECT, *supra* note 66, at 160–61.

105. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. at 417.

106. *Id.* at 424 (“This order does offer a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible.”).

B. Negotiations

After the transfer, plaintiffs' and defendants' steering committees were formed. Judge Weiner appointed Ron Motley and Gene Locks as co-chairs of the plaintiffs' steering committee.¹⁰⁷ Aldock was active on the defense side. Omnibus negotiations spun in place. The negotiating groups were too big, and as Aldock recalls, every lawyer "wanted to be seen as tougher than the next."¹⁰⁸ From CCR's point of view, the essential principle underlying a global settlement had to be deferral of unimpaired claims. Many plaintiffs' counsel agreed—at least going forward. Others did not.

In early 1992, CCR decided to try negotiating a global settlement with a smaller group of lawyers, hoping to scale up if the negotiations proved successful. The obvious choice of negotiating partners was Motley and Locks. Motley was essential, since his firm "controlled a huge number of the cases and [was] the trial counsel for many others."¹⁰⁹ Locks was included in order to involve a Philadelphia lawyer and provide more bargaining options.¹¹⁰

The negotiations lasted for an entire year. *Amchem* was filed on January 15, 1993.¹¹¹ It was highly unusual because the class was defined to include only those who had not filed a lawsuit prior to the filing of the class action.¹¹² Earlier cases were settled in a series of inventory deals that gave cash compensation to unimpaired claimants—in sharp contrast to the class settlement.¹¹³

This inequality provoked bitter criticism.¹¹⁴ The settling parties may have been overconfident that the crisis atmosphere would lead courts and commentators to defer to political reality. The plaintiffs' bar obviously would not accept a global settlement that meant putting their clients on hold for years while the validity of the settlement was litigated. Moreover, some plaintiffs' lawyers who might otherwise support deferral of unimpaired future claims could be expected to balk at deferring present claims. Arguably, the stressful process of going to a lawyer and initiating a lawsuit gave

107. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 258 (E.D. Pa. 1994).

108. ORAL HISTORY PROJECT, *supra* note 66, at 162.

109. *Id.* at 163.

110. *Id.*

111. *Georgine*, 157 F.R.D. at 257.

112. *Id.* at 257–58.

113. See ORAL HISTORY PROJECT, *supra* note 66, at 164. The leading critic of this aspect of the settlement was John Coffee. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1393–99 (1995); see also Susan Koniak, *Feasting While the Widow Weeps*, 80 CORNELL L. REV. 1045, 1051–86 (1995). Both Professor Coffee and Professor Koniak were expert witnesses for the objectors to the settlement.

114. See *infra* Part IV.D.

current plaintiffs some equitable claim to cash compensation (which would, of course, produce an immediate fee to the lawyer).

CCR wanted to settle all of the outstanding present claims in order to avoid complications in defining the class. An undifferentiated class of future claimants would be behind a Rawlsian veil of ignorance. Because they would not know if they were going to get sick (or what disease they might contract), they were in a better position to determine overall fairness than present claimants, who would be influenced by their particular interest.¹¹⁵ Including present claimants in the class might give rise to unmanageable conflicts.

C. Terms

The *Amchem* settlement was an outgrowth of a decade of debate on how to handle asbestos cases. Its basic structure reflected CCR's settlement approach.

The settlement was a law reform. As we have seen, the cardinal problem in the tort system was its failure to produce settlements without a firm, credible trial date. The *Amchem* settlement established a framework for the disposition of asbestos cases that did not require an imminent threat of trial. Settlement was a matter of administration, not litigation.¹¹⁶

The settlement addressed other long-recognized problems of the asbestos litigation system as well.

First, it deferred unimpaired claims until the claimant became sick, thus concentrating resources on people with cancer and disabling asbestosis.¹¹⁷

Second, the settlement addressed horizontal equity issues by providing objective medical criteria to determine compensability. Of course, any such standard will get some cases wrong. The negotiators tried to balance objectivity and flexibility by creating an

115. See ORAL HISTORY PROJECT, *supra* note 66, at 164.

116. Dissolving the linkage between a trial date and settlement was what CCR had always been about. There was a cost, however: early settlements had always been discounted relative to trial list settlements.

117. See Stipulation of Settlement Between the Class of Claimants and Defendants Represented by the Center for Claims Resolution at 13–17, *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (No. 93-0215) [hereinafter Stipulation]. Non-malignant claimants could only recover if they met medical criteria requiring breathing impairment—i.e., had a low “total lung capacity” or “forced vital capacity.”

exceptional medical claims panel to take a second look at the medical evidence in compelling cases.¹¹⁸

Third, equity also required people with similar injuries to receive similar compensation. Individualized determinations of compensation can be expensive and time consuming, but fixed rules can fit specific cases poorly. The settlement gave claimants a choice. A plaintiff electing the simplified procedure would receive a specified minimum payment for his medical condition.¹¹⁹ A plaintiff who wanted more, and was willing to take more time, could elect individualized review. CCR would examine the claim in detail and make an offer (within a specified range) based on all of the factors that would be taken into consideration in the tort system.¹²⁰ A limited number of extraordinary claims might receive even higher compensation.¹²¹ The details were complex, but the basic principle was simple: to create a bargaining process that mimicked the tort system while being constrained by objective guidelines.

Fourth, the settlement helped ensure that the settling defendants would have the resources to pay claims.¹²² In addition, CCR and its members shared confidential business information with plaintiffs' lawyers that provided assurance that the CCR defendants would have the resources to meet their obligations under the agreement.¹²³

Fifth, the settlement controlled transaction costs. The reduced role of defense counsel would inevitably produce savings. Also, the settlement limited contingent fees for claimants' attorneys to 25 percent.¹²⁴

The *Amchem* settlement was the product of negotiation. Neither side got everything it wanted. From the plaintiffs' perspective, claim values might have been higher, the unimpaired might have gotten a small cash payment, the medical criteria might have been less stringent, and there might have been an inflation adjustment or separate payment for loss of consortium claims. Renewed negotiations after the Supreme Court's decision would have addressed some of these issues. As an example of law reform, however, the structure of the settlement is more important than the details. The

118. *See id.* at 21–22. The number of claims that could qualify as exceptional medical claims in each six month period was also limited. *Id.* at 22–23.

119. *Id.* at 26–27 & app. B.

120. *Id.* at 27–28. If the claimant rejected the offer, he could elect arbitration or resort to the tort system but in doing so would risk delay in payment. *Id.* at 33–36.

121. *Id.* at 29–31.

122. *See, e.g., id.* at 25–29 (case flow controls).

123. *See Georgine*, 157 F.R.D. at 267.

124. Stipulation, *supra* note 117, at 44.

agreement responded to all of the major criticisms of asbestos litigation that alarmed the Ad Hoc Committee and many commentators. It was tort reform from the trenches.

D. Legitimacy

Whether or not the *Amchem* settlement was a policy success, it was a public relations catastrophe.

It is not as though the settling parties were indifferent to appearances. From the beginning, they had stressed union involvement by selecting prominent labor leaders to serve as lead class representatives. The original lead representative, Edward Carlough, was president of the Sheet Metal Workers. After he came under fire within his union, he was replaced by the head of the AFL-CIO Building and Construction Trades Department, Robert Georgine.¹²⁵ Eventually, the settling parties stressed union involvement even further by negotiating an amendment to the settlement that gave the AFL-CIO a role in the settlement's administration.¹²⁶

The decision to negotiate with Motley also ought to have given some credibility to the resulting settlement. In Aldock's words, Motley's firm "controlled a huge number of the cases and w[as] the trial counsel for many others."¹²⁷ Motley and his allies would be primary users of the claims process created by the settlement. At the end of the day, the plaintiffs' lawyers who supported the settlement had by far the greatest number of cases.

Opposition to the settlement was led by Fred Baron, one of the leading advocates of the view that unimpaired claimants should recover substantial sums of money.¹²⁸ With hindsight, the settling

125. See ORAL HISTORY PROJECT, *supra* note 66, at 139–40.

126. The Amendment to the Stipulation was dated September 24, 1994, a month after the court's opinion certifying the class and finding the settlement fair and reasonable. Paragraph 7 of the amendment gives the AFL-CIO the right to participate equally with class counsel in monitoring the operation of the settlement and selecting arbitrators and medical panel members. Labor involvement in implementing the claims resolution process was a guarantee that the settlement would be implemented fairly and in the interest of the class.

127. ORAL HISTORY PROJECT, *supra* note 66, at 163.

128. Baron turned down an invitation to join the *Amchem* settlement in part because of his ideological opposition to deferral dockets. See *id.* at 166. Baron's firm was heavily invested in representing pleural claimants. Years later, after Texas adopted medical criteria legislation, the firm would lay off many lawyers and staffers. Mr. Baron's partner, Russell Budd, explained: "Today we have significantly less volume, but more complex, more serious, injury cases. That requires a different staffing model and a different business model." Brenda Sapino Jeffries, *Baron & Budd Lays Off 19 Lawyers, 100 Staffers*, TEX. LAW. (March 5, 2007), http://www.law.com/jsp/article.jsp?id=900005553874&Baron_Budd_Lays_Off_19_Lawyers_100_Staffers. The *Amchem* settlement would have required Baron & Budd to change its business model much earlier.

parties seem to have worn white hats on that issue. The burden of unimpaired claims would be largely responsible for scores of bankruptcies that would later limit the compensation of asbestos claimants and impose important economic and social costs on defendants, their employees, and their communities.¹²⁹ The settling parties failed, however, to make treatment of unimpaired claims the central issue in the public controversy set off by the settlement.

Instead, the public debate swirled around the decision to make *Amchem* a futures-only class action. Class counsel and their supporters in the asbestos trial bar represented a very large proportion of current claimants in the tort system. While they would also have represented many future claimants under the settlement, their obligations to today's clients might well have weighed more heavily than that future interest.¹³⁰

The settling parties misconceived the problem as one of collusion. They attempted to deal with it in two ways. They offered to settle all current claims for any lawyer who supported the settlement, not just the inventory held by class counsel.¹³¹ They also based the inventory settlements on historical settlement values. Later, special master Stephen Burbank, a law professor at the University of Pennsylvania, verified that there had been no premium

Opponents of the *Amchem* settlement also included lawyers whose attitude to unimpaired claimants could not have been more different from Baron's. Among these was Steven Kazan, a cancer specialist who later would figure prominently in efforts to defer unimpaired claims and preserve defendants' resources for the sick. *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 24–25 (2002) (statement of Steven Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farris). Mr. Kazan objected to the settlement's claim values, which were far below those prevalent in California.

129. See, e.g., Behrens, *What's New in Asbestos Litigation?*, 28 REVIEW OF LITIGATION 500, 504–05 (2009). According to RAND, "almost all" of the sharp growth in asbestos filings that occurred in the late 1990s and 2000s was due to non-malignant claims, most of which involved asymptomatic claimants. RAND REPORT, *supra* note 4, at 73. The aftermath of *Amchem* is discussed in greater detail in Part V, *infra*. For the impact on employees, see Jonathan Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 33 S. TEX. L. REV. 1077, 1082–83 (2003).

130. This problem is not unique to settlement class actions. It exists in asbestos bankruptcies as well. For example, in *In re Combustion Engineering, Inc.*, 391 F.3d 190, 239–43 (2004), claimants who settled with the defendant on the eve of bankruptcy did better than those who would have to collect from the bankruptcy trust. In both *Combustion Engineering* and *Amchem*, the settling parties may have relied too much on the formal separation between the class settlement and bankruptcy, on the one hand, and the pre-filing settlements on the other. The plaintiffs' bar felt acute discomfort over their relationship to future claimants in bankruptcy from the very beginning. See BRODEUR, *supra* note 22, at 291–92, 296–98, 316, 323, 344–46.

131. See ORAL HISTORY PROJECT, *supra* note 66, at 164 ("We also agreed to settle the pending backlog of cases with the plaintiffs' bar as a price of their agreement to the settlement of the future cases. While this was the only way the settlement could be reached, it was our undoing. The public saw it as a payoff when, in reality, the plaintiffs' lawyers would have made more money by continuing the litigation than through the settlement.").

involved in selected inventory deals, and the court found that there had been no collusion between class counsel and the defendants.¹³² There was, however, unequal treatment. The court's findings could not make that problem go away.

Setting aside the issue of collusion, the logic of a futures class action is legislative rather than judicial. In theory, a class settlement is legitimate because the interests of the class representative and class members coincide: in the absence of collusion, the class representative who does his best for himself will also do his best for the class member. A futures class settlement is not about settling a dispute between people with real interests. It is about laying down a law for the future. Class representatives in this situation represent the public interest. Of course, the class representatives had little role in negotiating the settlement, but a legislative perspective affected class counsel's point of view.¹³³ Thus, the usual structural guarantees of the adequacy of class settlements did not apply.

Apart from all this, there was another reason why the settlement lacked legitimacy. When it was negotiated, there was a broad consensus that business as usual would not be sufficient to meet the challenge of asbestos cases.¹³⁴ Business as usual, however, is exactly what the appellate courts were doing, not just in *Amchem*, but also in connection with all of the innovations that district courts were using to address the deep dysfunction of asbestos litigation. The Ad Hoc Committee Report had been widely interpreted as showing the commitment of the senior judiciary to address the asbestos litigation crisis. When Justice Ginsburg archly noted that Congress had not adopted an administrative claims process for asbestos cases, she

132. *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 305–12 (E.D. Pa. 1994). The fairness hearing was presided over by Judge Lowell Reed. His finding of fact did not put the issue of collusion to rest. See, e.g., John C. Coffee, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 852 (1995) (agreeing to settle inventory of current claims at “the prevailing market rate for such claims if the same attorneys will agree to bring and settle a class action on behalf of other (largely future) claimants on a less favorable basis” is “new technique” of collusion).

133. This legislative perspective is crystallized in John Aldock's explanation of the *Amchem* formula for allocating compensation:

We basically tried to sell it as Rawlsian justice in the sense that the political philosopher John Rawls said to look at things through a ‘veil of ignorance,’ deciding the principle before knowing on which side of the line you're going to fall. If a person doesn't know if he is going to get sick, what amount of money would he take? Obviously those who already are sick know that they want ‘X’ amount of money. If they know that they're never going to get sick, they will take a lot less. What is the right amount of money? It was done in the abstract and, therefore, we believe arrived at a more ‘just’ result.

ORAL HISTORY PROJECT, *supra* note 66, at 164.

134. See *supra* Part IV.A–C.

was not really suggesting that the settling parties call their lobbyists and get to work. She was saying that the asbestos litigation crisis had no bearing, and could have no bearing, on the job before the Supreme Court in *Amchem*. How different that tone was from the notes of despair struck six years earlier.¹³⁵

V. AFTERMATH

In the five years following the *Amchem* decision, the asbestos litigation system fell apart.¹³⁶ Filings reached levels that would have been unimaginable to the Ad Hoc Committee. From 1998 through 2002, the median number of claims was 55,100 per year, peaking at 94,840 in 2001.¹³⁷ The median number of filings in 1987–1994 was only 25,500.¹³⁸ Moreover, with the emergence in 1998–2002 of eye-popping verdicts from new venues, claim values shot up. Asbestos defendants marched over the cliff in serried ranks. Between 1998 and 2004, there were forty-two asbestos bankruptcies.¹³⁹ Each bankruptcy sucked resources from the system, which increased demands on other defendants, which led to more bankruptcies.

It was essential to control the unimpaired claims fueling this cycle. In 2000, a coalition of defendants, insurers, and lawyers who represented cancer victims began to press Congress for medical criteria legislation. This federal initiative was sidelined in 2003 by a

135. In a perceptive article written prior to the Supreme Court's decision in *Amchem*, Professor Richard L. Marcus recognized that the settlement was, in effect, tort reform under the auspices of Rule 23. Richard L. Marcus, *They Can't Do That Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 904–07 (1995). He nevertheless gave it (and several similar contemporaneous class settlements) qualified approval. Marcus noted at the outset that

the recent settlements, particularly the asbestos cases, are hardly business as usual for the federal courts. They address a serious problem of judicial overload and litigant delay that has plagued judges and plaintiffs for some time. Assurances that the problem at hand is unique must be taken with a grain of salt. Nevertheless, it is reassuring that the innovators are not saying that they can supplant the conventional tort system more generally or that class actions should routinely be used to intercept prospective mass tort litigation outbreaks.

Id. at 904 (footnotes omitted). In the particular cases at hand, Professor Marcus noted that despite vociferous objections, the settlement regimes may “prove to be a boon for many claimants.” *Id.* at 905. Marcus's pragmatic, nuanced approach to the problem was exactly what the settling parties were hoping for from the Supreme Court.

136. *See generally* Hanlon & Smetak, *supra* note 5, at 548–56.

137. RAND REPORT, *supra* note 4, at 71 tbl.4.1.

138. *Id.* The average for this period is approximately 29,000 claims per year, which is driven by an outlier of 54,000 claims in 1989. That spike might be due to pent up claims being filed when the Manville trust began to accept claims. *Id.*

139. *Id.* at 152 tbl.D.1. By contrast, from 1982 through 1991 there were twenty-four. *Id.*

more ambitious effort, led by defendants, to establish an administrative claims-processing facility.¹⁴⁰ The campaign to defer unimpaired claims continued in the states. Several courts with large asbestos dockets were persuaded, largely by plaintiffs' lawyers, to create pleural registries. Several state legislatures, at the urging of defendants and insurers, adopted medical criteria legislation, which often included other pro-defendant tort reforms as well.¹⁴¹

Uncertainty about the value of unimpaired claims undercut the market for the mass screenings that generated them. Those screenings, moreover, were often flagrantly fraudulent. Judge Janis Graham Jack's vigorous denunciation in 2005 thoroughly discredited mass screening, and the plaintiffs' lawyers who depended on it changed business models.¹⁴²

Today, claims are being filed at a lower rate than at any time since 1985. Filings are dominated by cancer claims, which are not crowding dockets. This does not mean that asbestos litigation has faded away. On the contrary, some insurers have been increasing their reserves in the face of significant losses. It does mean, however, that asbestos litigation no longer poses the sort of systemic problem that lends itself to the language of crisis.¹⁴³

The asbestos litigation landscape has also been affected by the conclusion of many of the bankruptcies that occurred in the early 2000s. Many earlier asbestos bankruptcies either did not result in trusts to pay asbestos claims or resulted in trusts that paid only a small fraction of their value. The more recent bankruptcies have

140. See Hanlon & Smetak, *supra* note 5, at 534; Patrick M. Hanlon, *Elegy for the FAIR Act*, 12 CONN. INS. L.J. 517, 518–19 (2007).

141. See *e.g.*, Patrick M. Hanlon & Elizabeth Runyan Geise, *Asbestos Reform—Past and Future*, MEALEY'S LITIGATION REPORT: ASBESTOS, Apr. 4, 2007, at 15, 17–29; Hanlon & Smetak, *supra* note 5, at 564–69; Behrens & Goldberg, *supra* note 84, at 492–93.

142. *In re Silica Prod. Liab. Litig.*, 398 F. Supp. 2d 563, 580–637 (S.D. Tex. 2005). Judge Jack's opinion was a turning point in a multi-year process in which for-profit screenings were completely discredited. While the underlying case involved silica rather than asbestos litigation, there was such a large degree of overlap that it easily applied to asbestos litigation as well. See Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 311–14 (2006).

143. Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADV. 1, 6–9 (2013) (mass filings by unimpaired claimants have ended). The Manville Trust saw a total of 16,607 domestic filings in 2005 (as compared with over 93,000 in 2003). These included 2,036 mesotheliomas, 1,825 lung cancers, and 600 other cancers. Manville Pers. Injury Settlement Trust, Summary Injury (Dec. 31, 2005) (unpublished report) (on file with author). As the litigation focuses on a limited number of desperately sick people, verdicts (and settlements) have greatly increased. See, *e.g.*, Ben Berkowitz, *Special Report: The Long Lethal Shadow of Asbestos*, THOMSON REUTERS (May 11, 2012), <http://www.reuters.com/article/2012/05/11/us-usa-asbestos-lawsuits-idUSBRE84A0J920120511>.

almost always established trusts, which often have had enough assets to pay a substantial portion of the claim value. We have now a mixed administrative/litigation system in which part of a claimant's compensation comes from trusts and the rest from lawsuits.¹⁴⁴

Today, the world of asbestos litigation resembles in key respects the world the framers of the *Amchem* settlement were trying to create. Congress, of course, has done nothing. But judicial management and state legislation have achieved much. The idea that the claims of the unimpaired should be deferred is no longer controversial. Moreover, through the operation of the bankruptcy trusts, the ideal of a settlement machine that will process claims without linkage to the litigation process or to trial dates is also a reality.

With hindsight, has all been for the best? Perhaps we are witnessing the triumph of patience. But the harm done has been incalculable. Forty-one bankruptcies in six years take their toll on investors, employees, and communities. The bankruptcies are also hugely expensive, generating millions of dollars in consultants' (including lawyers') fees. Surely there had to be a better way.

VI. LESSONS

What can we learn from the failure of the *Amchem* settlement? What might we do to handle difficult mass tort situations in the future?

In thinking about these questions, we should be clear about what the problem is not. There is no point trying to resurrect the mass tort settlement class action. *Amchem* is here to stay. Nor do we need to solve today's asbestos litigation problem or anticipate "the next asbestos." Asbestos litigation is no longer a crisis, and there probably will not be a next asbestos.

144. RAND Corporation's Institute of Civil Justice has investigated the relationship between the tort system and asbestos bankruptcy trusts in two recent reports: LLOYD S. DIXON, GEOFFREY MCGOVERN AND AMY COOMB, ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS (2010) [hereinafter Dixon, McGovern, and Coomb, Overview] and LLOYD S. DIXON AND GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION (2011).

Table A.1 in DIXON, MCGOVERN, AND COOMB, OVERVIEW, *supra*, shows that many bankruptcies prior to 1996 either did not result in trusts or, if they did, the trust had become inactive. Of the twenty-nine largest trusts, twenty-five (all but Eagle-Picher, H.K. Porter, Manville, and UNR) were established in 1996 or later. Asbestos trusts had \$30 billion in assets in 2008 and paid \$3.3 billion to claimants that year. DIXON & MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION, *supra*, at 3. Coordinating the activities of trusts and the tort system has become an important and difficult enterprise. *Id.* (Summary).

Just the same, new mass torts will surely cry out for some alternative to tort litigation. Is there anything to learn from the *Amchem* experiment?

Neither the courts nor Congress respond well to litigation crises. Some innovative trial judges may make heroic efforts. However, even in the adventurous 1980s, such efforts ran counter to the judiciary's prevailing ethos.¹⁴⁵ Moreover, the further courts were from the hurly-burly of asbestos cases, the more suspicious they were of departing from traditional judicial administration to address them.

Congress is hopeless for different reasons. Once a mass tort crisis comes into existence, it is very hard to assemble a coalition to support an alternative to tort litigation. Too many interests have too much at stake. This problem is worse when there are deep conflicts among defendants or between defendants and their insurers.¹⁴⁶ In recent years, Congress has established administrative compensation schemes when the federal government was the ultimate payer, but it has rarely done so when the private entities were the source of funding.¹⁴⁷ Congress might be able to help the parties put together imaginative solutions to mass tort problems, but it needs to do so in advance, not after the crisis hits.

After *Amchem* (and *Ortiz*), the only obvious procedure available for global resolution of past and future asbestos claims is bankruptcy. Neither judicial conservatism nor legislative paralysis seems to have had the same force in that area. When Manville filed in 1982, there were few models to follow. The courts and parties had

145. Many trial judges made no special efforts to deal with asbestos cases. See ASBESTOS IN THE COURTS, *supra* note 24, at 107–08; Hensler, *supra* note 17, at 262 (“While some judges picked their way through the morass of asbestos cases, others simply threw up their hands. The cases were too numerous, they argued, to be managed effectively in any reasonable amount of time. Congress would have to adopt a non-judicial mechanism for resolving asbestos claims. Until then, they would simply file asbestos cases away and attend to other more tractable civil lawsuits.”) Jurist-statesmen like Judge Parker, Judge Weiner, and Judge Weinstein were the exception, not the rule.

146. The FAIR Act failed, not so much because of the opposition of trial lawyers and some unions, but because of the opposition of defendants and insurers who thought they would have to pay too much. Hanlon, *supra* note 140, at 579–82.

147. In the last twenty-five years, Congress has established administrative compensation schemes for uranium workers and workers injured by nuclear testing. Those programs were government-financed. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-230, FEDERAL COMPENSATION PROGRAMS, PERSPECTIVES ON FOUR PROGRAMS 24–26 (2005). After the al Qaeda attack on the World Trade Center, Congress quickly assumed responsibility for providing compensation and set up the 9/11 Victims Compensation Fund to channel federal dollars to the victims. See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended in scattered sections of 49 U.S.C. (2006)). The Victim's Compensation Fund was reopened to address claims of injured responders to the 9/11 catastrophe. It is rare that federal compensation schemes are financed by private industry. The Black Lung Program is a much criticized example. See PETER S. BARTH, THE TRAGEDY OF BLACK LUNG 275–84 (1987).

to make up the process as they went along. Basic ideas—like estimation of the value of future claims that would materialize over decades, the use of a futures representative to ensure equality between present and future claimants, the establishment of a trust for the payment of future claims and a channeling injunction to prevent such claims from being pursued against the reorganized company, even the notion of a payment percentage to reserve funds for the people who will manifest disease far in the future—were invented by the courts in asbestos and other mass tort bankruptcies and only later enshrined in legislation.¹⁴⁸ Bankruptcy had the advantage of being an arcane area subject to special, legislatively fixed rules, all of which aimed primarily at facilitating agreements. Thus, though many of the Supreme Court's due process concerns in *Amchem* apply in bankruptcies too, the courts and Congress have been able to achieve reform in the bankruptcy context far more easily than in the civil justice system.

Bankruptcy is probably not suitable as a general vehicle for reaching global settlements in mass tort cases. It is hard to limit the proceedings to the mass tort issues. Transaction costs are high, as is the potential damage to the bankrupt business, its stakeholders, and the communities dependent on it.¹⁴⁹ Some of the basic ideas used in asbestos and other mass tort bankruptcies might, however, be incorporated into a statutory procedure that would achieve some of the benefits of bankruptcy without its disadvantages. Professor Francis McGovern suggested something along this line during the heat of the controversy over asbestos legislation in 2003.¹⁵⁰ The idea had no takers then, but as a general approach to future mass torts it might be worth (re-)considering.

148. Paul Brodeur's narrative of the Manville bankruptcy presents a fascinating picture of innovation in real time. BRODEUR, *supra* note 22, at 283–320, 343–48. From the very beginning, the parties wrestled over the treatment of future claims (including the question whether they could be properly dealt with in bankruptcy at all and whether their interests should be independently protected by a futures representative). Similarly, the structure for processing claims (the settlement trust), the idea that claimants could take over ownership of the company if money fell short, and the notion of a channeling injunction all were worked out in the give and take of bargaining. Though it may have been easier to innovate in these ways in bankruptcy than in ordinary litigation, the use of bankruptcy to resolve asbestos claims was bitterly controverted. *Id.*

149. See Orszag, *supra* note 129, at 1082–83.

150. Francis McGovern, *Asbestos Legislation II: § 524(g) without the Bankruptcy*, 31 PEPP. L. REV. 233, 233 (2003) (proposing a statute creating “a bankruptcy-type end game without the necessity for bankruptcy”). Professor McGovern has served as a court-appointed neutral or mediator in many asbestos and other mass tort bankruptcies. Any effort to create a general procedure for resolving mass tort liabilities using bankruptcy-like procedures would have to start with his analysis. See *id.* at 252–60.

Proposing a legislative global settlement framework would require systematic analysis of a host of difficult legal and practical problems. Here, however, I wish to take on only the humbler task of pointing out a few lessons suggested by the *Amchem* experiment.¹⁵¹

First, the statutory settlement procedure would have to presume full compensation of present and future claims (as *Amchem* did). If there is not enough money to make plaintiffs whole, the defendant really is insolvent. That is what bankruptcy is for.¹⁵²

Second, the settlement of mass tort litigation at a certain scale inevitably has a public aspect. It is more than the resolution of a private dispute.¹⁵³ Because mass tort settlements have an element of legislation in them, some public person or entity—possibly a court, possibly an agency—should actively review the substance of any settlement. The parties and the public should have broad rights to present their views in some kind of hearing.¹⁵⁴

Third, the settlement process should be transparent. This does not require negotiating in a fish-bowl, but it is important at least to preserve a record of deliberations and the evidence on which the settling parties relied.

Fourth, there needs to be some kind of voting procedure to determine whether a settlement had sufficient claimant support to be approved. Although voting cannot replace careful substantive review of the terms of the settlement, in combination with such review it can contribute mightily to the settlement's legitimacy. An important question is whether and how the different value of different claims should be considered in the voting process. It would be possible, for example, to weight votes, or establish separate voting

151. My perspective in this section owes a lot to Richard A. Nagareda, my colleague at Shea & Gardner during the *Amchem* years and subsequently an outstanding legal scholar at Vanderbilt. Professor Nagareda's analysis of *Amchem* and *Ortiz* is essential. See generally RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 74–94 (2007). No one has seen as clearly as he the elements of governance inherent in mass tort settlements, the challenges faced by judicial institutions in trying to address governance problems in a legitimate way, and the relevance of administration as an alternative model.

152. "Full compensation" must be defined in the settlement process, and there may be disagreement about what it means. It could take into consideration such factors as (a) whether settling plaintiffs will have a second bite at the apple if their condition worsens or if they develop a different injury, (b) horizontal equity, (c) the possibility that compensation under a settlement plan might be quicker, more certain, and more predictable than resort to the courts, and (d) the strength of the evidence on general causation for various kinds of injuries.

153. Professor Georgene Vairo has made a similar point with regard to the Dalkon-Shield litigation. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (Or Found)?*, 61 *FORDHAM L. REV.* 617, 623 (1992).

154. Often, a hearing could consist of an opportunity to comment on a proposed settlement. Sometimes a more elaborate hearing may be desirable.

classes, by disease category.¹⁵⁵ Failure to get this right risks introducing troubling horizontal equity problems into the settlement process.

Fifth, *Amchem* showed how important it is to address present and future claims in the same settlement. Probably nothing undermined the legitimacy of the *Amchem* settlement more than the fact that present claims were paid off outside the framework of the settlement and in some respects on better terms. Any agency reviewing a statutory settlement should also review any other settlements (whether aggregate or individual) that in fairness should be considered with it. Otherwise, it is impossible to dispel the suspicion that present claimants (who have already retained lawyers) were favored over future claimants, who by definition are not yet on the scene. While the district court in *Amchem* tried to address this suspicion, in part by appointing Professor Stephen Burbank to explore the possibility of collusion between class counsel and the defendant, the risk of unequal treatment of present and future claimants is so great that something more is required to support the integrity of the settlement.

Sixth, the practice of appointing a representative for future claimants, which currently plays a major role in the asbestos bankruptcy process, should be strengthened. The critical problem here is ensuring that the future representative is expert in the resolution of claims, independent of the lawyers representing present claimants, and authorized to examine the fairness of the settlement to future claimants taking into account the entire settlement context—including possible related settlement agreements. To this end, a public authority should be involved in appointing the future representative *before* the settlement is negotiated.

Seventh, once a trust is established, its performance should be reviewed regularly and publicly. Not just the parties, but the public, should have access to information about filings, audits, settlements, time to disposition, average payouts, transaction costs, and the like. Perhaps trusts could also be made subject to the jurisdiction of the inspector general of a related government agency. The public aspect of mass tort global settlements requires administrative claims structures to be responsible to the public and not just the part of the public who actively use them.

For similar, but not identical reasons, information from settlement trusts should be available, subject to appropriate provisions to

155. Of course, factors other than a person's disease category may influence the value of his claim. Particularization can only go so far. Voting cannot be based on a detailed consideration of everything that might affect the value of a person's claim.

protect the privacy of the claimant, to non-settling defendants in the tort system and to other compensation trusts involving the same toxic substance.¹⁵⁶ Many mass torts involve multiple defendants. Since not all will settle claims against them at the same time, it is likely that there will emerge a mixed system in which claimants pursue some defendants in the courts and others through the statutory settlement mechanism. There is always the possibility of abuse in such a situation. If we accept that mass tort settlements are not merely a matter of private ordering, but affect a public interest, then there does not seem to be any good reason for keeping secret the trusts from which the claimant has sought compensation and the basis for and outcome of the claim. The advantage of requiring such disclosure is to protect both the courts and other trusts from fraud or mistake.¹⁵⁷

Designing a frame for mass tort settlements raises a thousand issues. This Article barely skims the surface. The fundamental point, though, is that avoiding the legitimacy and transparency problems that brought the *Amchem* class settlement down requires a set of structures and procedures that courts cannot be expected to devise on their own. Congress could provide the necessary templates if it did do so *ex ante*.

156. In the context of asbestos bankruptcy trusts, this is controversial. See, e.g., COMM. ON THE JUDICIARY, FURTHERING ASBESTOS CLAIM TRANSPARENCY (FACT) ACT OF 2012, H.R. REP. NO. 112-687 (2012) (highlighting the differences between the views of the majority and minority). Compare *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 112th Cong. 87–111 (2011) (written statement of James L. Stengel), with *id.* at 49–58 (written statement of Charles S. Siegel). If bankruptcy trusts are considered part of a public compensation system—as I believe they should be—it is important to evaluate the “trusts’ effect on the overall claimant compensation provided to individual claimants and the compensation paid by solvent defendants.” LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 45 (2010). This cannot be done without transparency provisions that enable investigators to “determine the number of trusts providing payments to the same individual or the amount the trusts together pay to an individual claimant.” *Id.* See also Schwartz, *supra* note 143, at 16–20.

157. In *Amchem*, some co-defendants sought an order requiring the release of information about individual settlements. Judge Reed rejected that request on the ground that the information could always be subpoenaed. See *Georgine v. Amchem Prods., Inc.* 157 F.R.D. 246, 268 n.16 (E.D. Pa. 1994). But why jump through that hoop? Subject to appropriate orders designed to preserve individual privacy, a simple administrative procedure should be enough to allow other interested entities (other trusts or defendants) to obtain information about individual claims.

CONCLUSION

The *Amchem* settlement was a fascinating episode in the history of mass tort litigation. When the settlement was negotiated in the early 1990s, the sense that asbestos litigation was a crisis and that business as usual would no longer do had become overwhelming. Yet that very sense of asbestos exceptionalism may have led creative lawyers astray. For many courts, if asbestos could not be handled by ordinary judicial administration, then one had to get on with the rest of the docket while waiting for Congress to step in. That, however, was like waiting for Godot.

By the late 1990s, the historical moment had changed. Critics questioned the integrity of the plaintiffs' lawyers, doubted the willingness of judges to really scrutinize class settlements, and lamented, perhaps naively, the loss of party involvement and autonomy that class actions were said to entail. These criticisms came from both left and right and affected all kinds of collective litigation. The *Amchem* settlement, a product of the 1980s ethos, was wrecked in the reaction of the 1990s.

The settlement might have had a better chance if the settling parties had understood the political environment sooner. All along, the idea had been to obtain approval of the settlement and then scale it up to include practically all defendants and all plaintiffs' lawyers. The involvement of Ness, Motley gave the settlement support from a large part of the plaintiffs' bar, but it needed more. If the court had used its good offices to work out some of the problems before the fairness hearing, it might have changed the correlation of forces.

It also might have been better to recognize the settlement's quasi-public character. It would have been easier to see the importance of increased transparency, increased judicial involvement, procedures to ensure that relevant interests are taken into account, utilization of special masters and auditors to ensure that the program was working properly, development of public statistical information that would allow the settlement to be evaluated, and continued supervision by the courts.

Or maybe not. Still, a public law vision of the settlement process would not have hurt, and might have helped. What is tragic in retrospect is that *Amchem* was right in so many ways and could have been made better if business as usual had not dominated the thinking of the Supreme Court.

