Is there a fair way for policymakers to free the American economy from the specter of never-ending asbestos litigation?

Resolving the "Elephantine Mass"

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Supreme Court Justice David Souter has called asbestos litigation "an elephantine mass" — 600,000 plaintiffs have sued for damages, 6,000 companies have been sued, 80 companies have filed for bankruptcy because of asbestos liabilities, $54 billion has already been paid in compensation, and estimates of total compensation costs range as high as $250 billion.

An important feature of asbestos litigation is that the volume of claims keeps rising, even though most uses of asbestos ended in the 1970s and cancer deaths attributable to asbestos exposure have been falling since 1992. The number of claims filed against five large defendants increased from 81,000 in 1991 to 222,000 in 1998 (see Table 1) and claims filed against the largest of the asbestos compensation trusts rose by 68 percent per year between 1999 and 2001.

The rapidly rising number of claims means that new defendants are being drawn into asbestos litigation to replace old defendants that have gone bankrupt. While the earliest defendants were producers of asbestos insulation and asbestos-containing building materials, newer defendants include firms that sold or installed asbestos products, manufacturers whose products incorporated an asbestos-containing component, or owners of production facilities that had asbestos insulation. Unlike other mass torts, asbestos litigation has no natural ending point because the number of potential plaintiffs and potential defendants is virtually unlimited.

BACKGROUND

As early as the 1930s, asbestos has been known to cause harm to those who work with it. Nonetheless, it was widely used until the early 1970s for its insulating and fireproofing properties. About 27 million workers were exposed to asbestos in high-risk industries and occupations. Exposure can cause a variety of diseases, ranging from mesothelioma (a cancer that is usually fatal soon after diagnosis) to pleural disease (thickening of the pleural membrane around the lungs that is non-disabling). The probability of developing a severe asbestos disease rises with the length and intensity of asbestos exposure.

Most plaintiffs who file asbestos claims have been exposed to asbestos but do not have any asbestos-related impairment. Because asbestos diseases have very long latency periods, most people who were exposed will die of some other cause first. Most claimants file claims as soon as they learn that they have been exposed because, if they wait, statutes of limitations in some states will prevent them from filing later on and defendants may have gone bankrupt in the meantime.

Enter the lawyers Asbestos litigation started slowly and, like tobacco litigation, only became successful when lawyers obtained documents showing that producers of asbestos-containing products knew that exposure to asbestos was harmful. Asbestos litigation is dominated by a small number of plaintiffs' law firms, most of which represent thousands of claimants.

Law firms locate plaintiffs both by advertising widely and by offering free X-rays. One example of a large screening campaign involves textile workers at factories in the south. Textile factories have ventilation systems that used to be lined with asbestos insulation and, as a result, many textile workers have scarring of the lungs that could be due to inhaling asbestos fibers. But few have any asbestos-related impairment.

Law firms work on a contingency fee basis and typically file claims against many defendants for each plaintiff. For a factory worker, defendants would include all producers of the types of asbestos products that could have been used in the plaintiff's workplace — often as many as 50 defendants.

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Because the number of asbestos claims has risen rapidly but the number of claims involving asbestos-related cancers has remained constant, the proportion of claimants who have cancer fell from about 20 percent in the 1980s to less than 10 percent in the 1990s. Although some asbestos-related diseases are non-cancerous but seriously disabling and some asbestos-related cancers were probably not caused by asbestos exposure, the best estimate is that roughly 90 percent of asbestos claimants are unimpaired by the material.

Venue shopping Nearly all asbestos claims are filed in state courts and litigated under state law. Plaintiffs' lawyers decide where to file claims and they choose states where the law is particularly favorable to plaintiffs and courts within those states where judges are particularly pro-plaintiff.

In order for representing asbestos claimants to be a profitable business, plaintiffs' law firms must be able to obtain compensation for unimpaired claimants because most claimants are of this type. They must also settle most claims without going to trial because trials are very expensive. Plaintiffs' lawyers choose states that allow them to join large numbers of cases together. This puts pressure on defendants to settle because so much is at stake. As an example, Mississippi is a center for asbestos litigation because its joinder law allows asbestos claims to be litigated there even if neither the plaintiff nor the defendant is located in Mississippi. The only requirement is that claims by non-residents must be joined to a single claim involving a plaintiff who is a Mississippi resident. Lawyers therefore use Mississippi to litigate large groups of asbestos claims from all over the country.

Plaintiffs' lawyers also concentrate filings of asbestos claims in particular courts where judges favor plaintiffs. Because thousands of asbestos claims are filed in a few courts, holding an individual trial for each plaintiff would be impossible. Therefore, judges in those courts encourage the parties to settle large numbers of claims with minimal trial time.

Several procedural innovations are commonly used for asbestos litigation, including consolidated trials, bifurcated trials, and bouquet trials. In consolidated trials, multiple plaintiffs share a single trial, but the jury makes separate decisions for each plaintiff. Consolidated trials save court time compared to individual trials because only one jury must be selected and common evidence is presented only once. They also make trial outcomes more correlated and therefore put pressure on defendants to settle, because going to trial can be a "bet-the-company" proposition. Consolidated trials also tend to have more favorable outcomes for plaintiffs because jury members often assume that all claimants will inevitably develop severe asbestos disease.

In bifurcated trials, the trial is divided into phases and the jury decides only the amount of damages in the first phase. After the first phase, the judge recesses the trial and orders the parties to bargain a settlement. Because the weakest part of most asbestos plaintiffs' cases is demonstrating that the defendants are liable, bargaining over a settlement following the damages phase of the trial puts plaintiffs in a stronger position.

In a bouquet trial, a group of claims is selected for trial from a larger group of consolidated claims. A trial is held for the small group, and then the judge orders the parties to bargain a settlement for the large group using the jury's decisions for the small group as a template. If the negotiations break down, the judge may threaten to use the same jury to decide additional cases in the large group. When bouquet trials result in high damage awards, defendants are virtually forced to settle because the alternative is that the same high damage levels may be awarded to thousands of additional plaintiffs. An extreme example is a recent bouquet trial of 12 claims in Mississippi that resulted in damage awards of $4 million each, even though the plaintiffs conceded that they were unimpaired by their asbestos exposure. The 12 claims were selected from a large group of 1,738 claims. Given the risk that damages in the large group could have been as high as $7 billion, it is not surprising that defendants settled all 1,738 claims on very favorable terms for the plaintiffs.

THE GROWTH OF ASBESTOS LITIGATION

Asbestos stopped being used in the early 1970s. Nonetheless, asbestos litigation has been going on for four decades. Why, then, is the number of asbestos claims currently on the rise? My hypothesis is that plaintiffs' lawyers choose states with favorable laws and courts with favorable judges. They then file thousands of cases in those courts, creating judicial gridlock. In order to clear their dockets, judges adopt procedural innovations that encourage mass settlements with minimal trial time. The procedural innovations cause trial outcomes to change in a pro-plaintiff direction and also make settlements more likely.

When asbestos claims frequently settle and trial outcomes favor plaintiffs, asbestos litigation becomes extremely profitable for plaintiffs' lawyers. This means that plaintiffs' lawyers have an incentive to search out new plaintiffs and new defendants. And unlike most mass torts, asbestos litigation has no natural limits — millions of individuals were exposed and a virtually unlimited number of firms had some involvement. As one set of defendants goes bankrupt, plaintiffs' lawyers move on to a new set. Thus, the volume of asbestos litigation keeps on growing.

Procedural innovations In recent research, I tested parts of this hypothesis. First I examined the effect on trial outcomes of plaintiffs' lawyers filing claims in particular states and judges using the three procedural innovations. I con-

TABLE 1

Ever-Increasing Litigation

Asbestos claims filed against five major defendants.

Year	Number of claims filed
1991	81,000
1992	90,000
1993	112,000
1994	102,000
1995	164,000
1996	160,000
1997	123,000
1998	222,000

SOURCE: *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, by S.J. Carroll, D.R. Hensler, J. Gross, and M. White. Santa Monica, Calif.: RAND Corporation, 2001.

structed a dataset consisting of all asbestos trials from 1987 to 2002, about 5,500 in total. Each observation was an individual plaintiff, and trials were included in the dataset as long as the jury reached a decision in any phase of the trial.

I ran regressions explaining whether the plaintiff won as a function of whether the claim was filed in one of seven states that are centers of asbestos litigation (Mississippi, Texas, West Virginia, Pennsylvania, New York, New Jersey, and California) and whether the trial used any of the three procedural innovations. I also ran regressions explaining whether plaintiffs received punitive damages and the amounts of both compensatory and punitive damages. All regressions also control for other variables, including the year of trial, the plaintiff's alleged disease, and whether the plaintiff was a smoker.

The top portion of Table 2 shows the results for some of the state variables. Plaintiffs are 28 and 16 percentage points more likely to win at trial if their claims were filed in West Virginia or Mississippi, respectively, than in the states that are not centers for asbestos litigation. Conditional on winning at trial, plaintiffs in West Virginia and Mississippi were about 50 percentage points more likely to be awarded punitive damages than plaintiffs in the excluded states. Plaintiffs received about $400,000 more in compensatory damages and $400,000 more in punitive damages if their trials occurred in Texas and about $480,000 more in both types of damages if their trials occurred in West Virginia as compared to the excluded states.

On the other hand, plaintiffs whose trials occurred in Pennsylvania were 42 percentage points less likely to receive punitive damages and they also received lower damage awards. (All of those results are statistically significant.) The results suggest that plaintiffs' lawyers' right to choose where to file claims has a large effect on trial outcomes. Over the entire period, the best states for asbestos plaintiffs were Texas, Mississippi, and West Virginia and the worst state was Pennsylvania. Not surprisingly, the number of asbestos claims filed in Pennsylvania has fallen sharply over time.

The bottom of Table 2 shows results for the procedural variables. When trials are bifurcated or a bouquet trial is held, plaintiffs' probability of winning increases by 29 and 21 percentage points, respectively. Plaintiffs in bouquet trials are also 54 percent more likely to receive punitive damages, conditional on winning at trial. Plaintiffs' probability of winning in consolidated trials of up to five plaintiffs is 11 to 16 percent higher than in individual trials. (Again, all of those results are statistically significant.)

Table 3 puts those results together and shows how the state and procedural variables affect plaintiffs' expected return from trial. Plaintiffs whose trials occur in Mississippi, West Virginia, and Texas receive an average of $2.1 million, $1.3 million, and $1 million more, respectively, than plaintiffs whose trials occur in the excluded states. Plaintiffs whose trials occur in Pennsylvania receive $1.1 million less. Those results show that plaintiffs' right to choose where their cases are litigated greatly increases the value of their claims. Claims that have bifurcated or bouquet trials receive about $1.2 million more, while claims that have small, consolidated trials rather than individual trials receive $200,000 to $300,000 more. Those results suggest that judges' efforts to encourage mass settlements greatly benefit plaintiffs and their lawyers.

TABLE 2

Venue Shopping

Effect of state and procedural variables on trial outcomes.

	Percentage point change in the probability of plaintiff winning	Percentage point change in the probability of plaintiff receiving punitive damages	Change in the amount of compensatory damages	Change in the amount of punitive damages
State				
Mississippi	16*	51*	$1,640,000	$570,000
Texas	14*	36*	$394,000*	$397,000*
W. Virginia	28*	50*	$467,000*	$477,000*
Pennsylvania	-6	-42*	-$187,000*	-$1,036,000*
Procedural variables				
Bifurcated trial	29*	54*	$628,000*	-$279,000
Bouquet trial	21*	-28	$2,410,000*	-$523,000
Consolidation of 2-3 claims	16*	11	$90,000	$42,000
Consolidation of 4-5 claims	11*	6	$137,000	-$95,000

NOTES: Asterisks indicate statistical significance at the five percent level. The sample for the first and third columns is all trials in which liability or compensatory damages were decided. The sample for the second and fourth columns is all trials that the plaintiff won. The third and fourth columns are based on tobit regressions explaining the log of damage awards. Dollar figures are in 1987 dollars. For the state variables, the excluded category is all states except the four listed plus New York, New Jersey, and California. For the procedural variables, the excluded category is an individual trial.

Settlements Because nearly all asbestos claims are settled rather than tried, the main determinant of asbestos liability is the size of settlements rather than damage awards at trial. Therefore, I also examined how trial outcomes and settlements are related. Information concerning asbestos settlements is difficult to obtain, but some companies — generally those with high asbestos liabilities — report their costs to the Securities and Exchange Commission.

Using those data, I ran a regression explaining the average settlement amount for asbestos claims by company by year. The explanatory variables are the average compensatory and punitive damage awards at trial for the same company over the previous three years and the number of trials in which the company was a defendant in the previous three years. The average settlement in 1987 dollars is about $3,500, the average compensatory and punitive damage awards during the previous three years are about $800,000 and $700,000 respectively, and the average

number of asbestos claims pending is 82,000.

The results show that higher punitive damage awards at trial and additional trials are both associated with higher settlement costs. If punitive damages awarded against a company double, then its average settlement cost rises by 13 percent — probably because punitive damages signal that the company is an easy litigation target. Each additional trial during the previous three years raises the defendant company's average settlement cost by $11.

sation and deterrence. The first objective calls for asbestos producers to compensate victims for the value of their losses. The second objective calls for asbestos producers to be liable in a way that gives them economically efficient incentives to avoid producing harmful products.

Efficient incentives to make products safer can be achieved by making producers either strictly liable for victims' losses or liable only if they were negligent, but only strict liability also gives producers efficient incentives to limit their production of

Regression analysis shows that when punitive damage awards against companies are higher, they pay more to settle claims and also attract additional claims.

I also ran a regression explaining the number of claims pending against companies on the same variables, and found that higher punitive damage awards are associated with more claims. Thus, when punitive damage awards against companies are higher, they pay more to settle claims and also attract additional claims.

ESCAPING THE ASBESTOS CRISIS

Asbestos litigation is a crisis because damage payments are so high that they have caused substantial disruption to defendant firms, their workers, their insurers, and their equityholders. Many large asbestos defendants have filed for bankruptcy while others have avoided bankruptcy but seen their stock values plunge. The Halliburton Company's share value fell by 42.5 percent in one day of trading in December 2001 when investors became fearful of its asbestos liabilities — erasing $3.8 billion of market capitalization. Halliburton's bonds also fell sharply.

Workers at defendant firms have also suffered. One recent study concluded that asbestos bankruptcies have caused the loss of between 52,000 and 60,000 jobs, and displaced workers have lost an average of $25,000 to $50,000 in future wages plus $8,300 in their 401(k) retirement plans. Another study concluded that 128,000 jobs have been lost, counting jobs shed by both bankrupt and non-bankrupt asbestos defendants. Losses in the future will be much higher if asbestos litigation continues on the current path.

Proper awards How much asbestos compensation is the right amount? Traditionally, the tort system has been viewed as having the twin objectives of compensation and deterrence. The first objective calls for asbestos producers to compensate victims for the value of their losses. The second objective calls for asbestos producers to be liable in a way that gives them economically efficient incentives to avoid producing harmful products.

Efficient incentives to make products safer can be achieved by making producers either strictly liable for victims' losses or liable only if they were negligent, but only strict liability also gives producers efficient incentives to limit their production of goods that cause harm. Thus, both the legal norms of compensation and deterrence imply that producers should be strictly liable for the value of victims' losses.

There are two alternate approaches to providing this level of compensation. Suppose a proportion c of asbestos claimants today have severe asbestos-related diseases, while the remaining proportion $(1\text{-}c)$ are unimpaired. Claimants with severe asbestos-related disease have losses of D, while unimpaired claimants have losses of zero. Suppose a proportion p of claimants who are unimpaired today will develop severe asbestos disease in the future and, if so, their losses will also be D. Under the ex post approach, claimants are only compensated after they develop asbestos diseases, in which case they receive D. Unimpaired claimants receive nothing unless they develop asbestos disease in the future. The total cost of compensation is then $cD + (1\text{-}c)(1\text{-}p)0 + p(1\text{-}c)D$.

Under the ex ante approach, all claimants are compensated for the expected value of their losses. Unimpaired claimants receive pD, but do not receive additional compensation if they develop asbestos disease in the future. Claimants who have asbestos disease today receive D only if they have not previously been compensated. The total cost of compensation is $cD + (1\text{-}c)pD$, which is the same as under the ex post approach.

In practice, the tort system provides compensation on both ex ante and ex post bases. Present unimpaired claimants receive more than pD because they gain from the bargaining power conferred by large numbers of claims. Present claimants with severe asbestos disease receive high — although variable — compensation that probably approximates D on average.

TABLE 3

It Pays to Shop Around

Effect of state and procedural variables on the expected return from trial.

	Increase in the expected return from trial
State:	
Mississippi	$2,100,000
Texas	$1,000,000
W. Virginia	$1,300,000
Pennsylvania	-$1,100,000
Procedural variables:	
Bifurcated trial	$1,200,000
Bouquet trial	$1,200,000
Consolidation of 2-3 claims	$300,000
Consolidation of of 4-5 claims	$200,000

According to a recent RAND report, 65 percent of asbestos compensation goes to unimpaired claimants. If we assume that claimants with severe asbestos disease on average receive full compensation and we take the ex post approach as a benchmark, then all of the compensation paid to unimpaired claimants is in excess of the legal norm. In dollar terms, this means that excess compensation already paid amounts to $35 billion, and it may eventually rise as high as $163 billion. Because two-thirds of asbestos compensation goes to transactions costs, the figures suggest that lawyers have already collected $23 billion in excess legal fees.

RESOLVING THE CRISIS

Given the worrisome results of the status quo, it seems appropriate to search for a better way to resolve the asbestos crisis. Three oft-discussed possibilities are tort reform, bankruptcy, and administrative compensation.

Tort reform An important problem with using tort reform to resolve the asbestos crisis is that reforms adopted at the state level are unlikely to be effective because plaintiffs' lawyers file their claims in the most pro-plaintiff states. Thus, if the most favorable states adopted tort reforms, lawyers would just shift claims to the next-most-favorable states and there would be minimal effect. If less favorable states adopted tort reform, there would be no effect at all. As a result, tort reform as a solution for the asbestos crisis is likely to require changes at the federal level.

In addition, adoption of the tort reforms typically recommended is unlikely to have much effect on the asbestos crisis. Consider the recommendation of a ban on punitive damages. Punitive damages are awarded in one-third of all asbestos trials that plaintiffs win — a much higher rate than in other types of litigation. However, only four defendants — all producers of asbestos insulation — accounted for about 70 percent of all asbestos punitive damage awards since 1987. A ban on punitive damages during the 1990s would have helped those four firms, all of which have now filed for bankruptcy. But it would have had little effect on other asbestos defendants.

Another frequently discussed reform is to limit punitive damages to a multiple of no more than three to five times the level of compensatory damages. But this would also have had little effect on damages in asbestos trials because when both types of damages are awarded, punitive damage awards on average are less than 1.5 times as high as compensatory damage awards.

What if compensatory damage awards were capped in all states? To illustrate the effect of this change, suppose a nationwide cap of $1 million on compensatory damages (including medical costs, lost wages, and pain and suffering) had been adopted in 1987. From 1987 to 2002, this change would have reduced the average compensatory damage award by nearly half and the average total damage award by one-third. But this type of reform would probably not have discouraged plaintiffs' lawyers from filing large numbers of claims in particular courts. This is because nearly all asbestos claims are settled rather than tried, and the pressure on defendants to agree to mass settlements comes from the large numbers of claims. Even if damage awards at trial were reduced by half, the prospect of losing hundreds or thousands of cases at once puts defendants under great pressure to settle. In addition, caps on compensatory damages would reduce damage awards below the level of harm for those victims with the most severe asbestos diseases.

Many proposals for asbestos tort reform call for adoption of ex post compensation in order to bar unimpaired claimants from pursuing their claims unless they develop severe asbestos disease. Such a change would reduce the number of asbestos claims by 80 to 90 percent. Because courts would no longer be flooded with claims, individual trials could be held for most claims and defendants would be under far less pressure to settle. As a result, the amount of excess compensation paid would probably fall. Some individual courts have already moved in this direction by transferring unimpaired claims to an "inactive docket," which preserves plaintiffs' right to sue in the future if they develop a severe asbestos disease but prevents them from proceeding otherwise. But effective reform along those lines would require action at the federal level because reforms in a few courts or a few states would just cause asbestos claims to move to courts or states that do not use them.

Another approach to tort reform would be to allow defendants to transfer claims from state to federal court whenever they involve a plaintiff from one state suing a defendant from a different state. This change would prevent plaintiffs' lawyers from consolidating large numbers of cases from all over the country in particular state courts, which would ease the pressure on defendants to agree to mass settlements. This change by itself would not solve the problem of large numbers of claims by the unimpaired, but federal judges have also tended to take the lead in using inactive dockets.

Bankruptcy At present, the only way that firms can resolve all of their asbestos liabilities at once is to file

TABLE 4

Shrinking the Elephantine Mass

Theoretical and actual approaches to asbestos compensation.

	Ex post approach	*Ex ante* approach	Tort system in practice
Present claimants with severe asbestos disease	*D*	*D*	<> *D*
Present unimpaired claimants	0	*pD*	> *pD*
Future claimants who develop severe asbestos disease	*D*	0	< *D*
Total	*cD+(1-c)(1-p)0 + (1-c)pD*	*cD + (1-c)pD*	More than under the *ex post* or *ex ante* approach

for bankruptcy. A bankruptcy filing has two effects on firms with large asbestos liabilities. First, it stays all litigation against the firm, including asbestos litigation, so that firms in bankruptcy immediately stop paying damages. Because asbestos bankruptcies take many years to resolve, this reprieve is valuable to defendants. Second, the bankrupt firm proposes a plan for a compensation trust that will pay both present and future asbestos claims against it. Future claims are included in the plan because, otherwise, the reorganized firm would quickly fall into financial distress again. At least 50 percent of the reorganized firm's equity must be transferred to the trust and additional notes, cash, and insurance policies are usually transferred as well. Current asbestos claimants vote on the plan and, for it to be approved, 75 percent must vote in favor. If the plan is approved, the firm can emerge from bankruptcy free of all asbestos liabilities.

Because only current claimants are allowed to vote on plans for compensation trusts and 80 to 90 percent of current claimants are unimpaired, bankruptcy strongly favors currently unimpaired asbestos claimants. The interests of future claimants (who cannot vote) and present impaired claimants (who are a small minority) tend to be ignored. The earliest of the compensation trusts, set up by the Manville Corporation following its 1982 bankruptcy, illustrates the problem of under-compensation of future claimants with severe asbestos disease. In the late 1980s, the trust paid compensation ranging from $12,000 for pleural disease to $200,000 for mesothelioma. But the number of claims turned out to be far greater than the trust anticipated and, as a result, it cut its schedule of payments to five percent of the original levels. This means that early claimants with pleural disease received more than recent claimants with mesothelioma — $12,000 versus $10,000.

Creative solutions Several corporations — including Halliburton and Honeywell — are currently trying to stretch the bankruptcy rules so that they can resolve all of their present and future asbestos claims without actually filing for bankruptcy. They propose to do so by putting one or more of their subsidiaries into bankruptcy and setting up a compensation trust that will cover asbestos claims against both the parent firm and all of its subsidiaries. Halliburton has agreed to pay $4.2 billion to its compensation trust to compensate 200,000 pending claims plus all future claims. It has made agreements with a sufficient number of plaintiffs' law firms that the 75 percent voting requirement to approve the compensation trust will be met. Honeywell's negotiations are less advanced, but it expects to pay about $2.9 billion to its trust.

Whether these agreements will hold up under judicial review is unclear. A recent effort by the Big Three automakers to stretch the bankruptcy rules even further was recently struck down by the U.S. Supreme Court. The Big Three have asbestos liabilities because automobile brakes once contained asbestos. They attempted to discharge their asbestos liabilities by contributing to a compensation trust that will be set up by the Federal-Mogul Corp., a bankrupt producer of automobile brakes.

Halliburton and Honeywell's proposed agreements call for both firms to pay about $15,000 per claim currently pending against them — about 10 times as much as each firm has been paying per claim outside of bankruptcy. But a bankruptcy settlement would include all future claims, so plaintiffs' lawyers demand high compensation in return for giving up their right to file future claims. The fact that Honeywell and Halliburton are willing to pay so much to be free of asbestos liability shows how expensive and disruptive asbestos litigation has become.

> The tort reforms usually recommended — banning or limiting certains types of damages, for instance — are unlikely to have much effect on the asbestos crisis.

A federal solution Another way that asbestos claims could be resolved is for the federal government to adopt a compensation scheme to replace tort liability. This approach has been proposed many times in Congress, and Sen. Orrin Hatch (R-Utah) has recently introduced a new asbestos reform bill along these lines.

Under the bill, a new federal asbestos court would be established to resolve all asbestos claims. The bill calls for defendant firms and insurers to contribute $108 billion to a compensation fund. Eligibility for compensation would be based on detailed medical criteria and would go to claimants with pleural disease, asbestosis, and asbestos-related cancers. Claimants would receive between $40,000 (for pleural disease and asbestosis) and $750,000 (for mesothelioma).

A disadvantage of the Hatch bill is that it does not adopt either the ex post or ex ante compensation approach, as claimants can receive compensation both for non-disabling conditions and again for a serious asbestos disease that develops later. But strictly enforcing medical criteria for compensation would probably reduce the number of asbestos claims. Also, asbestos compensation would be more equitable than it is today because compensation would not depend on which state the plaintiff sues in or whether the judge uses procedural innovations.

Although the Hatch bill would remove asbestos litigation from the tort system, it would not otherwise preempt the rights of states to determine their own tort law and legal procedures.

The major stumbling block in the negotiations over the bill

has been how to insure that the fund will not run out before all claimants receive compensation. Because the proposed payments are high, the number of claims could be much higher than expected — as happened to the Manville Trust. One solution to the problem would be to pay all compensation in the form of annuities rather than lump sums, and adjust the payments each year according to the number of new claims filed. Thus, if the number of new claims turned out to be higher than expected in a particular year, payments that year would be adjusted downward in order to conserve additional funds for future claimants. This would ensure that the compensation fund would not run out prematurely, although later claimants could receive less than earlier claimants with the same condition. It would also spread the risk of the fund running out of money across all claimants rather than placing the risk on future claimants alone.

CONCLUSION

The economic effects of asbestos liability suits that have only recently been filed or that will be filed in the future will almost certainly dwarf the enormous effects of asbestos suits that have already been settled. Workers and other persons exposed to asbestos certainly deserve compensation — especially those who suffer from grievous asbestos-related illnesses. At the same time, current employees and equityholders should not be placed in economic jeopardy because the firm can be linked – sometimes very tenuously – to a product that has not been used in the United States for decades.

In order to escape the weight of asbestos litigation's elephantine mass, policymakers will need to find a solution that treats plaintiffs and potential plaintiffs fairly but also controls the negative effects of asbestos litigation on the economy. The various approaches illustrate just how difficult it can be to shrink an elephant. R

READINGS

- "As Time Goes By: Asbestos Litigation after Amchem and Ortiz," by Deborah R. Hensler. *Texas Law Review*, Vol. 80 (June 2002).
- "Asbestos: The $200 Billion Miscarriage of Justice," by Roger Parloff. *Fortune*, March 4, 2002.
- *Asbestos Litigation Costs and Compensation: An Interim Report*, by S.J. Carroll, D. Hensler, A. Abrahamse, J. Gross, M. White, S. Ashwood, and E. Sloss. Santa Monica, Calif.: RAND Corporation 2002.
- *Asbestos: Medical and Legal Aspects, 4th edition*, by B.I. Castleman and S.L. Berger. New York, N.Y.: Aspen Publishers, 1996.
- *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, by S.J. Carroll, D.R. Hensler, J. Gross, and M. White. Santa Monica, Calif.: RAND Corporation, 2001.
- *The Economic Structure of Tort Law*, by William M. Landes and Richard A. Posner. Cambridge, Mass.: Harvard University Press, 1987.
- "Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials." NBER working paper 9340, by Michelle J. White. December 2002.
- "The Impact of Asbestos Liabilities on Workers in Bankrupt Firms," by Joseph E. Stiglitz, J.M. Orszag, and P.R. Orszag. Sebago Associates, December 2002.
- *Outrageous Misconduct*, by Paul Brodeur. New York, N.Y.: Pantheon Books, 1985.
- "Overview of Asbestos Issues and Trends," published by the American Academy of Actuaries, December 2001.
- "Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle," by Michelle J. White. *University of Cincinnati Law Review*, forthcoming 2003.