
Manville: The Bankruptcy of Product

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THE ARCANE SUBJECT of bankruptcy has little appeal even to lawyers. In normal times the subject falls into that select group of specialties that must be done, but preferably by someone else. It is therefore a matter of note when a business bankruptcy, to be sure that of a company whose current operations are profitable, is the lead story for several days not only in the *Wall Street Journal* but in ordinary newspapers all across the land. Yet just this has happened now that Manville Corp.—known for years under the name Johns-Manville—has sought refuge in a New York bankruptcy court from an unending onslaught of lawsuits stemming from the use of asbestos.

How Did It Happen?

Manville, long the largest supplier of asbestos, is currently defending itself against about 16,500 asbestos claims, with 500 new ones being brought every month. The company's cost per claim has steadily increased, at a rate far in excess of inflation, to more than \$40,000 per claim. The discounted cost of all expected claims present and future is by conservative estimates something over \$2 billion. The net worth of the company, the asbestos claims to one side, is just over \$1 billion.

The effect of the petition, at least for the moment, is to place the operation of the company's business under the supervision of a

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bankruptcy judge, and to stay all lawsuits—not just those in asbestos cases—brought against Manville anywhere in the country.* The newspapers have been quick to point up the significance of the maneuver. They have noted that as Manville goes, so may go many of the other major manufacturers of asbestos products who are Manville's codefendants. (It is an open and vital question whether these suits against other suppliers will be stayed as well by the bankruptcy court.) They have also noted that Manville has conducted a well-orchestrated campaign to create some federally organized (and in part federally supported) compensation fund that would, to the consternation of contingent fee lawyers everywhere, replace the huge volume of litigation that now clogs the courts. And there has been a chorus of suggestions for quick fixes of a legal and business problem whose complexity is not fully comprehended by those taken by surprise at the dramatic turn of events. A *New York Times* editorial of August 27, for instance, tells us in five paragraphs "How to End the Asbestos Nightmare."

The Manville bankruptcy petition marks the latest turn in a complex journey. For our

*The matter is complicated by a recent Supreme Court ruling that the 1978 Bankruptcy Reform Act was unconstitutional. The Court gave Congress until October 4 to remedy the defects it found. (One option is to give bankruptcy judges the same life tenure and salary protection as regular district court judges.) If the lawmakers fail to act by then, the effect on this and other bankruptcy cases is anyone's guess.

Liability Law

purposes that journey began on September 10, 1973, when the U.S. Court of Appeals for the Fifth Circuit handed down its opinion in *Borel v. Fibreboard Paper Products Corporation*, allowing asbestos workers to pursue tort actions against the suppliers of asbestos products. In order to understand the current muddle and the limited possibilities for resolving it sensibly, we must go back to *Borel* and to its confused legal and medical antecedents. No short tour will do, for the history is as complex as the current situation.

One of the obvious questions about the current asbestos litigation is, why did nobody see it coming? Surely even the complexities of corporate structure could not have dulled all instincts to take prudent steps to minimize a loss of this magnitude. But clearly the only visible responses by the companies came after the lawsuits were filed, not before, so that Manville

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and the other asbestos companies could not have had any inkling of the risks they were courting. The question is how that could have been so.

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litigation (DES, Agent Orange, and so on) is the passage of time. It has been conclusively established that there is a period of at least twenty, and often thirty or forty, years between the initial inhalation of asbestos and the manifestation of asbestos-related diseases. The exposures to asbestos that were so frequent in the 1930s and 1940s have therefore become the subject of litigation only in very recent times, when the legal environment and medical understanding are vastly different from what they were back then. It is to the radical shifts in legal doctrine and medical knowledge that we must turn.

Legal Doctrine: Product Liability and Workers' Compensation

The suits brought against Manville are of two sorts. First and most important, there are actions against Manville as the *supplier* of asbestos to other businesses whose employees handled the product, say when installing insulation. Second, there are suits against Manville as the *employer* of individual workers. The first type of action is for a common law tort. The second is for workers' compensation. To a layman, the difference between tort and workers' compensation might appear small, but it is critical to understanding how these two institutions for accident compensation mesh with each other. In the tort action against Manville as supplier, the plaintiff is entitled to recover full damages (pain and suffering, medi-

cal expenses, and lost earnings), but only if he prevails by satisfying the complex requirements developed over the years in these tort actions. Roughly speaking, these requirements today include showing that Manville had indeed supplied the asbestos that caused the damage (no easy point when there are many suppliers in the market) and that the product in question was defective (in this context allegedly because Manville failed to conduct the proper tests or to give the proper warning). In addition, the worker's own conduct may also prevent recovery, as (sometimes) when the worker knew about the risk involved, or may diminish the amount of the recovery, as when the worker aggravated the injury by smoking or other misconduct.

In contrast to the tort suit, workers' compensation (here for occupational diseases) with but minor qualification pays the worker once it is shown that the injury or disease in question was work-related. At one stroke it removes the obstacles—proof of product defect or negligence by the employer, and defenses based upon the worker's misconduct—that may block a tort recovery. In exchange for the broader grounds for recovery, workers' compensation offers recipients a lower level of benefits (which, however, today includes everywhere complete medical expenses), and precludes, at least in the classical formulation of the "exclusive remedy" provision, all tort actions that an injured employee might otherwise have against the employer.

The doctrinal differences between the two areas are matched by their institutional differences. Workers' compensation cases are typically decided before commissions, not juries, and contingent fees may be sharply regulated, as in California where the commission sets them at 10 percent of the amount the worker recovers. It has long been a specialized area of legal practice, and one that is terra incognita to the ordinary personal injury lawyer, who feels far more at home with contingent fees that range from a third to half of recovery and with the ordinary jury trial available in both state and federal court. Because the net recovery available within the compensation system is by any measure far lower than that available in tort, plaintiffs have successfully sought in recent years to bypass the compensation system by converting asbestos cases into tort

suits. In large part this has been done by expanding the law of product liability against suppliers. In a lesser measure it has come through the very recent expansion of the doctrines of "dual capacity" (whereby it is said that an employer covered by compensation has assumed a separate and distinct role for which it is liable in tort) and "willful misconduct," both of which prevent an employer from availing itself of the "exclusive remedy" provision against its own employees.

In the ordinary course of business we should expect firms dealing with asbestos to take into account their expected liabilities under both the compensation and tort systems in making their decisions about how to produce, use, and price their products—or whether to produce them at all. If the legal environment of the 1970s and 1980s had been foreseen when these asbestos products were sold and used in the 1930s, 1940s, and 1950s, we would have today no bankruptcy problem: large suppliers would be paying for (a reduced number of) claims out of reserves especially accumulated for the purpose.

These claims, however, were unanticipated. To understand why, it is only necessary to look at the type of tort suits brought for various diseases in the 1940s, a pattern that persisted into the 1960s. Here I have been able to discover three cases that bear some relationship to the general problem. Of these only one—*Rowe v. Gatke Corp.*, decided by the Court of Appeals for the Seventh Circuit in 1942—involves asbestos as such. The defendant in *Rowe* was not a product supplier, but an employer who had elected, as was then possible, to opt out of the compensation system by subjecting itself to stringent forms of tort liability. The action, moreover, was successful because in it the plaintiff was able to show that the defendant had not adequately ventilated its plant, having used only "crude devices" for that purpose even though "standardized equipment" was available, and had not supplied the plaintiff with any kind of working respirator—all in violation of the applicable factory safety statutes. As a result of these practices, the dust was so thick that the plaintiff "at the end of a day's work appeared almost beyond recognition, covered with shreds that hung on him like whiskers, so that he looked like a 'polar bear.'" The decision in favor of the plaintiff is unques-

tionably sound. But for our purposes the relevant observation is that the case does not even begin to point to any tort liability for an asbestos supplier. The statutory provisions involved applied only to employers, and the inadequate provision of ventilation and absence of respirators were by definition the types of errors that no supplier could commit. In addition, the flagrant nature of the employer's misconduct only afforded an additional defense—that of the intervening misconduct of a third party—that further would have insulated the supplier from any tort suit.

The other two cases tell a similar story. Both involved deaths from overexposure to carbon tetrachloride ("carbon tet"), then used as a cleaning solvent. In the first, *McClaren v. G. S. Robins & Co.* (1942), the Missouri Supreme Court denied a worker's claim against the seller (who it appears was not a manufacturer) for injuries that took place when he was working with the solvent in a confined location at a temperature apparently as high as 110 degrees. The court noted that some of the carbon tet supplied was labeled "Volatile Solvent, Use with Adequate Ventilation, Avoid Prolonged Breathing"—a warning that was customary in the industry and approved by the surgeon general of the United States, presumably pursuant to his statutory powers. The decision could be challenged on the ground that the court treated the standard of care for the warning as being set conclusively by average practice, a rule that had in fact been rejected in many cases before then. But the decision itself rested in part on compliance with the surgeon general's warning requirements, and in any event it came out for the defendant. Even if it had come out the other way, it still would not have augured ill for the asbestos manufacturers because of the known and close relationship between carbon tet and inhalation poisoning.

This leaves only the second case also involving carbon tet, *Maize v. Atlantic Refining* (1945). Here the Pennsylvania Supreme Court held the defendant liable for the death of a housewife who inhaled the fumes from its product, "Atlantic Safety-Kleen," while cleaning her rugs. The product itself contained amounts of carbon tet which, when vaporized in normal use, were several thousand times the concentrations known to be sufficient to cause

death. Though the label in question did warn about the dangers of use without adequate ventilation, the court rightly allowed recovery on the ground that "the word 'Safety' was so prominently featured as to exclude from her mind that 'provident fear' which has been characterized as 'the mother of safety.'" Yet here too there were no apparent risks for asbestos suppliers. The court relied in part on the defendant's affirmative misrepresentation of a known safety hazard. And since the death arose in the consumer and not the work-place context, the court did not confront the issue of intervening control by a responsible employer covered by the compensation laws and capable of preventing injuries. It is not surprising therefore that the court in *Borel* did not rely on these cases as signposts on the general road toward supplier liability in asbestos cases, for if anything their specific features point in quite the opposite direction.

Indeed it is quickly apparent that the medical and public health discussions of asbestos that took place before the *Borel* decision follow the same general pattern. Asbestosis was regarded preeminently as an occupational disease, and it was thought that the control of the level of exposure within the work place, often by direct regulation, was the proper approach to the problem. This attitude finds expression in the studies of asbestosis by Dr. A. J. Lanza in the 1930s, and it is essentially followed by Dr. Irving J. Selikoff who, in his 1968 testimony to Congress on the pending occupational safety and health administration bill, at no point even contemplated tort actions against third party suppliers.

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The same holds true of the second (but less important) prong in the expansion of tort liability, for the dual capacity and willful misconduct doctrines were not used in connection with asbestos diseases until the late 1970s. In short, at the time that Manville and other cor-

porations sold asbestos, right up to the 1960s, they were subject to no discernible risk of tort liability either as supplier or employer. And the liabilities faced by Manville and other suppliers to their own workers under the occupational disease statutes were well understood, and in no event could they have driven the company to bankruptcy. On the legal front all was quiet.

Medical Issues

An evaluation of the relevant medical evidence is somewhat more difficult. As of now asbestos has been conclusively linked with three separate disorders: asbestosis, mesothelioma (an invariably fatal condition that affects the mesothelial cells that line the chest cavity), and lung cancer. The relationship between asbestos and asbestosis was the first to be clarified: it was regarded as probable shortly after 1900, and was established by the 1930s. The relationship between asbestos and lung cancer was not determined until a later time, being regarded as probable only after 1940 and established only (depending on whose view is accepted) somewhere between 1955 and 1960. Mesothelioma was the most difficult condition to establish. In the early years, it may have been confused with asbestosis, and in any event the connection between it and asbestos was first regarded as probable only in the late 1950s and established in the mid-1960s. (Margaret R. Becklake's 1976 article on this subject provides a comprehensive account; for this and other citations, see page 46 below.)

If the only question relevant to the legal inquiry was the association between asbestos and disease—any disease—then the affirmative connection was clearly recognized by the time of the 1938 Dreessen study on the asbestos textile industry and the 1946 Fleischer-Drinker study of insulation workers in naval vessels during World War II. Yet the apparent simplicity of this conclusion should not be allowed to conceal the essential point that the early studies thought that the permissible levels of exposure to asbestos products were far greater than those which are today generally regarded to be safe, by a factor of perhaps 50 to 100.*

Indeed, some of the early studies contain a kind of grisly, misplaced optimism that seems almost bizarre today. In 1936 Lanza wrote that

in both England and America "energetic steps have been taken to control the dust hazard in asbestos plants, so that it is probable that further cases of disabling asbestosis will be rare," and further that "asbestos plants are being cleaned up and the dust is being controlled."

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This, he added, "together with the smaller number of persons employed, implies that there will probably never be the wealth of clinical material that has been available in silicosis." Nor was this conclusion an isolated and irresponsible piece of optimism. The 117-page Dreessen study concludes as follows:

It would seem that if the dust concentration in asbestos factories could be kept below 5 million particles (per cubic foot) (the engineering section of this report has shown how this may be accomplished), new cases of asbestosis probably would not appear.

Likewise the overall conclusion of the 1946 Fleischer-Drinker study was that "[s]ince each of the 3 cases of asbestosis had worked at asbestos pipe covering in shipyards for more than 20 years, it may be concluded that such pipe covering is not a dangerous occupation."

That such represented the prevailing scientific wisdom of the time is, moreover, reinforced by looking again at the subsequent classical work on the relationship of asbestos to disease by Dr. I. J. Selikoff and his colleagues. In three studies published in 1964-65, they repeatedly stated that proper analysis of the problem requires a breakdown of asbestos workers by particular types and that any inferences to be drawn from textile workers, the

*Direct comparisons are somewhat difficult to make because the earlier standards referred to particles of dust while the more recent ones refer to particles of asbestos. The 100 figure assumes that virtually all the particles are asbestos; the 50 figure assumes that about half are.

chief object of the early studies, to other types of workers must be heavily guarded. As Selikoff explained in a paper on insulation workers, "The different occupations vary widely in important respects; intimacy, intensity and duration of exposure, in variety and grade of asbestos used, in working conditions, in concomitant exposure to other dust or inhalants." This same paper criticized the 1945 Fleischer-Drinker study because 95 percent of the workers studied there "had worked for less than 10 years at the trade, and, as we shall see, evaluation of the risk of insulation workers limited to study of men with relatively short duration of exposure may be misleading." Selikoff frequently noted the statistical and technical objections to the earlier studies that sought to link asbestos with disease conditions (made, as he reported to Congress in 1968, by those "sticklers for statistical niceties"). Indeed his own detailed studies of insulation workers in the New York area were designed to overcome the doubts about the previous research and to establish rigorously, for the first time, the relationship between asbestos and the various asbestos diseases in insulation, as opposed to textile workers. Yet even his studies did not, as he acknowledged, determine the dosage levels necessary to trigger these diseases (in particular there was at most only a vague inkling that a "single sniff" of asbestos could be sufficient to cause mesothelioma) or establish the correct relationship between asbestos diseases and the smoking habits of individual workers. Today, however, the evidence on this subject is so overwhelming that the causal questions can no longer be seriously debated: the older studies vastly underestimated risk and overestimated dosage levels.

The Borel Opinion

In light of modern knowledge, the older patterns of asbestos use are therefore quite indefensible, and are recognized as such by all parties. For purposes of legal liability, after all, it is not the current state of knowledge that is relevant, but the state of knowledge in the early years when the asbestos products were placed on the market. Yet in the *Borel* decision, Judge John Minor Wisdom, speaking for the court, concluded that the various asbestos companies

all had sufficient knowledge of the hazards of asbestos products to trigger a duty to test their products before sale and to warn possible users of their harmful side effects upon sale. His conclusion does not do justice to the historical ambiguities and uncertainties. It is here that the legal and the medical currents join in unexpected, and unfortunate, ways.

Let us begin with the medical question. When the companies asked for a rehearing of the earlier decision, Judge Wisdom was quite insistent that the case against them was ironclad:

The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 [sic] Dr. Selikoff and his colleagues confirmed the deadly relationship between insulation work and asbestosis.

This summary goes far beyond anything in the evidence. It ignores the fact that the 1938 and 1945 studies both concluded there were exposure levels that presented no health hazards. And nowhere does it make clear that, as Selikoff himself pointed out, it is difficult to generalize the findings from one type of asbestos case (say, textile workers) to another (say, insulation workers). The judge did not even take note of, let alone discuss or analyze, any

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passages such as those quoted above. And when in other portions of the opinion Wisdom did comment on the soundness of the earlier work, he was quite happy to condemn the 1945 studies on the basis of Selikoff's criticisms published some twenty years later—as if it were expected for manufacturers to be twenty years ahead of established medical knowledge. Nor does his opinion disclose any evidence that the suppliers possessed any private knowledge that they

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Manville and Product Liability

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withheld from the public at large. The kindest thing that can be said about the summary of the medical evidence in *Borel* is that it is one-sided and incomplete, written far more like an over-argued brief than a judicial opinion.

Legal doctrine, like the medical evidence, had changed greatly in twenty-plus years. It is instructive that Wisdom in no way attempted to invoke any of the doctrines that prevailed when the asbestos products were marketed a generation ago. Instead he relied heavily upon the *Restatement (Second) of Torts* first published in 1965, and an unfortunate decision handed down in 1968 by the ninth circuit court on a drug company's liability for polio vaccine. The principle he extracted was that where products are both dangerous and useful the supplier is under a duty to warn about their hazardous side effects, because "the user or consumer is entitled to make his own choice as to whether the product's utility or benefits justify exposing himself to the risk of harm"—itself an odd point in the work-place context for a judge who regards individual autonomy as something of a fiction in employment relations. In any event, Wisdom delineated what he saw as the scope of the manufacturer's liability.

[I]n cases such as the instant cases, the manufacturer is held to the knowledge and skill of an expert. This is relevant in determining (1) whether the manufacturer knew or should have known the danger, and (2) whether the manufacturer was negligent in failing to communicate this superior knowledge to the user or consumer of its product. The manufacturer's status as expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby. But even more importantly, a manufacturer has a duty to test and inspect his product. The extent of research and experiment must be commensurate with the dangers involved. A product must not be made available to the public without disclosure of those dangers that the application of reasonable foresight would reveal. Nor may a manufacturer rely unquestioningly on others to sound the hue and cry concerning a danger to its product. Rather

each manufacturer must bear the burden of showing that its own conduct was proportionate to the scope of its duty.

This decision completely transformed the law. Before the case, the sum and substance of the manufacturer's duty was to make sure that its purchasers knew what its product was and perhaps to warn of any latent dangers of which it had knowledge but the user and consumer did not. Asbestos satisfied the first element, since it was properly labeled for sale, so that purchasers and users could tell at a glance what it was. On the second element, however, all the relevant information was in the *public* domain. The most that could be said against the manufacturers is that they did not want to undertake studies about the possible side effects of asbestos use. Yet one must question the soundness of a system that places on each manufacturer the duty to test and inspect its asbestos. The question here is what party or institution is in the best position to test for the possible side effects. That question cannot be answered in a single uniform way for all products at all times. Here the key point is that asbestos is a product found in nature and used since ancient times, and one that is mined and supplied by a large number of separate companies. Many chemicals and drugs, by contrast, are developed under patent or license by a single producer who is therefore in a position particularly suited to test for its dangers.

Moreover, as noted above, the critical question of the actual level of worker exposure is most often controlled by the employer's company, and not the manufacturer. All the epidemiological studies, whether done by industry, the government, or independent physicians, have sought to measure asbestos exposure in the work place; all the government efforts to regulate exposure levels have sought to regulate it there. The *Borel* decision, therefore, not only demands that manufacturers conduct tests on the side effects of a generic product in common use, but it transfers the inquiry from those who could best do it to those who can do it only with difficulty. To say, moreover, that one manufacturer cannot rely upon the studies done by others is to invite mindless duplication of studies. Surely it is better to have the work done by independent parties whose findings and motives are more difficult to call into question than those of an interested party.

To impose such a duty on the manufacturer is bad enough; to announce that duty after the fact is to compound the dislocation. The *retroactive* nature of the duty not only renders the judicial exercise pointless as a matter of deterrence, but also imposes on the firm the impossible task of complying with a liability rule of which it could not have had any knowledge. The standard practices of yesterday have become the source of liability today. Rules, like horses, should not be changed in midstream. Therein lies the source of the Manville bankruptcy petition.

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The extent of this shift should not be understated. Asbestos suppliers, prompted by the first Selikoff study, began to use new warnings in 1964, only to have Judge Wisdom brush this effort aside in *Borel* as inadequate for the task at hand. In his view the warnings did not call explicit attention to the "fatal" nature of the illnesses involved, while the "admonition that a worker should 'avoid breathing the dust' is black humor." (Again the observation comes from the same federal judge who thought that worker autonomy required the warnings.) If so, then what are we to make of the warnings now required by the Occupational Safety and Health Administration: "Caution—Contains Asbestos Fibers—Avoid Creating Dust—Breathing Asbestos Dust May Cause Serious Bodily Harm." And how do we respond to those who say that warnings here would have had no greater effect than they have had in the case of cigarettes?

The Wrong Forum

We are now in a position to see just what went wrong in the asbestos situation. It was the midstream change of forum for the resolution of these disputes from workers' compensation to

the tort system. To make the point explicit, consider what would have happened if the cases had remained solely within the compensation system. The manufacturers, including Manville, would have been required to compensate their own workers for their injuries. Resolving the issues still would have posed difficulties, as there would have remained the question of whether a particular injury was asbestos-related and whether it was aggravated by some preexisting condition or by smoking. There would also have been the question of *which* employer was to compensate those workers who had frequently shifted jobs during their working lives, a burden that is reducible to manageable proportions by the rule that says that the last employer to expose the worker to asbestos dust picks up the full loss. To be sure, the level of compensation would be lower than it is today, but workers' compensation awards are not trivial and would in any event be bolstered by the workers' own insurance policies. Exposure levels can still be handled by direct regulation (as is now the case) or perhaps even by agreement between workers and employers, especially in the framework of collective bargaining.

Now that the battle has moved to the product liability arena, everything has been transformed. Retroactive application of new rules is just one of the problems. There is also a myriad of issues—defect, negligence, assumption of risk, and so forth—that must be litigated in

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order to determine relative responsibility. As Manville noted in the open advertisement it published on its announcement of bankruptcy, the tort system is "haphazard" in that different juries hearing the same evidence returned verdicts that ranged from a complete exoneration of Manville to an award of punitive damages against it. The company could have added that all these verdicts are probably consistent with the available evidence. The major source of dif-

faculty is that the modern doctrines of product liability law are so loosely formulated (chiefly consisting of a long list of relevant factors with indeterminate "weights") that once any defendant can be proved to have had any knowledge of any possible risk, any verdict, including one for punitive damages, becomes possible—and nonreversible on appeal.

The product liability situation suffers from additional complications not found in workers' compensation that arise from the sheer problem of large numbers. In order to be both safe and sensible the prudent plaintiff will sue every manufacturer that ever supplied any employer for whom he worked over the years. In the typical case this could well mean suing between ten and twenty defendants, each of which is, on the question of liability, in a somewhat different position from the others. To make matters worse, each of these defendants will demand that each of their many insurers take on the defense of the suit in question.

But the law today on the obligations of insurers to their insureds and to each other in these cumulative trauma cases can only be described as chaotic. Thus the standard coverage provisions (which require the insurer to pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury, disease, or sickness caused by an accident, including a continuous or repeated exposure to conditions which results during the policy period in bodily injury") have been construed in three wholly inconsistent ways by the three federal circuit courts that have now passed on the question. The upshot is that in many cases all the insurers for all the manufacturers may have some portion of the defense and indemnity obligation in each individual case. The resulting confusion and expense is almost impossible to imagine. It is tempting to attack the whole group of insurers and manufacturers for having left the terms of coverage incomplete, and thus having invited the entire problem. But again the truth is that, at the time these policies were taken out, no one anywhere thought that the question of tort liability for cumulative trauma was important enough to warrant the needed clarifications. We can regret that judgment today, but in the 1940s product liability was regarded as such a minor source of risk that it was not even separately priced, and was indeed often given away with-

out charge as an inducement to obtain more lucrative business. Again the insurance coverage problem, which only promises to get worse as excess carriers are drawn into the picture, shows some of the hidden costs of shifting the control of occupational diseases from the compensation system to the tort system.

Is there, at this late date, any way to take the problem out of the tort system? One suggestion that has been frequently made of late is to establish some kind of comprehensive program, modeled loosely on the black lung disease fund, to which all asbestos victims would be required to apply for compensation. The theory is that a centralized disposition of the cash would help eliminate many of the administrative and insurance nightmares that result from the proliferation of defendants in the tort setting. The proposal is of course strongly opposed by the plaintiffs' lawyers, whose contingent fees would be reduced, if not eliminated, by the plan.

Yet even on principled grounds there are formidable difficulties involved. First, there is the thorny question of how much money should be set aside in the fund, and how it should be raised. This question is of great difficulty, given that many of the claims have not yet matured and their number cannot be precisely estimated. One-time assessments would be almost impossible to calculate, but a continuing right to demand fresh assessments from the manufacturers would perpetuate their financial uncertainty and dim their enthusiasm for the plan. Second, if, as I have suggested, the manufacturers' tort liability is not as clear as has been generally assumed, then should the amount demanded from each firm be reduced to reflect the weakness of the claims against it? On the other hand, certain courts have allowed suits for punitive damages. Should the fund have to pay even if they affect only some manufacturers but not others? And what happens to the insurers? The conclusion seems well nigh irresistible that the insurers' obligations are transferred from the individual plaintiffs to the fund. But no one knows what those obligations are in the first place, because no one knows the extent of insurer obligations for the original tort actions. Finally, to add yet another note of uncertainty to the entire situation, there is the lingering question of whether the government should contribute in view of its heavy use of

asbestos in naval shipyards during the Second World War. All in all, such a comprehensive fund may well be said to be both a necessity and an impossibility—which testifies once again to the difficulties that emerge when judges radically change a system of compensation in midstream.

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Is there some other way that promises to be both more modest and more successful? Here I think that we should look once more at the workers' compensation system. The basic advantages of dealing with occupational diseases within this framework have already been noted. What is striking about the current situation is that many claimants have not even tried to collect the compensation benefits to which they are entitled by law. Why they have not is not at all clear, but some reasons can be advanced. First, sharp limitations on contingent fees may be dulling the incentive for suit. Second, plaintiffs often fear that the results of the medical examinations in compensation proceedings may be used against them in the tort action. Third, tort lawyers simply do not know and do not like the compensation system.

One radical way to return to the compensation system is to bar all tort actions against suppliers. While this might seem radical within the American system, it represents the uniform practice in every other industrial country. The likelihood that anyone will adopt this approach in this country is slim for political and perhaps even constitutional reasons. A larger role for the compensation system might be achieved, however, if legislators used a judicious combination of the carrot and the stick. The carrot might consist of relaxing both the restrictions on contingent fees and the eligibility rules of recovery in occupational disease cases. The stick might consist of a simple rule saying that the plaintiff's tort recovery is reduced by the amount of the compensation benefits paid *or payable*, so that injured workers have a reason

to turn to the compensation system first. For small cases this rule would forestall the lawsuit entirely. For large cases, it would mean that the stakes would be reduced and, with that, the costs of litigation for both parties. To be sure, the compensation system would come under new pressures that it has thus far escaped, but they would be only the pressures that have long been understood as appropriate for it, if not in all states then in the vast majority that allow recovery for occupational diseases. Mistakes could still be made, but the possibility for grave dislocations would be reduced.

The amount of work that would have to be done to make this proposal work in fifty-one jurisdictions (including the District of Columbia), with federal and state overlaps, is formidable beyond belief. And the prospects for success are at best modest. But the Manville bankruptcy has shown that even today there is not an endless supply of water at the trough. We must somehow undo the confusion wrought by unsystematic and unthinking judicial activism. Otherwise—as more and more cases work their way through the legal system, and more and more firms take the bankruptcy route—the only doors left will be closed, and marked “No Exit.” ■

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