THE TRAGEDY OF THE ASBESTOS COMMONS

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INTRODUCTION

WHAT we have here is a failure to cooperate.¹ The current world of asbestos litigation can helpfully be viewed as a

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"commons" problem. If not in the aggregate, certainly for individual plaintiffs and defendants, there is a tragedy of the asbestos commons because of an inability to engage in joint action.² The classic commons problem is exemplified by the overuse of a public good driven by rational decisionmaking on the part of users who have no individual disincentives to restrain their use because the detriments of their actions are collective, not individual, in nature.³ Likewise, there exists the reverse commons problem, exemplified by pollution, where individual cost-benefit analyses lead individuals rationally to pollute, even to the detriment of the environment as a whole.⁴

Asbestos plaintiffs—both present and future—while acting quite rationally, are arguably "overgrazing" the accessible financial assets to the detriment of the total value of those assets.⁵ Rational asbestos defendants—both present and future—are arguably polluting their own economic environment.⁶ Judges—both present and future—are arguably challenging the legitimacy of the public justice system by allowing it to be overrun by one class of users.⁷ The

¹ With all due appreciation to *Cool Hand Luke* (Warner Bros. 1967) ("What we have here is a failure to communicate.").

² For an introduction to the concept of the tragedy of the commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1244 (1968).

³ For example, there may be a common pasture available to all the herdsmen in a village without a user fee. The economic incentive for each herdsman will be to put an unlimited number of cattle onto the pasture. If all the herdsmen react the same way, there will be overgrazing that inevitably will destroy the pasture. The ultimate effect would be that all the herdsmen would be net losers because of their inability to limit their cattle to a sustainable number.

⁴ Assume that there are no limitations on polluting a common environment. The economic incentive for each producer in that environment will be to pollute to impose the costs of that producer's waste on others. If all producers act in the same manner, the entire environment could become unusable to all, just like the common pasture.

⁵ In the context of asbestos, if there is a limited fund of money for asbestos plaintiffs and no restriction on their access to that fund, it will become dissipated before all the asbestos plaintiffs are paid. Like the cattle, the latecomers will suffer.

⁶ In the context of asbestos, each defendant could follow his or her own limited interests by resolving cases in a manner that would be to the detriment of the entire community of defendants. Paying plaintiffs enough money so that counsel have an incentive to increase the supply of plaintiffs—ultimately overwhelming all defendants—is one example.

⁷ By devoting unlimited resources to resolving asbestos cases, courts can damage their legitimacy in several ways. Any given court can become a magnet for virtually unlimited asbestos filings, thereby creating an increasingly severe backlog of cases. If a court attempts to cut corners to eliminate the backlog, it may damage its own stan-

optimal solution to any commons problem typically is coercion, and the party or parties who cooperate first to orchestrate that coercion are the ones most likely to achieve their goals.⁸

Under this analysis, we are entering an asbestos era—at least from some perspectives—of scarce resources. There are multiple equilibria possible at which the parties may stabilize the asbestos litigation environment, subject to limitations from their legal bargaining and cognitive constraints.⁹ The near-term strategy developments among plaintiffs, defendants, counsel, and courts will be characterized by the search for cooperation among various parties—both subgroups of plaintiffs and subgroups of defendants—to reach an acceptable equilibrium for their mutual benefit.

First, it may be worthwhile to define the perceived “problem,” and then explain the forces driving the problem. This Article suggests that, in an era of scarcity, the failure to cooperate is pervasive among defendants, judges, and plaintiffs. The solutions are all coercive in nature and will be achieved by a critical mass of parties who are able to cooperate.

dards of due process. If the backlog continues, the court may deny access to due process for non-asbestos plaintiffs.

⁸ As Professor Hardin explains, “[t]he social arrangements that produce responsibility are arrangements that create coercion, of some sort.” Hardin, *supra* note 2, at 1247. This coercion may be external or internal. In the context of asbestos, cooperation among at least some of the parties would be a prerequisite to the coercion, which would be accomplished by agreement, by courts, or by the legislature.

⁹ One of the most fascinating aspects of the application of game theory and Nash equilibria concepts to asbestos litigation is the vast array of end games. Nash equilibria occur in game theoretical situations where all players’ expectations are fulfilled, and all players’ strategies are optimal, while each player has complete information about the other players’ options. Given the legal framework, the relative bargaining power of the parties, and the psychological pitfalls in negotiation, it is possible to envision multiple likely outcomes, some of which are summarized *infra* Figures B–E3 and Part VI. See generally Roger B. Myerson, *Game Theory: Analysis of Conflict* 91–108 (1991) (giving a detailed analysis of game theory and the application of Nash equilibria); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 *Harv. Negot. L. Rev.* 1 (1999) (suggesting that the unrealistic expectations of parties and lawyers thwart successful settlements).

I. IS THERE AN ASBESTOS "COMMONS" PROBLEM?

Under one vision—expressed by some plaintiffs, defendants, and courts—everything is fine.¹⁰ To the extent that there is a “problem,” it derives from the large number of persons who have been injured because of exposure to asbestos. Under this view, however, there is no problem with the system of public justice as a whole. The existing legal framework of federal and state courts, educated *Erie* guesses, procedural innovation, and bankruptcy is more than adequate. Almost all states have manageable asbestos trial calendars and backlogs.¹¹ All the federal asbestos cases are consolidated in one court,¹² and the transferee judge has been resolving them in a timely fashion.¹³ Companies that have massive asbestos liability are legitimately bankrupt, and their cases are being resolved in bankruptcy. The resulting qualified settlement trusts are processing claims more rapidly and less expensively than the tort system. Class action efforts to limit access to the tort system have justifiably been thwarted by appellate court recognition that due process warrants minimal rights to each asbestos plaintiff, present and future.¹⁴ It is not possible—nor should it be possible—for those rights to be limited simply because of the magnitude of the harm caused. Tortfeasors should not be treated more favorably because they hurt larger

¹⁰ See Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (1999) (written statement of Brian Wolfman, Staff Attorney, Public Citizen Litigation Group), http://www.citizen.org/congress/civjus/prod_liability/asbestos/articles.cfm?ID=670 (July 9, 1999); Stephen J. Carroll et al., RAND Institute for Social Justice, Asbestos Litigation Costs and Compensation: An Interim Report 89–90 (2002), <http://www.rand.org/publications/DB/DB397/DB397.pdf> (last accessed Sept. 25, 2002); The Federalist Society, Asbestos: The Next Liability Explosion? 13–14 (June 18, 2002) (unpublished transcript, on file with the Virginia Law Review Association).

¹¹ The Federalist Society, *supra* note 10 (transcript at 12).

¹² *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422–24 (J.P.M.L. 1991); Carroll et al., *supra* note 10, at 27; Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 Miss. L.J. 1, 9 (2001) (noting that “all asbestos claims have been consolidated for pre-trial purposes before Senior United States District Judge Charles R. Weiner of the Eastern District of Pennsylvania (the federal MDL Panel)”).

¹³ *In re Asbestos*, 771 F. Supp. at 423.

¹⁴ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846–48 (1999); *Amchem Prods. v. Windsor*, 521 U.S. 591, 628–29 (1997); *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988); Carroll et al., *supra* note 10, at 35.

numbers of people. Such is the view of those who believe the current asbestos system is functioning well.

The opposing view is that the asbestos litigation system is broken.¹⁵ At least fifty-six companies have filed for bankruptcy.¹⁶ There are currently hundreds of thousands of claims pending against thousands of solvent defendants.¹⁷ Eventually, between one and three million claims will be filed in total, according to historically low projections.¹⁸ An estimated \$54 billion in asbestos-related liabilities have been incurred to date,¹⁹ and an additional \$200 to \$265 billion are likely to be incurred in the future.²⁰ These are projections that have historically been low.²¹ Under this viewpoint, the litigation cloud has chilled the capital markets so that the cost of capital for any company facing asbestos liability has increased, thereby diminishing the growth prospects for all stakeholders.

Courts have not been immune to the deluge of asbestos suits. There are over 30,000 asbestos cases languishing in federal court.²² West Virginia alone has 12,000 pending asbestos cases in one circuit.²³ Pretty much every Jefferson County in the South, for exam-

¹⁵ Brief Amici Curiae of the Coalition of Asbestos Justice, Inc., et al., *Norfolk & Western Ry. Co. v. Ayers*, 122 S.Ct. 1434 (2002) (No. 01-963); Griffin W. Bell, National Center for the Public Interest, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis* 6 (June 2002); Carroll et al., *supra* note 10, at 3; Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 *Baylor L. Rev.* 331, 332-33, 337 (2002); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 *S.C. L. Rev.* 815, 816-17 (2002); Rothstein, *supra* note 12, at 2; Victor E. Schwartz & Leah Lorber, *Commentary, A Letter to the Nation's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims In Asbestos Liability Cases*, 24 *Am. J. Trial Advoc.* 247, 249 (2000).

¹⁶ Carroll et al., *supra* note 10, at 71, 81; Behrens, *supra* note 15, at 333.

¹⁷ Carroll et al., *supra* note 10, at 49.

¹⁸ *Id.* at 77.

¹⁹ *Id.* at 53.

²⁰ *Id.* at 77.

²¹ See *id.* at 6; A.M. Best, *Special Report, Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers* 2 (2001).

²² Carroll et al., *supra* note 10, at 29; Introduction to Science Brief, *In re Federal-Mogul Global, Inc.*, 2002 Bankr. LEXIS 937 (Bankr. Del. 2002) (No. 01-10587).

²³ See Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, *N.Y. Times*, Apr. 10, 2002, at A1; *Growing Chorus Demands Change in Law*, *Fin. Times*, Sept. 9, 2002, at 27; Press Release, *Norfolk Southern Corp., Railroads Challenge Harmful West Virginia Court Practice* (Nov. 28, 2001), http://www.nscorp.com/nscorp/html/releases01/vv_court.html.

ple, faces thousands of asbestos cases each year.²⁴ The transaction costs associated with this massive transfer of wealth from stockholders to plaintiffs are outrageous. Lawyers receive a grossly disproportionate share of the total amount of monies spent in the litigation process.²⁵

The commons analogy may be helpful for those who perceive that there are limited resources in the aggregate or, just as importantly, for those specific plaintiffs and defendants who are facing an empirically verifiable scarcity. So, for example, a given mesothelioma plaintiff may not receive full value for a case that is pending against a limited number of insolvent defendants, or a given defendant who has steadfastly denied asbestos liability may come to the sudden realization that its liability actually overwhelms its assets. More importantly, certain plaintiffs and their counsel may assume a future of limited resources—for a variety of reasons—and act strategically according to that assumption.²⁶

II. WHAT ARE THE EXPLANATIONS FOR THE CURRENT ASBESTOS LITIGATION LANDSCAPE?

Figure A illustrates the dramatic increase in asbestos personal injury case filings in recent years.²⁷ The impressive ability of law-

²⁴ Carroll et al., *supra* note 10, at 36; Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 *Tex. L. Rev.* 1821, 1839–40 (1995).

²⁵ In the 1990s, fifty-seven percent of the asbestos awards were applied to transactional costs. Carroll et al., *supra* note 10, at 61. This is less than it was in the 1980s, since defense expenses have decreased. *Id.* At least one organization, RAND, suggests that the “changing dynamics” of asbestos litigation will lead to another increase in transactional costs. *Id.*; see Behrens, *supra* note 15, at 333; James S. Kakalik et al., RAND Institute for Civil Justice, *Variation in Asbestos Litigation Compensation and Expenses*, at v (1984).

²⁶ Anticipation of scarcity often generates scarcity. If, for example, a defendant who could muster sufficient resources over time were forced to pay claims more quickly, bankruptcy might be the only alternative.

²⁷ Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, 4th Quarter, 2001, Financial Statements, Report of Independent Public Accountants, http://www.mantrust.org/FILINGS/Q4_01/4statmnt.htm (last visited Oct. 22, 2002); Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, 4th Quarter, 2000, Financial Statements, Report of Independent Public Accountants, http://www.mantrust.org/FILINGS/Q4_00/4statmnt.htm (last visited Oct. 22, 2002); Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, 4th Quarter, 1999, Financial Statements, Report of Independent Public Accountants, http://www.mantrust.org/FILINGS/Q4_99/4statmnt.htm (last visited Oct. 22, 2002);

yers to locate viable plaintiffs and defendants and to prosecute claims efficiently in the courts explains much of the increase in filings. Asbestos litigation is virtually unique in its high degree of elasticity.²⁸ There is elasticity in the sense of a nearly inexhaustible pool of plaintiffs and defendants. There is also elasticity in the procedural and substantive law to allow rapid processing of claims, thereby modifying the economics of tort recovery and accelerating the demand for new filings.

Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, 4th Quarter, 1998, Financial Statements, http://www.mantrust.org/FILINGS/q4_98/4statmnt.htm (last visited Oct. 22, 2002); Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, Highlights of the 4th Quarter 1997 Filing, http://www.mantrust.org/FILINGS/q4_97/4thqtr97.htm (last visited Oct. 22, 2002).

²⁸McGovern, *supra* note 24, at 1836–37, 1840; see also Advisory Comm. on Civil Rules & Working Group, Report on Mass Tort Litigation 16–17, *reprinted in* 187 F.R.D. 293, 303–04 (Feb. 15, 1999) [hereinafter Advisory Comm. Rep.] (explaining the phenomenon of increased case aggregation). Unlike aircraft crash mass torts, where the number of potential plaintiffs is limited, the potential number of asbestos plaintiffs is in the tens of millions. The concept of elasticity here is that the demand for new filings is a function of the cost and volume of cases resolved in the courts. The propensity to sue becomes much greater if courts resolve cases more cheaply and more quickly.

A. Economic Incentives

The landscape of asbestos litigation has evolved rather substantially over the last thirty years.²⁹ First, there were workers' compensation cases against employers that morphed into traditional tort personal injury litigation against third party defendants.³⁰ Then the cases became "mass tort" cases with a single, or at least principal, defendant.³¹ Soon there were multiple and constantly changing defendants for each plaintiff.³² Now there are bankruptcies that turn into asbestos trusts and plaintiffs who become claimants against asbestos claims facilities.³³ During the evolution of this litigation landscape, the financial valuation of the cases made by plaintiffs' counsel has evolved to reflect the realities at each stage.

Given the elasticity of the asbestos mass tort and the potential for a virtually endless stream of new case filings, probably the single most important factor in understanding asbestos litigation is the propensity to sue. Will plaintiffs' counsel file a lawsuit on behalf of a person allegedly exposed to and injured by asbestos? A critical aspect of the answer can be found in the economic analysis of the plaintiffs' lawyer. When is it economically favorable to bring suit?

The following discussion attempts to develop four simplistic, but arguably realistic, models to reflect the propensity of plaintiffs' counsel to sue at each stage in the evolution of asbestos litigation.

²⁹ See generally Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985) (giving a history of asbestos litigation). In the early stages of the asbestos litigation, like most mass torts, the defendants had the upper hand and the economic rewards for the plaintiffs and their counsel were more limited. The situation has obviously changed.

³⁰ See Brodeur, *supra* note 29, at 17–18.

³¹ For a description of what constitutes a "mass tort," see McGovern, *supra* note 24, at 1842–43; Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 482 (1986).

³² Carroll et al., *supra* note 10, at 5, 40, 41; Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1979 (1992).

³³ For an example of a bankruptcy that transformed into a bankruptcy trust, see the Manville Personal Injury Settlement Trust, at www.mantrust.org (last visited Sept. 20, 2002); see also Carroll et al., *supra* note 10, at 8; Francis E. McGovern, *The Alabama DDT Settlement Fund*, *Law & Contemp. Probs.*, Autumn 1990, at 61, 63–64; Rothstein, *supra* note 12, at 4–5 (describing this phenomenon).

1. The Traditional Model

Attorneys in contingent fee tort cases traditionally have decided to represent clients in trials by determining the expected amount of compensation, if any, to be awarded to the plaintiff. The trial process includes pretrial discovery, motion practice, the trial itself, and, maybe, an appeal. This process can take a number of years to resolve, with the plaintiffs' attorneys absorbing the entire cost until an award is made and the attorneys receive a fee, usually a fixed percentage contingent upon the amount of the award.

A lawyer facing the decision of whether to take a case makes an economic evaluation. In so doing, she takes into account, at a minimum, the probability of success, the amount of the anticipated award, the cost in time and money to obtain that award, and the opportunity costs of pursuing the case. A basic economic model for the attorney can be expressed as:

Economic Analysis for Model for Plaintiffs' Counsel

$$\text{Present Value of Return Expected Across N Plaintiffs} = \sum_{i=1}^N \sum_{j=1}^T \frac{(S_{ij}A_{ij} - P_{ij}C_{ij})}{(1+r)^j}$$

i = Individual

j = Year

N = Total Number of Individual Cases

T = Number of Years of Litigation

r = Discount Rate (7%)

S = Probability of Success

A = Award if Successful

P = Probability of Cost

C = Cost

In a traditional case involving one plaintiff and one defendant, an attorney for the plaintiff can typically expect, for example, that the duration of a case will be three to five years. If we assume that there is no chance of settlement or trial in the first three years, the expected return is \$0. It is plausible, under this hypothetical, to assume a forty-percent chance of settlement of \$100,000, to pick a figure, in year four. The expected value of that amount would then be \$40,000. It is also plausible to anticipate that there will be no settlement but a fifty-percent chance of a jury verdict of a hypothetical \$150,000 in year five, creating an expected value of \$45,000. There is, likewise, a fifty-percent chance that the plaintiffs' counsel will get nothing at all in year five.

The costs can be assumed to be predictable for the first four years—for example, \$2,000, \$3,000, \$2,000, and \$10,000. If it is necessary to try the case, then the cost can be assumed—say, \$20,000—discounted by a sixty-percent probability of the trial occurring (given a failure to resolve the claim in year four), resulting in an expected cost of \$12,000. Under this scenario, the expected cash return is \$85,000, and the cost is \$29,000. With a seven-percent discount rate, the present value of the inflows and outflows is \$40,293. Figure B reflects this analysis and these assumptions.

Figure B: Plaintiff Attorney Economic Model

Return per claimant—					
<i>Year.</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Return	0%	0%	0%	40%	50%
Conditional Probability					30%
Return	\$0	\$0	\$0	\$100,000	\$150,000
Expected Return	\$0	\$0	\$0	\$40,000	\$45,000
Cost per claimant—					
<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Cost	100%	100%	100%	100%	60%
Cost	\$2,000	\$3,000	\$2,000	\$10,000	\$20,000
Expected Cost	\$2,000	\$3,000	\$2,000	\$10,000	\$12,000
Net per claimant—					
<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Net Return: Annual	-\$2,000	-\$3,000	-\$2,000	\$30,000	\$33,000
Net Return: Cumulative	-\$2,000	-\$5,000	-\$7,000	\$23,000	\$56,000
Present Value @ 7%	\$40,293				

Embedded in any model of economic decisionmaking by plaintiffs' counsel are myriad variables, both economic and behavioral. For example, the cost of capital—whether it be in a monetary, human, or mental form—must be taken into account. Assumptions are also necessary for start-up costs, operating costs, carrying costs,

time to start-up, time to break even, transaction costs, maintenance costs, information costs, and so on. There are also other determinants related to litigation strategy, such as use of loss leaders and establishment of market power.³⁴ Opportunity costs are critical. A decisionmaker must define resources, compute alternative outcomes for each case, and pick the best cases within the available pool. A complete economic model should include a host of factors related to litigation outcomes, including jurisdiction, jurors, judge, trial skill, and other variables. Plaintiffs' lawyers may also take into account the increasing number of defendants filing for bankruptcy, and the resultant difficulty for plaintiffs to recover.³⁵ There are individual counsel characteristics such as marginal costs and benefits, risk seeking and aversion, cognitive dissonance, non-monetary rewards, and additional aspects involved in any decisionmaking process. This is to say that the plaintiffs' counsel's economic formula and Figure B are extremely simplistic methods of focusing on some of the initial variables that drive a decision. They are not designed to be comprehensive but only to illustrate how changes in asbestos litigation have driven the dynamics of the propensity to sue. The assumptions contained in the models are interesting, but basically irrelevant, as long as they are internally consistent. The thrust of the models, though, is undeniable: Lower costs and greater expected returns lead to an increased number of filings.

2. The Mass Tort Model (Single Defendant)

Mass torts have altered the economic calculus of the plaintiffs' bar in deciding whether to pursue lawsuits. These alterations have occurred in at least two respects: lowering of costs by economies of scale and increasing the probabilities of early settlements by shortening the time frame of judicial case resolution. These alterations have further increased the number of case filings.

³⁴ When plaintiffs' counsel analyze whether to invest in a mass tort, they must take into account the actions of other plaintiffs' counsel. One might, for example, take losses for the law firm on early cases in order to establish a larger market share in the litigation because a critical mass of cases may later create a disproportionately higher level of bargaining power. This subsequent bargaining power may enhance the chances for a more rapid settlement with defendants.

³⁵ Carroll et al., *supra* note 10, at 67.

If plaintiffs' counsel has multiple claims that have overlapping discovery, it is not difficult to create significant economies of scale. If liability development costs can be prorated over multiple cases, the per-case cost to counsel decreases.

The pressure the sheer volume of cases and suits brings against defendants in mass tort is another of the primary factors leading to greater economic returns to plaintiffs' counsel. As the volume of cases and claims has increased over the years, many defendants have decided that it is cheaper and less risky to settle claims than to litigate them.³⁶ Consequently, defendants have offered relatively low but rapid settlement offers to plaintiffs.³⁷ The courts have also played a role in changing the traditional economic calculus. As courts have become inundated with thousands of claims, judges have sought to relieve their case load burden by providing procedural vehicles for quickly resolving large numbers of cases.³⁸

As a result of these and other developments, the economic decisionmaking of the plaintiffs' bar has shifted toward filing more cases. Even if we take the same assumptions contained in the traditional model and change them only slightly in years one through three to reflect lower expected costs per claim, the economic incentives for plaintiffs' counsel to take a single mass tort case prove to be greater. These numbers are reflected below in Figure C.

³⁶ The tactic of settlement over litigation tends to avoid the risk of extremely large verdicts that are unsettling to the capital markets. Experience by the author suggests that the fundamental difference between settlement outcomes and trial outcomes is in their variance. Trial results tend to vary considerably, whereas settlements can be more constant and predictable. Carroll et al., *supra* note 10, at 26; see also Rothstein, *supra* note 12, at 1, 5 (discussing Owens Corning's attempt to settle as many claims as possible); Deposition of David McKnight at 36, *In re Babcock & Wilcox Co.*, 274 B.R. 230 (Bankr. E.D. La. 2002) (No. 01-1155) [hereinafter McKnight Deposition].

³⁷ See Rothstein, *supra* note 12, at 5; McKnight Deposition, *supra* note 36, at 59.

³⁸ See Carroll et al., *supra* note 10, at 25; McGovern, *supra* note 24, at 1840; McGovern, *supra* note 31, at 480; Rothstein, *supra* note 12, at 5.

Figure C: Plaintiff Attorney Economic Model*Traditional Model — Single Litigation*

Return per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Return	0%	0%	0%	40%	50%
Conditional Probability					30%
Return	\$0	\$0	\$0	\$100,000	\$150,000
Expected Return	\$0	\$0	\$0	\$40,000	\$45,000

Cost per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Cost	100%	100%	100%	100%	60%
Cost	\$1,000	\$1,000	\$1,000	\$10,000	\$20,000
Expected Cost	\$1,000	\$1,000	\$1,000	\$10,000	\$12,000

Net per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Net Return: Annual	-\$1,000	-\$1,000	-\$1,000	\$30,000	\$33,000
Net Return: Cumulative	-\$1,000	-\$2,000	-\$3,000	\$27,000	\$60,000

Present Value @ 7% \$43,791

If we were to change the assumptions to include a high probability of return in the early years by taking an immediate settlement, as opposed to the previous model where no return would be expected, the differential between traditional and mass tort models may be even larger, though the expected per-case return is significantly less. Figure D below reflects these assumptions.

Figure D: Plaintiff Attorney Economic Model*Mass Tort Model — Single Litigation*

Return per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Return	80%	70%	50%	0%	0%
Conditional Probability		14%	3%		
Return	\$2,000	\$4,000	\$8,000	\$100,000	\$150,000
Expected Return	\$1,600	\$560	\$240	\$0	\$0

Cost per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Cost	100%	20%	6%	0%	0%
Cost	\$1,000	\$1,000	\$1,000	\$10,000	\$20,000
Expected Cost	\$1,000	\$200	\$60	\$0	\$0

Net per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Net Return: Annual	\$600	\$360	\$180	\$0	\$0
Net Return: Cumulative	\$600	\$960	\$1,140	\$1,140	\$1,140
Present Value @ 7%	\$1,022				

In addition to a more certain and more rapid return, counsel may receive a payment after relatively little cost or risk to them. With higher volume and economies of scale, reduced scrutiny by defendants, and no necessity for expensive litigation apparatus, counsel can settle larger numbers of claims with the same staff and resources it previously took to bring only a few cases to trial. On balance, the traditional model may be preferable in any individual case because of the higher rate of return resulting from an outstanding trial verdict. If, however, counsel can take a larger number of cases for the same total cost, the mass tort model soon dwarfs the traditional model in rates of return.

3. The Mass Tort Model (Multiple Defendants)

Multiple defendant mass torts provide for a third model. This model is similar to the single defendant model in that returns may be generated early in the case life cycle. If claims can be filed against many defendants with little additional effort, however, the overall returns increase substantially. Under this scenario, the probability and speed of returns can vary among multiple defendants, yet the cost per claimant decreases substantially because the preparation is virtually the same for each defendant.

The following three Figures reflect three groups of five defendants, with each group pursuing a different litigation strategy. Figure E1 assumes defendants who settle early, but at lower per case costs; Figure E2 assumes defendants who require more discovery, but settle with higher per case averages; and Figure E3 reflects defendants who prefer trial or settlement immediately prior to trial.

Figure E1: Plaintiff Attorney Economic Model

Figure E1: Plaintiff Attorney Economic Model					
Mass Tort — Multiple Defendants			Five Defendants		
Return per claimant—					
Year	1	2	3	4	5
Probability of Return	80%	20%	0%	0%	0%
Conditional Probability		4%			
Return per Claim	\$2,000	\$4,000	\$8,000	\$100,000	\$150,000
Return X Number of Defendants	\$10,000	\$20,000	\$40,000	\$500,000	\$750,000
Expected Return	\$8,000	\$800	-	-	-
Cost per claimant—					
Year	1	2	3	4	5
Probability of Cost	100%	20%	0%	0%	0%
Cost per Claim: First Defendant	\$1,000	\$1,000	\$1,000	\$10,000	\$20,000
Cost of Filing with Additional Defendants	\$800	\$800	\$800	\$4,000	\$8,000
Expected Cost	\$1,800	\$360	-	-	-
Net per claimant—					
Year	1	2	3	4	5
Net Return: Annual	\$6,200	\$440	-	-	-
Net Return: Cumulative	\$6,200	\$6,640	-	-	-
Present Value @ 7%	\$6,179				

Figure E2: Plaintiff Attorney Economic Model*Mass Tort — Multiple Defendants**Five Defendants*

Return per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Return	0%	33%	33%	33%	0%
Conditional Probability			22%	15%	
Return per Claim	\$2,000	\$4,000	\$8,000	\$100,000	\$150,000
Return X Number of Defendants	\$10,000	\$20,000	\$40,000	\$500,000	\$750,000
Expected Return	-	\$6,667	\$8,889	\$74,074	-

Cost per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Probability of Cost	100%	100%	67%	33%	0%
Cost per Claim: First Defendant	\$1,000	\$1,000	\$1,000	\$10,000	\$20,000
Cost of Filing with Additional Defendants	\$800	\$800	\$800	\$4,000	\$8,000
Expected Cost	\$1,800	\$1,800	\$1,200	\$4,667	-

Net per claimant—

<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>
Net Return: Annual	-\$1,800	\$4,867	\$7,689	\$69,407	-
Net Return: Cumulative	-\$1,800	\$3,067	\$10,756	\$80,163	\$80,163

Present Value @ 7%	\$61,795
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Figure E3: Plaintiff Attorney Economic Model

<i>Mass Tort — Multiple Defendants</i>						<i>Five Defendants</i>					
Return per claimant—											
<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>						
Probability of Return	0%	0%	0%	40%	50%						
Conditional Probability					30%						
Return per Claim	\$2,000	\$4,000	\$8,000	\$100,000	\$150,000						
Return X Number of Defendants	\$10,000	\$20,000	\$40,000	\$500,000	\$750,000						
Expected Return	-	-	-	\$200,000	\$225,000						
Cost per claimant—											
<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>						
Probability of Cost	100%	100%	100%	100%	60%						
Cost per Claim: First Defendant	\$1,000	\$1,000	\$1,000	\$10,000	\$20,000						
Cost of Filing with Additional Defendants	\$800	\$800	\$800	\$4,000	\$8,000						
Expected Cost	\$1,800	\$1,800	\$1,800	\$14,000	\$16,800						
Net per claimant—											
<i>Year</i>	<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>						
Net Return: Annual	-\$1,800	-\$1,800	-\$1,800	\$186,000	\$208,200						
Net Return: Cumulative	-\$1,800	-\$3,600	-\$5,400	\$180,600	\$338,800						
Present Value @ 7%	\$285,618										

If a plaintiff's lawyer filed against fifteen defendants, the net present value—given these arguably realistic assumptions—would be higher than separately filing against each mass tort defendant.

The economic calculus of a mass tort plaintiff's lawyer, aided by the desire of the judiciary to maintain a current docket, provides enormous explanatory power to the expansion of asbestos filings. There are, however, other explanations.

B. Substantive and Procedural Law

Some defendants believe that the asbestos "explosion" can be explained by history. The unique facts of the early asbestos cases

led courts to make decisions that favored injured plaintiffs and relaxed traditional standards of proof. These decisions involved both substantive law regarding exposure³⁹ and procedural law regarding aggregation.⁴⁰ The foundation of these decisions was a series of assumptions as to the validity of the underlying claims: mesothelioma and asbestosis were marker diseases; the asbestos industry had exposed plaintiffs in the workplace; and the plaintiffs were demonstrably sick.⁴¹ Now, so goes the explanation, even though those assumptions have changed—exposure, causation, and injury are not certain—the substantive law and procedural law have not changed. Asbestos personal injury litigation, under this argument, matured in the context of a certain legal framework.⁴² The asbestos cases eventually mutated into heterogeneous forms, but the legal framework remained static, greatly to the detriment of defendants. As a result, claims of marginal validity are unduly benefiting from the original relaxed legal standards. The solution, then, is to rewrite history by tightening the law to accommodate the newly filed cases that do not deserve to benefit from the earlier assumptions.

C. Litigation Practice

Other defendants feel that the law itself has not been bent to accommodate the unique facts of the asbestos litigation but rather

³⁹ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1107 (5th Cir. 1973).

⁴⁰ *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986).

⁴¹ See B&W's Report to the Court Regarding Asbestos Developments Generally and the Proofs of Claim Filed Here, In re *Babcock & Wilcox Co.*, 2000 U.S. Dist. LEXIS 16741 (E.D. La 2001) (No. 00-0558) (discussing and criticizing all three of these assumptions); Debtors' Motion for a Case Management Order Establishing a Protocol for Litigating Asbestos Personal-Injury Claims, *In re Babcock* (No. 00-0558) (discussing and criticizing the second and third aforementioned assumptions); Carroll et al., *supra* note 10, at 17 (noting that mesothelioma is a marker disease).

⁴² As is the situation in most litigation, there are assumptions made about the characteristics of plaintiffs. Thus, for example, the trial of a small number of bellwether cases from the universe of plaintiffs could establish a model for the settlement of the entire universe. See Carroll et al., *supra* note 10, at 26. The concept of maturity suggests that, over time, mass tort litigation will establish rather consistent, predictable values. The same type of cases tried over and over and settled over and over will generate a marketplace of consistent values. The suggestion here is that the legal rules matured but that the plaintiff profile continued to evolve. See Advisory Comm. Rep., *supra* note 28, at 23, *reprinted in* 187 F.R.D. at 306; Carroll et al., *supra* note 10, at 40-41 (indicating that the severity of asbestos claims has changed over time); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 667 (1989).

that the application of the law to the customs associated with asbestos litigation has been bent past the breaking point. Courts never adopted market share liability *de jure*, but the allocation of settlement amounts among defendants is *de facto* an approximation of market share.⁴³ Courts never adopted offensive collateral estoppel, but settlement values reflect a reality as if there were collateral estoppel.⁴⁴ The use of consolidation of cases for discovery and trial has not been expanded in scope, but the sheer number of cases that are settled at one time is truly remarkable.⁴⁵ Under this theory, the solution is to re-mold the customs of the asbestos litigation, not the law.

D. Outlier Jurisdictions

A fourth defendant theory to explain the recent increase in asbestos case filings is that asbestos litigation is proceeding manageably except in certain jurisdictions and that plaintiffs' counsel have unfettered access to those jurisdictions for unlimited numbers of cases.⁴⁶ By aggregating thousands of cases where juries will award large verdicts, plaintiffs' counsel can create a dynamic that forces defendants to settle at exorbitant values.⁴⁷ The mere act of appealing is unavailable if the bonding requirements alone would wreak financial havoc on a defendant.⁴⁸ The solution to this kind of problem is to restrict the venue and consolidation rules to protect against the migration of large numbers of cases into unfriendly jurisdictions.⁴⁹

⁴³ See generally Linda S. Mullenix, *Mass Tort Litigation* 671-711 (1996) (tracing the evolution of the market share liability theory).

⁴⁴ *Id.* at 404-38.

⁴⁵ See *ACandS, Inc. v. Godwin*, 667 A.2d 116, 146 (Md. 1995); *ACandS, Inc. v. Abate*, 710 A.2d 944, 957-58 (Md. Ct. Spec. App. 1998); see also McGovern, *supra* note 42, at 666 (noting that, in the two years in which the Asbestos Claims Facility offered a common defense mechanism, over 19,000 asbestos disease claims were settled); McGovern, *supra* note 31, at 480 (stating that approximately ninety-eight percent of the asbestos disease cases that were resolved were settled, usually on the eve of trial).

⁴⁶ See Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. Times, Aug. 20, 2001, at A1.

⁴⁷ Schwartz & Lorber, *supra* note 15, at 255, 257, 259.

⁴⁸ Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 Wake Forest L. Rev. 871, 887 (2001); Tamsin Carlisle, *Ruling May Force Loewen to Seek Bankruptcy Shelter*, Wall St. J., Jan. 25, 1996, at B5; Thomas Petzinger, Jr., *Texaco's Journey Through the Courts Resembled a High-Stakes Poker Game*, Wall St. J., Apr. 8, 1987, at 1.

⁴⁹ This solution was proposed in the Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. § 402 (1999).

E. Undeniable Liability

Plaintiffs' counsel, on the other hand, have another explanation for the large number of cases being pursued.⁵⁰ They suggest that the facts of the asbestos litigation have become so well known and are so egregious that jurors are inclined to award large damages in almost every asbestos case. More specifically, discovery in asbestos litigation has uncovered egregiously damning behavior on the part of management and employers.⁵¹ Jurors can easily conclude that defendants deserve to pay for the harm they have caused. The system is working exactly as it should. Thus, from the plaintiffs' counsel perspective, the solution is to do nothing to reform our existing legal process.

F. All of the Above, Plus

A full explanation of the recent influx of asbestos personal injury claims includes all of the above. There is also a strategic overlay that cannot be ignored. The failure of defendants to cooperate in a united strategy, with certain notable exceptions,⁵² can be viewed as a critical element in the expansion of asbestos litigation. The failure of universal cooperation among judges is another. Now, because of the increase in filings and the bankruptcies of most traditional defendants, at least some plaintiffs are facing a classic commons dilemma.

III. THE FAILURE OF DEFENDANTS TO COOPERATE

There are three principal strategies for defending a mass tort. The first is to fight each case individually without quarter. Examples of this strategy include the tobacco companies in personal in-

⁵⁰ See The Federalist Society, *supra* note 10 (transcript at 9–14) (reflecting the argument of plaintiffs' lawyers that, under traditional tort doctrines of negligence and causation, asbestos manufacturers should be held liable).

⁵¹ See Introduction to Science Brief at 1, *In re Federal-Mogul Global, Inc.*, 2002 Bankr. LEXIS 937 (Bankr. Del. 2002) (No. 01-10587) (describing instances where asbestos manufacturers perjured themselves or misstated their knowledge of the link between asbestos exposure and disease).

⁵² See, e.g., Lawrence Fitzpatrick, The Center for Claims Resolution, *Law & Contemp. Probs.*, Autumn 1990, at 13 (describing the Manville settlement issue).

jury lawsuits,⁵³ the federal government in tort cases,⁵⁴ and the automobile manufactures in personal injury product liability litigation.⁵⁵ This "stonewall" strategy has been and can be enormously effective. By raising the plaintiff's transaction costs, reducing the probability of recovering damages, and delaying the payment of those damages, the rational plaintiff may forego filing the next case and, indeed, may not have the funding to do so.

The second strategy is to settle cases, individually or as a group, quickly and quietly by offering low but acceptable early offers that are below the transaction costs of defending cases, thereby reducing the financial uncertainty surrounding the defendant's litigation.⁵⁶ A number of asbestos defendants have pursued this strategy, often settling cases for a few hundred dollars apiece.⁵⁷ The silicone gel breast implant,⁵⁸ Bjork-Shiley heart valve,⁵⁹ and L-tryptophan⁶⁰ mass tort litigation illustrate the use of this strategy.

⁵³ See Martha Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* 28 (2002); Richard Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* 652-54 (1996); Michael I. Krauss, *Fire & Smoke: Government, Lawsuits and the Rule of Law* (2000); Michael Pertschuk, *Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars* (2001); Nancy A. Rigotti, *The Third Wave of Tobacco Tort Litigation*, in *Regulating Tobacco* (Robert L. Rabin & Stephen D. Sugarman eds., 2001); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853, 857 (1992).

⁵⁴ *The Case for Government Sanctions*, AAPS Newsletter (Ass'n Am. Physicians & Surgeons, Tucson, Ariz.), Dec. 1995, <http://www.aapsonline.org/newsletters/dec95.htm>.

⁵⁵ See Alan L. Adler, *Ford Gets Tough on Liability Settlements*, *Wash. Post*, July 5, 1996, at C2; Catherine Aman, *GC's Seven Deadly Sins*, *Corp. Couns.*, July 2002, at 68.

⁵⁶ The author served as a special master in the silicone gel breast implant cases, including *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1455 (N.D. Ala. 1995). After the demise of the first global settlement, a subset of the parties pursued this strategy. For an additional description of this strategy, see Alison Frankel, *Et Tu Stan?*, *Am. Law.*, Jan.-Feb. 1994, at 68-69.

⁵⁷ Asbestos Companies Report Annual Numbers of Pending Claims, New Filings in 2001, *Mealey's Litig. Rep.: Asbestos*, May 17, 2002 (detailing how Crown Cork & Seal settled 17,000 asbestos claims for \$4 million, which produces an average settlement of \$235 per claim).

⁵⁸ See Frankel, *supra* note 56, at 69.

⁵⁹ See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147 (S.D. Ohio 1992); Frankel, *supra* note 56, at 69.

⁶⁰ *Japan's Showa Denko Still Troubled Under New Management*, *Asia Pulse*, Mar. 31, 1997, LEXIS, Nexis Library, *Apulse File* (discussing a firm's financial damage arising from L-tryptophan suits); *Showa Denko K.K.'s BA3 Debt Rating Confirmed*, *Bloomberg News*, June 19, 1997.

A third, hybrid strategy is a selective combination of litigation and settlement. This is currently the favored approach for most defendants in mass torts.⁶¹ If the plaintiffs are viewed as constituting a pyramid of value, with a small number of extremely valuable cases at the top and a large number of less valuable cases at the bottom, the theory is to engage in strategic, discriminatory pricing.⁶² The shrewd defense attorney will keep the high value cases from inflating the lower end by settling the most dangerous cases quietly, trying less dangerous cases to a successful conclusion, and settling the bottom of the pyramid at bottom prices. The silicone gel breast implant defendants, for example, eventually adopted this approach.⁶³ They eliminated the elasticity of the mass tort by making a unilateral and low offer for the least valuable cases. Such settlements eliminated the pressure for massive judicial consolidations. The defendants contemporaneously raised the transaction costs for plaintiffs who desired higher settlements by using the full panoply of procedural tools and defenses in litigation. If a dangerous case came to trial, it was resolved before it could create a new public value standard for the cases as a whole. In contrast, less dangerous cases were tried so that the public value standard could be lowered.

Arguably, by their failure to cooperate, the asbestos defendants and their insurers have succeeded in accomplishing precisely the reverse: Some defendants have tried bad cases with disastrously high verdicts being returned, while others have settled cases regardless of merit or risk, thereby funding the litigation against other defendants.⁶⁴ Their lack of strategic cooperation has been a major factor in the success of asbestos plaintiffs.

In the early stages of the asbestos litigation, Johns-Manville ("JM") was quite successful in pursuing a strategy that unified the

⁶¹ The author's role in the breast implant litigation is discussed *supra* note 56. This strategy was the mass tort model that drove the second settlement.

⁶² See McGovern, *supra* note 33.

⁶³ See *supra* note 56; *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 1994 WL 114580 (N.D. Ala. 1994).

⁶⁴ An example is occurring in Madison County, Illinois, where the author has discovered that some defendants, facing large potential verdicts, are negotiating with the plaintiffs to reduce their own potential liability by facilitating liability against the other defendants. This phenomenon is not new. See *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 10 (Fla. Dist. Ct. App. 1967), overruled by *Ward v. Ochoa*, 284 So. 2d 385 (Fla. 1973).

defendants by taking the lead role in defense of a case.⁶⁵ Once JM filed for bankruptcy, there was strategic disarray. A few defendants combined forces in pursuing the hybrid strategy, but it ultimately failed. Some defendants, thinking their insurance was inexhaustible, persisted in setting outrageously high jury verdicts. Others pursued a self-destructive stonewalling approach that led courts to consolidate massive numbers of cases. Others fed the plaintiffs' asbestos financial engine by funding individually small but collectively significant settlements. The net result was the worst of all possible worlds: high verdict values, an unlimited supply of plaintiffs, rapid resolution of cases, and well-funded lawyers.⁶⁶

Yet each defendant pursued an individually rational strategy, at least when viewed year by year. In hindsight, the mistake was an inability to recognize the larger problem over time. When a defendant had adequate resources to settle, it made sense to settle quickly at low values. There was no need for litigation managers to threaten the sanctity of an annual report or their own job security by prognosticating dire outcomes. It was easier to project static settlements and a decreasing pool of plaintiffs. The incentive was to allow hope to overcome reality, a well-known psychological tendency under these circumstances aided and abetted by the prevailing accounting rules.⁶⁷ Once it became obvious that there were inadequate resources, a defendant typically and rationally began to litigate to conserve resources. The problem was that, with so many defendants, both of these strategies were occurring simultaneously, so neither strategy could be effective.

The same thought applies to insurers who never took a holistic view of the asbestos litigation. The conflicts among and between primary internal and external insurance carriers, excess carriers, re-insurers, and self-insurers have resulted in a disjointed strategy, much to the benefit of the underlying plaintiffs.⁶⁸

⁶⁵ See Brodeur, *supra* note 29, at 136–38.

⁶⁶ Asbestos litigation represents the most extreme form of this phenomenon.

⁶⁷ Financial Accounting Standards Board Statement No. 5 allows booking of a “minimum” estimate of contingent liability, thereby reinforcing the natural psychological tendencies to minimize unfavorable outcomes and avoid reporting bad news. Financial Accounting Standards Board, Statement of Financial Accounting Standards, Statement No. 5: Accounting for Contingencies (1975).

⁶⁸ Probably the most obvious example of this phenomenon is the “trigger” litigation. Insurance companies were unable to agree on the best definition for the commence-

IV. THE FAILURE OF THE JUDICIARY TO COOPERATE

Both federal and state judges have recognized the need for cooperation among courts. In 1990, a group of federal judges wrote to the Judicial Panel on Multidistrict Litigation to request that all asbestos personal injury cases be transferred to a single federal judge and to volunteer their cooperation with that judge.⁶⁹ The transferee judge decided, however, to handle all the cases himself. He sponsored negotiations that led to the class action settlement in *Amchem Products, Inc. v. Windsor*.⁷⁰ *Amchem* contemplated that certain defendants would settle their pending cases with plaintiffs' counsel and then settle all future cases with the same counsel using a formula that was arguably less favorable to future plaintiffs. The United States Supreme Court rejected that settlement.⁷¹ Since *Amchem* and the related case *Ortiz v. Fibreboard Corp.*,⁷² there has been no further judicial effort to coerce future asbestos plaintiffs into a predefined payment mode.

The transferee judge also decided to retain jurisdiction over all federally filed asbestos cases and sent to transferor judges only cases when the plaintiff was in extremis. He also retained all claims for punitive damages. The net effect of this decision has been to move all asbestos litigation to the state courts with no discernable federal-state interaction.⁷³ The federal system is a substantially reduced force, except in the context of bankruptcy.

Historically, the asbestos bankruptcies have been handled one-by-one by different judges. In 2001, Chief Judge Edward R. Becker appointed Judge Alfred M. Wolin to handle five asbestos bankruptcies filed in Delaware.⁷⁴ Judge Wolin is currently coordinating

ment of insurance coverage and courts have resolved the issue in multiple manners. See Kenneth S. Abraham, *Insurance Law and Regulation* 419-36 (3d ed. 2000).

⁶⁹ See *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 417 (J.P.M.L. 1991).

⁷⁰ 521 U.S. 591, 605 (1997).

⁷¹ *Id.* at 629 (grounding its rejection on congressional inaction in setting up a settlement framework and on the broad construction of Rule 23 needed to create the plaintiffs' framework).

⁷² 527 U.S. 815 (1999).

⁷³ Laura A. Foggan, *Current and Future Trends in Insurance Coverage Litigation: Emerging Mass Tort and Latent Exposure Claims*, in *Insurance Coverage Litigation* 1999, at 9, 13 (PLI Litig. & Admin. Practice Course, Handbook Series No. 598, 1999).

⁷⁴ The companies filing for bankruptcy before Judge Wolin include Armstrong World Industries, Inc., USG Corporation, Federal-Mogul Corporation, W.R. Grace &

the processing of those cases with the assistance of two bankruptcy judges: Randall J. Newsome and Judith K. Fitzgerald.⁷⁵

State judges also recognized the need to cooperate and formed the Mass Tort Litigation Committee ("MTLC") of the Conference of Chief Justices.⁷⁶ During the 1980s and 1990s, judges consolidated massive numbers of asbestos claims in order to parry the strategy of some defendants who were slowing the velocity of settlements by refusing to settle until an individual case was set for trial.⁷⁷ These consolidations inevitably resulted in large settlements, with the effect that defendant resources were concentrated in the consolidation jurisdictions to the detriment of other jurisdictions.⁷⁸ The MTLC judges generally concluded that the massive consolidated approach to case management was counterproductive in the context of an elastic mass tort.⁷⁹ By building a superhighway, they had created an even larger traffic jam. With the exception of a few counties in a few states, state judges have been able to establish a rough equilibrium between filings and dispositions of asbestos personal injury cases. Those exceptions, however, are so significant

Co., and Owens Corning Inc. 3rd Circuit Judge Orders 5 Bankruptcies To Be Consolidated In Del. Court, Mealey's Lit. Rep.: Asbestos, Dec. 7, 2001, LEXIS, Secondary Legal Library, MEAASB File; see also Letter from Edward R. Becker, Chief Judge, United States Court of Appeals for the Third Circuit, to Peter T. Dalleo, Clerk, United States District Court for the District of Delaware (Nov. 27, 2001) (designating Judge Alfred M. Wolin to preside over the consolidation of five bankruptcy proceedings) (on file with the Virginia Law Review Association).

⁷⁵ Judge Newsome, who sits in Oakland, California, is handling Armstrong, USG, and Federal-Mogul; Judge Fitzgerald, who sits in Pittsburgh, Pennsylvania, is handling Owens-Corning Fiberglass and W.R. Grace.

⁷⁶ James G. Apple et al., Federal Judicial Center, Manual for Cooperation Between State and Federal Courts 31-35 (1997).

⁷⁷ See Carroll et al., *supra* note 10, at 23-24; McGovern, *supra* note 24, at 1822, 1834; McGovern, *supra* note 31, at 483-89; McGovern, *supra* note 42, at 667-71.

⁷⁸ The total value of the Baltimore settlements has been estimated in the hundreds of millions of dollars. Jody Brennan, He's One of Us, *Forbes*, Aug. 16, 1993, at 84. Companies with annual limits on the amount of annual funding available would naturally be unable to settle cases in other jurisdictions once their annual cap had been met.

⁷⁹ The author served as Advisor to the MTLC. The judges who were members did not engage in mass consolidations after 1992. Commentators still note the use of mass consolidations, but only in a few states. Apple et al., *supra* note 76, at 31-35; Carroll et al., *supra* note 10, at 35; Rothstein, *supra* note 12, at 14-20.

that plaintiffs have managed to increase the numbers of cases filed, as shown in Figure A.⁸⁰

At the same time, there has been a gross disparity in jury verdicts among the states, usually with the largest verdicts coming from the same counties that allow large mass filings.⁸¹ In other jurisdictions, defendants have been able to convince courts to limit trials to more serious cases, resulting in large individual verdicts. Mesothelioma cases have generated large verdicts, for example, in Manhattan.⁸² Recently, six plaintiffs in Holmes County, Mississippi, received a jury verdict of \$150 million;⁸³ twelve plaintiffs received \$48.5 million in Jefferson County, Mississippi;⁸⁴ and five plaintiffs received \$130 million in Orange County, Texas.⁸⁵

V. THE FAILURE OF THE PLAINTIFFS TO COOPERATE

After the early stages of the asbestos litigation, plaintiffs' counsel cooperated with each other in sharing evidence, developing strategies, dividing labor, and allocating resources.⁸⁶ Recently, however, classic commons problems have arisen: malignancies versus non-malignancies;⁸⁷ present plaintiffs versus future plaintiffs;⁸⁸

⁸⁰ For the underlying information contained in this Figure, see sources *supra* note 27; see also Manville Personal Injury Settlement Trust, Summary of Quarterly Filings to the Court, 4th Quarter, 2001, Financial Statements, Report of Independent Public Accountants, http://www.mantrust.org/FILINGS/Q4_01/4statmnt.htm (last visited Oct. 22, 2002) (noting that a total of 578,700 claims have been filed with the Trust since its inception).

⁸¹ Carroll et al., *supra* note 10, at 34.

⁸² Carroll et al., *supra* note 10, at 58, 66 (noting that mesothelioma verdicts have risen from a mean of \$2 million in 1998 to \$6 million in 2001); Alex Berenson, Honeywell Says Asbestos Verdict Was More Than It Had Disclosed, *N.Y. Times*, Apr. 18, 2002, at C1.

⁸³ Miss. Jury Returns \$150M Verdict Against AC&S, Dresser Industries, 3M Corp, Mealey's Lit. Rep.: Asbestos, Nov. 9, 2001, LEXIS, Secondary Legal Library, MEAASB File.

⁸⁴ Mississippi Jury Awards 12 Plaintiffs \$48.5 Million, Mealey's Lit. Rep.: Asbestos, Aug. 3, 1998, LEXIS, Secondary Legal Library, MEAASB File.

⁸⁵ Texas Jury Awards Five Plaintiffs \$130 Million Against NARCO, Dresser Industries for Exposure, Mealey's Lit. Rep.: Asbestos, Sep. 21 2001, LEXIS, Secondary Legal Library, MEAASB File.

⁸⁶ See generally Brodeur, *supra* note 29, chs. 4-5 (discussing landmark asbestos claims and the lawyers who brought those claims).

⁸⁷ Approximately eight to ten percent of asbestos filings have been malignancies. As long as there was enough money for everyone, there was no intra-plaintiff allocation problem. In an era of economic scarcity, however, the malignancy plaintiffs are seek-

and personal injury versus property damage.⁸⁹ As long as there was a vision of unlimited access to a bountiful commons, conflicts among plaintiffs were limited in large part to ego battles among counsel. Once it became apparent that the bottom of the pyramid was expanding significantly, that qualified settlement trusts were paying smaller and smaller amounts for each case, that traditional defendants were bankrupt because their limited funds could not cover their liabilities, and that projections of future liability were painting an even bleaker future, the conflicts began.⁹⁰

The Manville Trust has reported a substantial change in the percentage of monies that go to cancer claims, as compared to non-malignancies. In the period 1995 through 1999, forty-four percent of the total money expended went to cancer claims, and fifty-six percent went to nonmalignancy claims. Between January 1, 2000 and November 30, 2001, only twenty-four percent of the monies went to cancer claims.⁹¹ In the litigation system, the situation is the reverse. That is, an increasing percentage of defendant indemnity payments are going to the malignants.⁹²

Because the plaintiffs' bar is not uniform in its representation of clients with the same asbestos diseases, there has been increasing disagreement as to the appropriateness of the allocation of the lim-

ing payment in full before any payment to non-malignants. See, for example, the settlement provision in *Ortiz*. Global Settlement Agreement, Exhibit B, at 23, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (E.D. Tex. 1993) (No. 6:93 cv 526).

⁸⁸ Projections concerning future asbestos liability and the performance of corporations in an age of scarcity may result in a reduction of payments to present plaintiffs. For example, the Manville Trust has reduced its payment percentage from 100% in 1988 to 10% in 1995; Eagle-Pitcher pays 15.5% of the liquidated value of its claims, while Celotex and UNR pay 10% and 7.5%, respectively. Carroll et al., *supra* note 10, at 79.

⁸⁹ Unlike other bankruptcies where there have been separate funds for personal injury and property damage claims, the Celotex Trust provides for a unified fund. There has been substantial controversy over the disbursements from that fund. See Motion to Stay Payment of Unimpaired Claims Pending Independent Compliance Audit of Bodily Injury Claims Facility, In re Celotex Corp., Nos. 90-10016-8B1 and 90-10017-8B1 (Bankr. M.D. Fla. May 2, 2002) (moving to enjoin the Celotex Trust from paying all bodily injury claimants).

⁹⁰ Revised Expert Witness Statement: B. Thomas Florence, Ph.D., *Falise v. Am. Tobacco Co.*, No. 99-CV-7392 (E.D.N.Y. Feb. 22, 2000) (noting that the number of asbestos claims is increasing exponentially).

⁹¹ Letter from Mark A. Peterson, Attorney, to Francis E. McGovern (June 13, 2002) (on file with the Virginia Law Review Association).

⁹² *Id.*

ited resources in bankruptcies and their resulting trusts.⁹³ Lawyers who predominantly represent malignancies are opposed to lawyers who have a preponderance of non-malignancies.⁹⁴ At the same time, Judge Jack Weinstein has held a hearing to consider a revision of the Manville Trust allocation formula.⁹⁵ In pending bankruptcies, the lawyers representing only malignancies have hired their own bankruptcy counsel, sometimes aligning themselves with defendants to limit the access of non-malignancies to the limited funds.⁹⁶

The presents-futures conflict emerged full force in *Amchem*.⁹⁷ Facing limited resources from defendants and an uncertain future number of plaintiffs, there has been an effort by present plaintiffs to garner as large a share of the assets as possible. Since that time, there have been multiple efforts by counsel for present plaintiffs to shift the balance in their direction. The national settlement plan of Owens-Corning Fiberglass, the liquidation of the present claims prior to a bankruptcy filing in Babcock & Wilcox, and negotiations with the asbestos claimants committee and the futures representative in all bankruptcies are illustrative.⁹⁸

⁹³ Based upon the author's experience, most plaintiffs' law firms represent a mixture of mesothelioma, lung cancer, other cancer, asbestosis, and pleural disease cases. It is rare to find an asbestos law firm that has no financial interest in nonmalignant cases.

⁹⁴ Probably the best examples of this phenomenon occur in the context of trust distribution plans in the bankruptcies. Memorandum of Interested Attorney at 2, In re Johns-Manville Corp., Nos. 82-B-11656 and 82-B-11676 (Bankr. E.D.N.Y. Aug. 30, 2002) (arguing that the trust should be reorganized "to correct present and prospective inequities arising from the Manville Trust's current miscalculation of funds which inequitably disfavors those with more serious asbestos injuries"). Additionally, the Joint Disclosure Statement, In re Babcock & Wilcox Co., No. 00-10992 (Bankr. E.D. La. July 3, 2002), for the first time, allocates a defined percentage of awards to malignancies.

⁹⁵ Alison Frankel, Waiting for Weinstein, *Am. Law.*, Feb. 2002, at 22-23.

⁹⁶ Letter from Frank Perch, Trial Attorney, Office of the United States Trustee, to James F. O'Neill, Esq., et al. (Apr. 10, 2002) (on file with the Virginia Law Review Association).

⁹⁷ See *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 (1997) (discussing the competing interests of currently-injured plaintiffs, who seek immediate, generous payments, with exposure-only plaintiffs, who want to maintain an inflation-protected fund for the future).

⁹⁸ In the National Settlement Program ("NSP") of Owens-Corning Fiberglass ("OCF"), an effort was made to settle all pending cases with each law firm at fixed values and then apply more restrictive criteria for future cases from that same firm. The concept was to apply the *Amchem Products* model by agreement rather than via

The property damage plaintiffs' bar has also entered this conflict with full force. Their desire is to maximize asbestos property damage claims, and they are allying themselves variously with debtors, unsecured creditors, and personal injury malignancy counsel, as their situations warrant.⁹⁹

The lack of cooperation among plaintiffs, therefore, has led to a "field of dreams" phenomenon wherein increasingly disparate and large numbers of current plaintiffs seek to maximize their compensation from current assets. The analogy is to the overgrazing of the commons and the detriment of both current and future claimants.

VI. WHAT ARE THE POTENTIAL SOLUTIONS?

The solution depends upon the definition of the problem. For those who see the problem as compensating asbestos victims, maintaining the status quo might be the best solution. For those who see a broken tort litigation system, the solution may be legislation. For those who see a misallocation among victims, bankruptcy may be best. For those who bewail the lack of financial predictability, there are a variety of approaches. From the perspective of the commons, the solutions involve cooperation among some or all of the parties to coerce everyone into a consistent regime to regulate access to the commons. This cooperation could manifest itself in a variety of forms. Each group could cooperate internally and seek to impose a given order on others, or subsets of one or more groups could ar-

a class action. The inability to restrict the entry of new law firms, however, led to financial demands on OCF so great that the company filed for bankruptcy. Credit Suisse First Boston Corporation, *Asbestos: The Dust Assassin Cries Out for Tort Reform* (2000). For Babcock & Wilcox ("B&W"), the company strategy was to settle all cases before they were filed, usually for small sums of money on a per case basis. This was often accomplished by entering into contractual arrangements with plaintiffs' law firms automatically to pay a predetermined amount for each case upon presentation of certain proofs. As the number of asbestos bankruptcies increased, the per case demands escalated to the point that B&W filed for bankruptcy. See generally McKnight Deposition, *supra* note 36.

⁹⁹ See, for example, the Celotex bankruptcy, where property damage claimants, bodily injury plaintiffs, and Celotex could not reach a consensual agreement. Modified Second Amended and Restated Disclosure Statement with Respect to Modified Second Amended and Restated Joint Plan of Reorganization for the Celotex Corporation and Carey Canada Inc., In re Celotex Corp., Nos. 90-10016-8B1 and 90-10017-8B1 (Bankr. M.D. Fla. Apr. 1, 1996).

guably achieve an alternative outcome.¹⁰⁰ The following suggested approaches to coping with the tragedy of the commons have varying chances of materializing.

A. Legislation

There are three legislative proposals currently being discussed: a mega fund, a criteria bill, and a voluntary program with criteria. The mega fund legislation would move all asbestos cases from litigation to an administrative forum, with a contribution by all defendants and their insurers and with controlled outflows to claimants.¹⁰¹ Participation, at least for a predetermined length of time, would probably be mandatory for insurers, defendants, and plaintiffs. An analogy is to existing qualified settlement trusts.¹⁰²

The criteria bill would establish a medical threshold as a prerequisite for pursuing an asbestos personal injury claim in the litigation system.¹⁰³ The criteria would probably include some level of medically established disability, in addition to various diagnostic tools such as x-rays and pulmonary function tests.¹⁰⁴

The third option would be analogous to workers' compensation. It would allow a defendant and its insurance carrier to participate voluntarily in a statutory system with medical criteria in lieu of litigation. For a predetermined annual payment, the defendant and its

¹⁰⁰ If corporate America were to agree on a single legislative strategy, a statute that would alter the playing field would have a great chance at passage. Or, the lawyers representing predominantly malignancies might ally with defendants to seek legislative criteria to reallocate resources more toward malignancies while reducing aggregate payments.

¹⁰¹ For analogous administrative processes, see, e.g., Black Lung Benefits Act, 30 U.S.C. § 932 (2000) (instituting a federal administrative system to compensate victims of black lung disease); Price Anderson Act, 42 U.S.C. § 2210 (2000) (instituting a federal administrative system to compensate victims of nuclear accidents); Paul R. Verkuil, Proposal for the Fair and Efficient Resolution of Asbestos Cases, Andrews Publications: Asbestos Lit. Rep., Nov. 6, 1998, LEXIS, Secondary Legal Library, ANDASB File.

¹⁰² The qualified settlement trusts include the companies Celotex Corporation, Eagle-Pitcher Industries, UNR Industries, and Johns-Manville Corporation.

¹⁰³ Verkuil, *supra* note 101.

¹⁰⁴ See Fairness in Asbestos Compensation Act, H.R. 1283, 106th Cong. § 201 (1999) (establishing medical criteria for malignant and non-malignant plaintiffs).

carrier would be insulated from lawsuits, and plaintiffs would be required to seek relief under the alternate statutory plan.¹⁰⁵

B. Case Management/Substantive Law/Procedures

Some states have adopted so-called deferral registry programs, bifurcated statutes of limitation, injury thresholds, and damages limitation.¹⁰⁶ Under the deferral, or "green card," approach, a plaintiff who has been exposed to asbestos but has below a certain level of injury can retain the right to sue once the requisite level of injury is incurred, even though there would otherwise be a statute of limitations bar. Sometimes there are so-called "green cards with money" that allow a current, limited payment with the right to return to court if a more serious disease ensues. A related approach involves bifurcating the statute of limitations to allow separate causes of action for the various alleged asbestos harms.¹⁰⁷ Other courts require a certain level of injury beyond exposure before a case can be pursued or limit the type of damages that a plaintiff may receive, depending upon the allegations of harm.¹⁰⁸

One of the most discussed proposals involves the judicial appointment of an expert scientific panel.¹⁰⁹ Federal Rule of Evidence 706, for example, provides that a court can appoint neutral experts to testify on scientific issues. In the silicone gel breast implant litigation,¹¹⁰ Judge Sam C. Pointer, Jr. convened such a panel to explore the relationship between silicone and various autoimmune

¹⁰⁵ See, e.g., National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-10 to 300aa-34 (2000) (creating a federal program to compensate victims of vaccine-related injury or death).

¹⁰⁶ For an example of a state adopting an injury threshold requirement, see *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (holding that asymptomatic pleural thickening is not a sufficient physical injury to give rise to a cause of action); see also Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992) (arguing for the creation of deferral registries to postpone the availability of a civil suit until asbestos claimants develop symptoms).

¹⁰⁷ Henderson & Twerski, *supra* note 15, at 821; Mullenix, *supra* note 43, at 799-807.

¹⁰⁸ *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 444 (1997).

¹⁰⁹ Advisory Comm. Rep., *supra* note 28, at 37, *reprinted in* 187 F.R.D. at 321; The Babcock & Wilcox Company's Informational Brief at 23, *In re Babcock & Wilcox Co.*, 274 B.R. 230 (Bankr. E.D. La. 2002) (No. 00-10992).

¹¹⁰ *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455 (N.D. Ala. 1995).

diseases.¹¹¹ Similarly, a court could institute a panel of experts to establish medical criteria, medical tests, exposure criteria, or exposure tests that would be prerequisites for a plaintiff to pursue an asbestos case.¹¹² If such a panel could establish a threshold and if other courts followed that threshold, there could be more national consistency. A less intrusive version of this strategy would contemplate a *Daubert* hearing to standardize the medical testimony.¹¹³

C. Class Action

After *Amchem*, there have been no asbestos class actions. Arguably, they are still feasible. It may be possible to have, for example, a Rule 23(b)(3) settlement class, followed by a Rule 706 expert panel that establishes medical criteria, and then a Rule 23 class for futures. Under this scenario, counsel representing present claimants would negotiate with defendants to establish financing and criteria for the liquidation and payment of participating present plaintiffs. Then an expert panel could establish presumably more stringent medical criteria for future claims and separate counsel for the futures could negotiate to establish a separate settlement fund to liquidate and pay those claims.

Another possibility would be to establish an opt-in class that would contain a payment grid. This would be similar to the approach eventually used for the HIV blood transfusion cases.¹¹⁴

¹¹¹ Expert Evidence: A Practitioner's Guide to Law, Science, and the *FJC Manual* 456 (Bert Black & Patrick W. Lee eds., 1997); Joe S. Cecil et al., Assessing Causation in Breast Implant Litigation: The Role of Science, 64 Law & Contemp. Probs. 139 (2001).

¹¹² There are several major "scientific," as opposed to substantive law, issues raised by defendants seeking an expert panel:

- (1) What level of exposure to asbestos or dose is a prerequisite to establish a causal relationship for any asbestos-related disease?
- (2) Is fibrosis a prerequisite for asbestos lung disease?
- (3) Can chrysotile asbestos cause mesothelioma?
- (4) Does asbestos cause "other" cancers?

A subset of exposure issues relates to the product dose from any given defendant's products to show medical causation.

¹¹³ *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592-93 (1993) ("[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.").

¹¹⁴ *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1017-18 (7th Cir. 1998).

Class action cognoscenti and asbestos mavens doubt the legal efficacy of such an approach, citing case in controversy, notice, and related due process concerns.¹¹⁵ As a practical matter, defendants would be reluctant to pay money to settle present cases unless they knew, for certain, that they would be able to close the door on futures. Any arrangement that recognized such a contingency relationship would be legally suspect, since it would treat presents and futures disparately.

D. Bankruptcy

The current nirvana for distressed asbestos defendants is Section 524(g) of the Bankruptcy Code.¹¹⁶ Bankruptcy is the only generally recognized legal vehicle that is currently available for imposing finality on a defendant's asbestos liability. Perhaps because of this, there have been more asbestos-related bankruptcy filings since 2000 than in either of the two prior decades.¹¹⁷

A plan of reorganization can include a Section 524(g) injunction that bars asbestos claims against the debtor if the following seven conditions are met: (1) there is a trust for present and future asbestos claims; (2) the trust is funded by securities and/or debt from the debtor; (3) the trust owns a majority of the voting stock of the debtor; (4) the trust will pay present and future asbestos claims against the debtor; (5) the present and future claims are valued and paid in substantially the same manner; (6) the plan is approved by a seventy-five percent vote; and (7) a futures representative is appointed.¹¹⁸

There are several scenarios in which a variety of asbestos defendants, aside from the debtor, can benefit from Section 524(g). Third parties who were past and present affiliates of the debtor, officers or directors of the debtor or a related party, insurers of the debtor, shareholders of the debtor, and lenders to or purchasers of the debtor who have provided or agreed to provide benefits to the trust are also potential beneficiaries of the injunction.¹¹⁹ In theory,

¹¹⁵ Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995).

¹¹⁶ 11 U.S.C. § 524(g) (2000).

¹¹⁷ Carroll et al., *supra* note 10, at 68.

¹¹⁸ 11 U.S.C. § 524(g)(2)(B).

¹¹⁹ 11 U.S.C. § 524(g)(4).

an asbestos defendant who has an entity with asbestos liability or who can push all of its asbestos liability into an entity where the parent remains the sole shareholder can benefit from a bankruptcy. This entity could then file for bankruptcy or “bolt on” another bankruptcy and, if the requisite conditions are met, the parent could receive a Section 524(g) injunction.

A variation of this theme could involve a prepackaged bankruptcy. Under such a plan, the present asbestos liability could be liquidated and partially paid by the parent prior to the bankruptcy. If seventy-five percent voted in favor of the plan of reorganization, the present claimants could agree to be paid the remaining amount owed on the same terms as the futures. Assuming the court and futures representative agreed and the other conditions were met, the parent could at least arguably receive its Section 524(g) injunction.

Other variations on this method involve protecting a variety of financial supporters of the debtor, either individually or through a Rule 23 class action device, in the context of bankruptcy. Insurers, for example, could greatly benefit from a Section 524(g) injunction for a range of claims that are aggregated in the bankruptcy by a class action. Bankruptcy provides the closure, while Rule 23 provides the procedural vehicle.¹²⁰

From a radically different perspective, there could be an aggressive use of bankruptcy “related to” jurisdiction under Section 502(c) to corral many or all asbestos personal injury cases in a single federal court and mandate uniform treatment for the entire litigation.¹²¹ This approach could be accompanied by a scientific panel to establish medical criteria and judicially mandated levels of recovery to satisfy a Section 502(c) estimation.¹²² Once those levels of recovery became the law of the case, there would be powerful incentives for a positive Section 524(g) vote. Section 524(g) would not be available for the “related to” only claims, but it might be possible to construct sufficient class action, Section 105(a), and Section 524(g) protection to engender one or more settlements.¹²³

¹²⁰ See *id.* (barring claims against an insurer of the debtor company in bankruptcy proceedings).

¹²¹ See *In re A.H. Robins Co.*, 880 F.2d 694, 701–02 (4th Cir. 1989).

¹²² 11 U.S.C. § 502(c).

¹²³ 11 U.S.C. § 524(g)(4).

This same strategy could also be used to define asbestos liability at a given level and to seek Section 524(g) protection.

CONCLUSION

Is there a commons-like asbestos problem, either for all parties or subsets of parties? There are certainly conflicts among plaintiffs, among defendants, among judges, and among all of the above involving scarcity. Viewing the asbestos litigation landscape as a commons problem may be a helpful perspective because it suggests that there is a defined end game and that the likely solutions are coercive in nature. Coercion in this context will emerge from a search for equilibrium among the parties, inevitably involving some level of cooperation whether to achieve status quo, legislation, judicial rulings, class actions, or bankruptcy. By recognizing the potential benefits of cooperation, there will be a multiplicity of strategies designed to advance the interests of the parties. Probably the most likely approach in the near future will be incremental uses of Section 524(g) of the Bankruptcy Code because it provides finality to defendants' asbestos liability. In the longer term, the political process will provide the forum for the asbestos debates and perhaps for even an end game to the mother of all mass torts.