LEGISLATIVE AND JUDICIAL RESPONSES TO THE INADEQUACY OF COMPENSATION FOR OCCUPATIONAL DISEASE

ELINOR P. SCHROEDER*

I

INTRODUCTION

Occupational disease is not a glamorous subject. It does not grip national attention and command lead stories on the evening news as did, for instance, the tragedy in Bhopal, India. Although the public is eager for news about disasters, it seems to prefer those that are quick, dramatic, and comprehensible. Occupational diseases rarely fit that description. Such diseases generally take years to develop; linking the occurrence of an individual's disease to a particular workplace exposure can be difficult, if not impossible; and the etiology of many diseases, particularly cancer, is poorly understood by medical science.[1] The death of one person on an amusement park ride[2] or of 114 people in a hotel collapse[3] can generate headlines and sustain public interest for a while, but the projection that at least 350,000 people will die from asbestos related cancers in the next forty-five years[4] has not received the same widespread attention. Periodically, the hazards of exposure to toxic substances do become the focus of concern, particularly

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* Professor of Law, University of Kansas. The author thanks John C. Nettels, Jr., J.D. 1985, University of Kansas School of Law, for his research assistance. This article was prepared for the Law and Contemporary Problems conference in November, 1984, and was updated by the author in late 1985. Further developments are not treated in this article.

1. As the methoisocyanate spill in Bhopal illustrates, exposure to some toxic substances can cause immediate serious health effects. That sort of exposure, however, appears to occur sporadically and can generally be dealt with quickly because causation is usually apparent. *See, e.g., Michigan Charges General Dynamics with Gross Overexposure of Worker*, 14 O.S.H. Rep. (BNA) 338 (Sept. 20, 1984). The present article deals with diseases with long latency periods, for which proof of causation is generally difficult.

2. *See, e.g.*, Helliker, *Accidents Fuel Debate over Regulation of Amusement Parks*, Kansas City Times, July 12, 1984, at A-1, col. 1 (discussing death of a woman who fell from a roller coaster at a St. Louis theme park).

3. *See* Project, *A Case Study in Mass Disaster Litigation*, 52 UMKC L. REV. 151, 174-90 (1984) (discussing media coverage of the Kansas City Hyatt Regency skywalks collapse and ensuing litigation).

4. *Failure to Regulate—Asbestos: A Lethal Legacy: Hearings Before the Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 1st Sess. 11 (June 28, 1983) [hereinafter *Lethal Legacy*] (statement of William J. Nicholson, Ph.D.).

when the exposure is perceived as affecting a large segment of the public,[5] but occupational exposures, which can present the greatest risk of disability or death because of their duration and intensity,[6] are rarely a focus of concern. While certain segments of the legal, medical, insurance, and organized labor communities are concerned with the problems of occupational disease, one has the sense that few others care.

One of the major reasons for public indifference to work related health hazards is that the victims of occupational disease are not politically powerful. While some belong to labor unions,[7] even the large unions have proved unable to achieve significant reform in the area of occupational health. Occasionally, societal problems cause the formation of citizens' groups and coalitions that are able to overcome established interests and achieve astonishing results, but we have not witnessed this phenomenon in the area of occupational health. When they are successful, grass roots groups appear to win by formulating clear, simple, appealing legislative goals.[8] There is no clear-cut answer to the problems of occupational disease, however, and the issues involved are highly technical.

Although the environmental movement faced many of the same obstacles of scientific and technological complexity, its leaders were able to overcome industry opposition by galvanizing large segments of the public in support of their positions. Many citizens may feel a psychic stake in the preservation of endangered species and scenic views, even though they may never see a whooping crane or visit the Alaska wilderness. It has been much more difficult to rally public support for workers who are exposed to toxic substances. The victims of occupational disease are usually not young and attractive; rather, because of long latency periods, they are often middle-aged or older, and the physical manifestations of cancer and respiratory diseases are not pleasant. The public seems simply to prefer to ignore the entire matter.

Another reason for the lack of public concern about occupational illness is fundamental ignorance about its scope and dimensions. One of the greatest obstacles to effective regulation of the risk of occupational disease is the lack of information available to the public about the substances to which workers

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5. For instance, the recent announcement by the EPA that the presence of asbestos in both public buildings and private homes is much more widespread than was previously believed may help intensify public interest in finding some feasible solution to the dangers of exposure. *See, e.g., The Asbestos Bill is Due,* Kansas City Times, August 15, 1984, at A-14, col. 1 (editorial).

6. *See* J. PAGES & M. O'BRIEN, BITTER WAGES (1973) (reviewing pathology of several more common occupational diseases).

7. Only 18.8% of the civilian labor force belongs to a union. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, 32 EMPLOYMENT AND EARNINGS 208 (1985).

8. For instance, Mothers Against Drunk Driving and similar groups have achieved remarkable results in their efforts to create public awareness and to influence the passage of legislation dealing with the problem of drunk drivers. *See, e.g.,* 23 U.S.C.A. § 158 (Supp. 1986) (requiring the withholding of certain federal highway funds to states that have not raised their drinking ages to twenty-one). *See also Prohibit the Sale of Alcoholic Beverages to Persons Under 21 Years of Age: Hearings before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce,* 98th Cong., 1st Sess. (1983).

are exposed.[9] While thousands of chemicals are used in the workplace,[10] only a relative few have been the subject of scientific studies to determine their toxicity.[11] Research into the harmful effects of chemicals and dusts is expensive,[12] and few entities other than the federal government have either the incentive or the resources to provide funding for extensive studies. Moreover, methodological difficulties inherent in the available types of research make translation of the results of studies into estimates of the risk to humans at given levels of exposure uncertain.[13] Even new methods of quantitative risk assessments, designed to lend a measure of confidence to the results of the research, incorporate many imprecisions.[14] As a result, it is impossible to predict the extent and severity of occupational disease. While some observers foresee an impending public health catastrophe of monumental proportions,[15] others assert that the current asbestos crisis will turn out to be the worst case and the overall incidence of death from occupational disease will be relatively low.[16]

This article proceeds on the assumption that the occurrence of occupational disease will continue to pose a major public policy problem for

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9. Schroeder & Shapiro, *Responses to Occupational Disease: The Role of Markets, Regulation, and Information*, 72 GEO. L.J. 1231, 1231-1239 (1984).

10. *See* NATIONAL RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCE, RISK ASSESSMENT IN THE FEDERAL GOVERNMENT: MANAGING THE PROCESS 12 (1983) (more than 70,000 chemicals in commercial use); GAO, EPA TOO SLOW TO CARRY OUT ITS RESPONSIBILITIES TO CONTROL HARMFUL CHEMICALS 1 (1980) (55,000 chemicals in commercial use with 1,000 introduced every year).

11. *See, e.g.*, Tomatis, Agthe, Bartsch, Huff, Montesano, Saracci, Walker & Wilbourn, *Evaluation of the Carcinogenicity of Chemicals: A Review of the Monograph Program of the International Agency for Research on Cancer (1971-1977)*, 38 CANCER RES. 877, 881 (1978) (of 368 chemicals reviewed by IARC, some evidence of carcinogenicity in one or more animal species was found for 221 chemicals. "For the majority of these chemicals, evidence of human exposure exists but no evaluation of the carcinogenic risk to humans was made, either because no epidemiological studies or case reports were available (205 compounds) or because the results were inconclusive." *Id.* Studies were inadequate to determine the carcinogenicity of 121 chemicals for both animals and humans.)

12. TOXIC SUBSTANCES STRATEGY COMM., TOXIC CHEMICALS AND PUBLIC PROTECTION 131 (1980) (a presidential report finding that animal testing of chemicals requires three to five years and costs several hundred thousand dollars per chemical); McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 733-34 (1979).

13. The chief methods of determining toxicity are animal experimentation and epidemiological studies. Both have shortcomings in estimating human risks. Animal studies must be conducted using higher doses than those to which humans may be exposed, and they do not measure the effects of the interaction of more than one chemical. Further, animal sensitivity to a chemical is not always identical to the human response. Epidemiological studies attempt to determine the prevalence of disease by following an exposed group. Their accuracy can be limited by the inability to locate group members, by the latency period of the disease, or by the failure to account for chemical interaction. *See* Chemical Carcinogens: Review of the Science and Its Associated Principles, 49 Fed. Reg. 21,594, 21,599 (1984).

14. *See* Leape, *Quantitative Risk Assessment in Regulation of Environmental Carcinogens*, 4 HARV. ENVTL. L. REV. 86, 90-103 (1980) (discussing methods and difficulties of predicting carcinogenic properties of potentially toxic substances).

15. *See, e.g., Lethal Legacy*, *supra* note 4, at 15-17 (estimating 350,000 excess deaths caused by asbestos-related cancers from exposures that occurred from 1940 to 1980).

16. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 704 (1983) (relying on NIOSH testimony for the assertion that dust control devices in mines will virtually eliminate pneumoconiosis). *See generally* E. EFRON, THE APOCALYPTICS: CANCER AND THE BIG LIE (1984) (criticizing scientific predictions of cancer and their presentation to public).

the foreseeable future. Chemical or physical agents to date have caused thousands of workers to die or suffer serious disabilities. While asbestos has been the center of most of the recent attention, workers continue to be exposed to many other known toxic substances. Future exposure can be expected because of the lack of effective mechanisms to force employers to clean up the workplace. For various reasons, workers' compensation and tort remedies have not provided incentives to reduce toxic exposures; indeed, the unique character of occupational disease may make it impossible for those remedies to function as a deterrent. Prevention of disease through regulation of workplace exposure to toxic substances has not worked because of the dismal record of the Occupational Safety and Health Administration (OSHA).[17] One encouraging development has been the proliferation of state and local right-to-know laws (also referred to as hazard communication laws), requiring employers to provide their employees with the identities and properties of the hazardous substances to which employees are exposed.[18] These laws could provide a partial solution to the problem of lack of information on toxicity by mandating the dissemination of information that is known by the manufacturer or employer but is not currently available to workers. The effectiveness of state efforts, however, may depend in large part on OSHA's actions in this area. In 1983, OSHA promulgated its own hazard communication rule covering only the manufacturing sector.[19] The Third Circuit recently upheld OSHA's claim that the rule preempts all state laws that deal with disclosure to employees covered by the rule.[20] The court also found that the agency had failed to justify the limitation of coverage to the manufacturing sector and directed OSHA either to order the application of the rule to other employment sectors or to state sufficient reasons not to do so.[21] If OSHA amends the rule to apply to all workers, state requirements of employment-related disclosures will be totally preempted.[22]

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17. *See infra* notes 79-86 and accompanying text.

18. For a list of state hazard communications laws as of the date of this article, see COMMERCE CLEARING HOUSE, HAZARD COMMUNICATION: FEDERAL/STATE RIGHT TO KNOW LAWS (1985).

19. 29 C.F.R. § 1910.1200 (1986).

20. United Steelworkers of Am. v. Auchter, 763 F.2d 728 (3d Cir. 1985). The court held that the OSHA rule has preemptive effect because it is a "standard" under § 6 of the Act, 28 U.S.C. § 655 (1982). 763 F.2d at 734-35. Section 18(b) of the Act, 29 U.S.C. § 667(b) (1982), prohibits any state from regulating as to matters covered by a § 6 standard unless it has submitted a state plan for OSHA's approval. The court noted that few states challenging the OSHA rule were likely to submit plans, because section 18(c)(5) of the Act, 29 U.S.C. § 667(c)(5) (1982), then requires them to bear the financial burdens of enforcement. 763 F.2d at 734.

21. 763 F.2d at 736-39. The court allowed the rule continued effect in the manufacturing sector pending OSHA's response. In addition, the court held the rule invalid in two respects: its definition of trade secret, *id.* at 739-42, and its limitation of trade secret access to health professionals, *id.* at 742-43.

22. In N.J. State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985), the Third Circuit faced a challenge to the New Jersey Worker and Community Right to Know Act, N.J. STAT. ANN. § 34:5A-1 to -31 (West 1984), which requires disclosure of both workplace and environmental hazards. The case raised the issue not resolved in United Steelworkers of Am. v. Auchter, 763 F.2d 728 (3d Cir. 1985), whether the current OSHA standard preempted state laws outside of the manufacturing sector. The court declined to find such a broad preemptive effect, holding that the current OSHA rule preempted the New Jersey Act only as the state law "pertains to protection of

Even if effective hazard communication rules exist, prevention of occupational disease will remain problematic. First, since there are no toxicity studies for many substances (and none of the existing warning rules requires the performance of toxicity studies), employers and manufacturers may have no useful information to provide under the communication rules. For the substances not yet studied, preventive regulation can take place only long after workers have been exposed. Second, regulation of the hazard is uncertain even when evidence of toxicity is available and provided to workers.[23] Informed workers and their unions could pressure OSHA to adopt stricter exposure standards, but the history of the agency's efforts does not provide ground for optimistic predictions of its ability to respond. If they are willing to make health issues a priority item in bargaining, workers could demand protection or reduced exposure directly from their employers. Although many national unions devote a great deal of time to occupational health issues,[24] it remains to be seen whether local unions will prefer health issues over matters of wages and job security, particularly in times of

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employee health and safety in the manufacturing sector." 774 F.2d at 593. *See also* Manufacturing Ass'n of Tri-County v. Knepper, 623 F. Supp. 1066, 1075-76 (M.D. Pa. 1985), *aff'd in part, rev'd in part,* 801 F.2d 130 (3d Cir. 1986) (same result as to Pennsylvania Worker and Community Right-to-Know Act, 35 PA. CONS. STAT. ANN. § 7301 (Purdon 1986)).

Federal law does require companies that wish to market certain products, such as new drugs and pesticides, to perform health and safety testing as a condition of receiving a license to sell the product. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982 & Supp. I 1983); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982 & Supp. I 1983). State and federal hazard communication rules, on the other hand, deal with the thousands of substances that are already on the market; these rules require disclosure, not testing. For instance, the OSHA Hazard Communication Rule requires chemical manufacturers and importers to "evaluate" chemicals produced in their workplaces or imported by them, 29 C.F.R. § 1910.1200 (d) (1986), by "identify[ing] and consider[ing] the available scientific evidence concerning such hazards." *Id.* Perhaps the most stringent attempt to force companies to test hazardous substances was the joint EEOC-OSHA proposed guidelines on reproductive hazards in the workplace. Interpretive Guidelines on Employment Discrimination and Reproduction Hazards, 45 Fed. Reg. 7514 (1980). The proposed guidelines, which were eventually withdrawn by the two agencies, 46 Fed. Reg. 3916 (1981), would have required employers that wished to exclude fertile women workers from jobs involving exposure to toxic substances to initiate research designed to produce evidence of the toxic effects of the substance. The research was to be completed within the shortest feasible time, not to exceed two years.

23. To be useful, information must be provided to workers in a form they can understand. Many existing warnings either are vague or use technical terminology not familiar to lay people. *See* Hadden, *Labeling of Chemicals to Reduce Risk,* LAW & CONTEMP. PROBS., Summer 1983, at 235; *Compliance with OSHA Standard Requires Employees to Understand Chemical Information,* 14 O.S.H. REP. (BNA) No. 21 at 416 (1984). In addition, it is not clear that providing information about health hazards will cause changes in workers' behavior. *Compare* Adler & Pittle, *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?,* 1 YALE J. ON REG. 159 (1984) (discussing the inability of education campaigns to alter the public's behavior) *with* Viscusi & O'Connor, *Adaptive Responses to Chemical Labeling: Are Workers Bayesian Decision Makers?,* 74 AM. ECON. REV. 942, 948-52 (1984) (reporting the results of a study in which workers revised their risk assessments of their jobs when they were given a hazard warning for use of a new chemical).

24. *See, e.g.,* L. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH 60-87 (1980) (discussing health and safety bargaining patterns of three large unions); *IUD Forms Job Health Research Agency Aimed at Providing Services to Workers,* 15 O.S.H. REP. (BNA) No. 17, at 364 (1985) (describing creation of a fund by AFL-CIO Industrial Union Department to provide occupational disease research and education).

concessionary bargaining and a shrinking industrial sector.[25] Third, since it may be impossible to determine a "safe" level of exposure to a carcinogen,[26] only total elimination of a toxic substance from the workplace will ensure a zero risk of disease. To date, no OSHA standard has mandated complete elimination of a toxic substance. Indeed, some materials are so vital to industry that prohibiting their use would be economically catastrophic.[27]

For the reasons stated above, workplace exposure to hazardous substances will continue, and those workers who contract an occupational disease will seek compensation. This article will discuss the inadequacies of existing forms of compensation and the need for change of some type. It will then explore the two proposed reforms that have received the greatest attention: a federalized system of compensation for certain occupational diseases, and revision of some of the rules governing tort litigation. In addition, this article will discuss the innovative approach worked out in the asbestos industry, the establishment of a central claims facility for negotiation of settlements without litigation.

II

THE FAILURE OF EXISTING FORMS OF COMPENSATION

Under current law, there are two possible sources of compensation for workers who contract an occupational disease: claims under state workers' compensation laws and state law tort suits against third-party manufacturers and suppliers. Neither remedy works well in providing compensation for occupational disease.

A. Workers' Compensation

State workers' compensation laws embody that famous compromise between employer groups and reformers,[28] pursuant to which employers surrendered their powerful defenses to tort suits by injured workers and agreed to a system of no-fault compensation for work related injuries. In exchange, employees received a low level of compensation, the exclusion of

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25. Since most workers are not organized, *see supra* note 7, they lack significant bargaining power. Nevertheless, economic theory predicts that even unorganized workers who are unable to enforce demands for a clean-up of the workplace will "demand" wage premiums for hazardous work. If a sufficient premium is not paid, the theory is that workers will take other, less risky jobs with the same pay. Even though hazard communication rules will rectify one of the major flaws in the theory of wage premiums by supplying at least some missing information upon which workers can act, available empirical evidence does not consistently support the existence of wage premiums for exposure to known health hazards. *Compare* W. VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 43-45 (1983) *with* I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES 569-85 (1981).

26. *See* Karstadt, *Protecting Public Health from Hazardous Substances: Federal Regulation of Environmental Contaminants*, 5 Envtl. L. Rep. (Envtl. L. Inst.) 50,165, 50,174 (1975) (panel of experts assembled by HEW, thought to reflect consensus of scientific community, concluded that only a zero exposure to a carcinogenic chemical should be considered safe).

27. *See* Schroeder, *A Decade of Change in Regulating the Chemical Industry*, LAW & CONTEMP. PROBS., Summer 1983, at 1, 7-8.

28. *See, e.g.*, Potomac Elec. Power Co. v. OWCP, 449 U.S. 268, 272 n.4, 282 (1980).

recovery for pain and suffering or punitive damages, and the abolition of tort suits against the employer.[29] Injured workers have long chafed under these compensation restrictions and have sought to increase their recoveries by suing third-party manufacturers whose products may have caused or contributed to their injuries or by advancing new theories of employer tort liability to avoid the exclusivity rule of the workers' compensation laws.[30]

Whatever the deficiencies of the system for compensating injured workers may be, they pale in comparison to its treatment of workers disabled by disease. Although every state includes occupational diseases in its workers' compensation law, restrictive provisions such as statutes of limitations that run from some point other than discovery, recent exposure rules, minimum exposure requirements, and limitations that diseases be "peculiar to" or "characteristic of" the workers' occupation and not "ordinary to life" make recovery for many workers difficult.[31] The biggest obstacle to recovery is the requirement of proof of causation. The long latency period of many diseases often obscures the causal link between workplace exposure and the illness, particularly when workers do not know the identities of the substances to which they were exposed years before. Even when chemical identities are known, workers must have specific proof linking their individual illness with the workplace exposure. Epidemiological data establishing a higher risk of disease in the exposed workers are not sufficient to prove causation in an individual worker's case.[32] A few states have enacted presumptions of eligibility for workers with certain diseases, but these presumptions generally have limited application.[33]

Formidable obstacles to recovery provide an incentive for employers to contest occupational disease claims. A 1980 federal study of workers' compensation found that while only ten percent of accident claims were contested, that figure ballooned to sixty percent of all occupational disease claims, and ninety percent of all dust disease claims.[34] As a result, the system

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29. *See* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 65.00-65.11, 65.37, 65.51(c) (1983). Physical pain and suffering can, of course, contribute to a worker's disability and therefore support an award of compensation, *see, e.g.*, Cain v. LaGrange Steel Erectors, 195 Neb. 272, 277-78, 237 N.W.2d 640, 643-44 (1976), but nondisabling pain is not compensable as it is in tort, *see, e.g.*, Tafoya v. Leonard Tire Co., 616 P.2d 429, 430 (N.M. App. 1980).

30. The two leading theories advanced to avoid the exclusivity rule, the infliction of intentional injury, *see* Johns-Manville Prod. Corp. v. Contra Costa Super. Ct., 27 Cal. 2d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), and the dual capacity doctrine, *see* Mercer v. Uniroyal, Inc., 49 Ohio App. 2d 279, 283-85, 361 N.E.2d 492, 495-96 (1976), have received a great deal of attention, but very limited application. Few states have adopted either of these theories and those that have apply them narrowly. *See generally* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 68.00-.13; 72.80-.88 (1983). As a practical matter, victims of occupational disease will find it almost impossible to avoid the exclusivity rule.

31. *See* Schroeder & Shapiro, *supra* note 9, at 1244-50, 1298-1304.

32. Robblee, *The Dark Side of Workers' Compensation: Burdens and Benefits in Occupational Disease Coverage*, 2 INDUS. REL. L.J. 596, 611 (1978).

33. *See, e.g.*, NEV. REV. STAT. § 617.455 (1986) (presumption that lung disease arose out of the employment of a fire fighter or police officer if a medical examination of the claimant during the twelve months preceding the filing of the claim failed to reveal any evidence of the disease).

34. DEP'T OF LABOR: AN INTERIM REPORT TO CONGRESS ON OCCUPATIONAL DISEASE 69-70 (1980).

that was supposed to provide speedy compensation as the workers' quid pro quo to relinquishing tort actions has taken on many of the trappings of common law litigation—retention of lawyers,[35] delays,[36] cost,[37] and compromise.[38]

Data collected as part of Dr. Irving Selikoff's famous study of 995 asbestos related deaths among insulation workers in the New York City metropolitan area reveal the inadequacies of the workers' compensation system.[39] Most troubling is that, although most widows studied who filed workers' compensation claims received some benefits, only half of them filed claims.[40] Although the failure to perceive a connection between the occupational exposure and a worker's disability or death will result in a failure to seek benefits, the widows studied seemed to be among those most likely to recognize the causation probabilities. Their husbands belonged to powerful construction unions that presumably have the resources to provide information to survivors. Asbestos had also already been recognized as a virulent health hazard capable of causing the kinds of respiratory illnesses from which the decedents had suffered. If the number of claims filed was so low among widows with resources available to them, the number of potentially compensable occupational disease claims outside the workers' compensation system could be staggering.[41] Not only did half the widows fail

35. Seventy-seven percent of occupational disease claimants used lawyers to handle their claims, as compared to twenty-four percent of accident claimants. *Id.* at 71.

36. The average time from the filing of a claim to an award was a year for occupational disease, and two months for accidents. *Id.* at 75.

37. The federal study found that forty percent of all workers' compensation taxes were used to pay the cost of administering the system, not including either side's legal fees and expenses. *Id.* at 76.

38. *Id.* at 74.

39. Johnson & Heler, *Compensation for Death from Asbestos*, 37 INDUS. & LABOR REL. REV. 529 (1984). This analysis used data from interviews in 1980 with 560 widows of asbestos insulation workers concerning the amount and sources of their income in 1979. Johnson and Heler concluded that "compensation was neither adequate in amount, when compared to the loss, nor equitably distributed among survivors." *Id.* at 529. The data were collected as part of Dr. Selikoff's study. *See* I. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES (1982).

40. Johnson & Heler, *supra* note 39, at 533. The study distinguished between widows whose husbands' expected work life extended to 1979, and those whose husbands would have retired by 1979. There were 249 widows in the former group. Of these 249, 125 filed workers' compensation claims. Of these, two had been denied benefits, thirteen had cases pending in 1979, and 108 had received an award or settlement.

41. Some have speculated that workers or their survivors might not file workers' compensation claims because their attorneys fear that the medical reports necessary for a claim might prejudice a more lucrative third-party tort suit. *Occupational Health Hazards Compensation Act of 1982: Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 2d Sess. 239 (1982) (statement of William C. McLaughlin, President, Asbestos Compensation Coalition). This suggestion seems strange because the tort plaintiff's medical reports are generally available to defendants. In many states the filing of a personal injury claim constitutes a waiver of plaintiff's physician-patient privilege and makes all medical reports concerning the condition in controversy discoverable. *See* MCCORMICK ON EVIDENCE § 103 (E. Cleary 3d ed. 1984). In addition, in almost all states, courts have the power to order physical or mental examinations of a party whose condition is in controversy. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2231 (1970 & Supp. 1984). Many of these states have rules based on Federal Rule of Civil Procedure 35, which provides for a waiver of the physician-patient privilege if the examined party requests a copy of the mandatory

to file claims, but for those who did file, benefit levels were low. Of the 125 widows who filed for workers' compensation benefits, nineteen received income only from workers' compensation; these benefits replaced only 36.2% of their losses.[42] Among those widows who received income from sources in addition to workers' compensation, workers' compensation benefits replaced a larger portion of their loss, up to 58.4%.[43] Even this higher amount falls short of the federal recommendation that workers' compensation should replace two-thirds of the wage losses, up to a maximum of 200% of the state's average weekly wage.[44]

Although many observers have pointed out the deficiencies of state workers' compensation laws,[45] the states have responded exceedingly slowly to these criticisms.[46] Since reform in workers' compensation law can have a direct economic effect on employers in the state, powerful industry and insurance groups lobby aggressively against change.[47] Without some shift in the balance of power, significant reform at the state level is unlikely.

B. Tort

Those disabled workers who can bring third-party tort suits generally face legal doctrines just as formidable as those presented by the workers' compensation system.[48] Statutes of limitations, for example, often create a barrier to recovery. While many states have statutes of limitations that run

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examination. FED. R. CIV. P. 35(b)(2). Moreover, Johnson and Heler's data do not support the argument that there is a substitution of tort for workers' compensation; they found that the rate of tort filings was even lower than the workers' compensation filing rate. Johnson and Heler, *supra* note 39, at 533-34. Another possible reason for the low rate of workers' compensation filings is that Social Security disability payments are reduced by workers' compensation benefits, but not by tort awards. 42 U.S.C. § 424a(2)(A) (1982).

42. Johnson & Heler, *supra* note 39, at 532 (table 1). Loss to the survivor was defined as the portion of the worker's wages the survivor would probably have consumed—the worker's wages minus taxes and the amount the worker would have consumed. Not included were intangibles such as loss of companionship, which are not recoverable under workers' compensation laws.

43. *Id.*

44. COMMISSION ON STATE WORKMAN'S COMPENSATION LAWS, REPORT 64-65 (1972); 1 RESEARCH REPORT OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE 19 (1979). Only two states, Alaska and Iowa, have enacted the 200% maximum. *See* Schroeder & Shapiro, *supra* note 9, at 1298 app. 1.

45. *See* NATIONAL COMM. ON STATE WORKMEN'S COMPENSATION LAWS, REPORT 64-65 (1972) (recommending increasing maximum allowable benefits for permanent disability to at least 200% of the average weekly wage and the use of expert panels to determine causation issues); REPORT TO THE PRESIDENT AND THE CONGRESS OF THE POLICY GROUP OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE 35-36, 38 (1977) (recommending elimination of unrealistic statutes of limitation and requirements of minimum and recent exposure and adoption of presumptions to aid proof of causation).

46. *See* Schroeder & Shapiro, *supra* note 9, at 1298-1304 (outlining specific state requirements workers must still meet to recover workers' compensation benefits for occupational disease).

47. Korioth, *The Forces That Produce Changes in the Workmen's Compensation Laws of Texas and Louisiana*, in 3 SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 517, 519 (1973); Motley, *A Study of the Forces That Produce Changes in the Workmen's Compensation Laws of Four States: Maryland, Pennsylvania, Virginia, West Virginia*, in *id.*, at 544, 552, 556; Skelton, *Workmen's Compensation in Oregon*, in *id.* at 526.

48. The exclusive remedy provisions of workers' compensation will bar workers who are employed by the producer of the toxic substance from suing their employer, unless they can manage to squeeze themselves into one of the judicially created exceptions to exclusivity. *See supra* note 30.

from the time the disease is discovered, others measure accrual of a cause of action from some other point, with the result that latent diseases may not manifest themselves until long after the statute has run.[49] Plaintiffs also face the difficulty of identifying the proper defendant if there are many producers of the substance.[50] Proof of causation, as with workers' compensation, still presents the most formidable legal obstacle. Once again, more than proof of a statistical relationship between the exposure and the illness is necessary before the case will be allowed to go to the jury; the plaintiff must satisfy the preponderance of the evidence test, usually with expert testimony, that the exposure at defendant's hands "more probably than not" caused the plaintiff's injury.[51] Except in the case of diseases, such as mesothelioma,[52] that do not occur in the absence of exposure to a particular substance, causation can be nearly impossible to show.[53]

Some state courts have responded to the recovery obstacles by adopting less restrictive rules of law in product liability cases.[54] Although relatively few state supreme courts have considered cases raising the crucial issues in toxics

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49. *See* Fleishman v. Eli Lilly & Co., 62 N.Y.2d 888, 478 N.Y.S.2d 853, 467 N.E.2d 517, *cert. denied*, 469 U.S. 1192 (1985) (under New York law, cause of action for cancer allegedly resulting from plaintiff's mother's use of DES accrued when the mother ingested the substance in 1955, not when plaintiff's injury manifested itself in the 1970's); Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983); Comment, *Occupational Carcinogenesis and Statutes of Limitations: Resolving Relevant Policy Goals*, 10 ENVTL. L. 113, 114-15 (1979).

50. *See, e.g.*, Thompson v. Johns-Manville Sales Corp., 714 F.2d 581, 583 (5th Cir. 1983) (applying Louisiana law and refusing to adopt market share or enterprise liability in asbestos litigation); Copeland v. Celotex Corp., 447 So. 2d 908, 916 (Fla. Dist. Ct. App. 1984) (adopting a form of market share liability in asbestos litigation). *See generally* Pollan, *Theories of Liability*, in TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES (G. Northstein Ed.) §§ 11.19 - .25 (1984).

51. *See* W. PROSSER, LAW OF TORTS § 41, at 272 (1971); Comment, *Judicial Attitudes Towards Legal and Scientific Proof of Cancer Causation*, 3 COLUM. J. ENVTL. L. 344 (1977).

52. *See, e.g.*, Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

53. For instance, no plaintiff has ever won a disease suit against a manufacturer of one of the most well-studied products, cigarettes. Haskins, *The Tobacco Industry—A Contributor to Asbestos Disabilities*, 34 FED. INS. COUNS. Q. 271 (1984).

54. The most dramatic changes have occurred in diethylstilbestrol (DES) cases in which some courts have allowed plaintiffs to dispense with the requirement of identification. *See* Collins v. Eli Lilly Co., 116 Wis.2d 166, 190-93 342 N.W.2d 37, 49-50, *cert. denied*, 469 U.S. 826 (1984) (plaintiff in DES suit may proceed against any defendant that manufactured the type of DES her mother took; where plaintiff cannot allege and prove what type of DES the mother took, she need only allege and prove that defendant produced and marketed DES); *see also* Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 610-13, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-146, *cert. denied*, 449 U.S. 912 (1980) (shifting burden of proof of identification in DES cases from plaintiff to defendant and subjecting defendants to liability in proportion to their market share unless they can prove they did not manufacture the product that harmed plaintiff); Abel v. Eli Lilly Co., 418 Mich. 311, 325, 343 N.W.2d 164, 170, *cert. denied*, 469 U.S. 833 (1984) (under DES-unique version of alternate liability, burden of proof may be shifted to defendants on element of causation in fact); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 604-05, 689 P.2d 368, 382 (1984) (en banc) (under market-share alternate liability theory plaintiff need commence suit against only one defendant, and inter alia, allege that defendant produced or marketed the type of DES taken by plaintiff's mother). It is not yet clear whether these doctrines will be extended to suits involving other substances. *See generally* Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 749-67 (1982); Comment, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 890-95 (1983). Another trend is to eliminate the so-called state of the art defense, which can often be dispositive in cases involving exposure that occurred many years earlier. *See, e.g.*, Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434, 438 (Mo. 1984) (en banc) (state of the art evidence has no bearing on the outcome of a strict liability claim involving

litigation, there are reasons to believe that, given enough time and enough plaintiffs willing to pursue the issues, significant changes in the common law could occur. First, the industry and insurance company forces that work against legislative reform in workers' compensation laws do not have the same power over the state judiciary. Second, the courts face fewer institutional disincentives to change, since liberal product liability decisions have a far different economic impact on a state than do changes in workers' compensation laws. Although application of a state's law to a case does not necessarily mean that the state can assert jurisdiction over the defendant,[55] under the current choice of law doctrines, any state that can assert jurisdiction over the defendant can probably justify application of its substantive tort law to the case.[56] A manufacturer might be able to defeat jurisdiction in a state that has unfavorable product liability decisions by carefully structuring its business to avoid transactions with that state,[57] but most large corporations would not find that tactic practicable. Even if it were, presumably jurisdiction could still attach for injuries caused before the avoidance behavior began;[58] for some diseases with long latency periods, a defendant could be subject to jurisdiction in a state for years after it had ceased selling its product in that state. Assuming that judges consider the long-range economic impact of their decisions, it is therefore unlikely they would conclude that imposing liability on an out-of-state defendant under a novel theory would have a singularly negative effect on the state;[59] rather, the costs of increased liability will be spread nationwide among all purchasers of the product.

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occupational exposure to asbestos); Beshada v. Johns-Manville Prod. Corp., 90 N.J. 191, 204-09, 447 A.2d 539, 546-49 (1983).

55. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 296 n.11 (1980) (that the law of the forum chosen by plaintiff would apply to the case does not necessarily mean that the forum has jurisdiction over the defendant); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958). *See generally* Martin, *Personal Jurisdiction and Choice of Law,* 78 MICH. L. REV. 872 (1980); Reese, *Legislative Jurisdiction,* 78 COLUM. L. REV. 1587, 1594-1608 (1978).

56. *See* Allstate Ins. Co. v. Hague, 449 U.S. 316 (1981) (Minnesota may constitutionally apply its law to a Wisconsin accident; the contacts allowing Minnesota to choose its own law were (1) the decedent worked in Minnesota, (2) defendant did business in Minnesota, and (3) plaintiff became a Minnesota resident before she filed suit). *But see* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (Kansas may not constitutionally apply its law to the claims of absent nonresident members of a plaintiff class).

57. While the Court in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980), placed heavy emphasis on defendant's purposeful contacts with the forum state, it also apparently sanctioned the "stream-of-commerce" doctrine applied in cases like Gray v. American Radiator, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), which allows assertion of jurisdiction over manufacturers of component parts in states where the larger product was sold. In dicta, the Court also recently reaffirmed the existence of a state's power to assert general jursidiction over corporations that carry on "continuous and systematic" activities in that state. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984).

58. *See* R. CASAD, JURISDICTION IN CIVIL ACTIONS ¶ 4.01[2] (1983) (discussing retroactive application of long-arm statutes and finding that "[m]ost courts have characterized the long-arm statutes as involving only procedural concerns, and have concluded that they may apply retroactively . . . .").

59. *Cf.* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction,* 1980 SUP. CT. REV. 77, 105-08 (discussing the incentives for states to try to expand jurisdictional reach in order to distribute losses to citizens of other states).

As might be anticipated, defendants have vigorously resisted challenges to established doctrines of liability, and plaintiffs contemplating such a suit must gird themselves for a lengthy and expensive battle. In any event, the very nature of the common law dictates that tort rules will change slowly, sporadically, and inconsistently. Although judicial rejection or modification of various defendant-oriented rules has not yet been widespread, the reaction to the possibility of such changes has been swift. A proposed federal Product Liability Act heavily supported by manufacturing groups has been making its way through Congress.[60] The legislation would preempt all state product liability laws and reverse some of the more liberal state decisions.[61] Similar legislative actions have occurred in some states, with varying degrees of success.[62]

As a result of this legal turmoil and the sheer magnitude of the toxics/products liability problem, the tort system sometimes appears to be on the verge of collapse. Estimates of the number of asbestos related lawsuits that will be filed in the next thirty years range from 30,000 to 200,000.[63] The costs of this litigation are also staggering. One estimate put the ultimate liability of the insurance industry for asbestos claims at four to ten billion dollars,[64] while another study found that future compensation payments could range from eight to eighty-seven billion dollars.[65] Yet, of the vast amounts of money spent in asbestos litigation, only approximately one-third

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60. S. 44, 98th Cong., 1st Sess. (1983); S. 100, 99th Cong., 1st Sess. (1985). *See generally* 12 PROD. SAFETY & LIAB. REP. (BNA) No. 2, at 81-82 (1984) (S. 44 has strong support of business groups and the Reagan administration, and is opposed by consumer groups and the American Bar Association.).

61. The most recent version of the proposed federal Product Liability Act, S. 100, 99th Cong., 1st Sess. (1985), imposes a twenty-five year statute of repose for claims involving capital goods, unless the harm did not manifest itself until after the limitations period ran, or the harm was caused by the cumulative effect of prolonged exposure to a defective product. *Id.* at § 11(a), (b). The Act provides manufacturers with a state-of-the-art defense, *id.* at § 5(b)(1), and a defense for injuries caused by "unavoidably dangerous" products, *id.* at § 5(b)(3). Under some circumstances, manufacturers can discharge their duty to warn of knowable dangers by giving a warning to an employer or other immediate buyer, rather than to the product user. *Id.* at § 6(d). Punitive damages may be awarded only if plaintiff establishes by clear and convincing evidence that defendant acted with reckless disregard of the product's safety. Although the trier of fact determines whether punitive damages should be awarded, the court determines the amount. *Id.* at § 12.

62. *Compare* Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982) (ten-year statute of repose for product liability suits violates Alabama constitution) *with* Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985) (six-year statute of repose for product liability suits does not violate North Carolina constitution).

63. The Manville Corporation has claimed in an advertisement that it will be named in at least 30,000 new suits, in addition to the 16,500 that were pending when it sought Chapter 11 reorganization. Wall St. J., August 27, 1982, at 29, col. 1. A Rand Corporation study reached the conclusion that at least 200,000 additional suits would be filed by the year 2010. J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTION & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 4 (1984) [hereinafter COMPENSATION AND EXPENSES].

64. CONNING & CO., THE POTENTIAL IMPACT OF ASBESTOS ON THE INSURANCE INDUSTRY (1982), *cited in* J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, COSTS OF ASBESTOS LITIGATION 10 (1983) [hereinafter COSTS]. These figures apparently do not include the costs of the accompanying litigation among the defendants and their insurers over coverage issues, estimated by one source at $1500 per personal injury claim. COSTS, at 30-33.

65. P. MACAVOY, THE ECONOMIC CONSEQUENCES OF ASBESTOS-RELATED DISEASE (1982), *cited in* COSTS, *supra* note 64, at 9-10.

of it actually goes to the plaintiffs. Two different Rand Corporation studies of asbestos litigation, based on different sets of data, found that plaintiffs received as net compensation only thirty-seven to thirty-nine percent of the total amounts spent by defendants and their insurers.[66] Moreover, the payments that ultimately go to plaintiffs do not always cover their economic losses. There have been some enormous and well-publicized verdicts in product liability suits,[67] but available evidence indicates that most plaintiffs receive much smaller amounts. Irving Selikoff and his associates found the average settlement in tort suits filed by members of the group of asbestos workers they studied was $72,000, while the average total after-tax wage loss was $127,151.[68] The Rand Corporation study estimated the average total compensation to plaintiffs for the closed claims studied to be $60,000.[69] More important, it appears that most victims do not file suit.[70] Thus, while the tort litigation system imposes tremendous costs on manufacturers and their insurers, little compensation flows through to the victims of toxic substances.

III

THE ALTERNATIVE OF A FEDERAL COMPENSATION SYSTEM

Observers of the workings of state compensation systems could logically conclude that federal action is the only way to accomplish meaningful reform in compensation for occupational disease. While the states have been the leaders in promulgating hazard communication rules, enacting such regulation is entirely different from altering existing compensation systems. Hazard communication rules are politically appealing and easy for legislators to support. First, a warning rule involves little, if any, initial cost to the government, since it merely commands manufacturers and employers to act. The state may face the cost of enforcement actions down the line, but most of the issues involved should be fairly simple.[71] Second, while manufacturers

66. COSTS, *supra* note 64, at ix, used aggregate data on closed claims obtained from 17 major defendants, 12 major insurers, and 27 plaintiffs' attorneys. It found that of total expenses and compensation paid by defendants and their insurers, defense litigation expenses were 37%, plaintiff's litigation expenses were 26%, and net compensation to plaintiff was 37%. *Id.* at vii, table S.2. COMPENSATION AND EXPENSES, *supra* note 63, at xviii, fig. S.1, collected data on 513 individual claims, including all tried claims. It found that defense expenses were 37% of the total expenditures, plaintiff's expenses were 25% and net compensation to plaintiff was 39%.

67. *See* K. BUSHNELL & W. JORDAN, RECENT DEVELOPMENTS IN ASBESTOS LITIGATION 46-51 (1984) (listing results in asbestos disease cases).

68. I. SELIKOFF, *supra* note 25, at 11. The Johnson and Heler analysis of this data found that only 26 of 44 widows who filed tort suits received an award or settlement, and only 13 of the 26 received income from their suit in 1979. Johnson & Heler, *supra* note 39, at 534.

69. COSTS, *supra* note 64, at 18-19. The study did not attempt to calculate plaintiffs' economic losses.

70. Of the 249 widows studied by Johnson and Heler, only 44 filed tort suits. Johnson & Heler, *supra* note 39, at 534.

71. *See, e.g., Settlements Reached by New York State on Cases Involving Information, Training,* 14 O.S.H. Rep. (BNA) No. 35, at 706-07 (1985) (describing the settlement of a suit under the state right-to-know law against an employer that allegedly fired two workers who requested information about fuel oils and petroleum products used in the workplace); *Firing of Lab Technician Violated New York Law,*

and employers who oppose the rules argue that they will be costly and burdensome, the costs involved seem small when compared to the costs of other forms of regulation. The best argument against warning rules is the trade secret issue, but appropriate protections can solve that problem .[72] Finally, it is likely that many jurisdictions have enacted right-to-know laws precisely because the federal government has failed to take effective action in the area.

Hazard communication laws are only a first step, however, to reform of existing systems of exposure regulation and compensation. Some commentators, recognizing the inadequacies of these systems, have urged the adoption of a federal statutory scheme to handle claims for injuries caused by exposure to toxic substances.[73] Legislation that would establish federal compensation standards for some occupational diseases, most notably those caused by asbestos, has been introduced in Congress regularly.[74] It is hard to gauge the likelihood that legislation of this type will pass, given the current political climate, the forces in opposition to various aspects of the proposals, and their mutual mistrust.[75] Nevertheless, if properly structured and administered, a federal compensation system for occupational disease, while minimizing administrative cost, could give victims a fairer level of compensation than any existing mechanism.

Moreover, a uniform federal compensation system would be more equitable than the current patchwork of state regulations. When the product that caused the injury is marketed nationally, the probability of receiving benefits, or the level of those benefits, should not depend on the state in which a worker is living at the time he or she files a claim. The mobility of our society and the long latency periods of many occupational diseases make it probable that the worker was exposed in several different states during a working life, making the availability of a favorable forum totally fortuitous.

Another argument favoring federal regulation is that, with the exception of perhaps a few states, only the federal government has the resources to make the scientific determinations necessary for an effective compensation system. The workers' compensation and tort systems are ineffective because,

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State Supreme Court Finds, 14 O.S.H. Rep. (BNA) No. 12, at 259-60 (1984) (describing a court decision finding that an employer violated the state right-to-know law when it fired an employee who refused to work after her request for information on workplace chemicals was denied).

72. *See* Schroeder & Shapiro, *supra* note 9, at 1238.

73. *See* Trauberman, *Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victims*, 7 HARV. ENVTL. L. REV. 177, 215-49 (1983); Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916, 929-34 (1980).

74. *See* S. 1155, 98th Cong., 1st Sess. (1983) (Brown Lung Disease Benefits Act of 1983); H.R. 3175, 98th Cong., 1st Sess. (1983) (Occupational Disease Compensation Act); S. 1643, 97th Cong., 1st Sess. (1981) (Asbestos Health Hazards Compensation Act of 1981); H.R. 5224, 97th Cong., 1st Sess. (1981) (Asbestos Health Hazards Compensation Act); H.R. 5735, 97th Cong., 2d Sess. (1982) (Occupational Health Hazards Compensation Act of 1982).

75. *See, e.g.*, Cain, *Experts Wrestle with Problems Posed by Occupational Disease Compensation*, BUS. INS., July 9, 1984, at 3 (state workers' compensation officials opposed to federal legislation); Proposed Asbestos Bill Should Require Federal Funds, Manufacturer Testifies, 13 O.S.H. Rep. (BNA) No. 3 at 44 (June 16, 1983) (asbestos industry wants partial funding of federal compensation by government and insurance companies).

while there is often little information available on the hazards to which workers are exposed, the law requires very precise information before it will award compensation. Therefore, an effective system must provide coverage for diseases for which there may be incomplete information on causation, and it must remove some of the current burdens of proof from the victims and allow recovery without conclusive evidence that the workplace exposure caused the illness. An effective system must also be flexible enough to cover additional toxic materials as data on their toxicity become available. Commissioning the work of scientific experts to perform toxicity studies, and following their best advice and conclusions is one way of making these determinations. The funding sources of the federal occupational disease compensation system could pay for these studies, but it would take a federal effort to amass the funds required.

One of the most prominent of the recent proposals is Representative Miller's Occupational Disease Compensation Act,[76] a complex bill that would create a Toxic Substance Employee Compensation Insurance Pool to pay compensation benefits for asbestos related illnesses.[77] Covered asbestos manufacturers[78] and employers whose employees handle asbestos would be required to carry insurance or qualify as a self-insurer for their obligations to the pool, as determined according to a formula devised annually by the Secretary of Labor.[79] The bill limits workers' actions for asbestos related illnesses to claims against the pool for lost wages and medical expenses.[80] If, however, a worker's claim is not processed within one year, the worker may proceed with other remedies.[81] Eligibility for compensation would be established by proof of occupational exposure and disability by a disease associated with asbestos exposure.[82] To facilitate claimants' proof, the bill establishes both rebuttable and irrebuttable presumptions for asbestos

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76. H.R. 3175, 98th Cong., 1st Sess. (1983).

77. *Id.* at § 11.

78. The bill distinguishes between "employers" and "toxic substance market participants." The latter are defined as

> a present or former manufacturer, mine operator, processor, refiner, importer, distributor of asbestos or of a product containing asbestos, or other enterprise involved at any stage in the commercial or industrial production of asbestos.

Id. at § 3(17)(A).

79. The bill sets forth a number of criteria to be considered in arriving at the formula. As to toxic substances market participants, the criteria include relative market share, relative toxic content of the company's products, relative risk posed to workers by those products, and the company's tort litigation experience. *Id.* at § 11(c)(3)(B). For employers, the criteria include relative risk in the company's workplace, numbers of employees exposed and the duration of exposure, relative intensity of exposure, and the employer's workers' compensation claims experience. *Id.* at § 11(c)(3)(C). Both formulas may also include "such other factors as the Secretary determines appropriate." *Id.* at § 11(c)(3)(B)(v), (C)(v).

80. *Id.* at § 10(a). Lost wages during the period of disability are limited to eighty percent of the national manufacturing or construction weekly wage for the month in which the disability began. *Id.* at § 5(b).

81. *Id.* at § 10(c)(1)(A). The waiting period would be eighteen months during the first two years of operation of the pool.

82. *Id.* at § 6(a).

related diseases.[83] The federal Office of Workers' Compensation Programs would adminster the claims.[84] Claimants would have to file their claims within a two year statute of limitations that would accrue according to a liberal version of the discovery rule.[85] Although the bill initially covers asbestos, the Secretaries of Labor and Health and Human Services may provide for the coverage of other toxic substances when there is evidence that the incidence of disease among workers exposed to a substance exceeds the expected incidence in the general population by thirty percent.[86]

Proponents of new forms of federal administrative regulation can be accused, perhaps justly, of a certain naivete. The liberal belief that government can solve the problems of society has been sorely tried over the years. OSHA itself provides a splendid example of a well-intentioned government effort that has failed. Conceived with lofty notions of effecting true change in the safety of the country's workplaces, OSHA rapidly became bogged down by bureaucratic ineptitude, massive industry opposition, and later by an administration philosophy hostile to many forms of government regulation. Although mandated by Congress to regulate worker exposure to toxic substances,[87] OSHA has proceeded very slowly in promulgating standards for toxic substances. In its entire history, OSHA has managed to complete rule making proceedings for only twenty-four substances.[88] Recommendations that OSHA strengthen existing national consensus standards for toxic substances[89] have gone unheeded, in spite of persuasive scientific evidence of the inadequacy of those standards.[90]

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83. Mesothelioma and asbestosis are irrebuttably presumed to have resulted from exposure to asbestos. *Id.* at § 6(c)(1), (2). Lung cancer carries a rebuttable presumption of causation if it occurs more than ten years after the first occupational exposure to asbestos. The presumption becomes irrebuttable if there is also evidence of asbestotic changes in the lung. *Id.* at § 6(c)(3).

84. *Id.* at §§ 7, 8.

85. *Id.* at § 7(a). "The time for filing a claim shall not begin to run in any event, until the employee is disabled or has died, and the employee or the claimant is aware, or through the exercise of reasonable diligence should have been aware, of the causal relationship between the workplace exposure to a toxic substance and the disability or death." *Id.* at § 7(b)(3).

86. *Id.* at § 16.

87. 29 U.S.C. § 655(b)(5) (1982).

88. Schroeder & Shapiro, *supra* note 9, at 1231; *see also infra* note 89.

89. Section 6(a) of the Occupational Safety and Health Act, 29 U.S.C. § 655(a) (1982), authorized the Secretary of Labor, for a period of two years following the effective date of the Act, to adopt as OSHA's own standard the "national consensus standard" and "established Federal standards" without having to comply with the lengthy rule making procedures of either Section 6(b) of the OSH Act, 29 U.S.C. § 655(b) (1982), or of the Administrative Procedure Act, 5 U.S.C. §§ 553, 556-57 (1976). Most of the standards adopted pursuant to this authority were related to safety matters, but OSHA also adopted exposure limits for 400 toxic substances developed by the American Conference of Government Industrial Hygienists, a private organization. 36 Fed. Reg. 10,466-714 (1971). Although the power to adopt these standards expired after two years, the standards adopted are permanent, unless revised or revoked by OSHA in rule making proceedings. *See* Rothstein, *OSHA After Ten Years: A Review and Some Proposed Reforms*, 34 VAND. L. REV. 71, 73 n.11, 74 (1981).

90. The National Institute for Occupational Safety and Health (NIOSH) was established by the OSH Act to develop recommendations for exposure to toxic materials. 29 U.S.C. § 671(d) (1982). From 1972 to 1980, NIOSH recommended revision of national consensus standards for 109 toxic substances, *NIOSH Recommendations Compared with OSHA Regulations for Occupational Health Standards, 1982*, EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 8022 (1983), and NIOSH and OSHA jointly have

pointing to unremedied health hazards, have challenged OSHA's current inaction, although they have met with limited success.[96]

The same kind of delay that has plagued OSHA standard setting could easily befall a federal occupational disease compensation system. To avoid the ad hoc approach that has characterized current attempts to deal with occupational disease, a comprehensive system would have to give authority to the responsible agency to cover additional substances and to specify eligibility criteria.[97] Adminstrative standard setting, however, can spawn vehement and protracted resistance from affected interest groups, as the experience with OSHA's standards has shown. The Miller bill seems to remove some discretion and thus some argument about the appropriateness of its exercise by (apparently) requiring the Secretary of Labor to include a substance when certain evidence of risk is present. This automatic approach to regulation has been upheld in other areas[98] and presumably would be upheld here as well. The establishment of eligibility standards and presumptions would be another matter, however, and would seem to call for administrative standard setting and the inevitable challenges.

Affected industries will also probably oppose the funding mechanism of any federal compensation system. The pool liability formula in the Miller bill attempts to consider past uses of covered materials and thus recognizes the latent nature of many occupational diseases. The bill's coverage is, however, vague and subjective, and thus vulnerable to political manipulation. Covered entities more than likely will mount a challenge to each year's allocations of liability to the pool.

Another related objection to a federal occupational disease compensation system is the seemingly inevitable high cost of any payment program. Opponents can point to the federal black lung program, probably the most comprehensive and detailed legislative attempt to treat disease compensation, and a continuing source of controversy. This legislation, first enacted in 1969,[99] has been the subject of alternately liberalizing and restrictive amendments as Congress reacted to the effects of each previous enactment.[100]

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96. *See, e.g.*, Public Citizen Health Research Group v. Auchter, 702 F.2d 1150 (D.C. Cir. 1983) (ordering OSHA to issue a notice of proposed rule making for ethylene oxide within 30 days and to expedite issuance of a permanent standard); UAW v. Donovan, 590 F. Supp. 747 (D.D.C. 1984) (ordering OSHA to reconsider its decision not to issue an emergency temporary standard for formaldehyde), *transferred to* 756 F.2d 162 (D.C. Cir. 1985) (holding district court lacked subject matter jurisdiction but adhering to judgment).

97. The alternative to administrative standard setting would be to spell out every program detail in the enabling legislation, but that approach has serious flaws. Once enacted, standards would be difficult to change even if new information revealed deficiencies in the standards.

98. *See, e.g.*, 21 U.S.C. §§ 348(c)(3)(A), 376(b)(5)(B) (1982) (prohibiting the FDA Commissioner from listing as safe any additive that has been found to induce cancer in humans or animals).

99. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 792-98 (codified as amended in 30 U.S.C. §§ 901-62 (1982)).

100. *See* Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (codified at 30 U.S.C. §§ 901-02, 921-23, 932, 940 (1982)). For a more detailed discussion of each set of amendments, see generally Lopatto, *supra* note 17, at 677 (1983); Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981). *See generally* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92

Congress enacted the first set of amendments in 1972 because it felt that the Social Security Administration, which administered part of the program, had interpreted the statute too restrictively and had denied too many claims.[101] To follow the congressional command, the Social Security Administration adopted the so-called "interim presumption," which established presumptions of eligibility based on certain medical evidence and years of coal mine employment.[102] Adoption of this regulation improved the agency's approval rate, but it also highlighted the very low claims approval rate of the Department of Labor, which also had responsibility for certain black lung claims.[103] Therefore, in 1977, Congress amended the statute again, this time requiring the Department of Labor to adopt criteria "no more restrictive than the interim presumption of the Social Security Administration.[104] These changes resulted in an increase in the percentage of successful claims. By the end of 1980, about 370,000 miners, their dependents, and their survivors had received over $9 billion in benefits from general federal appropriations.[105] At the same time the Black Lung Trust Fund, established in 1978 to pay claims of miners who left the industry before 1970, and financed by a production tax, had run up a deficit of $1.2 billion.[106] The 1981 amendments, accordingly, repealed the presumptions of eligibility based solely on years of coal mine employment, tightened medical criteria, disallowed payments to survivors of disabled miners who died from a cause other than black lung, and imposed a tax increase on coal production to eliminate the Trust Fund deficit.[107] The cost of the program has far exceeded the predictions of its initial proponents.[108]

The history of the black lung program raises serious questions about the wisdom of another federal compensation scheme covering thousands of workers. On the other hand, there are some explanations for the runaway

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Stat. 95 (1978) (codified at 30 U.S.C. §§ 901-04, 921-25, 931-45 (1982)); Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) (codified in scattered sections of 26 U.S.C. and 30 U.S.C.); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified at 30 U.S.C. §§ 901-941 (1982)).

101. The claims approval rate of the Social Security Administration before the 1972 amendments was about fifty percent. S. REP. No. 743, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2307.

102. 20 C.F.R. §§ 410, 490 (1980).

103. S. REP. No. 95-209, 95th Cong., 1st Sess. 1, 3-4, 12-14 (1977).

104. Under § 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2) (1982), the Secretary of Labor was authorized to develop new medical criteria to evaluate disability and death claims. Congress also directed the Secretary that, until the department promulgated these new standards, all claims, including previously denied or pending claims rendered subject to re-review by the 1977 amendments, should be decided under criteria no more restrictive than interim presumptions established by the Social Security Administration.

105. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7 (1981) [hereinafter *Black Lung Hearings*] (statement of Morton E. Henig, Senior Associate Director, Human Resources Division, General Accounting Office).

106. *Id.* at 7-8. The deficit was financed by advances from the treasury.

107. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635.

108. See Solomons, *supra* note 100, at 915, for a detailed analysis of the effect of the use of the interim presumption in transforming, at least partially, the black lung program into a "*de facto* federal pension program for some older retired miners and many of the survivors of deceased miners."

nature of the black lung program. Congress did not anticipate the potential dilemmas of such legislation when it first enacted the law in 1969. Congress had originally devised a program to provide temporary compensation for retired miners; only a last-minute conference committee change made it a prospective system.[109] Once the program became established, political pressure perpetuated it. Thereafter, the low claims approval rate may have masked the impending financial problems of the system. Further, it is apparent, albeit in hindsight, that the eligibility presumptions adopted were contrary to generally accepted medical wisdom.[110] In addition, various studies have purported to show that many claims were paid even though there was little or no evidence of disability caused by pneumoconiosis.[111]

It is possible that the major deficiencies in the black lung program are inherent in any large-scale disability compensation program. Objections that a program will cost too much, however, miss the point unless taken in context. The black lung program "costs too much" in large part because no attempt was made to calculate the number of potential claimants and the benefits they would receive before the Act or subsequent amendments were passed. A federal occupational disease compensation system may "cost too much" because of the sheer number of dollars involved. The question, however, should be whether the costs are justified in reference to the losses of the victims and the costs and effectiveness of other available forms of relief.

One study has tried to predict the total cost of the Miller bill, as applied only to asbestos related illnesses. It found that the present value of compensation under the bill for asbestos related deaths is between sixteen and thirty billion dollars.[112] By comparison, estimates of the cost of asbestos tort litigation under existing laws range from four to eighty-seven billion dollars.[113] On the other hand, the same report predicts that if, because of generous presumptions of eligibility, all lung cancer in asbestos workers were compensable under the Miller bill, the present value of the total cost of the program would mushroom to between 54 and 108 billion dollars.[114]

It is hoped that the administrators of a federal occupational disease compensation system would learn from the black lung program in adopting eligibility standards. Unfortunately, when there is a difference of scientific opinion and lay decision makers must choose a course of action, mistakes can

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109. CONF. REP. No. 761, 91st Cong., 1st Sess., *reprinted in* 1969 U.S. CODE CONG. & ADMIN. NEWS 2578. Even then, Congress apparently did not expect the black lung compensation problem to continue. The 1969 Act also mandated a reduction of coal dust levels, periodic x-rays of miners to detect pneumoconiosis, and authorized payment for protected transfers in the event that x-rays are positive. Congress hoped that use of these measures would eventually eliminate disability from black lung. Indeed, the program was originally planned to expire in 1976. *Id.* at 683. *See also Black Lung Hearings, supra,* note 105, at 161-88 (report of Andrew Kalmykow on legislative history of 1969 Act); Lopatto, *supra* note 16, at 680-82.

110. Solomons, *supra* note 100, at 880-84.

111. *See Black Lung Hearings, supra* note 105, at 8-15 (statement of Morton E. Henig).

112. F. SISKIND, THE COST OF COMPENSATING ASBESTOS VICTIMS UNDER THE OCCUPATIONAL DISEASE COMPENSATION ACT OF 1983, at 32 (1984).

113. *See supra* notes 63-64.

114. F. SISKIND, *supra* note 112, at 32.

occur. The system would need a mechanism to monitor the state of scientific and medical knowledge and revise standards accordingly.

Finally, the complaint that eligibility presumptions allow the undeserving to recover is not apt. By definition, a presumption will operate to include some who properly should be excluded if perfect information could be obtained without cost. Since that is not possible, presumptions shift the burden and costs of proving noneligibility, as well as the risk that noneligibility cannot be proven, to the party that is best able to bear the risks. While a presumption may include some who should not be included, available evidence indicates that the current tort and workers' compensation systems exclude claimants who should receive payment. Where there is persuasive epidemiological proof of disease causation, a properly drafted presumption should do justice in most cases.

Another familiar objection to administrative schemes is that regulatory agencies tend to become politicized. Although industry groups may lose the first round when a piece of reform legislation is passed and signed into law, they may ultimately prevail by dominating the agency and influencing its decision making process.[115] For instance, some observers have called for the creation of a private cause of action for damages caused by toxic waste facilities on the ground that industry interests control the EPA to such an extent that it does not carry out its responsibilities under the Superfund legislation.[116] Even purely entitlement functions of government become bogged down by their own procedures, or altered by changing political philosophy. This development has been seen in the Social Security Administration's efforts to reduce the number of people receiving disability payments, and the ensuing litigation challenging those efforts.[117]

As our experience with every major government program illustrates, establishing an administrative system does not eliminate litigation over individual claims; it merely changes the issues that are litigated. If those who control the administering body view claimants with suspicion, or have an anti-entitlement philosophy, even more litigation will be generated. Any federal occupational disease compensation scheme would have to contain carefully drafted presumptions and guidelines to preclude undue administrative stinginess. Unless the statute provided for an award of attorneys' fees to claimants who successfully challenge a denial of compensation, claimants could be in a much worse position than they would have been under current law. Although the obstacles to tort recovery are great, there are generally no

115. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684-87 (1975).

116. In 1984, Congress amended the Solid Waste Disposal Act to provide for citizen suits against violators of the Act and against the EPA for failing to enforce the Act. *See* 42 U.S.C. §§ 6901-6987 (1982), *amended by* 42 U.S.C. § 6972 (Supp. III 1985). The House recently passed a bill that would amend the Comprehensive Environmental Response, Compensation and Liability Act (Superfund), 42 U.S.C. §§ 9601-9657 (1982), to provide for the same sort of citizen suits. *See* H.R. 5640, 98th Cong., 1st Sess. (1984).

117. *See, e.g.*, Pear, *Disability Reviews Spur Legal Crisis*, N.Y. Times, Sept. 9, 1984, § 1, at 38, col. 1.

dollar limits on the amount of recovery in personal injury suits.[118] Therefore, plaintiffs' attorneys will take cases on a contingent fee basis in the hope of a large verdict or settlement. On the other hand, the limitations on recovery that would have to exist under any federal compensation system would make claims for compensation much less attractive to attorneys and could prevent claimants from being able to secure representation to pursue their appeal rights.

Moreover, there should be concern about any system that cuts off access to the courts by powerless people. It is significant that the major asbestos producers support the concept of the Miller bill, although they oppose its use of presumptions of eligibility.[119] In other words, they favor the cutoff of tort liability and a greatly reduced level of compensation. Similarly, employers began to support state workers' compensation laws as tort recoveries by injured workers increased.[120] If the asbestos companies want to impose a federal compensation system, perhaps workers should be suspicious.[121]

Another argument against administrative resolution of occupational disease claims is that tort suits should be retained because of their value in deterring wrongdoing. The fallacy of this position is that there is little deterrence in the area of toxic substances. Since many occupational diseases have long latency periods, the tendency of companies to discount future probabilities will cause them to do little to prevent future illness.[122] Those who make decisions on preventive spending probably will no longer be employed by the company when the harm appears and claims are filed years later. The emphasis on current productivity and short-term profits will lead to decisions to spend on goods other than health. While OSHA health standards have required firms to spend money in compliance activity, OSHA has promulgated very few standards for toxic substances.[123] Moreover, firms may weigh the cost of compliance with the penalty for noncompliance and determine to delay compliance until it is absolutely necessary.[124]

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118. Limitations on recovery under state wrongful death statutes are not uncommon, however. *See, e.g.*, KAN. STAT. ANN. § 60-1903 (Supp. 1985) (limit of $100,000 on damages other than pecuniary loss in wrongful death suits). Further, if the movement to limit recoveries in medical malpractice suits, *e.g.*, IND. CODE ANN. § 16-9.5-2-2 (Burns 1983) (imposing a recovery limit of $500,000 for any injury or death of a patient), gains widespread acceptance among the states, limits on recoveries in other kinds of personal injury litigation may eventually be considered.

119. *See, e.g., Occupational Health Hazards Compensation Act of 1982, Hearings on H.R. 5735 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97TH CONG., 2D SESS. 95-98 (1982) (statement of Glenn W. Bailey); *id.* at 242-44 (statement of G. Earl Parker).

120. *See* Croyle, *Industrial Accident Liability Policy of the Early Twentieth Century*, 7 J. LEGAL STUD. 279, 297 (1978).

121. *See Industry Ultimately Will Request Toxics Compensation System, Florio Says*, 14 O.S.H. Rep. (BNA) No. 12, at 269 (Aug. 23, 1984) (discussing Congressman Florio's prediction that the chemical industry will support administrative compensation schemes as soon as evidence of causation is clear).

122. Many scholars believe that companies, as a rule, tend to discount future probabilities because of the pressure to maximize short-term profits. *See* McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1016 (1981).

123. *See supra* text accompanying notes 87-90.

124. R. SMITH, *supra* note 91, at 60-64 (discussing the financial disincentive for employer compliance with OSHA standards in advance of an inspection); *cf.* Miller v. Cudahy Co., 592 F. Supp. 976, 994-98 (D. Kan. 1984) (judicial finding of fact that defendant polluted intentionally because it

Further, it is far from clear that the deterrence theory of tort law works even when the possible liability producing event could have immediate effects. For instance, fire in a public building would seem to be an event within the contemplation of the owners of the building and, therefore, one against which precautions, including obtaining adequate insurance, would be taken.[125] At least two recent catastrophic fires, however, involved owners who were grossly underinsured.[126] There is also evidence that many small- and medium-sized firms have responded to the rising cost of product liability insurance by not insuring at all, even though they could not possibly pay a large tort award from their assets.[127] At the same time, few firms of that size have increased spending on prevention.[128] Recent events have shown that even large firms may seek the shelter of the bankruptcy laws in the face of potentially massive tort liability.[129] Cynics could also argue that major corporations would discount future liabilities in reliance on some form of government bail-out if the situation became desperate.[130]

IV

THE ALTERNATIVE OF REFORMING TORT LAW

Given all of these objections to the creation of a government compensation program, one could easily conclude that the nation as a whole, and perhaps the victims of occupational disease individually, would be better

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decided that paying the maximum fine under state law of $10,000 was cheaper than taking antipollution measures).

125. The effect of the availability of liability insurance on safety enhancing behavior may depend on the precision of the correlation between the risks created by the insured and the premiums charged to insure against that risk. A 1978 federal study found that most product liability insurance policies were not loss related according to the specific risks posed by the insured. INTERAGENCY TASK FORCE ON PRODUCT LIAB., FINAL REPORT at V-9 to -12 (1978).

126. *See, e.g.*, Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom.* Union Light, Heat & Power Co. v. United States Dist. Ct., 588 F.2d 543 (6th Cir. 1978), *cert. dismissed,* 443 U.S. 913 (1979). In that case, a fire at the Beverly Hills Supper Club in Southgate, Kentucky, killed 164 and injured at least 50 people. Claims in excess of $1.5 billion were asserted against the corporation that owned the club. The corporation, which was subsequently dissolved, had assets totalling only $3 million. 77 F.R.D. at 45. The fire in the MGM Grand Hotel in Las Vegas in November, 1980, killed 85. The hotel had $30 million in insurance coverage which it quickly determined was inadequate. Rundle, *MGM Insurance: Hotel Says Back-Dated Cover Has Been Placed, But Plaintiffs' Attorneys Dispute Amount,* BUS. INS., Aug. 24, 1981, at 3. Similarly, the owners and operator of the Hyatt Regency Hotel in Kansas City had $300 million in insurance coverage, but the structural engineer had only $1.5 million in coverage and a negative net worth. Whittaker, *Skywalk Wars,* 18 INT'L SOC'Y OF BARRISTERS Q. 332, 332 (1983).

127. INTERAGENCY TASK FORCE ON PRODUCT LIABILITY *supra* note 125, at III-2, -17 (1978).

128. *Id.* at IV-4. Professor Pierce concludes that this behavior may be rational, since bankruptcy is always available, and personal assets are protected by incorporating. Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation,* 33 VAND. L. REV. 1281, 1301-02 (1980).

129. *See* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings,* 96 HARV. L. REV. 1121 (1983). Bankruptcy is not, however, a panacea, as Manville is learning. White, *Bankruptcy Costs and the New Bankruptcy Code,* 38 J. FIN. 477 (1983); *see also* Ohio v. Kovacs, 469 U.S. 274 (1985) (obligation under state injunction to clean up a hazardous waste disposal site is dischargeable in bankruptcy).

130. *E.g.*, Atomic Energy Damages Act of 1984, 42 U.S.C. § 2212 (Supp. III 1985) (government contractors are shielded from liability arising from acts or omissions in carrying out atomic weapons testing program).

served by a continuation of the current means of compensation. After all, state legislatures and courts have responded, at least in part, to the legal obstacles to recovery.[131] It is arguable that only a few additional changes in the law are needed to improve the situation greatly.

Commentators have suggested various reforms, chiefly to the tort system, to increase the chances of recovery in toxics suits. One of the chief litigation-based proposals is that judges should allow increased use of class actions in mass tort cases.[132] Another intriguing reform advanced by Professor Rosenberg involves the combination of the class action device with a shift from the preponderance of the evidence rule to a proportionality rule for determining causation.[133] Under this proposal, manufacturers of toxic substances would be held liable for the proportion of the total incidence of disease or injury that is statistically attributable to their products. Their liability would be determined by computing the excess risk of the disease caused by exposure to a toxic substance, somehow assigning a dollar value to that risk, and then paying a proportionate amount to everyone who has contracted the disease even if some of those individuals cannot prove specific causation. It would appear that under this scheme no individual victim would receive full compensation for his or her losses, since compensation is based only on the risk attributable to the manufacturers. Everyone with the disease, however, even those who might be part of the statistical background risk, would receive compensation.

Even without conscious adoption of such sweeping procedural reforms, recent mass tort litigation has been the subject of some efforts at efficiency. For instance, although it was once axiomatic that class actions were inappropriate for mass tort claims,[134] courts have used[135] or attempted to use[136] class certification in much of the recent disaster and toxics litigation.

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131. *See supra* note 30 and accompanying text.

132. *See, e.g.*, Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983); Wright & Colussi, *The Successful Use of the Class Action Device in the Management of the* Skywalks *Mass Tort Litigation*, 52 UMKC L. REV. 141 (1984); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143 (1983); Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180 (1983).

133. Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

134. *See, e.g.*, FED. R. CIV. P. 23 advisory committee's note; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (pt. 1), 81 HARV. L. REV. 356, 393 (1967). Under Fed. R. Civ. P. 23(b)(3), a so-called "opt-out" class may be maintained only if the court finds that a class action is superior to other methods of adjudication. Factors to be considered in this determination include "the interest of members of the class in individually controlling the prosecution . . . of separate actions," FED. R. CIV. P. 23(b)(3)(A), and "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," FED. R. CIV. P. 23(b)(3)(B).

135. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983) (granting motion to certify as class action under FED. R. CIV. P. 23(b)(3), but granting motion to certify under FED. R. CIV. P. 23(b)(1)(B) only with respect to the claim for punitive damages); Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), *petition for mandamus denied sub nom.* Union Light, Heat and Power Co. v. United States Dist. Ct., 588 F.2d 543 (6th Cir. 1978), *cert. dismissed*, 443 U.S. 913 (1979).

136. *See. e.g., In re* "Bendectin" Prod. Liab. Litig., 749 F.2d 300 (6th Cir. 1984) (vacating trial court's certification under FED. R. CIV. P. 23(b)(1)); Abed v. A.H. Robins Co. (*In re* Northern Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.), 693 F.2d 847 (9th Cir. 1982) (vacating trial court's

The increased acceptance of the class action in toxic suits puts new pressure on the situation. Few defendants want to bear the costs and risk the uncertainty of a trial of a large claim-large class action. Although as a practical matter the named plaintiffs in a class suit face no greater risk from a trial than they would if their suit were an individual one, their attorneys may be greatly tempted by the prospect of settlement with an award of fees from defendants. As a result, settlements are likely to occur. Indeed, class certification may become the key vehicle for the settlement agreement. For instance, the proposed settlement of suits against the manufacturer of the morning sickness drug Bendectin involved the certification of a no-opt-out class of all plaintiffs with suits on file in federal or state court and all future claimants.[137]

We have, of course, become accustomed to the use of the class action device in the small claim-large class situation. These suits are almost invariably settled without trial, and although they sometimes reach a result of questionable benefit to the class members,[138] few objections are heard. After all, members of the class would not have sued on an individual basis anyway, so anything they receive from the settlement presumably is better than nothing. The implicit judgment in the approval of such settlements is that deterrence of the wrongdoer is the most important value to be served.[139] At the other end of the class action spectrum are suits that seek massive institutional reform.[140] They require the judge to take an active role in resolving the dispute, generally with ongoing supervision.

The toxic tort suit fits in neither of these categories. Claims for disability or death are large enough that the claimants will care about the outcome. Further, compensation of these class members should be at least as important as the deterrence goal. On the other hand, the typical toxics suit does not require the same kind of ongoing judicial supervision that public law litigation does. Although some settlements may call for the establishment of a claims

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certification of a nationwide class on the issue of punitive damages under Fed. R. Civ. P. 23(b)(1)(B) and a statewide class on liability under FED. R. CIV. P. 23(b)(3)), *cert. denied*, 459 U.S. 117 (1983); *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (reversing trial court's certification of a class under FED. R. CIV. P. 23(b)(1)(A) and (B)), *cert. denied*, 459 U.S. 988 (1982).

137. *In re* "Bendectin" Prod. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984). The class was certified solely for the purpose of achieving a settlement; the trial court had previously declined to certify a class for trial, *see* 102 F.R.D. at 240 n.4, and was proceeding with a trial of individual cases consolidated under FED. R. CIV. P. 42, when the parties announced they were near an agreement. 749 F.2d at 302. *See also In re* Skywalk Cases, No. CV81-15244 (Mo. Jackson County Cir. Ct., Jan. 6, 1983) (imposing an opt-out class for settlement only).

138. *See, e.g., In re* Cuisinart Food Processor Antitrust Litig., 38 Fed. R. Serv. 2d 446 (D. Conn. 1983) (settlement giving class members, instead of cash, a coupon which required further purchase from the defendant to realize value).

139. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 54-56 (1975); Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 666, 669 (1979).

140. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (10-year-old class action challenging conditions and fact of confinement in state institution for mentally retarded).

facility or for the determination of eligibility on an individual basis,[141] judicial involvement in these activities can be limited. With the goal of judicial economy at the forefront, and many of the other goals of class actions absent, the class treatment of toxics claims should be carefully scrutinized. Toxics suits are, however, often resolved in a manner that prevents such scrutiny.

Attempts to use similar massive settlement devices in toxics cases are certain to continue. If the settlement of tort suits is the alternative to administrative resolution of occupational disease claims, the implications of such a solution should be more fully explored. Class resolution of toxics suits raises specific legal issues that could present serious obstacles to complete termination of litigation. From the defendants' point of view, the attraction of class settlement agreements, and the factor most likely to motivate them to pay huge sums of money to settle, is the ability of the judicial decree to determine finally all of the claims against them. To the extent that uncertainty about the inclusive and preclusive effects of the judgment exists, defendants will be less willing to agree to a large settlement.[142]

If a federal court action attempts to determine the rights of nonconsenting persons with suits on file in state courts, it may run afoul of the Anti-Injunction Act.[143] For this reason, the Eighth Circuit reversed a no-opt-out class in the Hyatt skywalk cases.[144] No other court of appeals has ruled on this precise issue, and the Eighth Circuit's decision can be construed narrowly.[145] Nevertheless, as critics of the decision have pointed out,[146] under the court's ruling it would be difficult to achieve a complete, single class resolution of any

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141. For instance, the Agent Orange settlement contemplates the establishment by seven defendants of a $180 million dollar fund, with payments to claimants to be determined by the type and severity of disease. *In re* "Agent Orange" Product Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984) (approving settlement agreement); *In re* "Agent Orange" Product Liab. Litig., 611 F. Supp. 1396 (E.D.N.Y. 1985) (approving distribution plan). The proposed Bendectin settlement would have involved the establishment over nineteen years of a $120 million fund for payment of claims to class members. Lauter, *Bendectin Pact Creating Furor,* Nat'l L.J., July 30, 1984, at 1, col. 1.

142. Until recently, the question of personal jurisdiction over nonresident members of a plaintiff class posed one of the major legal obstacles to a nationwide class in suits based on state law. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806-14 (1985), the Supreme Court held that a state may exercise jurisdiction over the claims of absent class plaintiffs, even though those plaintiffs do not have the kind of "minimum contacts" with the forum state that are necessary for jurisdiction over defendants, if the absent plaintiffs receive notice and an opportunity to be heard and participate, if they are afforded an opportunity to opt out of the action, and if the named plaintiff adequately represents the class. Following *Shutts,* any state with an appropriate class action rule and jurisdiction over the defendant should be able to assert jurisdiction over a toxics class suit, regardless of the place of injury or residence of the absent class members. See 472 U.S. at 814 n.5 for a list of state rules with opt-out provisions.

143. 28 U.S.C. § 2283 (1982).

144. *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied,* 459 U.S. 988 (1982).

145. The Eighth Circuit found that the certification of a no-opt-out class constituted an injunction against pending state actions that did not fall within any of the recognized exceptions to § 2283. In defining the order as an injunction, the court was heavily influenced by the extent of the state court proceedings. "The state court cases had been filed, consolidated, and discovery had begun." 680 F.2d at 1180. In an accompanying footnote, *id.* at 1180 n.12, and in its statement of the facts, *id.* at 1177-78, the court described the extensive pretrial activity that had already taken place in the state court.

146. Note, *Class Certification in Mass Accident Cases under Rule 23(b)(1),* 96 HARV. L. REV. 1143, 1159 (1983).

mass disaster or toxic tort case, for invariably there will be pending state suits that predate the federal class certification.

A second problem raised by these toxics class actions and settlements is whether they can be used to cut off the rights of future claimants. In some situations, such as the administration of trusts, the law recognizes the device of the appointment of a representative to protect the interests of unknown and future claimants, but it tolerates the fiction of representation because of the need to terminate trust administration by the court.[147] A defendant's desire to cut off future liability and a court's wish to avoid future litigation do not seem to rise to the same level of significance and may not justify a decree establishing the rights of future claimants.

Third, every class action raises familiar questions of the adequacy of the representation provided by the named plaintiff, and every settlement of a class suit raises issues of the adequacy of the amount settled upon, the fairness of the claims procedures, and the payment of class counsel's fees. Mass tort suits are no exception and, indeed, very loud protests have been made in almost all of these cases.[148] There are often good reasons for absent class members to suspect settlements. The class representative, or, more realistically, class counsel, is a self-selected volunteer who may not keep the interests of absent class members foremost. The defendants are naturally interested in the most favorable terms possible; their only concern for the members of the class lies in being sure that the court's judgment will bind class members. Negotiations invariably will be conducted in secrecy. In fact, some recent settlements have involved agreements to keep those negotiations and any materials gathered during discovery confidential.[149]

The accepted response to complaints about the conduct of class actions, of course, lies in our faith in the requirements of Rule 23, particularly the requirement of adequate representation, and in the supervisory role of the district judge throughout the class proceedings. In reality, however, the requirement of adequacy of representation receives little scrutiny. It is very unusual for an appellate court to overturn a district court's finding of adequacy, and district courts in turn rarely find would-be representatives inadequate.[150] Indeed, most successful attacks on adequacy have involved class representatives who "sold out" the absent class members while achieving a satisfactory result for themselves.[151] A class settlement that treats

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147. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4454, 4455 (1981) (discussing preclusion by representation).

148. *See, e.g.*, Blumenthal, *Veterans Speak Out on Agent Orange Settlement*, N.Y. Times, Aug. 9, 1984, at B1, col. 4.

149. *Cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (protective orders entered under FED. R. CIV. P. 26(c) prohibiting dissemination of discovered information before trial do not violate first amendment).

150. *See* Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1191-97 (1982) (discussing the "singularly laconic" nature of the requirement of adequacy in FED. R. CIV. P. 23(a)(4)).

151. *See, e.g.*, Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983) (reversing the trial court's approval of a class settlement under which the named plaintiffs received approximately half of

all members of the class identically is not likely to be rejected even though it may not provide significant relief for class members, or a majority of the class objects to its terms.

Several observations can be made about the supervision of the trial judge. Many of the recent toxics settlements have been presided over by activist judges who, according to some accounts, have played a large role in accomplishing the parties' agreement. While Rule 23 is designed to require the continuous supervision of the trial judge, and many kinds of litigation involving issues of public law or the reform of public institutions mandate an active judicial role,[152] there are drawbacks to judicial participation. First, with all respect to judicial motives, one wonders whether a judge who becomes actively involved in settlement negotiations can maintain complete objectivity about that settlement. Compounding the objectivity problem is the tremendous pressure judges, particularly federal judges, face to move their dockets along. The chief means of accomplishing docket control is settlement, and the urge to induce a settlement must become almost overwhelming when the case in question would take weeks or months to try.[153] It is entirely consistent to acknowledge the brilliance and vision of many jurists in accomplishing the Herculean task of presiding over complex, lengthy, and bitterly contested cases, and bringing them to an acceptable resolution, while at the same time recognizing that not all judges are capable of such action, and that our process of judicial selection at both the federal or state level is not particularly geared to finding those individuals who are.[154] There are some mechanisms that may help ensure that complex cases are assigned to judges who can handle them,[155] but these mechanisms do not

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the settlement fund); Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982) (affirming trial court's denial of approval of proposed class settlement under which only the named plaintiffs were to receive immediate cash payments); Gonzales v. Cassidy, 474 F.2d 67, 75-76 (5th Cir. 1973) (collateral attack on grounds that named plaintiff failed to appeal a judgment giving him relief but denying relief to the class).

152. *See, e.g.*, Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

153. Indeed, this justification was offered explicitly in the proposed Bendectin class certification and settlement.

> For the identified over 700 cases, a full trial on each would probably require at least 30 trial days. Two Bendectin cases have already been tried. One required two trials of 44 and 45 days each. The other required 20 trial days. Assuming 200 trial days available per year per Judge, disposition of the present Bendectin cases at the trial level alone might require 21,000 trial days or the equivalent of 105 Judge years, i.e., one Judge for 105 years or 105 Judges for one year.

In re Bendectin Prod. Liab. Litig., 102 F.R.D. 239, 240 n.3 (S.D. Ohio), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984).

154. *See, e.g.*, McKnight, Schaefer & Johnson, *Choosing Judges: Do the Voters Know What They're Doing?*, 62 JUDICATURE 94 (1978); Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment* (pts. 1 & 2), 66 JUDICATURE 348, 385 (1983).

155. Within each federal judicial district, the chief judge may assign cases to particular judges. 28 U.S.C. § 137 (1982). Cases pending in more than one district and involving a common question of law or fact may be consolidated and transferred to any district for discovery pursuant to 28 U.S.C. § 1407 (1982). The Judicial Panel on Multidistrict Litigation often chooses a transferee judge whom it believes is especially qualified by experience or expertise to handle the particular kinds of cases involved. *See, e.g., In re* Cutter Laboratories, Inc., 465 F. Supp. 1295 (J.P.M.D.L. 1979) (transferee judge had presided over three suits involving another heart valve).

operate in all situations. Further, the decisions on assignment are made by other judges, who may suffer from the same institutional biases as those they choose. While a judge who mishandles a case may not be selected for future complex cases, one suspects that it may take a long time for such "blackballing" to occur, and, in the meantime, there is little relief for the parties to an affected case. Thus, it is safe to conclude that, as a practical matter, judges are not accountable for their excesses of discretion.

The impetus to settlement is not necessarily "bad," particularly in light of the unappealing alternatives to a class settlement. Settlement undoubtedly performs a useful function if it operates to decrease significantly the transaction costs of litigation.[156] Further, the judicial system could not operate if most cases were not settled. When, however, the debate is between continued reliance on tort suits to resolve claims of occupational disease and channeling these claims into an administrative scheme, litigation in the current mode does raise some serious questions of public accountability and legitimacy. These class settlements can determine the rights of thousands of people through secret deliberations conducted by defendants and a self-appointed class representative, and presided over by a judge with an appointment for life. They may involve the establishment of a claims facility run by court appointed experts who will make eligibility determinations based on medical criteria they will devise, with the only available review an appeal to the same judge who approved the settlement. The results of these negotiations are thrust upon class members without their consent or meaningful participation.

Suddenly, this judicially sanctioned settlement begins to look like an administrative resolution of tort claims.[157] It consists of a claims facility, some form of eligibility presumptions, a payment schedule, and an appeals mechanism. The difference is that class settlements are established on an ad hoc basis and may or may or not include contributions by all members of the industry. Further, agency determinations are conducted in a more open fashion than are class settlements generally. Although congressional oversight may not be very effective, there is a certain level of accountability provided that is not present in private litigation. While legislative standards for compensation could certainly be arbitrary and unfair to claimants, the more important consideration may be how the public perceives the court approved settlement. Even if a private settlement of a class suit provides

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156. Settlement does, of course, reduce litigation costs because it eliminates the expenses attributable to trial. The amount saved depends on many factors, including when agreement is reached and how many trial related costs have already been incurred. The Rand study found that the amount of plaintiff and defense expenditures rose from an average of $88,000 for claims closed before trial to $380,000 for tried claims. COMPENSATION AND EXPENSES, *supra* note 63, at xviii.

157. As the Supreme Court commented, "[F]rom the plaintiffs' point of view a class action resembles a 'quasi-administrative proceeding, conducted by the judge.' " Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985). The Court's context in Shutts was personal jurisdiction, but its holding reinforces the role of the class action in cutting off individual rights. *See* Kennedy, *The Supreme Court Meets the Bride of Frankenstein:* Phillips Petroleum Co. v. Shutts *and the State Multistate Class Action,* 34 U. KAN. L. REV. 255 (1985).

more compensation than would ever be available through a federal compensation system, and even if a settlement is advisable because of the great uncertainties of trial, the public may not perceive matters that way. The judiciary may have to realize that its legitimacy may be called into question when these settlements are approved.

These comments on the shortcomings of judicial resolution of toxics suits do not necessarily prove that administrative resolution would be any better. In may well be that the Agent Orange settlement will prove very successful in determining eligibility and in paying compensation. The problem is that there is not yet enough experience with this kind of decree to know how well it will function. Each of the current agreements has, however, come about only after years of one-on-one litigation or prolonged and expensive disputes over insurance coverage. It is logical to conclude that the defendants agreed to such massive payments primarily because they determined that the cost of continued litigation, even if they prevailed on the merits in each case,[158] would be more than the cost of funding a settlement, particularly if payments to a settlement fund could be made over several years. Further, it would appear that the resolution of the insurance coverage questions among defendants and their insurers has played a major role in promoting settlement of the personal injury litigation.[159]

At any rate, the settlements have come only after great expense. It is at least arguable that an administrative solution could be reached more quickly and at less cost than these settlements. The major issues in a scheme such as the Miller bill proposes would be whether the necessary level of scientific certainty has been met to trigger coverage and whether the eligibility presumptions were reasonable. These are not easy questions, as OSHA's standard setting experience has shown, but a carefully drafted enabling act could help to indicate the measure of review Congress intended and avoid, to some extent, restrictive judicial interpretation.

If there is a bright spot in the area of compensation for occupational disease, it may be in the private solution to the asbestos litigation hammered out by the Wellington group, chaired by Harry Wellington, Dean of the Yale Law School.[160] More than two years of negotiations resulted in an agreement establishing the Asbestos Claims Facility. The facility will administer the

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158. Some toxics defendants have won most of the suits against them. *See, e.g., Occupational Health Hazards Compensation Act of 1982: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor on H.R. 5735*, 97th Cong., 2d Sess., 239 (1982) (Unarco won 9 out of 11 cases tried) (statement of William C. McLaughlin); Lauter, *supra* note 141 (manufacturer of Bendectin won both tried cases). Indeed, following the unsuccessful attempt at a class settlement in the Bendectin litigation, a March 1985 trial involving more than 800 consolidated lawsuits brought by more than 1,100 plaintiff children was held. The verdict was for the defendant. *See* Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 242 (D.D.C. 1986) (LEXIS, Genfed library, Dist. file).

159. Settlement of the *Skywalk* litigation was facilitated by an agreement between the insurance companies, their insureds, and the state court to make approximately half of the coverage available for payment of claims before the resolution of the coverage litigation. Morris & See, *The Hyatt Skywalks Litigation: The Plaintiffs' Perspective*, 52 UMKC L. REV. 246, 258-59 (1984).

160. For a general description of the negotiations and the major issues, see Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375 (1984-85).

evaluation, settlement, or defense of all asbestos related personal injury claims against its members, the participating insurers, and asbestos producers. Producers' individual liability to claimants will be determined by a formula that takes into account the number of claims paid or owed by that producer and the state in which the claims were filed. The key to this settlement was the resolution of the insurance coverage disputes,[161] which neither the Miller bill nor other compensation proposals have even addressed.

The effectiveness of the Wellington agreement will depend on many factors. The initial signatories to the agreement in June 1985 were sixteen insurers and thirty-four producers; several major companies, including Manville Corporation, have not signed.[162] Since most producers have had several different insurers and reinsurers over the years and not all insurers have signed the agreement, much of the complex insurance coverage litigation will continue.[163] The cost of that litigation will certainly be reduced as claims between participating producers and insurers are dismissed, but many claims will remain. In addition, since property damage claims are not covered by the Wellington agreement, that litigation is unaffected.

More importantly, the success of the Claims Facility rests with the claimants. Claimants cannot be compelled to submit their claims to the facility, so the entire scheme will work only if the process is perceived as fast, fair, and adequate. If claimants and their attorneys believe they can recover more favorable settlements or verdicts through continued litigation, they will not use the facility.

Moreover, even if the Wellington agreement results in the nonjudicial resolution of a majority of the pending and future asbestos claims, the toxics litigation problems will remain. The Wellington agreement was negotiated against a backdrop of years of litigation over both the personal injury and the insurance aspects of the negotiations. It is doubtful that insurers and producers would have been willing to compromise their disputes in the absence of a series of court decisions defining the meaning of the key policy terms.[164] Further, years of scientific studies on causation and over a decade of personal injury litigation had established many of the legal and factual issues necessary for a claimant's recovery. Although a defendant that has never lost a case might join a claims facility in order to avoid the costs of defense, as a practical matter it is the real risk of loss that motivates settlements of any kind.

Most toxic substances, however, have not been the subject of massive tort litigation defining the issues. It does not seem likely that settlements like the Wellington agreement can be reached with producers of those substances and their insurers, at least not until years of costly litigation have begun to result

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161. *Id.* at 379-85.

162. 50 *Producers, Insurers Sign Asbestos Facility Agreement,* BUS. INS., June 24, 1985, at 1. Manville is involved in reorganization proceedings and will not be able to sign until its reorganization has been completed. 13 Prod. Safety & Liab. Rptr. (BNA) No. 25, at 536 (June 21, 1985).

163. Tarnoff, *Wellington Settles Few Coverage Suits,* BUS. INS., July 1, 1985, at 1.

164. *See* Wellington, *supra* note 160, at 383 (discussing the producer position that any resolution of coverage issues had to be as favorable as the judicial decisions that maximized coverage).

in claimants' victories. In the meantime, the victims of these diseases are left with the existing tort and workers' compensation systems, and all of their flaws.