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Gene Locks

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ASBESTOS-RELATED DISEASE LITIGATION: CAN THE BEAST BE TAMED?

GENE LOCKS†

I. THE ASBESTOS LITIGATION INDUSTRY

The litigation of asbestos-related claims has recently emerged as a full-fledged industry. Problems inherent in the nature of asbestos-related claims, combined with a litigation-oriented system of dispute resolution, have resulted in the development of this industry which has become a burden to both the judicial system and society in general, as well as a source of excessive costs to plaintiffs and defendants alike. The purpose of this article is to explore some of the problems particular to asbestos-related disease which nettle the plain-

1. For a synthesis of the problems inherent in toxic tort litigation, see Comment, Coping with the Particularized Problems of Toxic Tort Litigation, 28 Vill. L. Rev. 1298 (1983).
2. The word "industry," the author believes, accurately describes the armies of attorneys, support personnel, judges, and court personnel who are engaged in the litigation of asbestos-related claims, as well as the volume of paperwork generated by this litigation, the extensive pleading and discovery involved in these claims, and—perhaps most importantly—the cost to the court system, the defendants, and the plaintiffs involved in resolving asbestos-related disputes.
3. Since 1975, according to one reporter, there have been 16,500 asbestos-related disease lawsuits filed in the United States. Reibstein, The Deadly Curse of Asbestos, Philadelphia Inquirer, Nov. 7, 1982 (Today Magazine) 12, 13. In Philadelphia alone, where there is a backlog of over 2,000 asbestos-related suits, it would take 23 years to clear the dockets at the current disposal rate of cases. Id. Philadelphia has the third largest number of asbestos-related cases in the nation, with new cases being filed at the rate of 75 per month and indications that new cases will continue to be filed at that rate for a substantial number of years to come. See Pittsburgh Corning Corp. v. Bradley, 499 Pa. 291, 294, 453 A.2d 314, 315 (1982). In Philadelphia, the average jury trial for an asbestos-related claim lasts two and one-half to three weeks. Since only six judges in the Philadelphia Court of Common Pleas are assigned to hear asbestos-related cases, the backlog will continue to increase as time goes on. Id. at 296-97, 453 A.2d at 316. See generally, Winter, Asbestos Legal 'Tidal Wave' is Closing In, 68 A.B.A. J. 397 (1982).
4. Plaintiffs find the amount of their recovery reduced by the enormous costs incurred in litigating their claims. Litigation is naturally more expensive than early settlement. Of course, jury verdicts may be substantially higher than out-of-court settlements.

Defendants not only face the cost of defending all suits regardless of the merit of the underlying claims, but also they must pay meritorious claims. Again, costs of defending against the claim (and probably the amount of the claim itself) would be lower if the claim were settled early in the proceedings, rather than after a jury verdict and an appeal.

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tiffs' bar. The author will also suggest several changes which, if implemented, could enable more expeditious and inexpensive resolution of these claims within the existing court system.

For a practitioner in the plaintiffs' bar, an asbestos-related disease claim typically arises in the following manner. A potential plaintiff will have a vague idea that his illness is the result of exposure to something at his work site; he will be generally aware of his right to sue and of the potential for relief in the form of monetary damages. The potential plaintiff will then consult an attorney, telling him, "The doctor says there's something wrong with me. I've got something in my lungs, something to do with work, brown spots, some kind of dust." Workers frequently do not know the exact nature of

5. This article focuses on the perspective of the asbestos-litigation plaintiff and his attorney. For another discussion from the plaintiff's point of view, see Levy, Toxic Tort Litigation—A Plaintiff's Perspective, in ASBESTOS LITIGATION (W. Alcorn ed. 1982). For background discussions of the defense strategies available in products liability suits, see generally Kircher, Products Liability—the Defense Position, 44 INS. COUNS. J. 276 (1977); Lester, Defenses That Work in Products Liability Cases, 26 FED'N INS. COUNS. Q. 89 (1976); Murphy & Marsh, Defense and Management of a Products Liability Case—What, When and How To Do It, 28 FED'N INS. COUNS. Q. 227 (1978); Sheid & Papalia, Resisting the Irresistible: Defending a Products Liability Case, 45 INS. COUNS. J. 211 (1978); Vargo, Something New and Something Old: Defenses to Strict Liability, 15 TRIAL 48 (Nov. 1979).

6. For a complete discussion of the author's suggestions, see notes 66-87 and accompanying text infra.

7. The national average for asbestos-related disease verdicts is $87,000. Reibstein, supra note 3, at 30. Verdicts in the Philadelphia area have been as high as $1.1 million. Id. at 17. In other jurisdictions, individual verdicts have been as high as $3 million. Mansfield, Asbestos: The Cases and the Insurance Problem, 15 FORUM 860, 866 (1980). As one commentator has pointed out,

Little doubt exists that a properly prepared plaintiffs case with a disabled or dead claimant, with proven exposure to identified asbestos containing products, and with expert testimony to establish the causal relationship between the asbestos exposure and the disability or death, presents the potential for a large jury verdict . . . . Given the excellent interstate communication and association among plaintiffs' counsel, the manufacturers and insurance industry are faced with a formidable challenge.

Id. It has been this practitioner's experience that plaintiffs themselves are also aware, through media coverage, trade associations, and word-of-mouth, of the potential for substantial awards.

8. Exposure to asbestos has been linked causally to three main diseases: asbestosis, pulmonary carcinoma, and mesothelioma. Mansfield, supra note 7, at 862. All asbestos-related diseases have relatively long latency periods, frequently 20 years or more. Id. The first asbestos-related disease, asbestosis, takes two forms: parenchymal asbestosis—characterized by scarring of the lungs—and pleural asbestosis, characterized by pleural thickening and other changes in the pleura/pleural cavity. Id. at 862-
their illness, its precise cause, or when it was first diagnosed. This lack of knowledge on the part of plaintiffs results from a combination of factors such as inadequate medical surveillance at the work site, non-specific symptoms, diseases which are difficult to diagnose and have long latency periods, and the presence of contributing factors unrelated to asbestos exposure. Often the plaintiffs’ attorney’s first task is to put the potential plaintiff in contact with someone in the medical profession who specializes in the diagnostic techniques particular to asbestos-related diseases.

Once a positive diagnosis of an asbestos-related disease is made and the plaintiff’s attorney accepts the case, the attorney’s primary responsibility is to get his client’s claim paid as expeditiously and inexpensively as possible. The attorney’s first step, frequently taken even before a positive diagnosis has been made, is to file a lawsuit. While settlement of a claim would accomplish the goal of getting the claim paid, it has not proven to be a realistic option in asbestos-related claims, for reasons discussed below. Consequently, suits are filed and typically go to trial, placing additional burdens upon a judicial system already plagued by crowded dockets.

The rush to file suit is necessitated by statutes of limitations. Faced with diseases which have latency periods of twenty or more years and the short two-year statutes of limitations which generally

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63. Asbestosis is non-malignant. Both forms may be present at the same time and clinical findings are generally non-specific. Id. at 862. A diagnosis usually rests on clinical testing viewed in combination with the work history of the patient. Id.

Pulmonary (lung) carcinoma is another disease that has been linked to exposure to asbestos. Id. at 863. Sometimes asbestosis masks the early symptoms of lung cancer. Id. It is important to note, however, that while pulmonary carcinoma is more prevalent among those exposed to asbestos then the general population, no single cause of lung cancer can be isolated, particularly if the plaintiff has been exposed to known carcinogens other than asbestos, such as cigarette smoke. Id.

Mesothelioma, the third disease commonly linked to asbestos exposure, is a malignancy which occurs in the mesothelial walls—pleural, peritoneal and/or pericardial. Id. at 864. Asbestos is the major cause of the disease and only a limited amount of exposure seems necessary to trigger the malignancy. Id.

For a complete discussion of the relationship between occupational exposure to asbestos and its associated diseases, see Selikoff, Asbestos-Associated Disease, in Asbestos Litigation, supra note 1, at 21.


10. For a discussion of the obstacles to settlement at any point prior to complete litigation of the claim, see notes 21-23 and 33-34 and accompanying text infra.

11. For a discussion of the effect the volume of asbestos-related litigation has had on court dockets, see note 3 supra.

12. See note 8 supra. The long latency periods associated with asbestos-related diseases raise significant statute of limitations problems. In diseases which have long latency periods and cannot be diagnosed until manifestation, it is difficult to determine for purposes of the statute of limitations when an injury “occurs,” such that the statute of limitations is triggered. Most jurisdictions have dealt with this situation by
apply in tort cases, a plaintiffs' attorney may find it necessary to file suit now and ask questions later. By filing as soon as it is practicable, the attorney avoids a lapse beyond the statutory period. However, this also means that the attorney is focusing his efforts to obtain compensation through litigation and therefore is necessarily de-emphasizing other avenues of dispute resolution. 13 Although most jurisdictions now apply the "discovery rule" for the running of the statute of limitations, 14 questions about when the plaintiff discovered his disease are applying a discovery rule for triggering the running of the statute of limitations. For further discussion of the discovery rule, see note 14 and accompanying text infra.

13. For a discussion of other methods of dispute resolution, see notes 78-83 and accompanying text infra.

14. Under the discovery rule, the date a plaintiff "discovers" his illness triggers the running of the statute of limitations. See, e.g., Urie v. Thompson, 337 U.S. 163 (1949) (the statute of limitations in a plaintiff's claim for compensation under the Federal Employers' Liability Act for exposure to silica dust began running when the disease manifested itself); Ayers v. Morgan, 397 Pa. 282, 154 A.2d 788 (1959) (the statute of limitations in a medical malpractice claim began to run at the time the plaintiff discovered, or by reasonable diligence could have discovered the presence of a surgical sponge in his body and its resulting harm, rather than at the time the sponge had been left there by the defending physician); Anthony v. Koppers Co., 284 Pa. Super. 81, 425 A.2d 428 (1980) (applying the discovery rule in "creeping diseases" in which the plaintiff contracted a disease over a long period of continuous exposure to a hazardous substance and in which injury and its cause may be difficult to determine). For a state-by-state review of the discovery rule's status in various jurisdictions, see McGovern, The Status of Statutes of Limitation and Statutes of Repose in Products Liability Actions: Present and Future, 16 FORUM 416 (1980).

Despite a long latency period before manifestation of the toxic substance-related disease, some jurisdictions appear to apply the traditional rule that the date of first exposure to a toxic substance triggers the running of the statute of limitations. However, even these jurisdictions have made exceptions for asbestos-related disease. See, e.g., McKee v. Johns-Manville Corp., 94 Misc. 2d 327, 404 N.Y.S.2d 814 (Sup. Ct. 1978) (rejecting the first exposure rule in an asbestos-related disease claim and holding that the diagnosis of the disease triggered the running of the statute). See also Birnbaum, "First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases, 13 FORUM 279 (1977).

Other jurisdictions have set the time of the of running the statute at the date of a plaintiff's last exposure to the toxic substance, regardless of when the related disease manifests itself. Baron, Piercing the Compensation Veil: Third Party Remedies for Job-Related Injuries, in ASBESTOS LITIGATION, supra note 11, at 101, 135.

By and large, most jurisdictions now follow the discovery rule in asbestos-related disease cases. Under the discovery rule as generally applied in toxic tort cases, the statute of limitations begins to run on the date the plaintiff first discovered or reasonably should have discovered that he was injured, that he had been exposed at an earlier point in time to the defendant's product, and that there was a causal link between his illness or injury and his exposure to the defendant's product. See generally Schwartz & Krantz, Statute of Limitations in Cases of Insidious Diseases, 12 CLEV.-MAR. L. REV. 225 (1963); Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 FORDHAM URB. L.J. 55 (1978); Note, Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law?, 43 U. PITT. L. REV. 501 (1982). Obviously, this formulation leaves open issues for litigation, such as when the plaintiff became aware of the nature of his illness or of the causal connection with asbestos. Also, the
often hotly contested. Consequently, delay in filing suit by the plaintiffs' attorney invites litigation of the statute of limitations issues.

One of the major questions facing the plaintiffs' attorney is the obvious question of whom to sue. Workmen's compensation laws preclude most plaintiffs from suing their employers for damages occasioned by asbestos-related disease. Plaintiffs must instead resort to bringing suit against the manufacturers, distributors, and suppliers of the asbestos materials with which the plaintiff came into contact at his work site. Although a typical suit involves twenty or fewer defendants, there is a pool of approximately 600 asbestos defendants from which to choose. Since plaintiffs frequently do not know who manufactured or produced the asbestos to which they have been exposed, cautious plaintiffs' attorneys sue every manufacturer who conceivably could have been responsible for their clients' exposure. Consider a lawsuit involving twenty or thirty defendants—and therefore twenty or thirty law firms employing attorneys and support personnel—and then multiply the expense and manpower involved in that lawsuit by the total number of asbestos-related claims currently practitioner must be aware that the formulation of the discovery rule may vary among jurisdictions.

For a discussion of the statute of limitations and the role it plays in asbestos-related litigation, see generally Goggin & Brophy, supra note 5; Note, supra.

15. See, e.g., Volpe v. Johns-Manville, 4 Phila. 290 (1980). Among the issues litigated in Volpe was the issue of what constituted the "discovery" of a plaintiff's illness, thereby triggering the running of the statute of limitations. The plaintiff's counsel argued that the statute of limitations should not begin to run until the injured individual became aware of his "right to bring a lawsuit which would compensate him for the injuries he sustained as a result of his exposure to asbestos." Id. at 293-94. The court, however, held that the plaintiff "discovered" his illness when he knew or reasonably should have known of his injury, its operative cause, and the "causative relationship between the injury and the [defendant's] operative conduct." Id. at 295. The court then went on to say that "subjective knowledge" of the availability of legal redress is not a prerequisite to the triggering of the statute of limitations. Id. at 300.


17. See, e.g., Glover v. Johns-Manville Corp., 525 F. Supp. 894 (E.D. Va. 1979) (manufacturers of asbestos-containing products seeking indemnity from federal government for damages resulting from a claim brought by a worker in Naval shipyard who had been exposed to manufacturers' asbestos-containing products), aff'd in part, 662 F.2d 225 (4th Cir. 1981); Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980) (insulator suffering from asbestos suing eleven corporations that were either manufacturers, sellers, or distributors of insulation products containing asbestos).

being litigated. The figure which results allows one to begin to grasp the magnitude of the asbestos litigation industry.

The multiplicity of defendants in these asbestos-related disease cases not only adds to the plaintiff's cost in filing suit, but it also limits the potential for an out-of-court settlement of the claim. The sheer number of interested parties—including named defendants, insurers of defendants, and third-party defendants—impedes the settlement process. There is no one to act as spokesperson for the defendants, no one with whom the plaintiffs' attorney can negotiate a pre-trial settlement, and no set pre-trial settlement procedure to follow.

The divergent interests of the parties involved renders it unlikely that a pre-trial settlement process will evolve naturally. Defendants and their various insurers frequently are engaged in internal dispute resolution processes in order to determine their respective liability should the plaintiff secure a judgment. Asbestos-related diseases typically manifest themselves many years after exposure to asbestos. Consequently, a manufacturer may have been insured by a number of companies or may even have had periods of self-insurance during the period in which the plaintiff was exposed. Furthermore, a man-

19. For an estimate of the total number of claims currently being litigated, see note 3 supra. For a description of the effect asbestos litigation has had on the legal profession in Philadelphia, see Reibstein, supra note 3, at 16-17.

20. The plaintiffs' lawyer usually works on a contingency fee, so a plaintiff's bill does not actually increase because there are multiple defendants. However, the attorney's costs are generally significant because he must incur the expense of investigating the identity of the manufacturers who provided the asbestos to the sites where the plaintiff worked. The combination of the passage of time, incomplete records of sales, incomplete work histories, multiple suppliers and distributors, and plaintiffs who worked at many different sites, makes this investigation a formidable task.

21. For a discussion of the insurance issues in asbestos-related cases, see notes 23-26 and accompanying text infra.

22. Third party defendants that might be named in these suits would include wholly-owned subsidiaries of the principal corporation, medical personnel of the employer, independent testing laboratories who failed to warn employees of dangerous conditions, and government agencies. See Baron, supra note 14, at 104-08.


24. For a discussion of the latency periods of asbestos-related disease, see note 8 supra.

25. One group of commentators has summarized the problems which arise when a defendant has had a series of different insurance coverers:

There is . . . the matter of the coverage trigger. Legal authority now exists
manufacturer may have had more than one insurer at a given time. This multiplicity of interested parties results in confusion regarding with whom a plaintiffs' attorney should negotiate, conflicting interests among defendants, and procedural complexity in responsive pleadings.

As the obstacles to settlement mount, the wheels of the asbestos-litigation industry gather steam and the litigants' costs escalate. In addition to the investigative costs of deciding whom to sue, the plaintiff bears the cost of filing suit. The plaintiff also faces the cost of service upon multiple defendants. Defendants bear the cost of determining their respective liability and the allocation of legal fees among interested parties and insurers. Inartful pleading results in yet more expenses for both plaintiffs and defendants. Frequently plaintiffs' complaints, sometimes filed prematurely or with only preliminary investigation, are not specific enough to allow defendants to determine how to respond or to identify which insurer(s) should defend the case. Defendants then file motions for more specific pleadings in various courts to define the triggering event as the point of exposure to the substance; or the much later point that the disease manifests itself and either is or should be discovered by the claimant; or the entire period after exposure (prorated among the involved defendants and insurers); or any or all of the three, depending upon the circumstances. Because of the time-specific nature of the responsibilities of individual insurers, authoritative selection of one or another of these coverage theories often yields dramatic variations in the extent of the liability of particular defendants, insurers or reinsurers.


26. Where there have been multiple insurers for a given time period, the insurers' interests are not necessarily cohesive. As one commentator has pointed out, when a manufacturer has been covered by several insurers during a specific time period, there is the question of the boundaries of the primary insurer's duty to defend the insured, an obligation which is also of keen interest to excess carriers and reinsurers, who are anxious that primary coverage not be prematurely consumed and their layers activated because of lax defense and/or overly generous settlements. Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 24.

27. These costs, which go into the lawyer's expenses, include drafting the necessary documents (involving attorneys and support personnel), and the actual cost of filing the suit.

28. These costs include the costs of copying and mailing and/or delivering the complaint to all interested parties; this expense snowballs for both sides as the suit progresses through various rounds of pleading, pre-trial motions/objections, and discovery.

29. For some indication of the problems presented in making these determinations, see notes 18-19 & 25-26 and accompanying text supra.

30. The reason for premature filing frequently involves the attorney's desire to avoid problems involving the statute of limitations. See notes 12-15 and accompanying text supra.
nings and the plaintiff must respond, thus generating an additional round of pleadings merely to clarify the plaintiff’s claim. Lack of uniformity in pleading among different jurisdictions may add additional delay to the slow-moving litigation process. Furthermore, even the cost of producing, copying, filing, and distributing the paperwork involved in the pleading process are staggering.

Following the initial stages of pleading, discovery begins, usually with a barrage of interrogatories. Defendants not only file preliminary motions or objections, but they also frequently file motions incorporating all the motions or objections and interrogatories of the other defendants in the suit. This enormous volume of paper is compounded as parties file extensive and duplicative sets of standard interrogatories.

This repetitive effort continues through the various stages of discovery. For example, corporate officers and custodians of important records are frequently subjected to repeated depositions, either because courts will not allow depositions taken for use in other jurisdictions to be used in their forum, or because defendants do not want to be bound by something someone said in another case or another jurisdiction. Plaintiffs themselves are subject to repetitive deposition by the multiple defendants, often with each defendant asking the same questions. Because the sheer volume of asbestos-related disease claims prevents attorneys from becoming truly familiar with each individual case, much of the questioning involves background information setting the stage for the probative questions in the particular case. All of this repetitive questioning, of course, causes delay and increases the expense for all parties.

Despite these delays and the tremendous expense involved in this type of litigation, the opportunity for settlement, even after pleadings and discovery have been completed, remains elusive. There is no pretrial mechanism or procedure for settlement, even on the eve of trial. Parties thus are practically compelled to litigate, regardless of how
clearly issues have been defined through pleading and discovery. Furthermore, due to changes in corporate management or directorships, case management, or insurance coverage, there is no consistent procedure for valuing the cases among the defendants themselves. In addition, there are collateral source or subrogation problems in these cases, including the issue of the subrogation interests of the federal government. With settlement looking more and more difficult, most cases simply proceed to trial.

The problems at trial, for the most part, are beyond the scope of this article. Suffice to say that, in addition to the expected issues in a multiple-defendant products liability case, asbestos-related disease litigation is affected by some other unique problems. For example, some named defendants have filed petitions for reorganization under Chapter 11 of the Bankruptcy Code, an action which has raised issues as to the defendants' status in litigation and as to whether the litigation can proceed without them. Also, because large numbers of asbestos-related claims raise similar issues, argument has surrounded commentators' suggestions that collateral estoppel provides an appropriate solution to the problem of relitigation of issues.

Trial problems notwithstanding, the investigation, pleading, and discovery stages of asbestos-related disease litigation provide sufficient evidence of the magnitude of the asbestos-litigation industry. It em-

33. For a discussion of possible means to encourage pre-trial settlements, see notes 66-83 and accompanying text infra.

34. Manufacturers have sought contribution and/or indemnification from other potentially liable parties, including suppliers of asbestos and the United States government. Mansfield, supra note 7, at 871. The issue of liability of suppliers of asbestos—such as mines, mills, the federal government, and other manufacturers—is undecided and fraught with problems of proof. Id. Claims against the federal government allege that the government bears some responsibility for the working conditions in naval shipyards, where a great deal of exposure to asbestos occurred during World War II, and where “military specifications mandated the inclusion of asbestos in products sold to the government until 1976.” Id. These claims continue to be filed despite a 1979 federal district court ruling that dismissed all claims against the United States government. See Glover v. Johns-Manville Corp., 525 F. Supp. 894 (E.D. Va. 1979), aff'd in part, 662 F.2d 225 (4th Cir. 1981).

35. For a discussion of the issues which appear regularly in asbestos-related disease litigation, see generally Comment, An Examination of Recurring Issues in Asbestos Litigation, 46 ALB. L. REV. 1307 (1982).


37. For discussion of the possibility for collateral estoppel as a means of streamlining asbestos-related litigation, see Baldwin, Asbestos Litigation and Collateral Estoppel, 17 FORUM 772 (1982); Mansfield, supra note 7, at 869; Comment, supra note 14, at 85-89. See also note 85 and accompanying text infra.
employs an army of attorneys and support personnel, clogs already crowded court dockets,\textsuperscript{38} increases the cost of defending suits,\textsuperscript{39} and reduces the amount of the judgment which eventually goes to the injured plaintiff.\textsuperscript{40}

Despite some inherent flaws in the mesh between asbestos claims and the litigation system, the author of this article does not advocate a radical departure from the existing judicial system. There are some minor changes that can be made in the current system which would shrink the asbestos-litigation industry, yet facilitate the payment of claims to injured plaintiffs without always resorting to costly and time-consuming litigation. This article will now consider some proposed solutions which involve a departure from the present system and some proposed solutions which merely require modification of the existing mechanisms. It should become apparent that alternative dispute resolution within the existing framework offers the greatest hope for solutions to the problems posed by asbestos-related disease litigation without severely disrupting our judicial system.

II. TAMING THE BEAST: SOME ALTERNATIVES TO ASBESTOS LITIGATION

Solutions to the asbestos-related disease litigation crisis which depart radically from the traditional forms of dispute resolution of tort claims are unsatisfactory in two ways. First, on a system-wide level, such departures threaten the stability of the judicial system as a mechanism for resolving disputes. This type of "solution" sets a dangerous precedent: any time a solution to a unique litigation situation is not immediately apparent within the existing system, we devise a new system. Consequently, refining or tailoring the existing system seems wiser and more efficient. This approach avoids the instability and the inefficiency of a tangled web of dispute resolution systems; it also increases the potential for uniformity in decisionmaking, and insures the finality of judgments. While there are situations in which an alternative dispute resolution/compensation scheme might be appro-

\textsuperscript{38} See note 3 and accompanying text supra.
\textsuperscript{39} It is estimated that the overhead costs of defending against asbestos claims will eventually amount to $25-30 billion in the next 30 years, a cost incurred in addition to payment of an estimated $35 million in asbestos claims. Hamilton, Rabino-vitz & Szanton, Costs Study, supra note 25, at 21.
\textsuperscript{40} Because the lawyers' expense in conducting asbestos-related litigation is substantial, the attorneys' fees for such litigation represent a larger percentage of the jury's award than is ordinarily the case in a non-asbestos suit. Plaintiffs' attorneys in asbestos-related suits typically work on 40% contingency fees—higher than the 33% charge which applies in most civil cases. Lawyers, of course, have to absorb their costs if they lose. Reibstein, supra note 3, at 17.
appropriate, it is, however, the author’s belief that asbestos litigation does not require such a new scheme. By refining the present system to suit the particular needs of asbestos claims, one can avoid the risks of new compensation systems and still ensure just and efficient resolution of the disputes.

Secondly, of the solutions which have been proposed as alternatives to the existing judicial resolution of these claims, each has internal flaws and/or external ramifications which make its implementation undesirable. This article will consider, as examples of unworkable solutions, federal legislation, no-fault insurance compensation schemes, and group settlement awards.

The desirability of federal legislation has sparked a great deal of discussion, with some members of the profession considering it a practical necessity in light of the continuing absence of voluntary action within the existing tort law system. However, this author joins


42. Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 29. This report noted, [c]oncern was often expressed [among members of the legal profession] that the legislative handling of asbestos, however hastily conceived, would inevitably set the tone for dealing with the entire burgeoning field of environmental claims, with incalculable effects on the cost structures of many major industries, as well as on all elements of the legal profession. Id. This report concluded that any “hastily conceived” compensation scheme would set a dangerous precedent. Id.

43. Id. at 28-29. According to this recent study, most of the members of the legal profession who were interviewed agreed, in the case of asbestos-related legislation, “with the proposition that legislation is inevitable unless the parties work out voluntary approaches that result in expedited handling of meritorious claims at reasonable overhead.” According to this report, “many participants forecasted that even if voluntary measures were put into effect, [f]ederal legislation was likely to follow . . . .” Id.


other commentators in submitting that federal legislation is a theoretically unsound proposal, that it will not serve its intended purpose, and that it will create far more confusion and delay than it will alleviate. Federal legislation is theoretically unsound because it represents an unprecedented and unnecessary intrusion of federal law into the states' substantive and procedural tort law. The uniformity sought by federal legislation will not be its result; it will merely replace fifty different states' law with fifty different interpretations of federal law. Finally, the new law will create uncertainty and confusion as courts grapple with problems of interpretation which accom-


44. The author is focusing his discussion on the proposed “Product Liability Act” currently pending in both the House and the Senate. See S. 44, 98th Cong., 1st Sess. (1983). Note that this bill is virtually identical to S. 2631, 97th Cong. 2d Sess. (1982).

As briefly summarized by one commentator, the scope of the proposed legislation includes the following areas:

[T]he sponsors of this significant legislative proposal . . . seek . . . to: (1) lay down the definitions of the terms employed; (2) state the pre-emptive effect of the proposed law; (3) set forth the responsibility of manufacturers for product construction, design, warnings and instructions; (4) provide for the responsibility of product sellers; (5) establish a system of comparative responsibility, including notions of misuse, alteration, contributory negligence and assumption of the risk; (6) relate the effect of the provisions of the legislation on worker's compensation benefits; (7) set a time limitation on liability; and (8) promulgate a system of punitive damages. Cooke, The Federal Product Liability Bill: The Judge's View, 15 Trial Law. Q. 5, 6-7 (1983).

The details of the provisions of this bill are beyond the scope of this article. This article instead concentrates on the overall inappropriateness of a legislative solution, rather than the advisability of particular provisions of the Bill. For more in-depth treatment of the substantive and procedural effect of the proposed Act or its predecessor (S. 2631), see Cohen, The Effect of the Proposed “Product Liability Act” on State Laws, 2 J. Prod. L. 89 (1983); Twerski, National Product Liability Legislation: In Search For the Best of All Possible Worlds, 18 Idaho L. Rev. 411 (1982). See also Kircher, supra note 43; Phillips, supra note 43.

45. With this one proposed Act, Congress is seeking to replace an entire body of law, both substantive and procedural, case law and statutory law—a body of law which has previously been largely reserved to the individual states. As one judge observed in a recent article, “[T]he Act constitutes an unwarranted and unwise incursion into states' rights. With the diversity of our states, their populations, economies, and necessities, each should retain the freedom to make choices respecting the welfare of their citizens.” Cooke, supra note 44, at 7. The same judge has also pointed out, by way of example, that commercial uniformity under the Uniform Commercial Code was achieved through adoption of the Code, with modifications, by each individual state, not by imposition by the federal government. Id. at 7-8.

46. S. 44, as proposed, does not give rise to a federal cause of action; jurisdiction vests in each of the 50 states (as well as the 12 circuits in cases of diversity jurisdiction), and no one state's interpretation of the Act would bind any other state. Id. at 6. If the legislature is seeking uniformity and the certainty which attends uniformity, it has failed to ensure its goal through this piece of legislation.
pany any statute, and the natural case-by-case growth and refinement of products liability law will be stunted by codified errors and gaps in the provisions of the federal statute. Federal legislation may look appealing now, especially to large companies facing multi-state products liability litigation, but such legislation will solve neither the problems of these defendants, nor those of the asbestos-injured plaintiffs.

A second category of proposed solutions involves a no-fault liability compensation scheme. Such schemes have been proposed in a variety of shapes and forms, with a variety of sources of funding.

47. At least under the present system, there is some semblance of certainty as to each state's tort law. As the body of asbestos litigation caselaw grows, more certainty will result. To interrupt this gradual solidification of the law by eradicating what has been done in the past and presenting a new statute for fresh interpretation will hardly increase certainty as to how issues will be decided.

Furthermore, courts in each jurisdiction will have to decide how the Act interacts with existing procedural and evidentiary law. As one member of the judiciary has noted,

If Congress is of the view that the states are not now in general agreement in the product liability area, they should not now be surprised, if, upon adoption, the states do not neatly fall into rows of agreement. The likelihood of disparate results under the proposed Act is enhanced by the variety of procedures and evidentiary holdings extant in the states not otherwise preempted by the Act. Cooke, supra note 44, at 7.


49. The law fails to address the ostensible concerns of certainty and uniformity which asbestos defendants claim to be so important to the protection of their interests. The law also does not help plaintiffs; it will not increase efficient payment of claims, and its substantive provisions are strongly biased in favor of the interests of asbestos manufacturers and other business concerns facing possible toxic-tort liability. See Specter, supra note 48, at 16-18; Twerski, supra note 44, at 476.


51. Senator Hart's bill provided that funds for each worker's compensation would come from the worker's last employer who exposed him to asbestos. Asbestos Health Hazards Compensation Act, S. 1643, supra note 50. If such employer were unknown or could not be located, other "responsible parties," including the government, would pay. Id.

Representative Fenwick's bill provided for three classes of contributors to a compensation fund: (1) manufacturers of asbestos products likely to cause asbestos dust, who would contribute two percent of their net domestic sales of asbestos products for
The political unpopularity of these government compensation systems in the current economic climate would seem to militate against any action on these proposals. Perhaps this is just as well since these compensation schemes do not necessarily expedite payment of claims and may result in unfairness to plaintiffs. Any compensation scheme would result in yet another layer of government bureaucracy through which the asbestos victim would have to wade. Furthermore, under most proposals, obtaining compensation would still involve the problems associated with establishing causation and identification of the responsible parties.

Furthermore, once the compensation system was in place, it

the 15 years preceding the year of payment; (2) manufacturers of asbestos products not as likely to produce asbestos dust, who would contribute one percent of their sales, as above; and (3) manufacturers of cigarettes or cigarette tobacco, who would contribute 0.3% of their sales, as above. Asbestos Health Hazards Compensation Act, H.R. 5224, supra note 50.

Under Representative Miller’s bill the last employer who had employed the victim for a minimum of two years and who had exposed him to asbestos would be primarily responsible for compensation. Occupational Health Hazards Compensation Act, H.R. 5735, supra note 50. If there were no such employer, the compensation would be paid by an Asbestos Compensation Excess Liability Fund. Fifty percent of this fund would come from manufacturers and importers of products in which asbestos was a significant constituent element, 30% from manufacturers of products in which asbestos constituted a less than significant element, and 20% from employers who exposed employees to asbestos in the course of employment. Id.

52. See Comment, supra note 50. The author of this article believes that even with proposals which do not involve government contributions to the fund itself, the taxpayers would bear the expense of establishing and running another bureaucracy for the purpose of administering these claims. Under the Hart and Fenwick bills, this would be the case. Id. at 197-98. Under the Miller bill, industry would bear the administrative costs, as well as the actual costs of compensation. Id. Placing all administrative costs on the other side—industry or government—would be unpopular politically and thus reduce even further the possibility of passage of this legislation. This commentator has suggested that a fairer arrangement might be an allocation of administrative cost between the parties, based on the percentage of claims which the party is paying. Id. at 197. The lack of congressional action to date affirms this author’s suspicion that these bills stand little chance of enactment in their present forms, despite growing societal concern about the inadequacy of the way asbestos claims are currently being handled.

53. Under the Fenwick bill, victims would need direct evidence of an asbestos-related disease and would not have the benefit of any presumptions of a causal connection between their disease and asbestos exposure. Asbestos Health Hazards Compensation Act, H.R. 5224, supra note 50, § 205. The Hart bill and the Miller bill both require identification of the last employer who exposed the victim to asbestos. Occupational Health Hazards Compensation Act, H.R. 5735, supra note 50, § 11(b); Asbestos Health Hazards Compensation Act, S. 1643, supra note 50, § 7(2)(a). Under the Hart bill, if that employer is unavailable or unknown, the victim would have to identify other responsible parties. S. 1643, supra note 50, § 7(2)(a). The point here is that these systems do not necessarily alleviate the problems of proof faced by asbestos victims seeking compensation. For suggestions as to how the burden could be alleviated and still provide fairness to defendants, see notes 88-89 and accompanying text infra.
would most likely be the plaintiff's only avenue of relief. Although it is unclear exactly how victims would be compensated, it is fairly safe to assume that the recovery of significant damages, such as those for pain and suffering—damages to which an injured party has a legal right—would be greatly reduced.54 The benefits to manufacturers of a government-run and partially funded compensation system are obvious.55 Just as obvious is the unfairness to victims, a peculiar irony in a system supposedly designed to alleviate the so-called unfairness of the present situation.

A third proposed solution, which also yields an unsatisfactory result, is the possibility of elective no-fault products liability insurance. Under an elective no-fault insurance system, a manufacturer or any potential products liability defendant would elect a no-fault policy which would compensate victims of product-related injuries.56

There are a number of serious disadvantages to this assembly-line payment of claims. First of all, the manufacturer makes the election and holds all the cards: he decides which expenses and which

54. Under the Hart bill, all pending asbestos-related litigation would be terminated and the compensation scheme would be the victim's only avenue of relief. S. 1643, supra note 50, § 10(b). Under the Fenwick bill, victims engaged in pending litigation could elect to proceed with their lawsuits or to withdraw and proceed under the Act. H.R. 5224, supra note 50, § 302. The compensation scheme would be the exclusive remedy for all other claims. Id. The Miller proposal is also designed as an exclusive remedy; however pending claims would not be affected. H.R. 5735, supra note 50, § 9.

Under the Hart bill, the Secretary of Labor would evaluate state workers' compensation laws and establish "minimum federal standards" to ensure adequate compensation. S. 1643, supra note 50, § 1(b)(7). States whose workers' compensation laws did not measure up to minimum standards would be required to make supplemental payments to bring compensation up to federal standards. Id. § 5(b). The other two bills contain no such provisions. Even with the minimum standards provision, it is doubtful that asbestos victims under one of these compensation schemes would be afforded the same opportunity to have their damages evaluated on an individual basis and in light of the effect their disease has had on their lives, as they now enjoy in a jury trial setting.

55. Some of the benefits to manufacturers include lower awards, lower legal fees, and the possibility of government assistance in paying the fees. Also, not every employer or manufacturer who contributed to a given victim's injury would necessarily be forced to compensate that victim under the "last employer" rule of the Hart and Miller bills. Thus manufacturers could avoid payment on some claims altogether.

types of injuries will receive compensation. By electing certain policy coverage, the manufacturer thus chooses which of the plaintiff's rights will be protected and to what extent. Since this system provides for little, if any, evaluation of claims on an individual basis, a plaintiff is deprived of the opportunity to be compensated for the unique ways in which the defendant's conduct has injured him personally. For example, the elective no-fault system would seem to interfere with recovery for pain and suffering. Certainly pain and suffering is at least as legitimate a compensable injury as is lost wages, even if it does require greater time and individualized consideration to determine the extent of such damages.

Finally, no-fault liability insurance strays too far from the traditional fault system of liability. In fact, it strays dangerously close to relieving manufacturers from public accountability for their products' safety. Although the no-fault insurance system is attractive be-

57. As one commentator has aptly observed,
[T]he manufacturer, solely, shall be the one who elects whether he wants to provide elective no-fault benefits. Not only may the manufacturer unilaterally make this election, but it is left to the manufacturer to decide if he wants to limit it to a particular product; or to a particular time period; or to a particular geographical area and, last but not least, to a particular type of bodily injury.

58. For example, a manufacturer could elect a deductible; he could limit benefits for funeral expenses or hospital expenses; he could opt for maximum weekly benefits. Lanzone, supra note 57, at 137.

59. As one commentator has pointed out, in place of the litigation forum for the adjudication of individual rights on a case-by-case basis will be a socialistic legal and insurance monolith which will dole out payments while being totally insensitive to an indistinguishable and faceless claimant who will be told to feel secure in the knowledge that he is getting the same as everyone else even though he is not adequately compensated for his personal loss.
Id.

60. Under Professor O'Connell's program, if the insured's policy is sufficient to permit recovery for pain and suffering, as well as other damages, the insured would have no tort liability. Id. If the policy pays maximum benefits of $500,000 or more, then the insured would not have any tort liability and could not be sued regardless of the amount of the claim. Id. If the policy provided maximum benefits of less than $500,000, and was not sufficient to cover the plaintiff's claim, the plaintiff could litigate. Id. However, if the plaintiff prevailed in the litigation, his recovery would be reduced by twice the amount elected by the manufacturer. Id. It is obvious that the scheme operates to limit the victim's recovery in a number of ways and it dramatically limits his recovery for pain and suffering.

61. The importance of a fault system of liability to society as a whole cannot be underestimated. One commentator has accurately described its place in our culture:
The issue of fault is predicated upon deep moral and ethical beliefs that a
cause of its efficiency, its effect of depriving individuals of the opportunity to protect their own rights and be compensated fully for the manufacturer's infringement upon those rights is unacceptable in a legal system which places such a high value on individual rights.

Finally, many commentators have urged a more frequent use of group settlement as a means of lowering costs and increasing efficiency. Although group settlement is within the parameters of the existing system, it is a solution that is basically unsuitable in many circumstances. The problem with this proposed "solution" is a practical consideration rather than a theoretical one: once the settlement has been arranged and the check has changed hands, the plaintiffs' attorneys are left with the cumbersome task of distributing the award among the plaintiffs. This task should not be left to private resolution, but is more suited to a courtroom setting. If a satisfactory individual case settlement procedure were in place, the need to resort to group settlement would diminish and the administration of claims' payment would be simpler. An individual case settlement procedure would be fairer to a plaintiff, who deserves to have the scope of his injury evaluated separately and to be compensated accordingly.

Having demonstrated some of the flaws in the proposals which reach outside the judicial system, this author now suggests that the proper place to look for such solutions is within the existing system itself. If the flexibility of the present system were to be fully exploited, solutions to many current problems could be developed and implemented. The expense and energy required to adjust the existing system would almost certainly be less than that required to create a new system. The effect would be less disruptive, the results more predictable, the precedent less dangerous, and the entire character of the solution less offensive to our traditional notions of substantial justice than would be many of the novel schemes that have been proposed.

person should be held accountable for his conduct, for if he were not, we need only look to the history of mankind to contemplate what the world would be like. Our system of common law has developed on the basic premise that we should encourage individuals to seek recourse and recompense... by looking to our judicial system. We promise them a fair and truthful administration of justice in exchange for which we ask them to waive their rights to seek personal retribution or vindication from the alleged tortfeasor.

Id. at 139.

62. See, e.g., Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 34.
63. See generally Mansfield, supra note 7, at 872-73 (discussing the ethical problems presented by group settlements).
64. For a discussion of the possibilities of a workable pre-trial settlement procedure, see notes 66-83 and accompanying text infra.
As was pointed out earlier, plaintiffs' lawyers frequently file first and ask questions later; by so doing, they avoid the running of the statute of limitations and they begin the process of identifying defendants and their insurers. Often a lawsuit is the easiest and safest way to notify manufacturers and their insurers of claims. Consequently, a starting point for preventing unnecessary litigation might be a procedure providing for filing preliminary notices of claims and for receiving initial responses before instituting suit. As long as such filing tolled the statute of limitations, it would remove an incentive for filing prematurely. As long as neither party gave up substantial rights to litigate the claim later, neither party would have anything to lose by such a preliminary interchange and both parties would gain if litigation were ultimately forestalled.

If and when claims reach the lawsuit stage, some standardization of pleadings and pre-trial procedure would greatly facilitate the progress of claims through the system. As noted above, inartful pleading, which may generate several rounds of documents before the initial steps of complaint and answer are completed, results in delay and excessive cost. If plaintiffs, through a procedure of general fact pleading, could uniformly plead as many facts as were available, the

65. For a discussion of the pressures which compel plaintiffs' attorneys to file suit, see notes 10-15 and accompanying text supra.

66. Hamilton, Rabinovitz and Szanton, Inc. has formulated such a proposal which would involve having the plaintiff file a Letter of Representation containing basic information about the claimant and his claim which would be supplemented by additional substantiation (e.g. medical records). Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 41. The defendant or insurer would respond within six months, by either denying the claim, offering to settle, or requesting further information. Id. at 42. After these two steps, the claim could be abandoned, settled, negotiated further, or litigated—at the discretion of the plaintiff's attorney. Id. At each stage of the process, if a party became dissatisfied with the other party's action, the case simply could be taken to court. Id.

67. The Hamilton, Rabinovitz and Szanton, Inc. proposal apparently does not provide for a tolling of the statute of limitations. See id. It is difficult to see how a plan which does not allow relief from that pressure to file suit would operate at maximum efficiency.

68. As Hamilton, Rabinovitz and Szanton, Inc. points out regarding its proposal,

[O]ne of the beauties of the Program is that so little risk to any party is involved in giving it a try. It requires no unanimity, waives no rights, forecloses on future actions, adds no work that would not eventually need to be performed in any event, requires no new institutions or formal organizational arrangements; it can easily be abandoned if unforeseen flaws evolve. Yet if the approach does work—i.e. if resolutions can be expedited without the premature engagement of defense attorneys and the resulting incurrence of defense costs—it can result in major savings. Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 42-43.

69. For a discussion of the problems created by inartful pleading, see notes 30-31 and accompanying text supra.
need for motions for more specific pleadings and amended complaints could be reduced greatly. One commentator has also suggested the development of a "Model Standing Procedural Order" that would be agreed upon by the defense and plaintiffs' bar. This order would be submitted to the courts by attorneys engaged in asbestos litigation in order to facilitate pretrial procedures. Such an order could include provisions for special pleading rules and standardized discovery procedures, liaison counsel, authorization to obtain necessary documents, set roles for experts, and incorporation of procedures such as the "lead case" concept. A standardized "Model Standing Order" would be advantageous to litigants because it would be developed precisely to deal with asbestos-related litigation problems, in a fashion that would have been agreed upon by the parties, and its uniformity would allow for at least a medium of predictability.

In addition to standardized procedures for discovery, the availability of multi-district discovery would greatly reduce the cost of discovery for both parties. Defendants have contested the application of multi-district discovery, and courts have been reluctant to allow it to take place. Admittedly, the limits on the consolidation of cases are

70. Under the proposal put forth by Hamilton, Rabinovitz and Szanton, Inc., an ad hoc group of experienced asbestos attorneys from both the plaintiffs' and the defense bar would draft a model standing order. Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 81. They would review existing standing orders and procedures and assess their strengths and weaknesses. Following such an examination, the group would draft its own standing order which would attempt to avoid the problems which occur under current procedures. Id. at 81-82. The draft would be circulated to a representative number of plaintiffs' and defense counsel for comments. Id. at 82. These comments would be reviewed and the ad hoc group would prepare a final draft of the model order. Id. at 82. The model would then be disseminated under broad, non-partisan auspices, to attorneys and through the court system; it could be adopted as is, or modified to address the unique concerns of a particular jurisdiction. Id.

71. Id. at 79. A specific provision might standardize the format for interrogatories, complaints, and answers. Id.

72. Id. at 79-80. Through such a procedure, one attorney or a small group of attorneys would act as a liaison between multiple defendants and a single plaintiff.

73. Id. at 80. Included among these documents might be employment and medical records, as well as the age, tax, and social security records of the claimant. Id. A simplified procedure might eliminate the more cumbersome discovery procedures now in place which frequently involve petitioning the court for authorization to obtain documents if a party contests the other's right to the documents.

74. Id.

75. Id. at 80. Under the "lead case" concept, "it is established by rule that one case can be used as the surrogate for a body of others with regard to the taking of depositions of national experts, which depositions can then be admitted as evidence in all other cases in the group without a new taking." Id. at 80.

hard to draw. This administrative difficulty, however, is insignificant when compared to the overall asbestos-case management dilemma.\textsuperscript{77} Consolidation of cases within geographic areas for purposes of limited discovery is still a viable alternative to repetitious discovery on a case-by-case basis. Discovery in such instances, for example, could be limited to the composition of a manufacturer’s products, the time and place the products were sold, and questions involving the state-of-the-art. The potential for reducing the present waste of time and money is enormous under a multi-district discovery system.

The ultimate goal of all of the above suggestions is to facilitate pre-trial settlement by providing the maximum amount of information to both sides at the minimum cost, and in the shortest period of time. Hopefully, this information would enable the parties to evaluate the worth of the claims and arrive at a satisfactory settlement figure without actually litigating the case. The appointment of liason counsel in multi-party litigation\textsuperscript{78} would be a starting point for facilitating settlement. The liason counsel would initially act as a collective spokesperson for the defendants. Although he could not formally represent their interests, the spokesperson would at least give the plaintiffs’ counsel someone with whom to initiate contact in order to negotiate a settlement. Similarly, any effort to coordinate defense procedures or discourage intra-defense litigation would surely facilitate settlement. One proposal along these lines provides for the development of national guidelines to facilitate coordination among defendants and their respective insurers.\textsuperscript{79}

\textsuperscript{77} One commentator has suggested that, if one is willing to consolidate 10 or 25 cases, why not consolidate 5,000. Mansfield, supra note 7, at 87. He then proceeds to elaborate on the problems which would accompany a consolidation of 5,000 cases and the formation of an “asbestos litigation discovery court.” \textit{Id.}

Consolidation of 5,000 cases, however, should not be done simply because all the cases involve asbestos-related diseases. Instead, this author recommends that cases should be consolidated within practicable geographic areas, areas from which similar discovery is likely to be required anyway. The burden thus would fall among the various judicial districts, not on any one “asbestos litigation discovery court.” Although the burden of presiding over consolidated discovery proceedings would be more significant than presiding over discovery in a single case, the cumulative burden of case-by-case discovery, due to repetition and duplication of evidence, is far greater than that presented in one consolidated discovery process.

\textsuperscript{78} For a discussion of the mechanism for appointment of liaison counsel, see note 72 and accompanying text supra.

\textsuperscript{79} Hamilton, Rabinovitz & Szanton, Costs Study, supra note 25, at 54-67. Briefly stated, this proposal involves the formation of a voluntary committee for the purpose of drafting a handbook for asbestos defendants. \textit{Id.} at 67. The draft would be circulated, critiqued, revised, and distributed to those involved in defending against asbestos claims. \textit{Id.} The handbook would focus on the possibilities of consolidated representation, procedures for “common data bases,” and “guidelines for achieving group settlements.” \textit{Id.} Although the study does not endorse the viability...
A final proposal for facilitation of the pretrial settlement process involves the establishment of a resource center that would provide claimants and manufacturers with information about the availability of arbitrators, factfinders, or decisionmakers. Neutral decisionmakers are available to parties engaged in asbestos litigation, with services ranging from neutral experts to decisionmaking corporations. As one group of commentators has so aptly suggested, what is needed to facilitate settlement is access to these neutral decisionmaking services through a neutral resolution brokerage organization. It would provide parties who want to settle a lawsuit out of court with information as to the decisionmaking and arbitration services available to them. This brokerage service would provide parties with a neutral resource center which could put them in touch with arbitration and decision-making services and thereby facilitate the settlement process. Such an organization could be run as a corporation, governed by partisan directors from each side of the asbestos dispute and neutral directors as well, and operate out of regional facilities. It would give the parties of group settlements, it is fully in agreement with the need for consolidated representation of defendants and coordination of information as a prerequisite to a workable pre-trial settlement procedure. One cannot negotiate with any facility if the opposing position is comprised of conflicting interests rather than a coordinated stand on the issues at stake.

80. Id. at 68-69. The Hamilton, Rabinovitz & Szanton study points out that the need for a neutral party and the nature of the party needed is a function of the lawsuit involved. Id. at 68. The parties may want to present their cases to an arbitrator or obtain the assistance of a mediator in their negotiation process. Id. In the alternative, they may require a neutral expert to "provide unbiased advice on the significance of a technical point that is at the heart of the issue." Id. A neutral financial expert could explain the ramifications of structuring the settlement in a certain way, and suggest a settlement structure that fairly provides for the needs of both parties. Id. There may also be a need for continuing medical surveillance and for later decisions regarding the need for additional compensation if new diseases or injuries manifest themselves. Id. That surveillance and the subsequent decisions may require a neutral forum. Id.

81. Id. at 68-74. The Hamilton, Rabinovitz & Szanton study suggests the formation of an ad hoc committee consisting of plaintiffs' attorneys and executives from asbestos manufacturing and insurance companies. The study recommended that this committee draft a conceptual description of such a brokerage house, submit the draft for evaluation, and then revise or amend it as needed. Id. at 74. This conceptual description subsequently would be translated into Articles of Incorporation and By-laws, and the corporation would thus be formed. Id. The corporation would be a non-profit organization, funded initially by a grant or loan and later self-financed by fees paid for services rendered. Id. at 71-72.

82. Id. at 70.

83. Id. at 71. The study suggests that the Board of Directors might consist of 15 members, of whom six would be plaintiffs' attorneys, three would represent insurers, three would represent defendants and three could be prominent neutral figures selected by unanimous vote of the other Directors. Id. The Chairman could be drawn from the neutral Directors. Id.
ties somewhere to go, by providing them with the first step in the mediation and settlement process.

Even assuming a case does go to trial—as some inevitably would—there are steps that can be taken at the trial stage to move cases quickly through the court system while maintaining fairness for all parties. As an extensive discussion of these suggestions is beyond the scope of this article, only a few possibilities will be mentioned. For example, parties could agree to certain stipulations on common asbestos questions to simplify proof of the case and/or the defense. Such agreements could be modeled on standard options or agreements which would be drafted by a committee representative of plaintiffs’, defendants’, and insurers’ interests. In addition, courts could permit the offensive use of collateral estoppel to prevent defendants from relitigating issues that have been adjudicated against them in prior lawsuits. Both of these mechanisms would reduce the number of issues actually being litigated, thereby shortening trials and eliminating the costs of repetitive litigation.

In addition to these essentially procedural possibilities for simplifying asbestos trials, some changes in the substantive law would simplify the process of proving meritorious claims while still affording fairness to both plaintiffs and defendants. For example, to alleviate the problems a plaintiff faces in identifying the manufacturer of the product to which he has been exposed, courts could adopt burden-

84. Id. at 74-79. In the view of the Hamilton, Rabinovitz & Szanton study, these stipulations, which would be reciprocal in nature, could address questions such as medical causation or could preclude certain defenses, such as the state-of-the-art defense. Id. at 77-78. The effect of stipulations for common issues over which there is little dispute would be to allow a much shorter trial and substantial savings to parties who would no longer bear the burden of producing or refuting evidence.

85. The basic requirements for the use of collateral estoppel have been met in most asbestos cases: the issues of fact are generally the same as to certain issues like medical knowledge, and the party against whom collateral estoppel is asserted was usually a party to the previous action. Comment, supra note 14, at 86. The doctrine of mutuality, under which “the party asserting the doctrine of collateral estoppel” must himself “have been subject to preclusion if the first action had gone against him” has been abandoned in many jurisdictions. Id. An example of the offensive use of collateral estoppel might be to preclude Johns-Manville Corporation from the opportunity to relitigate the issue of medical knowledge of the dangers of asbestos on the grounds that Johns-Manville has already litigated the issue in Borel v. Fibreboard Paper Prods. Corp. See Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973) (in which the jury’s decision for the plaintiffs necessitated a finding that the asbestos industry knew or should have known of the dangers of asbestos inhalation by insulation workers). See also Comment, supra note 14, at 86-87. Again, the effect of the use of collateral estoppel in this fashion would be to reduce the number of issues being litigated, therefore shortening trials and cutting the cost of litigation. For additional authority discussing the benefit of collateral estoppel in asbestos, see note 37 and accompanying text supra.
shifting devices such as the doctrines of alternative liability, or market share liability. Although these doctrines would constitute significant changes in existing tort law, numerous scholars have written about the advisability of their adoption. The author's main purpose in mentioning these proposals is not necessarily to advocate their applicability to the asbestos context. Rather, the author wishes to reiterate his belief that utilizing the flexibility of the existing system will result in adequate measures to handle the unprecedented phenomenon of asbestos litigation.

86. Comment, supra note 14, at 83-85. The theory of alternative liability, which results in shifting the burden of proving identification among several possible tortfeasors from the plaintiff to the defendant, was originally set forth in Summers v. Tice. Id. at 84 (citing Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948)). The adoption of this theory of liability in asbestos cases would relieve the plaintiff of the burden of proving exactly which of the potential tortfeasors manufactured the products to which he was exposed, thus resulting in a saving of both time and expense. And, since manufacturers are in possession of the records showing what was produced and when it was sold and to whom, it would be easier and more efficient for them to prove they did not expose the plaintiff to asbestos than it is for the plaintiff to prove they did. Id. at 85. This commentator has observed,

In most instances this theory [of alternative liability] will . . . result in joint and several liability because the defendant manufacturers will not be able to prove that the plaintiff was not exposed to their product. However, all of the asbestos manufacturers knew or should have known that products containing asbestos were a potential health hazard, and as between the injured innocent plaintiff and the defendant, it is more equitable for the defendant to compensate the plaintiff than to escape liability.

Id. at 84.


87. Under the market-share theory of liability set forth in Sindell v. Abbott Laboratories, once the plaintiffs had joined defendants representing a substantial share of the market to which they were exposed, the burden would shift to the defendants to prove that the plaintiff could not possibly have been exposed to his product. Vagley & Blanton, Aggregation of Claims: Liability for Certain Illnesses with Long Latency Periods Before Manifestation, 16 FORUM 636, 645 (1981) (citing Sindell v. Abbott Laboratories, 25 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980)). Those defendants who are unable to extricate themselves would pay the claim in accordance with their percentage share of the market, rather than being jointly and severally liable. Id. at 645.

Although asbestos-related claims are overwhelming in number and in the burden they place on the judicial system, it is probable that they will not be the last such wave of "toxic tort" litigation.\textsuperscript{89} How we, as a society, as a government, as a judicial system, as manufacturers and insurers, and as members of the legal profession, respond to the challenge of asbestos litigation, will have an impact on thousands, even millions of individuals who have been injured through exposure to toxic substances. The resolution of asbestos claims within the present court system, adhering to traditional notions of fairness and justice, sets the most worthy precedent for the solution of toxic tort problems in the future.

\textsuperscript{89} One article has suggested that we can anticipate more "toxic tort" litigation which is characterized by exposure of large groups of people to toxic substances that result in diseases with long latency periods and cumulative trauma injuries. Vagley & Blanton, \textit{supra} note 87, at 647. The toxic substances giving rise to such litigation might include "industrial waste, such as radioactive materials, ocean and river dumping, preservatives in foods, urban pollutants, and occupational exposures generally. . . ." \textit{Id.}