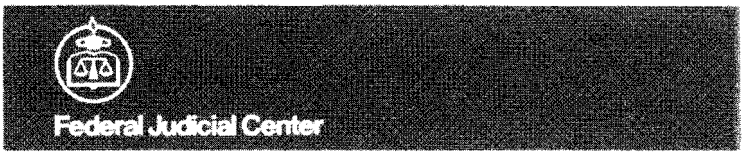
Trends in Asbestos Litigation



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TRENDS IN ASBESTOS LITIGATION

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FOREWORD

Asbestos litigation is unique. As this study points out, it is the convergence of a number of factors that makes it so: the numbers and concentrations of cases, the widespread use of a highly toxic product during an extended latency period, the suppression of information about its dangers, the clarity of general causation and the lack of clarity of causation-in-fact. Yet, viewed from another perspective, lawyers and judges report that although asbestos cases were once complex, they have become routine. This confirms the principal finding reported in an earlier Center publication, *Asbestos Case Management: Pretrial and Trial Procedures* (Federal Judicial Center 1985), that "[a]sbestos cases, however complex they may have been at first, have become relatively routine product liability cases that involve a large number of parties." To say this much, however, does not yet warrant classifying asbestos litigation with simple fender-benders. Large numbers can create enough problems in themselves. It is helpful to remember Kenneth Feinberg's reference to "the experience of one former asbestos manufacturer [Manville Corp.], which saw its defense of a single claim explode into a litigation burden of 17,000 claims."

The perception of these experienced lawyers and judges can best be understood in the light of how much has been achieved by prudent and innovative case management, with use of alternative dispute resolution, and the development of expertise by the bench as well as the bar.

This report describes techniques that have worked and some that have not. The problems remain acute, however, because the number of filings has increased dramatically. It is true that the number of dispositions has also increased and the length of time required for trial has decreased, but the fact remains that there is an increasing backlog of asbestos cases in most courts.

The picture with asbestos litigation reminds us of the importance of adequate resources in the effort "to secure the just, speedy, and inexpensive determination of every action." Multiplying judges to keep pace with the escalating caseloads is not, in itself, the optimal solution. The importance of dedicated judges and the value of innovative techniques, recorded in these pages, attest to that. However, we must also remember that there are irreducible minimums and

at some point resources become so scarce, whether because vacancies are not filled or new judgeships are not created—or both—that it is simply not possible to afford litigants their due.

Finally, I would like to thank those careful readers of our earlier report, especially Chief Judge Charles Clark and Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit, for encouraging us to explore more fully the shadowy world of toxic torts. Their interest and concern helped stimulate this current effort. We publish this study in the hope that it will shed light on some of the murky corners of a challenging area of law.

A. Leo Levin

ACKNOWLEDGMENTS

The norm in the Research Division is for colleagues to provide extensive support to each other. Our team spirit is such that formal acknowledgment of routine contributions is not expected. In keeping with this practice, I want to acknowledge the extraordinary contributions that Patricia A. Lombard made to this report. Her normal contribution is to mediate efforts to extract meaningful data from computer data bases. Without her assistance, the tables in this report could not have been compiled. Her extraordinary efforts related to reviewing my organizational plan for making sense of a mountain of interview data. Her logical and incisive analysis helped provide a consistent conceptual structure for the report. Finally, her thoughtful and careful review of a lengthy draft—sandwiched between her responsibilities for implementing a new computer system for the division—contributed immensely to whatever coherence exists in the final draft. Any defects on that score, of course, are the responsibility of the author.

Once exceptions are made, it is difficult to draw a line. I would be remiss if I did not give full credit to Joe Cecil of the Research Division for having the foresight to sense the importance of toxic tort issues to the federal judiciary long before the June 1984 Asbestos Case Management Conference. He has been a vital catalyst to all of the division's efforts in this area.

Finally, I want to thank Professor D. Marie Provine of Syracuse University for thoughtful comments on the settlement section and Professor Irwin A. Horowitz of the University of Toledo for continuous support and consultation as well as a review of the final draft.

EXECUTIVE SUMMARY

Asbestos as a Unique Phenomenon

Asbestos litigation is sometimes equated with the growing phenomenon loosely described as "mass torts" or "mass toxic torts." Asbestos litigation, however, should be distinguished from single-event mass accidents, including those involving toxic substances. Long latency periods, ranging from ten to forty years, lead to an accumulation of cases. Each case has individual characteristics: Plaintiffs suffer similar, but not identical, injuries resulting from different periods of exposure to different products. Injuries vary from fatal cancers to mild impairments of lung capacity.

Even in the group of mass torts based on latent injuries arising from product defects, asbestos litigation exhibits distinctive characteristics. The utility of asbestos, based on its indestructibility and its insulating properties, generated widespread industrial, commercial, and household usage. During a period of increasing use, asbestos manufacturers suppressed knowledge about the dangers of exposure to asbestos fibers. The result was a further accumulation of potential cases and a factual foundation for punitive damages. A by-product of suppression of unfavorable information was that companies failed to improve safety standards and communicate warnings that might have mitigated the dangers of continued production and use of asbestos materials.

The capacity of asbestos fibers, unlike many other toxic substances, to cause serious injuries, including rare forms of cancer, is undisputed. General causation is clear; causation-in-fact, that is, whether exposure to a particular product or substance substantially contributed to the specific injuries of a given plaintiff, is disputable and often disputed, as are medical diagnoses.

Additional complications in asbestos litigation result from the number of parties and the concentration of cases. Approximately twenty defendants are involved in each case. Secondary disputes among the defendants have impeded the pretrial management and trial or settlement of the personal injury cases. Concentrations of cases in certain cities and judicial districts led to a disproportionate burden on some courts during a brief time period in the late 1970s

and early 1980s. Recent case filings are more widely dispersed; still, one-third of all federal courts account for 92 percent of the caseload (see table 1). District courts in the Fifth Circuit have more than one-third of all filings.

Convergence of all of these factors—the widespread use of a highly toxic product during an extended latency period, the suppression of information about its dangers, the clarity of general causation and the lack of clarity of causation-in-fact, and the numbers and concentrations of cases—renders asbestos litigation unique. This singularity of asbestos litigation extends backwards and forwards: There are no historical analogues and no projected recurrence of similar phenomena.

Complexity and Simplification

Lawyers and judges interviewed for this study report that asbestos cases, in comparison to other personal injury-products liability cases, were once complex and have become routine. Overall, asbestos dispositions have been by settlements, with a much lower percentage of trials (2 to 3 percent) than other personal injury-products liability cases (see tables 3 to 5). As experience with asbestos litigation grows, the number of trials diminishes. At the same time, the number of filings and dispositions has increased dramatically (see table 11). In 1985, there were eight complete jury trials reported in ten of the federal courts with high concentrations of asbestos cases. Estimates of the length of time required for trial have decreased dramatically from about three to five weeks to five to ten days.

Simplification of asbestos litigation has occurred through several means. Pretrial, trial, and appellate rulings have established patterns to guide case evaluations, which, in turn, support more settlements. Familiarity with cases in many districts has led to grouping increasing numbers for pretrial and trial scheduling.

Creation of a private asbestos claims facility agreement, known as the Wellington facility, has simplified some facets of asbestos litigation while complicating others. The clearest effect has been in the reduction of the number of defense attorneys in a given case from at least a dozen to less than a handful, thereby easing some of the pretrial management burden of the courts. Specialization of defense counsel now parallels that of plaintiffs' counsel, leading in many instances to improved ability to evaluate and settle cases. Implementation of the Wellington plan has also led to a redistribution of power among counsel for plaintiffs and defendants, causing

complications in bargaining and changes in the patterns of early settlements by some defendants. In some jurisdictions, Wellington has upset established patterns by reopening settled legal issues.

To date, Wellington has not operated either as a claims facility for prelitigation settlements or as a vehicle for early settlements of court cases. While almost all cases scheduled for trial have settled under Wellington, the vast majority settle on the courthouse steps or after jury selection. Operation of the claims facility is scheduled to begin in early 1987, creating an opportunity for further simplification of asbestos litigation.

Simplification has also occurred through pretrial screening of cases to eliminate ones with evidence of mild impairments, diminishing the number of highly disputed claims. Inactive dockets serve the same purpose and may also improve the ability of the courts and parties to give priority to cases with serious injuries. Accumulation of discovery materials also promotes simplification by reducing redundancy in the pretrial stage.

Lack of scheduled trials for sufficient numbers of cases remains the major complication in asbestos litigation. Failure to schedule sufficient trials has resulted in an increasing backlog of cases in most courts.

Assignment Systems

Courts use a diverse set of practices for assignment of asbestos cases to judges. Most of the systems involve special treatment for asbestos cases, resulting in their removal from the individual calendar/random assignment system that almost all federal courts employ. A test of the adequacy of the special treatment for asbestos cases is whether it is effective in coping with the complexity caused by the sheer number of cases.

Two of the ten courts studied use specialists who have primary responsibility for the district's entire asbestos caseload and who have innovated extensively to cope with increasing numbers of cases in their courts. One benefit of specialization is that these judges have been able to consolidate large numbers of cases for trial and settlements.

Most of the other courts use a variety of pretrial and trial assignment systems that entail dispersion of responsibility among several judges or the entire court. Some of the systems include using a master trial schedule, with each judge periodically assigned to trials. Some of these systems reduce the flow of asbestos cases to a pace far slower than equivalent nonasbestos cases. An implicit jus-

tification for limiting the number of cases appears to be the cash flow claims of defendants, yet procedures for the systematic evaluation of such claims have not been used outside of the bankruptcy courts.

In most courts, pretrial management was performed by selected judges. In some cases, courts assigned asbestos cases to newly appointed judges who had no desire to specialize in asbestos litigation. In two of these districts, the use of reluctant specialists for open-ended assignments resulted in a failure of the court to devote sufficient resources to the cases. Even if specialists are used, as volunteers or otherwise, other judges need to be available to support the specialists either by handling some asbestos trials or relieving the specialist of some other burdens.

Assignment of cases to specialists without relief from other areas of caseload responsibility may create disincentives for judges to accept and fulfill those assignments. Formal credit in the form of relief from other case or administrative assignments should be considered in courts that do not apportion asbestos cases to all judges. Several courts have developed systems for crediting asbestos case management by reducing assignment of new nonasbestos cases and, in some cases, later asbestos cases.

In districts with large numbers of cases and without a volunteer specialist, dispersion of cases to all judges has served to equalize the burden of the litigation. In two districts, assignments were made by reverse seniority: The more senior judges assigned themselves responsibility for the first trials.

Overall, special treatment of asbestos litigation has not expedited the flow of cases in comparison with other civil cases. Such special delays may be attributable to the relative complexity of the early cases. As asbestos litigation has become more routine, special treatments that delay trial dates beyond the norm are difficult to justify.

Development of Case Management Orders

Early warnings of the challenges of asbestos litigation came from problems with the massive paperwork generated by large numbers of defendants. Clerks, lawyers, and other judges identified these paperwork management problems. Groups of judges, clerks, and lawyers, sometimes with the aid of special masters, worked to create appropriate solutions on a court-by-court basis. No national model evolved, but cross-fertilization has occurred through the efforts of

lawyers with national practices and the formal and informal communication of judges with each other.

These early case management orders tended to focus on "paperwork management." Only after the numbers of cases became apparent did courts and lawyers direct more attention to what is called "disposition management." Paperwork management has resulted in the creation of standard interrogatories and routine exchange of documents, including expert medical reports. In almost all districts, lawyers now customarily follow these standard practices even when they are not technically mandated by a court order.

Disposition management serves to integrate the pretrial management system into a coherent and credible schedule for disposition of a case or cluster of cases through trial or settlement. Disposition management depends on judicial initiatives, primarily through scheduling firm trial dates. Setting priorities among cases in terms of their ripeness for trial is a part of disposition management. Innovative use of an "inactive asbestos docket" has pressed plaintiffs' counsel to set priorities among their cases and to delay cases of plaintiffs with minimal impairments.

The cornerstone of case management continues to be the scheduling of firm, credible trial dates. For courts to reduce current backlogs, they will have to increase the numbers of cases scheduled for trial beyond the number of new filings.

Settlement

Disposition management typically involves judicial examination of the impact of the court's case management practices on the settlement of cases, which is the overwhelming mode of disposition of asbestos litigation. In seven of the districts studied, judges have been active in the settlement process; in three, judges follow the more traditional practice of becoming involved only at the specific request of the parties and for a limited purpose, such as breaking an impasse.

Selective judicial intervention in settlement of different cases is the norm for federal courts. The purpose of such intervention is generally based on an *information gap* theory (i.e., the court provides information not otherwise available to the parties) or on a *communications gap* theory (i.e., that there are barriers or lack of incentives to discuss settlement, especially in the early stages of the litigation). Assessment of whether and when to intervene depends on judgments about efficiency of judicial time investments,

fairness to the parties, and improvements in the quality of results (which are difficult to measure).

Absent judicial efforts, asbestos cases exhibit a pattern of settling shortly before or after the scheduled trial dates. Earlier settlements involve a dramatic discount of plaintiff's claim. Intensive judicial efforts in one district to advance the timing of settlements have had mixed results that are difficult to evaluate. Perhaps because of the start-up costs of the system, the time from filing to disposition far exceeds that of other districts. In this same district, however, computer-based records of prior settlement afford counsel an opportunity to use systematically collected data to guide settlements. This approach may serve as a model for future settlement efforts in asbestos litigation and in other types of cases. In the development phase, however, questions regarding cost, efficiency, delays, and fairness to the parties preclude a final assessment.

A simple system for accelerating the timing of settlement revolves around the imposition of fines for announcement of late settlements. One judge has advanced settlements in his court to a week before trial by issuing an order detailing the fines to be imposed for settlements beyond that time.

Evaluation of the efficiency of settlement approaches in asbestos litigation is hindered by a "ceiling effect." Because so few cases proceed to trial, all techniques, including the traditional passive role, appear to work. Application of a pure efficiency rationale leads to the conclusion that judicial investment of time in settlement negotiations generally is not necessary or efficient at this stage of the litigation. Qualitative improvements in settlements may justify active judicial intervention, but such improvements have not been pinpointed for asbestos litigation.

Lawyers generally welcome intervention, even mediation, by a judge who offers an informed assessment of the value of a case or a considered forecast of legal rulings. When assessments are based on review of expert reports and briefs on the merits, lawyers benefit from the information and expertise. At the same time, lawyers report that superficial evaluations, not grounded in the record of the case at hand, impede settlement efforts.

Summary jury trial procedures have been used in two of the courts studied. In addition to questions of efficiency and necessity, similar to those addressed above, there are serious questions about the accuracy of the advisory verdict of a jury hearing summaries of evidence. Inaccurate estimates of case value may undermine other settlement efforts.

Experience with arbitration as a form of alternative dispute resolution for asbestos cases is very limited. Widespread use of arbitra-

tion pursuant to an agreement among the parties in the Eastern District of Texas shows promise as a structurally fair approach. As used in that district, arbitration functions primarily to regulate the flow of cases and operates with minimal monitoring by the court.

Settlement formulas are evident in certain subsets of asbestos litigation. Some defendants have negotiated districtwide settlements, and even one nationwide settlement, with individual law firms representing plaintiffs. Settlement of the class action in the Eastern District of Texas was based on formulas derived from prior settlements by two sets of plaintiffs' counsel. The Wellington facility provides for allocations among signatory defendants according to agreed formulas. Allocations among Wellington and non-Wellington defendants are worked out in each district.

Allocations of group settlements to individual plaintiffs raise issues of systemic fairness as well as ethical concerns for plaintiffs' counsel. Often with the aid of judges, lawyers have developed a number of techniques for providing fair allocations. For example, in the Eastern District of Texas and in a national settlement, the court has exercised its authority to review class settlements under Federal Rule of Civil Procedure 23(e). Other forms of judicial review of allocations have been reported. Counsel for both parties sometimes agree on the allocations in their settlements or even in postsettlement discussions. In other cases, plaintiffs' counsel may satisfy ethical obligations by full disclosure to all clients.

Settlement has become the dominant mode for disposition of asbestos litigation. Cases settle individually or in groups of hundreds when firm, credible trial dates are scheduled. Evaluation of the cases at that juncture does not seem to be a problem.

Alternative Trial Structures

The structure of trials determines the structure of settlements. Whether scheduled as individual trials, in consolidated groups, or as class actions, all but a small percentage of cases have settled at a time close to the trial date. Indeed, class actions may be more likely to settle because of the enormity of the stakes for all parties and their lawyers. When cases are grouped together for resolution of the common issues, it is generally understood that some fair procedure must be devised to apply the result to each individual case.

The districts studied used a range of trial structures that involve four different models: (1) individual pretrial and trial, (2) consolidated pretrial and individual trials, (3) consolidated pretrial and

trial, and (4) class action. The number of cases combined in the consolidations and the class range from six to about one thousand.

There are three available approaches to grouping cases for pretrial and trial purposes: consolidation, class certification, and multidistrict litigation (bankruptcy also provides an alternative national structure in which claims against asbestos manufacturers are collected for common action). None of these structures was designed to accommodate mass latent tort actions, and calls for reform of these procedures are plentiful.

Consolidation. Federal Rule of Civil Procedure 42 gives district judges broad powers to consolidate any common issues of law or fact for a joint trial or hearing. In exercising their discretion, courts are called on to balance possible prejudice to any party, possible jury confusion, risks of inconsistent adjudications, the burdens on parties and witnesses, and the relative efficiency of consolidated versus individual proceedings.

Appellate case law generally supports consolidation of asbestos cases for pretrial and trial purposes while encouraging measures to prevent prejudice to any party. Common factual and legal issues that have been subject to consolidation in asbestos litigation include all issues relating to the failure to warn of the dangers of asbestos, "state-of-the-art" issues (which address the issues of what manufacturers could have known about the dangers of asbestos and when they could have known it), statute of limitations issues, proximate cause issues involving specific products at a given worksite, punitive damages, and the "government contractor" defense. Consolidation is generally organized so that counsel for all parties, especially all plaintiffs, are the same. Combining consolidation with an interlocutory appeal can expedite appellate review of major issues.

Class actions. Two recent appellate decisions have approved "opt-out" class actions under Federal Rule of Civil Procedure 23(b)(3); one involved asbestos personal injury litigation and the other involved asbestos property damage litigation. In applying rule 23 criteria, the courts specifically found that common issues predominate over individual issues and that the class action device is superior to repetitive litigation of issues such as the state of the art. In the personal injury class action, the class was limited to plaintiffs within the district, thereby avoiding problems of applying the law of more than one state. In the property damage case, which is still in litigation, the class is national. In approving the class procedure, the court of appeals noted the availability of subclasses under rule 23(c)(4)(B) to accommodate variations in law or in case characteristics.

In both the class action context and the consolidation context, two federal judges who have earned the title of specialists in asbestos litigation evidenced a "stepladder effect" in dealing with the numbers of asbestos cases. Starting with consolidation of small groups of cases, these judges have steadily increased the number of cases grouped together until they are now dealing with hundreds of individual claims in a single group.

Multidistrict litigation (MDL) procedures have been used for some products liability cases, including Agent Orange, but the Judicial Panel on Multidistrict Litigation has twice rejected such treatment for asbestos personal injury litigation and once for school property damage litigation. In each case the panel remarked on the opposition of most of the parties to MDL proceedings. Despite these rejections, the MDL procedure has potential for improving management of cases involving latent injuries caused by toxic or otherwise defective products. A major deficiency is the lack of authority for a consolidated trial, but courts have created ways of retaining jurisdiction for trial of most cases. Authority to divide the cases according to differences (e.g., in state law) could provide manageable subclasses (e.g., one for each state). A transferee court also has power to establish different tracks for discovery. With such adaptations, MDL procedures could be useful for any future waves of litigation that resemble asbestos cases.

Collateral estoppel has not been successful in forestalling repetitive litigation of issues in asbestos litigation. Attempts to apply the doctrine, even on a limited issue-by-issue basis, have sparked further litigation about the contours of the doctrine's applicability. Use of test case procedures has been more productive.

Bifurcation of trials into liability and damages phases is committed to the discretion of the court by Federal Rule of Civil Procedure 42(b). As with application of rule 42(a), the court is called on to balance prejudicial effects, convenience of the parties and the court, and saving of resources. Because bifurcation decisions may affect the outcome of the case, they are to be made on a case-by-case basis. Courts attempt to avoid a sterile laboratory atmosphere or the separation of interrelated issues.

Variations, such as reverse bifurcation and reverse trifurcation, have been used in asbestos litigation. Such procedures are subject to the criticism that they focus on the weakest issue in the plaintiff's case and defer consideration of defendant's alleged misconduct until a later stage.

The ultimate question relating to trial structures is one of numbers. Issues of efficiency and fairness to the parties are important and, at the same time, counsel seem to perceive them to be relative

to the size of the caseload. For the most part, each side prefers individual trials; larger numbers represent compromises on both sides. Empirical evidence suggests that each side's point is well taken. In simulated trials, a case involving serious injuries raises the average verdict of other cases while lowering its own. Knowledge by the jury that hundreds of victims may be involved increases the amount of punitive damages.

Courts have experience with clusters of up to fifty cases, but jury allocation of individual damages is generally limited to eight to ten cases at a time. Some courts have made progress in managing their asbestos dockets without any consolidation of cases by simply scheduling a steady stream of trials assigned to the dockets of individual judges.

Special Burdens on Court Personnel

Asbestos cases have been generally been superimposed on crowded dockets. The time lag for appointment of new judges means that judicial resources to cope with any increased burden remained static during the period of greatest need. In courts that invested scarce judicial resources and confronted the burden at an early stage, these investments paid dividends in the form of simplification of the cases and routinization of settlements. In courts that gave priority to other types of cases and delegated asbestos cases to magistrates, the backlog grew and burdens continue.

None of the courts studied devoted the judicial resources to asbestos litigation that the case weights derived from the Federal Judicial Center's 1979 time study (which examined and compared the judicial workload associated with various types of cases) indicates for similar products liability cases. No district appears to have invested more than one judge-year into all aspects of asbestos litigation. Demands of the cases and burdens are generally concentrated in the early years of active case management. In most courts, the burdens have diminished as management systems begin to operate routinely or, in one case, a class action leads to a major settlement. In all courts, the judicial burden has been proportionate to the number of cases and generally far less than the burden predicted by the time study.

Clerks' Office Burdens

Many of the clerks' office burdens were detailed in an earlier report, T. Willging, Asbestos Case Management: Pretrial and Trial Procedures (Federal Judicial Center 1985). Some courts have pioneered development of special computer data bases to keep track of and manage the asbestos caseload. Their experience shows the value of, and need for, automated court records for civil cases.

Delegated Burdens

In one district, a magistrate was successful in formulating a case management plan for the entire court. In two districts, delegation of asbestos cases to a magistrate for pretrial management was not successful because the courts did not provide the backup and support in terms of scheduling trials. In another district, a magistrate established a computer program to monitor the progress of an arbitration system.

Specialist law clerks, sometimes assigned to the entire court, have served as a ready palliative to the substantive law and managerial demands of this new form of litigation. In addition to being a research resource, these clerks function in the front line of administration of case management orders by communicating with the parties, enforcing deadlines, and the like.

Filing Trends and Dispositions

Recorded terminations of asbestos cases lag far behind new filings. Termination statistics, however, do not account for many dispositions that are partial or that are entered only upon final payment of a settlement. The number of dispositions has increased steadily in each year from 1983 to 1986 (see table 11). The number of filings increased dramatically in 1985 and the first half of 1986 (see table 12). More than half of all asbestos cases in the federal courts were filed during 1984–1986. Disposition of that number of cases will require substantial increases in the numbers of cases scheduled for trial.

Trends for filings are difficult to predict. Some lawyers indicate that the major wave is cresting due to reduced use of asbestos in the 1970s. Long-range forecasts are that asbestos filings will taper off within the next decade. In some jurisdictions with large back-

logs, the asbestos burden has been shifted to state courts as counsel seek the forum most likely to respond to their clients' needs.

New Waves of Toxic Torts?

The unique characteristics of asbestos litigation render it unlikely that this phenomenon will repeat itself in the foreseeable future. Convergence of widespread use of a dangerous product, capable of causing serious injuries, through a long latency period during which some manufacturers suppressed information about the dangers is the starting point. Asbestos litigation is also unique in that general causation is clear while causation-in-fact is disputable, involving the defenses and cross-claims of numerous defendants in each case.

Charting the historical and current analogues, including MER/29, thalidomide, DES, Agent Orange/dioxin, Dalkon Shield, silicosis, groundwater contamination, Bendectin, formaldehyde, tobacco, radiation, and black lung litigation demonstrates the vast differences of asbestos litigation. While the coalescence of large numbers of cases with clear liability and varied injuries caused by a large number of defendants over an extensive time period seems improbable, it is not impossible. A taxonomy derived from the asbestos experience is designed to aid in forecasting future waves of similar litigation (see table 13). A collection of case management techniques linked to case characteristics (see table 14) provides a flexible mechanism for courts to adapt case management strategies to the characteristics of new forms of litigation.

I. INTRODUCTION

Asbestos litigation has presented and continues to present profound challenges to the judicial system. Courts in districts with large concentrations of asbestos personal injury cases have struggled, some more intensely and successfully than others, with myriad numbers of cases. Commentators have created a burgeoning literature that typically examines asbestos litigation as a more or less representative example of what has come to be known generally as mass toxic tort litigation.[1] Some commentators distinguish between mass accidents, such as the familiar incidents at Bhopal, India, and Chernobyl in the U.S.S.R.,[2] and latent toxic torts, such as those related to asbestos, groundwater pollution, or other exposures over a period of time. Explicitly or implicitly, some commentators and courts assume that asbestos cases foreshadow dramatic changes in the landscape of litigated disputes.[3] This report will ex-

1. "Mass toxic tort" or "mass exposure" litigation refers to court actions filed as a result of exposure of large numbers of plaintiffs to toxic substances, either in a single event or over an extended period of time. *See, e.g.,* D. Hensler, W. Felstiner, M. Selvin & P. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts (1985) [hereinafter Hensler]; Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions,* 24 Hous. L. Rev. 155 (1987); McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management,* 19 Forum 1 (1983); Parrish, *Dimensions of the Problem,* 8 State Ct. J. 5 (1984); Rabin, *Environmental Liability and the Tort System,* 24 Hous. L. Rev. 27 (1987); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System,* 97 Harv. L. Rev. 849 (1984); Rubin, *Mass Torts and Litigation Disasters,* 20 Ga. L. Rev. 429 (1986); Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters,* 11 Colum. J. Envtl. L. 1 (1986); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation,* 36 Vand. L. Rev. 573 (1983); Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem,* 54 Cin. L. Rev. 467 (1985); Comment, *Affirmative Judicial Case Management: A Viable Solution to the Toxic Product Litigation Crisis,* 38 Me. L. Rev. 339 (1986).

2. *See, e.g.,* Weinstein, *supra* note 1, at 6–15. Chief Judge Weinstein's typology distinguishes the single-event mass tort, such as the Bhopal gas leak or the Kansas City skywalk collapse, from multiple-event torts, such as those resulting from use of toxic products over time. The proximity of the injury to the alleged cause and the clarity of causation are two additional features that distinguish types of mass disasters.

3. *See, e.g.,* Feinberg, *supra* note 1, at 156 ("The experience of one former asbestos manufacturer [Manville Corp.], which saw its defense of a single claim explode into a litigation burden of 17,000 claims by 1982, serves as a premonition of what might yet be expected"); *see also* Hensler, *supra* note 1, at 110–24 (asbestos litigation assumed to be representative of mass latent injury torts; proposal for action commis-

amine the assumptions that asbestos litigation is representative of other toxic torts and that it forecasts vast changes in the landscape of disputes that reach the courts.

My overall approach in this report is to include both historical and predictive dimensions. On the historical side, I dissect and analyze the origin and development of asbestos litigation up to its current state, with an eye toward unmasking its essential features and documenting the efforts that courts and lawyers have used, successfully or otherwise, in their attempts to control the litigation. In the historical phase, I address questions such as these:

- What are the major characteristics of asbestos litigation that might render it unique?
- How complex are asbestos cases, and what types of burdens have they imposed on the courts?
- What special (managerial) treatments have courts formulated to respond to the unique features of asbestos litigation, and how effective have these treatments been?

On the predictive side, I use a table to guide projections about whether similar waves of litigation are likely to flood the courts in the future. This table is designed to aid courts in answering questions such as these: Are special treatments called for? What is the nexus linking proposed treatments to case characteristics? Are the unique characteristics of asbestos litigation likely to be repeated in other types of cases? What are the key variables? Two intertwined questions drive the analysis: Does asbestos litigation and other forms of toxic tort litigation warrant special treatment by the courts? If so, what treatments have been effective in responding to the unique characteristics of asbestos litigation and, therefore, may be useful in similar litigation?

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sion to study issues that mass latent injury torts, exemplified by asbestos, pose for the civil justice system).

Other commentators have identified characteristics that distinguish asbestos litigation from other mass toxic torts. *See, e.g.*, Rabin, *supra* note 1 (discussing identification, source, and boundary problems for injuries in toxic tort cases involving individualized harms, multiple party cases, or mass tort occurrences); *see also* Weinstein, *supra* note 1, at 6-15 (national disaster court recommended to cope with toxic torts).

Methodology

Building on information gathered at the Asbestos Case Management Conference held in Baltimore, Maryland, in June 1984,[4] I conducted interviews in ten federal judicial districts with moderate to heavy asbestos caseloads. In each district, I talked with participants in asbestos litigation, including district judges, magistrates, law clerks, clerks of court, deputy clerks, and attorneys for plaintiffs and defendants. In all, I held interviews with approximately sixty-one lawyers, twenty-seven representing plaintiffs (including at least five with national practices) and thirty-four representing defendants (including ten regional counsel for the Wellington Asbestos Claims Facility).[5] I also conducted interviews with twenty-one federal judges, three federal magistrates, three law clerks, nine clerks of court or chief deputy clerks, and eight deputy clerks. All of the interviews were conducted during the period from March 31, 1986, to October 16, 1986.

I selected districts for inclusion in the study by gathering data from the Administrative Office of the U.S. Courts regarding caseloads of pending and terminated asbestos cases through June 30, 1984. The aim was to include courts that had heavy or moderate caseloads (more than one hundred filings) and that showed a wide range of disposition rates. The courts selected were the districts of Massachusetts, New Jersey, Eastern Pennsylvania, Western Pennsylvania, Maryland, South Carolina, Eastern Louisiana, Eastern Texas, Northern Ohio, and Eastern Tennessee. Their caseloads and disposition to filing ratios are set forth in the Appendix.[6]

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4. This conference of judges, magistrates, clerks of court, deputy clerks, and a special master was sponsored by the Federal Judicial Center in consultation with the Clerks' Division of the Administrative Office of the U.S. Courts. A report of the major conclusions of the conference was published as T. Willging, Asbestos Case Management: Pretrial and Trial Procedures (Federal Judicial Center 1985).

5. The Asbestos Claims Facility, also known as the Wellington Facility, is an institution created by contractual agreement of more than thirty defendants in asbestos cases. Mediated by Professor Harry Wellington of the Yale Law School at the behest of the Center for Public Resources, the claims facility is designed to provide a common defense for asbestos claims and to provide a means of processing claims without a need to resort to litigation. *See generally* Wellington, *Asbestos: The Private Management of a Public Problem*, 33 Clev. St. L. Rev. 375 (1984–85).

6. These courts exhibited a wide range of caseload distributions and percentage of dispositions. The percentages ranged from 2.7 percent to 80.9 percent. The median number of filings per court was 487; the median percentage of dispositions was 27.6 percent for all ten courts.

Several courts with caseloads in the moderate to heavy range, such as the Southern District of Mississippi, the Southern District of Texas, and the Eastern District of Virginia, were not included in the study for a variety of logistical reasons. The ten districts selected were all among the fifteen districts with the most filings.

II. UNIQUE CHARACTERISTICS OF ASBESTOS LITIGATION

The literature on asbestos litigation and the interviews for this report reveal a number of salient characteristics that, when examined together, distinguish asbestos litigation from other toxic tort cases.

Latency Period

There are three distinct disease processes associated with exposure to asbestos fibers:[7] asbestosis,[8] mesothelioma,[9] and cancers (including lung, gastrointestinal, and other cancers).[10] Each has a

7. Plaintiffs' attorneys argue that there is a fourth distinct process, involving the thickening or calcification of the pleural tissue, resulting in pleural plaques. The relationship of pleural plaques to the development of asbestosis and lung cancer is disputed. *See, e.g.,* Kiviluoto, Meurman & Hakama, *Pleural Plaques and Neoplasia in Finland,* in Health Hazards of Asbestos Exposure, 330 Annals N.Y. Acad. Sci. 31 (1979) [hereinafter Health Hazards]; *see also* Selikoff, Lilis & Nicholson, *Asbestos Disease in United States Shipyards, id.* at 295, 304 (limited X ray changes often precede lung cancer, mesothelioma, and extensive asbestosis).

8. *Asbestosis* refers to a pulmonary insufficiency caused by a destruction of air sacs in healthy lung tissue. *See* Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia,* 188 J. A.M.A. 22, 25 (1964) [hereinafter Selikoff]; Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation,* 36 Vand. L. Rev. 573, 579 n.10 (1983). Exposure to asbestos dust is the sole known cause of asbestosis, as the name implies. B. Castleman, Asbestos: Medical and Legal Aspects 302 (2d ed. 1986).

9. Mesothelioma is a type of cancer, once rare, that affects the mesothelial cells that make up the pleural, pericardial, and peritoneal membranes enclosing the lungs, heart, and abdomen, respectively. B. Castleman, *supra* note 8, at 98–99. Asbestos exposure is a primary cause of mesothelioma, and its occurrence has been documented among individuals with only casual exposure to asbestos dust, such as spouses who cleaned the clothes of asbestos workers or visited them at work. *Id.* at 98–103, 447–49, 457–60. *See also* Special Project, *supra* note 8, at 579 n.11.

10. Pulmonary and bronchogenic cancer are most commonly associated with asbestos exposure. Dr. Selikoff and his colleagues at Mount Sinai Hospital concluded that "far more deaths from cancer of the lung and pleura occurred among the asbestos workers than would have occurred had their death rates from these diseases been the same as for all US white males." Selikoff, *supra* note 8, at 144. Lung cancers associated with asbestos are often found in the lower lobes of the lung. Special Project, *supra* note 8, at 579 n.12. Exposure to asbestos and cigarette smoking have a synergistic effect, resulting in drastically higher rates of cancer than occur when only one of the factors is present. Hammond, Selikoff & Seidman, *Asbestos Expo-*

lengthy latency period, that is, a period between exposure to the harmful product and manifestation of the related disease. During this period the disease process is dormant and undetectable by routine examination. Authorities estimate a latency period for asbestosis of ten to forty years after exposure to significant quantities of asbestos fibers.[11] Asbestosis and cancer may develop simultaneously. For workers with asbestosis, the average time from exposure to asbestos to development of lung cancer is twenty-five years and for peritoneal cancer, thirty years. Many workers die from asbestosis before cancers develop.[12] Generally, the range of time for development of lung cancers is fifteen to thirty-five years.[13] Latency periods in excess of twenty years are reported for cases of mesothelioma among household members of asbestos workers, some of whom had extremely limited and casual contact with asbestos.[14]

Latency periods of ten to forty years create distinct problems of fact-finding in the legal system. The plaintiff generally has the burden of proving causation-in-fact—that a product of the defendant was a substantial cause of plaintiff's injury.[15] Plaintiffs need to uncover records of product use or produce testimony of co-workers to show exposure to a particular defendant's product.[16] Any expo-

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sure, Cigarette Smoking and Death Rates, in Health Hazards, *supra* note 7, at 473; Frank, *Public Health Significance of Smoking-Asbestos Interactions, id.* at 31.

Selikoff also found that asbestos insulation workers suffered surprisingly higher death rates from cancers of the stomach, rectum, and colon. Selikoff, *supra* note 8, at 145. Epidemiological studies have shown that asbestos insulation workers also have excess risks of cancer of the kidney, larynx, pharynx, and mouth. B. Castleman, *supra* note 8, at 99.

11. Special Project, *supra* note 8, at 579 n.10 and authorities cited therein. The latency period varies with the level (amount) of exposure and the age of the worker. For example, exposure of a young worker for a brief period of time is likely to result, on the average, in a relatively long latency period. On the other hand, heavy exposure in an older worker ("of cancer age") is likely to be associated with a brief latency period. Seidman, Selikoff & Hammond, *Short-term Asbestos Work Exposure and Long-term Observation,* in Health Hazards, *supra* note 7, at 31.

12. B. Castleman, *supra* note 8, at 43, 97.

13. Special Project, *supra* note 8, at 579 n.12.

14. B. Castleman, *supra* note 8, at 417.

15. For the most part, courts have rejected market-share theories of liability for damages caused by exposure to asbestos. *See* Special Project, *supra* note 8, at 607-26. *But cf.* Goldman v. Johns-Manville Sales Corp., Nos. L85-016, CU82-0794 (Ohio Ct. App. Lucas Cty., June 30, 1986) (Westlaw, Ohio Cases Library) (market-share theory applicable to mesothelioma victim whose employer's building and records were destroyed by fire years before the claim was filed); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981) (market-share liability preferable to joint and several liability because of fairness to small producers).

16. *See, e.g.,* Tippens v. Celotex Corp., 805 F.2d 949 (11th Cir. 1986) (reversing district court grant of summary judgment because product identification witness failed to remember specific times, places, and situations in which defendant's product was used).

sure to an asbestos product during the latency period may be relevant.

Lengthy latency periods produce another dramatic effect that distinguishes asbestos litigation from most products liability cases and some toxic tort cases. Because the victims have not discovered their injuries, latency periods delay the lawsuits that, in turn, trigger the deterrent effects that might otherwise produce changes in business practices.[17] The result is that a ten to forty year span of workers may suffer the same injuries before economic deterrents in the form of verdicts or settlements become evident. Long latency periods also inhibit the development of epidemiological evidence that may be a necessary element of plaintiff's proof of medical causation.[18]

Pervasive, Insidious Use

Asbestos fibers perform their functions of insulation and fire retardation almost miraculously, being almost indestructible. Asbestos occurs naturally and sources have been plentiful. As a result, its properties have enticed businesses to produce thousands of products serving household, commercial, and, ironically, public safety (fire prevention) purposes.[19] In the years between 1934 and 1964, the world's use of raw asbestos per year increased from 500,000 tons to 2,500,000 tons.[20]

This period of expanding usage coincided with increasing awareness by leaders in the asbestos industry of the harmful effects of inhaling asbestos fibers. Industrial leaders, however, suppressed information about the dangers of asbestos. A few of the more striking examples of industry knowledge, actual and potential, of the health dangers associated with exposure to asbestos fibers illustrate some of the causes of the asbestos litigation explosion. Extensive pretrial

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17. *See* G. Eads & P. Reuter, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation (Rand Corp. 1983); *see also* Hensler, *supra* note 1, at 110–12 (tort system deters careless manufacture of dangerous products).

18. B. Castleman, *supra* note 8, at 97, referring to a California study of California asbestos workers that would require "at least five years" of additional time for follow-up, Dunn, Linden & Breslow, *Lung Cancer Mortality Experience of Men in Certain Occupations in California,* 50 Am. J. Pub. Health 1475 (1960); *see also* P. Schuck, Agent Orange on Trial 234–44 (1986) (Agent Orange case was brought before the latency period could run its full course).

19. Special Project, *supra* note 8, at 578 n.7. Some of the uses include a wide range of building and insulation materials, fire retardant curtains and drapes, protective clothing, gaskets, brake linings and other friction products, paints and sealants, and floor tiles. *Id.*

20. Selikoff, *supra* note 8, at 142.

discovery during the 1970s, narrated dramatically in a book by Paul Brodeur, uncovered documents showing that major manufacturers of asbestos products knew of the dangers of asbestos exposure at least as early as the 1930s.[21] Now known as the "Sumner-Simpson" papers, these writings detailed the knowledge of the executives and attorneys of Johns-Manville (now Manville Corp.) and Raybestos-Manhattan (now Raymark) about the dangers of asbestos and their efforts to suppress its publication in the industry's trade journal.[22] Litigation against Johns-Manville by eleven asbestos workers raising claims of damage to health can be seen as formal notice of injuries alleged by plaintiffs; those cases were settled, according to the minutes of the board of directors' meeting of April 24, 1933, under terms that prohibited plaintiffs' attorney from bringing similar claims against Johns-Manville.[23]

Knowledge of the dangers of asbestos fibers dates back at least to the first century.[24] In this century, public knowledge of the dangers of asbestos appears to have developed earlier and more fully in Europe than in the United States. A report written by a factory inspector in Great Britain in 1899 referred to the "easily demonstrated danger to the health of [asbestos] workers" and to "ascertained cases of injury to bronchial tubes and lungs medically attributed to the employment of the sufferers."[25] Transfer of knowledge across the Atlantic was likely to have been inhibited by attitudes like that expressed by one American asbestos industry trade representative: "this foreign disease . . . should be left in Europe where it belongs and not brought to our local communities and create hysteria and fear amongst the families of our contented workmen who are now enjoying good health and living to a ripe old age."[26] As early at 1928, however, life insurance representatives

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21. P. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial 97-131 (1985). *See also* Hensler, *supra* note 1, at 18-20 (evidence of suppression prompted punitive damage awards).

22. Brodeur, *supra* note 21, at 116-17. For the text of the correspondence with the editor of the trade journal *Asbestos*, see B. Castleman, *supra* note 8, at 651-54. For Manville's interpretation, see *Hearings before the Subcomm. on Compensation, Health, and Safety of the House Comm. on Education and Labor*, 95th Cong., 2d Sess., conducted Nov. 14, 1978, at 637-46 (1979) (testimony of Francis H. May, Executive Vice President, Johns-Manville Corp.), *reprinted in* B. Castleman, *supra* note 8, at 655-76.

23. Brodeur, *supra* note 21, at 113-14.

24. B. Castleman, *supra* note 8, at 1. The Roman historian Pliny the Elder (A.D. 23-79) is reported to have referred to "diseases of slaves," one of which resulted from weaving asbestos fibers. Transparent bladders were used as respirators to prevent inhalation of asbestos dust. *Id.*

25. *Id.* at 2, citing Annual Report of the Chief Inspector of Factories and Workshops for the Year 1898, 171-72 (1899).

26. Brodeur, *supra* note 21, at 117.

recommended higher rates and more restrictive screening for workers exposed to large quantities of asbestos dust, basing these recommendations on three studies of pulmonary asbestosis that had appeared in the *British Medical Journal.* In the words of a physician who conducted major studies for the asbestos and insurance industries, "[s]ilicosis and asbestosis burst upon the amazed consciousness of American industry during the period 1929–1930."[27]

Working together, substantial increases in the use of asbestos products, the long latency period, and the evidence of prior knowledge of asbestos hazards by industry leaders supplied a volatile fuel for the asbestos litigation explosion that followed. Inflamed by evidence of the suppression of information, juries awarded punitive damages in a significant number of cases.[28] Financial pressures prompted filings of bankruptcy petitions, including the Manville Corporation's petition for a reorganization pursuant to Chapter 11 of the bankruptcy code.[29]

Clear Liability (General Causation)

From the time of the *Borel* case to the present, there has been little or no dispute about the basic propositions that asbestos is an unreasonably dangerous product and that it can cause injuries

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27. *Id.* at 115.

28. As of 1982, it was reported that 21 plaintiffs had been awarded a total of $39,468,002 in punitive damages. Special Project, *supra* note 8, at 707 n.853. Later, awards became larger and more numerous, but courts have rejected constitutional and policy-based challenges to such awards. *See, e.g.,* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 398–409 (5th Cir.) (en banc), *cert. denied,* 106 S. Ct. 3339 (1986).

Empirical evidence suggests that juries are selective in awarding punitive damages and that high awards to asbestos plaintiffs are an aberration from the norm in products liability and personal injury litigation. Studies have shown that punitive damages are rarely awarded and that awards in products liability cases are especially rare. *See generally* Daniels, *Punitive Damages: The Real Story,* 72 A.B.A. J. 60 (1986). A recent study by the Rand Corporation's Institute for Civil Justice for the American Bar Association's Litigation Section reported that the average punitive damage award in Cook County, Illinois, and San Francisco, California, was roughly $120,000 from 1980 to 1984. Eighty-five percent of the awards were in intentional tort or business contract cases. Personal injury cases accounted for disproportionately few punitive damage awards. *Punitive Damages: Litigation Section Study Finds No Crisis,* 1 Inside Litigation 12 (1986).

29. *See, e.g., In re* Johns-Manville Corp., Nos. 82 B 11,656–82 B 11,676 (Bankr. S.D.N.Y. filed Aug. 26, 1982). The bankruptcy judge rejected objections to confirmation of the reorganization plan. *Id.* 68 Bankr. 618 (Bankr. S.D.N.Y. Dec. 18, 1986). *See also* Note, *Strategic Bankruptcies: Class Actions, Classification and the* Dalkon Shield Cases, 7 Cardozo L. Rev. 817 (1986).

As of early 1987, six asbestos defendants had filed for Chapter 11 protections and reorganization under the bankruptcy code. *See Standard Insulation Files Chapter 11, Intends to Liquidate,* Mealey's Litig. Reps.: Asbestos, Aug. 22, 1986, at 4,863.

such as asbestosis, mesothelioma, and lung and gastrointestinal cancers.[30] Some of the injuries claimed in asbestos litigation are directly traceable to asbestos fibers; asbestosis is especially, as its name implies. On the other hand, some of the lung and gastrointestinal cancers can be caused by other substances or by a combination of substances, resulting in potential disputes. In contrast to many other toxic tort cases, for example, those involving substances such as Bendectin and Agent Orange, the issue of medical causation (that is, the capacity of the substance to cause the harms at issue) is not in doubt.[31] This is not to say that issues of causation-in-fact (that is, whether a particular defendant's product was a contributing cause of the specific injuries alleged by a particular plaintiff) are never in doubt. Issues of whether or not the plaintiff was exposed to a product of a given defendant, whether the defendant could reasonably know the dangers of asbestos and foresee its effects, and whether warnings were adequate continue to be litigated in those rare cases that proceed to trial.

In a sense, the uniqueness of asbestos fibers contributes to the clarity of general causation. Biopsy and autopsy tests can detect asbestos fibers as the final residue of chemical tests that burn all other substances. Proof of causation-in-fact may be aided by this indestructibility. In some cases, test results identify the type of fiber that was ingested. These fibers can then be compared with the types of fibers in a specific product. This capacity to trace and detect asbestos fibers distinguishes asbestos from other toxic substances that are either very widely used in the environment, such as formaldehyde, or are not so easily tracked in the human body.[32]

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30. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1087-92 (5th Cir. 1973). *See generally* Special Project, *supra* note 8, at 593-605. Questions of whether the dangers of asbestos were foreseeable to the manufacturer of a specific product have been treated as issues of fact for juries to decide. *Id.* at 605.

31. *See generally In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, Nos. 1140 *et al.* (2d Cir. Apr. 21, 1987) (settlement approval), 611 F. Supp. 1223 (E.D.N.Y. 1985) (summary judgment against opt-out plaintiffs based on lack of causation), *rev'd on other grounds*, Nos. 1085 *et al.* (2d Cir. Apr. 21, 1987); *In re* Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig., MDL No. 486, Order Denying Motions for Judgment NOV and for a New Trial (S.D. Ohio Sept. 17, 1985) (upholding jury finding of lack of general causation), Ct. App. No. 85-3858, *argued* (6th Cir. Oct. 9, 1986); Oxendine v. Merrell Dow Pharmaceuticals, 506 A.2d 1100 (D.C. 1986) (reversing judgment NOV and reinstating jury verdict for plaintiff in case involving Bendectin).

32. There is scientific evidence that dioxin stores in the fatty tissue of the body. *See, e.g.*, Eckholm, *Highly Sensitive Skin Test Can Detect Dioxin Years After Exposure*, N.Y. Times, Oct. 14, 1986, at C1; Gardner, *Answers at Last*, The Nation, Apr. 11, 1987, at 460. Some immunologists claim that they can detect damage to the immune system caused by toxic substances. *See, e.g.*, Sterling v. Velsicol, No. 78-1100, slip op., Findings of Fact Nos. 628-642 (W.D. Tenn. filed Aug. 1, 1986). If that evidence proves to be reliable and is accepted by courts generally, litigation relating

Asbestos litigation thus seems to be an exception to the stumbling over problems of identification of harm that is a feature of toxic tort litigation.[33]

Unclear Causation-in-Fact

In contrast to the clarity of general causation, proof that a plaintiff's exposure to a specific product was a substantial cause of a specific alleged disease is troublesome for plaintiffs. Diseases such as lung cancer and gastrointestinal cancer have multiple causes. Provable exposure to a specific product at a particular worksite may appear to be insubstantial in relation to exposure to other products or to cigarette smoking. Disputes as to the diagnosis of the disease, the degree of impairment, and the prognosis for future diseases, especially cancer, can, and frequently do, arise. One doctor's diagnosis of pleural thickening may be another doctor's diagnosis of obesity.[34]

These disputes over specific causation and the nature and extent of damages are enough to generate triable issues of fact. Once a jury issue is involved, plaintiffs understandably want to present the entire context of the asbestos story, especially the evidence of suppression of knowledge of product dangers. Plaintiffs' evidence, in turn, provokes defendants into presenting a state-of-the-art defense (i.e., a claim that defendants could not have known of the dangers of asbestos to plaintiffs at the time and in the circumstances of plaintiffs' exposure) in an attempt to neutralize plaintiffs' indictment of the asbestos industry. When the parties follow

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to toxic chemicals will likely be transformed, and a major impact on the legal system can be expected. At the same time, easier identification of the toxic substances simplifies the litigation.

33. *See, e.g.*, Rabin, *Environmental Liability and the Tort System*, 24 Hous. L. Rev. 27, 29 (1987). Damage caused by high doses of radiation also exhibits clear general causation. *See, e.g.*, Allen v. United States, 588 F. Supp. 247, 315–20 (D. Utah 1984).

34. *See, e.g.*, Planteydt, *Observer Variation and Reliability of the Histopathological Diagnosis of Mesothelioma*, in Health Hazards, *supra* note 7, at 761 (in sixty-seven cases there was complete agreement in thirteen, nearly complete agreement in thirty-one, reasonable agreement in six, and major disagreement in eighteen during initial review; reevaluation reduced major disagreements to four cases).

In Jenkins v. Raymark Indus., Inc., No. M-84-193-CA (E.D. Tex. 1986), the special master's data collection showed major disagreements about diagnosis, especially of the noncancer cases. For example, of 555 cases in which plaintiffs claimed proof of a diagnosis of asbestosis, defendants concurred in only 45 cases and reported evidence of lack of asbestosis in 329 of the cases. In the remaining cases, the defendants' diagnosis was either unavailable or uncertain. (Copy of slides on file at the Federal Judicial Center.)

this scenario, any savings of trial time based on the clarity of general causation disappear.

Numbers of Defendants and Cross-claims

Another unique feature of asbestos litigation is that a typical personal injury case involves an average of twenty defendants, who, in most jurisdictions, file cross-claims against each other.[35] Multiple defendants and claims complicate management of the massive amounts of paperwork and motions generated by these parties. In addition, satellite litigation among defendants and their insurers impedes settlement or disposition of the asbestos injury claims.[36]

Numbers and Concentration of Cases

In practical terms, substantial numbers of potential cases accumulated during the period of intensive use of asbestos. These cases continued to accrue until the rights to compensation were clearly established and corrective measures taken during the 1970s. After courts began to recognize the right of workers to recover damages from asbestos manufacturers, during the mid-1970s,[37] these cases flooded the courts.[38] Exact counts of pending asbestos cases are impossible to find. Recent estimates of the number of cases range from about 33,000[39] to 50,000.[40] New cases continue to be filed, and Manville estimates that it will have to pay between 83,000 and 100,000 personal injury claims as a part of its reorganization.[41] Ap-

35. Hensler, *supra* note 1, at 15.

36. T. Willging, *supra* note 4, at 9.

37. *See, e.g.,* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076 (5th Cir. 1973). For a detailed description of the evolution of asbestos litigation during this stage, see P. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial 39–93 (1985). For a summary overview of that process, see Hensler, *supra* note 1, at 18–20. For a theoretical analysis of the development of a rough equilibrium of case values during this process, see McGovern, *Toward a Functional Approach for Managing Complex Litigation,* 53 U. Chi. L. Rev. 440, 481–83 (1986).

38. *See* Hensler, *supra* note 1, at 33–34.

39. *Id.* at 24.

40. *In re* Johns-Manville Corp, No. 82 B 11,656-76, slip op. at 28–29, 68 Bankr. 618 (S.D.N.Y. Dec. 18, 1986) (50,000 is "floor" based on more than 53,000 claimants voting in reorganization plan).

41. *Cram Down Reorganization Plan Approved for Manville,* 1 Mealey's Litig. Reps.: Asbestos, Dec. 26, 1986, at 5,508; 5,511 (testimony of G. Earl Parker, Manville executive vice president, estimating 60,000 claims to be paid in next ten years).

proximately 21,000 cases have been filed in the federal courts as of July 1986. See table 1.

It is important to note that asbestos cases are ultimately based on a claim of personal injuries to an individual worker or bystander. As such, they demand individual attention at the point of allocation of damages and, to a lesser extent, in the proof of causation-in-fact. While economies of scale can be attained through consolidation and other procedural devices,[42] allocations to individual cases must be calculated by agreement of the parties or by a jury or judge.

Asbestos cases filed during the 1970s tended to be concentrated in certain cities and districts because a large cohort of workers with injuries were shipyard workers in cities with major port facilities, such as Boston, Philadelphia, San Francisco-Oakland, and Los Angeles, or in areas with major asbestos manufacturing facilities, such as Tyler, Texas, and Manville, New Jersey. As the litigation developed, lawyers representing plaintiffs began to develop a separate subspecialty of asbestos litigation and to file hundreds of cases.[43] One expects, however, that as information about asbestos litigation becomes more widely dispersed, cases in other locales will follow. Casual exposure to asbestos can cause asbestos-related diseases, and such exposure ranges from that of spouses and children of asbestos industry workers to those with peripheral connections with the industry, including insulation workers and brake-lining repair workers.[44] Table 1 shows the distribution of all asbestos cases filed in federal courts. All districts with more than ninety asbestos filings, based on data from the Administrative Office of the U.S. Courts, are listed.[45]

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42. See the discussion *infra* chapter 7.

43. *See also* Hensler, *supra* note 1, at 16–18.

44. B. Castleman, *supra* note 8, at 405–24.

45. For all of the tables in this report, the data cover cases that were filed or terminated during the period from July 1, 1977, through June 30, 1986. Asbestos cases filed and terminated prior to July 1, 1977, are not included. Asbestos cases filed prior to July 1, 1977, and terminated *after* July 1, 1977, are included.

The Administrative Office began to collect data specifically identifying asbestos cases on October 1, 1984. To identify asbestos cases filed prior to October 1, 1984, all personal injury products liability case captions were examined. If a major asbestos manufacturer was named as the defendant, that case was included in the data base.

TABLE 1
Concentration of Asbestos Filings in Federal Courts from July 1, 1977, to June 30, 1986

Circuit	Court	Number of Filings	Percentage of Filings
First Cir.	Me.	401	2
	Mass.	3,090	15
	Other	132	—
Subtotal		3,623	17
Second Cir.	Conn.	1,023	5
	Other	110	—
Subtotal		1,133	5
Third Cir.	N.J.	325	2
	E. Pa.	1,134	5
	W. Pa.	197	1
	Other	39	—
Subtotal		1,695	8
Fourth Cir.	Md.	625	3
	S.C.	590	3
	E. Va.	391	2
	S. W. Va.	189	1
	Other	180	—
Subtotal		1,975	9
Fifth Cir.	W. La.	166	1
	E. La.	362	2
	N. Miss.	146	1
	S. Miss.	2,720	13
	N. Tex.	518	2
	E. Tex.	2,480	12
	S. Tex.	659	3
	W. Tex.	99	0.5
	Other	81	—
Subtotal		7,231	34.5
Sixth Cir.	E. Mich.	94	0.5
	N. Ohio	1,063	5
	S. Ohio	198	1
	E. Tenn.	210	1
	Other	124	1
Subtotal		1,689	8.5
Seventh Cir.	N. Ill.	254	1
	Other	185	1
Subtotal		439	2
Eighth Cir.			
Subtotal		325	2
Ninth Cir.	N. Cal.	334	2
	C. Cal.	168	1
	Hawaii	750	3
	W. Wash.	163	1
	Other	272	1
Subtotal		1,687	8

(continued)

TABLE 1 (Continued)

Circuit	Court	Number of Filings	Percentage of Filings
Tenth Cir.			
Subtotal		149	1
Eleventh Cir.	M. Fla.	306	1
	S. Fla.	105	1
	S. Ga.	245	1
	N. Ga.	155	1
	Other	47	—
Subtotal		858	4
D.C. Cir.			
Subtotal		33	0
Total		20,837	100

The districts of Massachusetts, Eastern Texas, and Southern Mississippi account for 40 percent of the cases. No other court has more than 5 percent of the federal caseload. Overall, thirty-one of the ninety-three federal districts have more than ninety asbestos filings and account for 92 percent of all filings.

At the circuit level, the concentration is even more dramatic. District courts in the First and Fifth circuits account for 52 percent of all filings. District courts in the Seventh, Eighth, Tenth, and D.C. circuits have received only 5 percent.

A primary effect of the concentration of asbestos cases in a few courts is that the cases will disrupt the ordinary operations of the court and call for a special plan to cope with the block of cases. Special assignment systems and other modes of coping with the specialized and duplicative nature of the cases seem logical. Such plans may, however, have harmful side effects that will be examined more thoroughly in a later chapter.[46]

In summary, the unique features of asbestos litigation are these:

- long-term and widespread usage of a useful but dangerous, even deadly, substance without clear warnings to the users of its known or knowable hazards;
- clear general causation and reasonably clear evidence of knowledge of potential perils;
- large numbers of individual cases, with unclear causation-in-fact, concentrated in a limited number of jurisdictions and involving an average of twenty defendants and a limited number of specialist law firms.

46. See the discussion *infra* at notes 99 to 106.

Respondents uniformly were unable to identify a known substance that had caused, or was likely to cause in the foreseeable future, a litigation explosion like that generated by asbestos cases. Their discussion of potential analogies to asbestos will be examined in a later chapter.[47]

47. See the discussion *infra* at notes 325 to 334.

III. COMPLEXITY AND SIMPLIFICATION

Some of the major, unique characteristics of asbestos litigation were identified in the previous chapter. This chapter presents a portrayal of asbestos litigation during 1986, addressing questions such as the following:

- How complex are asbestos cases in comparison with other products liability, toxic tort, and personal injury cases in the federal courts?
- If these cases are complex, what are the complicating factors?
- If these cases are not complex, were they once complex? How were they simplified?

In many ways, this entire report is about the complexity and simplification of asbestos litigation. In this chapter, the main elements of the simplification process will be highlighted.

Overview

Interviewees were unanimous on two points: Asbestos cases were once complex and they have become less complex with experience. In only one jurisdiction did respondents indicate that asbestos cases were presently more complex than other products liability cases filed in federal court.[48] In three jurisdictions, the overall impression was that asbestos cases are equal in complexity to other federal products liability cases; in five jurisdictions,[49] asbestos cases were seen as less complex than other federal products liability cases.[50]

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48. That district, Massachusetts, had the highest number of filings and the lowest ratio of dispositions to filings. These factors suggest that the district may have unique complicating factors and has only recently evidenced serious efforts toward simplification. *See also* Hensler, *supra* note 1, at 99–100.

49. In one jurisdiction I did not elicit responses on this precise issue.

50. I did not intend to carry out a quantitative study of this issue due to constraints of time and inherent limitations based on the subject matter and the difficulty of quantifying exactly the comparisons of different cases. I did, however, for-

In general, the process of simplification of asbestos cases has evolved primarily through pretrial rulings, trials, appeals, and settlements of cases. The creation of the Wellington Asbestos Claims Facility[51] has simplified some aspects of settlement in most jurisdictions, but in some areas, the rearrangements involved in implementing the Wellington agreement relating to common defense have disrupted settled patterns.

A judge who had presided over four asbestos trials and several clusters of consolidated cases vividly portrayed the process of simplification by displaying his file folders for the cases: The first case included several full accordion files and the last, a single manila folder. The first case took a week and a half of trial time before settling. The second case was a consolidation of cases involving two workers and their spouses. Trial took three weeks. The third was an individual trial, lasting nine days. The fourth trial consolidated the cases of six plaintiffs and their spouses and took three weeks of trial time. During the two years between that trial and the interview for this report, all cases had settled, most without significant judicial action.

Another judge capsulized the tenor of the vast majority of responses on the question of complexity in this way: "Asbestos cases are not complex, but compound." Typical remarks from lawyers were that "cases are very simple" and that "the law is settled." A typical judicial reaction was that asbestos cases become "simple to try" after the first trial. This is not to say that no complications remained, especially in the district with the highest volume of cases, Massachusetts. In another district in which there had been no trials, the lawyers stated that the medical issues were complex.

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mulate a questionnaire that was used primarily to focus discussion on these issues. A relatively small percentage of the lawyer-interviewees (fifteen of sixty-one, or 25 percent) completed the questionnaires, and I present these returns in this note in impressionistic rather than quantitative form, because I am not convinced that they are representative. They do not, however, differ substantially from the responses conveyed in the interviews.

In the questionnaire, I called the attention of respondents to a recently closed asbestos case and asked for a comparison with a typical case in the office or chambers and for a comparison with another closed case of their choice among either an early asbestos case, another toxic tort case, another federal products liability case, or another federal personal injury case. Respondents indicated that a recently closed asbestos case was slightly more difficult, in terms of disposition, than a typical case in the law firm. They also indicated that the closed asbestos case was more difficult than another toxic tort case ($n = 4$), about equal to a typical toxic tort case ($n = 1$) and a federal personal injury claim ($n = 5$), and slightly less difficult than an earlier asbestos case ($n = 4$). Only one respondent chose to compare the recently closed asbestos case with another federal products liability case; he reported that the latter was much more difficult than the asbestos case.

51. See *supra* note 5 for a description of the Wellington plan.

In other districts, the remaining complicating factors related to settlements.

Findings regarding complicating and simplifying factors in asbestos litigation are summarized in table 2 and discussed in the sections following that table. Additional discussion of the simplification of asbestos litigation will be found in later chapters, especially those dealing with standard pretrial procedures, settlement, and alternative trial structures.

Organization of Counsel

If not altered by the court or the parties, the sheer number of lawyers involved in asbestos litigation can be an overwhelming complication. Simple matters like sending notices to parties or scheduling hearings are major tasks. Hearings become complex and arguments repetitive when, as one judge described it, lawyers are "up and down, like pistons."

Implementation of the Wellington plan to date has served to reduce the number of lawyers representing defendants from approximately 1,260 to approximately 60 regional law firms. In a specific case, the effect is to reduce the number of defense lawyers from approximately twenty to about three to five. In addition to the obvious reduction of transactions costs to the defendants, every aspect of the case becomes simpler, including scheduling depositions, notifying defendants, negotiating settlements, and conducting trials. Because Wellington's participation in a case will be triggered by showing liability of one signatory to the Wellington plan, extensive proof of exposure to a product of each defendant is no longer essential.[52]

In at least two jurisdictions, respondents reported that defendants had agreed not to file cross-claims against each other. Such agreements simplify the litigation, as do judicial orders deeming such claims to have been filed, avoiding the duplicative paperwork of cross-claims and answers.[53]

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52. A claim or verdict against one signatory is sufficient to invoke the involvement of the facility. Some lawyer-respondents, however, reported that Wellington internally allocates responsibility based on proof that plaintiff was exposed to the product of a particular defendant, thereby encouraging defense counsel to insist on product identification evidence in settlement negotiations.

53. *See, e.g.,* Johnston v. Johns-Manville Prods. Corp. (W.D. Pa. Jan. 23, 1980) (unpublished order). *See generally* T. Willging, *supra* note 4, at 21-22.

TABLE 2
Complicating and Simplifying Factors in Asbestos Litigation

	Complicating Factors	Simplifying Factors
Organization of counsel	Numbers of parties and lawyers	Common defense agreement (Wellington) reduces numbers of lawyers and parties
		Deeming of cross-claims and "opt-out" procedure for motions
	Delegation in law firms leads to delay in evaluation of cases, settlement at courthouse steps or later	Unresolved
Settlements	Wellington disrupts settled bargaining patterns and reduces mass settlements	Unresolved
	Lack of alternatives to court filings	Claims facility planned
	Complexity of communications with multiple counsel	Wellington provides stable, simplified communication
	Lack of authoritative rulings and settlements	Trials, rulings, and settlements have accumulated
	Lack of settlement formulas	Ranges of values developed from prior trials and settlements
	Lack of sufficient trial dates to reduce backlog	Partially unresolved
		Increasing clusters of cases
		Special assignment systems
		Alternative trial structures
Pretrial	Relitigation of settled issues such as state-of-art	Waiver of state-of-art and punitive claims in East Texas
		Consolidation for resolution of common pretrial issues
	Clogging dockets with cases of limited impairments	Creation of inactive asbestos docket
		Screening cases and plaintiffs
	Repetitive discovery	Accumulation of discovery materials; creation of document depositories and computer data bases
		Unresolved in some districts
Trial	Length and complexity	Pretrial, evidentiary, and trial rulings establish format
		Reverse bifurcation

Asbestos cases tend to be handled by lawyer-specialists representing plaintiffs and defendants.[54] Organization of lawyers into specialists promotes simplification in at least two ways. Evaluations of cases and development of settlement formulae become easier. In addition, specialists are able to identify repetitive tasks and delegate them to paralegals, who prepare the information for trial or settlement in a standard, predictable format. On the other hand, such delegation may complicate settlement, because the lawyer with authority to settle may not learn the facts necessary to evaluate the cases until immediately before trial. In that case, routinization of pretrial preparation does not equate with simplification of dispositions.

While the dominant response was that Wellington simplifies settlement negotiations, that opinion was not unanimous. Simplification occurs through reduction of the number of parties to a negotiation and through specialization occurring as a result of dealing with one major adversary on a repeated basis. Wellington, however, changes the status quo regarding negotiations and this causes disruptions, at least in the short term. Prior to Wellington, plaintiffs could negotiate separately with a number of defendants before trial. This permitted plaintiffs and their counsel to settle early with some defendants and receive compensation that would help meet any expenses incurred by plaintiff and finance the litigation. Frequently, these settlements would be on a mass basis according to predetermined formulae.

Concentration of most defendants into the Wellington entity results in hard bargaining and perhaps a shift in negotiating power and in the timing of settlements. Reports were uniform that it was difficult or, in some cases, impossible for plaintiffs to bargain with Wellington defendants prior to the week before trial. This may be a product of understaffing in the newly designated Wellington law firms. Some lawyers alleged, however, that the Wellington policy is not to settle cases that are not scheduled for trial. Wellington denies this.[55] Outside of the settlements in Northern Ohio and

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54. Hensler, *supra* note 1, at 68–76. Implementation of representation of Wellington defendants by local counsel has drastically increased the specialization among defense attorneys, concentrating defense representation in about sixty law firms.

55. *Cf. Plaintiff Bar Blames Wellington for Mounting Trial Backlog,* Mealey's Litig. Reps.: Asbestos, Oct. 10, 1986, at 5,159 (Tennessee plaintiffs' lawyer quoted: "On the eve of trial . . . [Wellington will] talk to us, but no settlements are reached. This is pretty much the case around the country."); *Wellington Pledges ADR Program Within Six Months, id.,* July 25, 1986, at 4,673 (Wellington CEO quoted: "in our first year our achievements have included settlement of cases not immediately involved in trial"). This statement may refer to cases in the Northern District of Ohio. A Pittsburgh plaintiff's lawyer claimed: "In Ohio, there is one attitude, but in Pennsylvania we can't get anything moving [with Wellington]." *Id.* at 5,160.

Eastern Texas,[56] however, there have been no large-scale settlements announced with Wellington. In the short term, Wellington has altered the timing of settlements to the detriment of individual plaintiffs.

In some jurisdictions, there were complaints that Wellington counsel did not accept values established through negotiations with individual defendants and that they sought to reduce total settlement values.[57] At the same time, Wellington counsel tried to break the pattern in which plaintiff's counsel was frequently the only source of information about the total settlement. In some jurisdictions, more than one law firm competes for the Wellington business; some plaintiffs' lawyers assert that this results in posturing and saber-rattling, at the expense of good-faith negotiations. In those same jurisdictions and others, there were complaints that Wellington counsel engaged in a subtle undermining of the structure of the asbestos litigation by relitigating issues thought to have been settled by standard, districtwide rulings.

The bottom line is that Wellington has indeed settled the vast majority of cases that have been scheduled for trial during its brief existence.[58] It has not, however, fulfilled its promise of providing a prefiling vehicle for settlement and will not have a claims facility available until "early 1987."[59] Despite serious delays in implementing the claims facility and alternative dispute resolution procedures, Wellington shows promise of further simplification of asbestos litigation. Once the claims facility is established, early settlements should be available through alternative dispute resolution procedures. Full operation of the facility should cause a dramatic reduction in the number of claims filed in court. In the absence of

56. See the discussion *infra* at notes 210 (Eastern Texas) and 143 to 145 (Northern Ohio). These settlements were channeled by the grouping of cases by those courts.

57. Evidence of strife between some plaintiffs' counsel and Wellington counsel has surfaced in public forums. One firm has sued the Wellington facility on antitrust grounds. Sweeney v. Acands, C85-2984 (N.D. Ohio 1985). Another has challenged the ability of Wellington to represent codefendants with arguably competing interests in the same litigation. *Arguments Heard on Joint Representation of Wellington Members*, Mealey's Litig. Reps.: Asbestos, Dec. 26, 1986, at 5,512; *see also Attorneys Discuss Wellington Problems: Anti-trust Suit Possible, id.*, Jan. 23, 1987, at 5,659 (proposed antitrust suit against Wellington "being worked on").

58. As of December 1986, Wellington claimed to have settled 5,500 cases at an average cost of $72,000 a case, a total of $396,000,000 in settlements. *Wellington Said to Be Paying $72,000 Per Case*, Mealey's Litig. Reps.: Asbestos, Dec. 26, 1986, at 5,513. *See also infra* table 6, showing a declining number of trials in the ten courts studied.

59. *Wellington Expects ADR in Place in Early 1987*, Mealey's Litig. Reps.: Asbestos, Nov. 28, 1986, at 5,374. The computer system was expected to be fully operational by February 1987.

a claims facility, plaintiffs have had no alternative to filing lawsuits.

Pretrial

Lawyers and judges specified several pretrial changes that promoted simplification. A major change that could have national implications is that two major plaintiffs' law firms and Wellington lawyers have agreed to waive their respective clients claims for punitive damages and the state-of-the-art defense for hundreds of cases in the Eastern District of Texas.[60] In the same agreement, these parties created a procedure for cases in which the plaintiffs do not have evidence of restrictive impairments of breathing, as shown by pulmonary function tests. This procedure will permit the parties or an arbitrator to place cases on the court's administrative docket, with a stay of all proceedings, for up to two years.[61] The District of Massachusetts had previously created a similar procedure.[62]

Several plaintiffs' attorneys indicated that they now screen cases more carefully than they did before. One candidly admitted that he had accepted too many cases in the early years, not predicting the abundance of cases that developed and the demands of those cases on the law firms and the courts. Some counsel for plaintiffs now think that premature filing of marginal cases affects the ability to obtain trials for more serious cases. One claimed that his office now used pulmonary function tests to distinguish obstructive lung defects, which might be attributable to smoking, from restrictive lung defects, which are more likely caused by asbestos.[63] Focusing on the medical evidence, two lawyers in the office review a typical case before filing and an out-of-town specialist law firm also has to sign off before the case is filed. In the District of Massachusetts, and in other jurisdictions, this process is standardized by a require-

60. Jenkins v. Raymark Indus., Inc., No. M-84-193-CA, Order & Alternative Dispute Resolution Agreement at 7 (E.D. Tex. Sept. 19, 1986). The agreement applies to claims filed between January 1, 1985, and April 1, 1986, after the cutoff date for phase one of the class action.

61. *Id.* at 4, 5-6.

62. See the discussion *infra* at notes 119 to 125.

63. Such a practice would be likely to have a major effect. For example, in the Eastern District of Texas, 171 of the plaintiffs in the first phase of the *Jenkins* class action had pulmonary function test results that showed either normal functions or obstructive defects only; 197 showed mixed results or restrictive defects only; and 326 did not have any useful test results. Jenkins v. Raymark Indus., Inc., No. M-84-193-CA (E.D. Tex. 1986) (slides prepared by special master are on file with the Federal Judicial Center).

ment that plaintiffs file specific medical information with their complaint.[64]

Another aspect of pretrial simplification is the accumulation of discovery materials. One possible issue regarding each defendant is whether or not plaintiff was exposed to a product manufactured by that defendant. In the early stages of asbestos litigation, that information was difficult to obtain. Discovery of the available evidence, however, has accumulated for each jobsite so that it is frequently possible to identify invoices and co-worker testimony that will confirm or refute plaintiff's claims without extensive new discovery. At least one plaintiff firm has computerized records of such information.

In the Eastern District of Louisiana plaintiff and defense lawyers jointly established a document depository, accessible to all lawyers, that includes documents from all cases, such as medical records, depositions (including depositions and documents from other jurisdictions), medical articles about asbestos dating back to the nineteenth century, and documents relating to each defendant.[65]

On the other hand, in a few jurisdictions, the pretrial process remains unorganized, resulting in unfettered contentiousness. Discovery battles highlight the need for a settled process to exchange information, but counsel continue to squabble and resist, perhaps representing the dominant legal culture of their locale. Some courts further distance themselves from resolution of the cases by delegating pretrial functions, including monitoring of discovery disputes, to magistrates, who have little power to control the general strife or bring cases to trial.[66] The absence of firm trial dates and realistic discovery cutoffs in those jurisdictions seems to add fuel to such strife.

Settlement

Settlement is by far the predominant mode of disposition of asbestos cases.

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64. *See, e.g., In re* Massachusetts Asbestos Litig., M.M.L. Nos. 1-5 (all cases), Order of Magistrate Cohen Amending Pretrial Order No. 4 (D. Mass. May 8, 1986).

65. The depository serves as a source of access to the documents, but the parties have not stipulated to the authenticity or admissibility of the documents.

For a discussion of the general issue of access of other plaintiffs to discovery information from prior cases, even when that information is covered by a protective order, see Comment, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order,* 60 N.Y.U. L. Rev. 1137 (1985).

66. In none of the jurisdictions studied had the parties consented to trial by a magistrate in an asbestos case.

TABLE 3
Procedural Progress at Termination of Federal Asbestos Cases
(All Districts; All Reported Terminations)
July 1, 1977, to June 30, 1986

Mode of Disposition	Number	Percentage	Declining Percentage
All cases	5,849	—	100
Uncontested			
Dismissal for want of prosecution	243	—	—
Default judgment	340	—	—
Uncontested subtotal	583	10	—
Declining balance	5,266	—	90
Motions before trial	383	7	—
Declining balance	4,883	—	83
Settlement			
Dismissed, discontinued, settled, etc.	4,071	—	—
Judgment on consent	160	—	—
Settlement subtotal	4,231	72	—
Declining balance	652	—	11
Other	487	8	—
Declining balance	165	—	3
Trial			
Jury verdict	113	2	—
Directed verdict	16	0	—
Court trial	36	1	—
Trial subtotal	165	3	—
Final balance	0	0	0

As table 3 indicates, 73 percent of the asbestos case dispositions are recorded as settlements, voluntary dismissals, or consent judgments.[67] Less than 3 percent of the cases proceed to bench or jury trial, far fewer than the trial rate generally reported.[68] Pretrial motions account for an additional 7 percent of the cases that clearly involve judicial action. Table 4 presents data for the ten

67. This is close to what might be considered normal for tort litigation. In the University of Wisconsin's Civil Litigation Research Project, 75 percent of the cases were reported as "not adjudicated." Kritzer, *Adjudication to Settlement: Shading in the Gray,* 70 Judicature 161, 164 (Oct.-Nov. 1986). Kritzer excluded from his classification all cases that were tried, decided without trial or dismissed for cause, had motion ruling, or defaulted. Kritzer's categories, however, differ from the categories used to construct tables 3, 4, and 5. The latter include among settlements cases in which there were earlier rulings or other judicial action.

68. *Id.* at 162, 164 (10 percent rate). *See also infra* table 5 (9 percent rate for federal personal injury products liability cases in the ten study courts).

study courts only, and table 5 shows the comparable rates for products liability litigation in those ten federal district courts for the same time period, 1974–1986.

TABLE 4
Procedural Progress at Termination of Asbestos Cases in Ten Federal Districts, July 1, 1977, to June 30, 1986

Mode of Disposition	Number	Percentage	Declining Percentage
All cases	2,658	—	100
Uncontested			
Dismissed for want of prosecution	23	—	—
Default judgment	102	—	—
Uncontested subtotal	125	5	95
Declining balance	2,533	—	—
Motions before trial	83	3	92
Declining balance	2,450	—	—
Settlement			
Dismissed, discontinued, settled, etc.	1,907	—	—
Judgment on consent	55	—	—
Settlement subtotal	1,962	74	18
Declining balance	488	—	—
Other	423	—	—
Declining balance	65	16	2
Trial			
Jury verdict	45	—	—
Directed verdict	6	—	—
Court trial	14	—	—
Trial subtotal	65	2	0
Final balance	0	100	0

Comparing tables 4 and 5, the most striking contrast is in the trial rates. Products liability cases in the ten study courts are more than four times as likely to go to trial than are asbestos cases. The percentage of settlements was approximately identical (74 versus 73 percent). Only 5 percent of the asbestos cases are disposed of by trial or ruling on pretrial motions, compared with 15 percent of the other products liability cases.

In the great majority of the districts studied in this report, there had been few complete trials during 1985 and 1986. In only three of the ten districts did respondents report more than two trials during this period. Data from records of the Administrative Office of the U.S. Courts also show few trials during this period.

TABLE 5
Procedural Progress at Termination of Personal Injury Products Liability Cases in Ten Federal Districts, July 1, 1980, to June 30, 1986

Mode of Disposition	Number	Percentage	Declining Percentage
All cases	4,196	—	100
Uncontested			
Dismissed for want of prosecution	61	1	—
Default judgment	46	1	—
Subtotal	107	2	—
Declining balance	4,089	—	98
Motions before trial	236	6	—
Declining balance	3,853	—	92
Settlement			
Dismissed, discontinued, settled, etc.	2,975	71	—
Judgment on consent	86	2	—
Subtotal	3,061	73	—
Declining balance	792	—	19
Other	432	10	—
Declining balance	360	—	9
Trial			
Jury verdict	279	7	—
Directed verdict	42	1	—
Court trial	39	1	—
Trial subtotal	360	9	—
Final balance	0	100	0

In general, the annual rate of trials has increased slightly from 1983 to 1986. The average in 1986 is one jury trial per district. Typically, a handful of trials provide information on values that drive the initial settlements. The values are adapted to variations in individual cases, and soon a matrix of values becomes available to the parties. Trials are necessary only when new evidence or untested cases, such as those from a different jobsite, arise.

Settlement formulations, however, have not become as mechanical as a workers' compensation schedule of benefits. One lawyer articulated the standard view of the evolving settlement process by describing it as "one part analysis and one part intuition." Lawyers and judges report a range of values for each type of disease and use their analysis of the facts and their judgment and intuition to evaluate a case within that range.

TABLE 6
Asbestos Jury Trials
in Ten Federal District Courts

District	Prior to 1983	1983	1984	1985	1986[a]	Total
Mass.	0	0	1	1	1	3
N.J.	1	0	1	0	0	2
E. Pa.	3	0	2	4	1	10
W. Pa.	2	0	0	1	1	4
Md.	0	2	0	0	0	2
S.C.	4	0	1	0	0	5
E. La.	0	0	0	1	0	1
E. Tex.	7	2	0	1	0	10
N. Ohio	1	0	0	0	0	1
E. Tenn.	7	0	0	0	0	7
Total	25	4	5	8	3	45

[a]Data for 1986 cover the period from January 1 to June 30, 1986, only.

Even disputed medical diagnoses, which continue to be numerous,[69] are often resolved through negotiation. If the parties cannot compromise their differences on diagnosis, retesting will frequently break the impasse.

Trial[70]

As tables 5 and 6 indicate, trials are rare events. The norm is for a judge to spend about three weeks, but perhaps as long as five weeks, conducting the first trial. By developing standard rulings and streamlining the trial in other ways,[71] courts generally reduce the time for subsequent trials to about five to ten days. In the class action trial in East Texas,[72] plaintiffs' case was presented in about twenty-five days of trial. The presiding judge estimates that a districtwide class trial would take thirty days; trial of four cases, representing a cluster of thirty, took five days.[73] Two other districts

69. See the discussion *supra* at note 34.

70. For extensive consideration of alternative trial structures, such as consolidation, class actions, and bifurcation, see the discussion *infra* at notes 218 to 308.

71. See T. Willging, *supra* note 4, at 31–35 for a discussion of some of the procedures used to streamline asbestos trials.

72. Jenkins v. Raymark Indus., Inc., No. M-84-193-CA (E.D. Tex. Sept. 19, 1986), 782 F.2d 468 (5th Cir. 1986) (class certification affirmed).

73. Newman v. Johns-Manville, No. M-79-124-CA (E.D. Tex. 1984), discussed in D. Hensler, *supra* note 1, at 42, 65.

reported that the five-day figure, about the average for trials in those districts, was the norm for asbestos cases. In one district, the estimate was seven days, but many judges in that district use reverse bifurcation (trial of damages first, typically taking two days) and rarely conduct a full trial. In another district, respondents estimated ten days, but there had not been a trial since 1984. In four districts, there had been not been any trials recently enough to support an informed estimate.

In one jurisdiction, respondents expressed a need for more trials to clarify the law and set values for cases involving serious injuries. In another jurisdiction, parties anticipated that a jury trial would be necessary to support values for cases from a new worksite.

Districtwide stays of all asbestos litigation, pending resolution of appeals, may have impeded dispositions in one district. On the other hand, the stays may have simply validated a de facto delay relating to the availability of judicial resources.

Scheduling of trials is the dominant need in asbestos litigation.[74] In those districts with delays in dispositions, lack of trial dates is reported to be the primary cause. A major factor implicated in the scheduling of trials is the court's assignment system for asbestos cases.

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74. *See also* T. Willging, *supra* note 4, at 24–31.

IV. ASSIGNMENT SYSTEMS: SHOULD ASBESTOS CASES BE TREATED SEPARATELY?

Starting from the proposition that the scheduling of trials is essential to the disposition of asbestos cases, the next step is to examine the various systems used to assign asbestos cases for trial. In the course of looking at different models of organization, this report posits an underlying question that logically precedes the creation of special systems for asbestos litigation: To what extent, if any, should special treatment be given to asbestos cases in the assignment process? After examining models of special systems, the report will return to the question of whether special treatments are warranted.

In describing the assignment systems used in the ten courts studied, there are four fundamental issues:

- Does the court assign the cases to judge-specialists[75] who will maintain responsibility for their disposition and, if so, what effects does this have on the disposition of cases?
- If a specialist is to be used, how does the court choose a specialist? Does it make a difference if a volunteer steps forward as opposed to having an individual designated by the chief judge?
- What, if any, benefit or credit is afforded a judge who undertakes a special assignment to manage asbestos cases?
- In what ways, if any, do other members of the court remain involved in the assignment and trial of cases?

In looking at the practices for assignment of asbestos cases, the diversity is striking. There is no universally acclaimed model. Indeed, no two courts of the ten studied operate programs that

75. By the term *specialist* I mean that the judge acquires a special knowledge of the subject matter and procedures relating to asbestos litigation. I do not intend to connote that any judge will deal exclusively with asbestos cases. In the courts studied, I did not find a single judge who handled only asbestos cases, even on a temporary basis.

take similar approaches. Development of assignment systems was idiosyncratic to each court. After a brief description of each program, this report will document the primary factors that affected the courts' choices among alternatives. Table 7 summarizes the practices in the ten study courts on some major specialization issues.

TABLE 7
Forms of Asbestos Case Specialization in Ten Federal District Courts

Court	Special Assignment System	Type of Specialist	Stage of Specialization	Dispersion of Cases for Trial	Formal Credit for Specialist
Mass.	Yes	Magistrate, then judge	Pretrial Settlement Some trials	Yes	Yes
N.J.	Yes	Magistrate and judge(s)[a]	Pretrial	Yes	No[a,b]
E. Pa.	Yes	Judge	Pretrial Settlement Trial assignments	Yes	No
W. Pa.	Yes	Judge	Pretrial Trial (limited time)	Yes	Yes[b]
Md.	Yes	Two judges	Pretrial Trial scheduling	Yes	No
S.C.	Yes	Judge	All stages	No	No
E. La.	Yes	Magistrate and Committee of judges	Pretrial Trial scheduling	Yes	No
E. Tex.	Yes	Judge	All stages	No	No
N. Ohio	Yes	Judge	All stages	No	Yes
E. Tenn.	No	N.A.	N.A.	N.A.	N.A.

[a]Separate system in Camden Division, which used a single judge as pretrial and trial specialist.
[b]Credit given in form of relief from new asbestos cases after specialist finished trials.

Use of special assignment systems for asbestos litigation is limited to personal injury cases. Cases involving removal of asbestos from public buildings are treated as complex litigation and handled outside of any special system for personal injury litigation.[76] This distinction between personal injury and property damage cases suggests that the primary reason for a special assignment system is not the complexity of the litigation, but the volume of cases await-

76. In South Carolina, for example, trials in two asbestos building cases have been conducted by judges other than the single judge who manages all the asbestos personal injury cases.

ing trial or settlement. A test of the adequacy of a special assignment system is whether it is designed to cope with large numbers of cases.[77]

Specialization

Two of the courts studied used specialists to manage asbestos litigation from assignment to final disposition, both with a great deal of success. Judges Parker (Eastern District of Texas) and Lambros (Northern District of Ohio) have developed national reputations as innovators, at least in part due to their intensive involvement as "specialists."[78] Each of these judges volunteered to manage a consolidated docket of asbestos cases at a time when less centralized systems did not show prospects of being able to move the asbestos caseload toward disposition.

At the other end of the spectrum, the Eastern District of Tennessee uses its traditional individual calendar system to assign cases. This court has a moderate asbestos caseload, about equal to the pre-1986 caseload of Northern Ohio but far less than that of Eastern Texas or Massachusetts (see table 1). None of the judges specializes in asbestos litigation, yet the disposition rate in this district outstrips that of many courts with equivalent numbers of asbestos cases.

In several other districts, a more collegial system, that is, a system involving shared responsibility for the asbestos litigation, reigns. In Eastern Louisiana, Judge George Arceneaux managed the pretrial stage of the asbestos docket based on specialized knowledge he acquired in the trial of silicosis cases. Trials were to have been assigned back to all of the judges on an individual calendar basis. When it became apparent to Judge Arceneaux that his pretrial rulings would have a substantial impact on the trial of all cases, he called for formation of a committee, on which he continues to serve. The committee assigns the cases for trial ("spreads the joy," as one judge put it) after recent filings have been organized by the magistrate and counsel into groups of cases with similar legal theories, worksites, and counsel.[79] The committee also issues

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77. If the system is designed to deal with complexity as opposed to numbers, I question whether the assumption of complexity fits the facts of current asbestos litigation, as found in this report.

78. *See, e.g.,* Arthur, *Texas Judge Rides Herd on Asbestos Suits,* Legal Times, May 19, 1986, at 1; McGovern, *supra* note 37, at 478–91 (1986). *See also* Hensler, *supra* note 1, at 60–65, 105–06. *See generally* T. Willging, *supra* note 4.

79. A general order requires counsel, upon filing of a case, to complete a form that will aid in identification of the proper category for consolidation. All Asbestos-Related Cases, General Order (E.D. La. Nov. 7, 1984).

case management orders and can serve as a vehicle for standard rulings on pretrial issues.

In Eastern Pennsylvania, Judge Charles R. Weiner has served as asbestos coordinator for several years, starting shortly after the Manville bankruptcy in August 1982.[80] Prior to that time, all cases had been handled on the individual assignment system without serious problems. A stay, lasting about twelve to eighteen months, was issued by the court of appeals pending a decision that the cases could proceed without Manville.[81] The stay created a backlog of cases. Judge Weiner responded to a request from the chief judge that he coordinate the flow of asbestos cases.

Working with the lawyers from both sides, Judge Weiner created a trial list of about four to five cases a week. Cases have been assigned for trial to all the judges on the court in order of seniority, starting with the most senior judges.[82] For each trial assignment, both a primary trial judge and a backup judge are assigned, to make the trial date as certain as possible. The judges apparently perceive the system as a fair distribution of a courtwide burden. While pretrial matters are handled by the judge initially assigned to the case, issues of importance to a group of cases may be handled by consolidation of an issue, circulation of draft opinions, and even resolution by a three-judge panel of the district.[83] Under this system, as of July 1986 the court had scheduled all of its 1984 cases and some 1985 cases for trial before the end of 1986.

In Western Pennsylvania, shortly after his appointment to the bench, Judge Gustave Diamond agreed to the chief judge's request that he take responsibility for all of the asbestos cases then on the docket of the court. He educated himself about the cases by dealing with pretrial motions and presiding over a trial in a case that lasted four to five weeks (and settled on the eve of final argument). In the course of managing a full docket of asbestos cases together with other civil and criminal cases, Judge Diamond identified a number of pretrial problems that could be solved by standard rulings on issues such as sanctions, cross-claims, joint motions, and summary judgment issues.[84] Once the pretrial process became es-

80. For a description of the system used in the Eastern District of Pennsylvania, see Weiner, *Concentrating on Cooperation,* Litigation, Winter 1986, at 5.

81. The decision is not published.

82. Pretrial matters are handled by the judge to whom the case was first assigned.

83. In New Jersey, the district decided an issue relating to the state-of-the-art defense for all asbestos cases by creating an en banc procedure to generate a district-wide ruling. *In re* Asbestos Litig., 628 F. Supp. 774 (D.N.J. 1986).

84. For further discussion of these orders, see T. Willging, *supra* note 4, at nn.71–73, 76–77, 80–81.

tablished, he asked that the remaining cases be redistributed among the court, and this was done. His pretrial rulings stand as a model for use by other judges, but they have not been adopted as standing orders or local rules for the entire court.

In the District of Maryland, the court groups cases for trial by all (nonrecused) judges. The system was created primarily through the efforts of then-Chief Judge Frank A. Kaufman (presently a senior judge) and Judge James R. Miller, Jr. (who has resigned), building on trials presided over by the current chief judge, Alexander Harvey II.[85] Judges Kaufman and Miller reviewed the literature on asbestos litigation, drafted case management orders, including consolidation under Federal Rule of Civil Procedure 42, and held hearings on the proposed orders. The final orders were adopted by a vote of the judges. Groups of cases, clustered by worksite and plaintiffs' attorney, were scheduled for trial each month before a different judge. For each worksite (which includes multiple trial groups), a single judge was assigned to monitor the pretrial process and to rule on general motions and discovery disputes. Rulings on pretrial issues are usually adopted by most of the judges who hear asbestos cases, but there is no formal procedure for adoption of rulings beyond the initial case management orders.

In the District of New Jersey, Judge Harold Ackerman was assigned to handle the Raybestos and Manville plantworker cases shortly after taking his oath of office. He engineered a comprehensive settlement of the Raybestos cases and participated jointly with Judge John E. Keefe of the New Jersey Superior Court to stimulate settlement of the Manville cases. The docket of that court is currently divided among the judges, with Chief Judge Clarkson Fisher handling dispositive motions. A stay is currently in effect pending a decision by the U.S. Court of Appeals for the Third Circuit. In the Camden division, Judge Stanley Brotman was assigned all of the cases on an individual basis and he disposed of them by presiding at a trial and participating actively in settlement discussions for all subsequent cases.

In South Carolina, Judge C. Weston Houck was assigned all the district's asbestos cases shortly after his appointment. He has grouped the cases together and called special terms of court to dispose of them. All but one of the dispositions since 1982 have been by settlement; the docket was current as of 1984. Between 1984 and

85. This approach was taken after it became apparent that individual trials under the individual assignment system would not be adequate to deal with the caseload. These trials did, however, apparently establish the values that have been used to settle later cases.

1986, a new backlog developed and a new term of court was held during the fall of 1986.

In Massachusetts, the court has had the highest asbestos caseload in the federal system. Judge Rya Zobel was designated as the pretrial specialist in 1984. She has developed an assignment system that calls for preparation of trial lists of forty to fifty cases each, organized according to plaintiffs' counsel. Every other month, one of the ten judges, on a rotating basis, undertakes responsibility for any trials. Judge Zobel continues to handle pretrial matters, and she provides each trial judge with a listing of prior evidentiary rulings. Before her involvement, a magistrate was assigned to the pretrial preparation of asbestos cases, but none had been scheduled for trial until Judge Zobel undertook responsibility for the docket.

Selection

In at least three districts, the selection of judges has been difficult. One feature that distinguishes those three districts is that none of them had a volunteer or committee of volunteers come forward during the early years of the asbestos litigation to establish a management plan. In two of the districts, there are large backlogs of civil cases (in one of these districts, the backlog is increasingly composed of asbestos cases). In the same two districts, the disposition rate has been low.[86]

In two of the three districts, all of the cases were assigned to a single judge who did not volunteer for the assignment. In both of those districts, the assignment was made to a newly appointed judge who received no special credit or relief from other assignments. While the caseload grew, these draftee-specialists gave priority to other cases and did not devote many resources to asbestos litigation. In both of these districts, lawyer-interviewees were more likely to communicate their impression that federal judges do not like asbestos cases.

In these same two districts, the assignment of the draftee-specialist judge was open-ended. There was no provision for other judges of the court to become involved in the ultimate trial of the cases or for successors to take over the workload of the specialist. By way of contrast, in four of the six courts that use specialists, the role of the specialist is limited, and either a committee of the judges or the entire court handles trial assignments. In the other two courts,

86. *See* T. Willging, *supra* note 4, at 35–39. *See also* Hensler, *supra* note 1, at 84–85, 91.

volunteer-specialists created innovative procedures that eased the burden of the cases without the need for direct assistance from other judges. (Hereafter, the term *specialist* will be used to refer only to those two judges who have assumed full responsibility for all asbestos cases pending in their courts.)

Specialization carries a danger of boredom arising from the tendency for cases to become repetitive. Innovative procedures help to avoid such problems. Use of special masters may also have a secondary benefit of maintaining a high level of interest in cases that otherwise might become routine.[87] A side effect of implementing innovative procedures is that successful management of asbestos litigation may enhance the professional reputation of a judge.

In summary, asbestos litigation benefits either from an innovative plan, implemented by a volunteer-specialist, or from the active involvement of an entire court or a sizeable committee. Judges should not be drafted and expected to become specialists for the indefinite future. Collegial support seems essential for successful management of a major collection of cases. Even volunteer-specialists expressed the need for support from other members of the court to assist with nonasbestos cases or to conduct asbestos trials or both. Both specialist judges report having such support.

Credit

One factor that may affect the viability of a court's system for managing asbestos litigation may be the extent to which the judges are given formal credit for their efforts. While formal credit does not motivate judges to seek assignment to asbestos cases, absence of such credit may exacerbate a situation in which many judges do not find asbestos cases an attractive area of specialization. One would anticipate that norms of equity in the workplace would lead judges to expect a fair division of the labor. Long-term voluntary assumption of a special burden on top of a normal caseload should not be expected: Dependence on volunteers builds a shaky foundation for an effective case management system.

Each of the courts involved in this study has a different method for allocating credit for management of asbestos cases. In the courts that use committee systems, no formal credit is given for the committee work. It appears to be simply a part of sharing the administrative burdens of the court. Committee meetings are kept to a minimum and may be scheduled during lunch or at the end of

87. *See generally* McGovern, *supra* note 37.

the day. In one of the specialist courts, there is no formal credit for dealing with the major burdens of a heavy asbestos caseload, yet the specialist judge finds it sufficient that "everyone pitches in" to help with each other's caseloads as needs arise. Similarly, a judge who coordinates asbestos litigation throughout the district simply "fits asbestos work in" with work on other cases.

On the other hand, in one district in which no credit was given, the specialist judge did not schedule any asbestos cases for trial for about two years. Similarly, in another district in which there is no credit given, a district judge withdrew from the position of specialist after the draft of a public report criticized that court's management of the asbestos caseload. These examples of asbestos burnout illustrate the need for a system that distributes asbestos cases fairly in the event that no volunteer specialist emerges.

In two of the districts studied there is no formal credit for asbestos management, but the judge-specialists have the benefit of assignment in divisions of the court that suit their interests and personal needs. Caseload allocations within those divisions, based primarily on geography, do not permit full credit for asbestos efforts because there are few cases that could be reassigned to the other divisions.

In three of the districts there was formal relief from assignment of new cases in specified areas. In two districts, the judge was relieved of a draw of a personal injury case for every asbestos case that was assigned. In one of those districts, the asbestos caseload increased dramatically, exceeding the personal injury intake, and the exchange was expanded to all civil cases. In other words, that judge no longer receives new nonasbestos civil cases. In yet another court, a judge undertook to create a plan and devote time to trial of asbestos cases. For a year and a quarter, no new civil cases were assigned to that judge.

In sum, there is no established system for allocation of credit for management of asbestos litigation. Individual courts with high concentrations of cases depend on voluntary efforts to respond to what appears to be a unique challenge. Lack of systematic means of affording credit for work on special litigation may account for the failure of some courts to organize the cases efficiently and allocate sufficient resources to schedule trials and dispose of them.[88] At a minimum, the lack of such a system seems related to delays in disposition of asbestos cases in comparison with other forms of litigation.

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88. Hensler, *supra* note 4, at 78-82.

Development of Case Management Orders

One of the major roles of the pretrial specialist is to work with the parties to develop case management orders. Several models for the process of creating such orders seem to have evolved. Their common features are that they depend on identification of specific problems and applications of commonsense problem-solving techniques, including consultation with knowledgeable and experienced lawyers and judges.

Ordinarily, the individual calendar system used in most federal district courts would not alert a court to an influx of cases that call for special attention. Indeed, in a large court, distribution of the cases randomly may mask a pattern. In such cases, it may be the chance encounters of judges with similar problems in similar cases that bring the problems to the attention of the court as a whole. In asbestos litigation, the distinctive features of the cases provided several checkpoints for calling attention to the problems. First, the sheer amount of paperwork commanded the attention of the clerks' offices at an early stage. Lawyer-specialists generally alerted the court that unusual events were unfolding. Plaintiffs generally feel the impact of the paperwork and can estimate the number of future cases; major defendants are likely to know the number of cases filed by all plaintiffs.

Dividing the world of asbestos litigation into two types of problems, namely paperwork and numbers, the early warnings are likely to be more effective with paperwork than with numbers. The paperwork is an immediate flood that magnifies every case; the trend of the numbers cannot become apparent until a sufficient time has passed for patterns to develop. Many case management plans were developed at an early stage in the asbestos litigation before the enormity of the numbers became apparent. Those plans may need modifications to address the numbers and to account for the simplification of asbestos cases over the years.

Once the need for special case management was identified, how did the courts proceed to develop their orders? In most jurisdictions, the process evolved after a flirtation with use of the ordinary individual calendar. An avalanche of motions generally convinced courts to looks for ways to cope.

In most courts, judges collaborated with colleagues and the clerk of courts to assess the general problem. Some courts have regularly scheduled judges' meetings at which these problems can be identified and brainstormed. Circuit or national conferences provide an opportunity to obtain wider perspectives on a problem. In one case, the use of a special master to prepare a plan grew out of a presen-

tation at a circuit conference. In another case, the court of appeals warned a district court in an opinion that a problem of districtwide proportions existed. In that same district, the Asbestos Case Management Conference sponsored by the Federal Judicial Center[89] served as a catalyst for some of the ideas proposed in the case management orders. That conference has also apparently served as a source of cross-fertilization and modification of approaches in various districts. For example, one court that had emphasized trial has since experimented with settlement and alternative dispute resolution approaches. On the other hand, a court that has focused on settlement shifted to a trial mode for some cases. Courts with case management crises, however, seemed to draw little from the conference.[90]

Once a court or a single judge has determined that a serious problem exists, a range of strategies has been used to diagnose the specific maladies and prescribe remedies. In one court, two judges collaborated in the drafting of case management orders and presided at hearings in which attorneys voiced their reactions and submitted written comments. After revisions, the orders were adopted by a vote of the entire district court. The final product consisted of standing case management orders, including a major consolidation of cases and a scheduling order. This process is similar to administrative rule making and shares with it the advantages of participatory democracy and perhaps some of the disadvantages of rigidity.[91]

In another district, a specialist judge used special masters to assist in the development of a case management order. The two masters, both of whom were law professors from outside of the jurisdiction, met with counsel for all parties, individually and collectively, and elicited detailed information about the nature of asbestos litigation, prior settlements and trials, information needs of the parties, and other factors that might affect disposition of the cases. After listening to all counsel, a comprehensive order was formulated that was adopted by the court without formal objections from

89. See *supra* note 4.

90. Less formal networks, such as telephone calls to judges identified as experts through the "grapevine" or through reported decisions, have also likely had an impact. At the time that most asbestos case management order were developed the Manual for Complex Litigation, Second (Federal Judicial Center 1985) had not been published. It is a valuable source of ideas for management of mass tort litigation.

91. A danger of a formal rule-making process is that it could result in rules that are overly rigid and that the process is not sufficiently flexible to allow necessary amendments. For example, the scheduling order issued in December 1983 after the hearings and a vote of the entire court came to mean, as the caseload increased, that cases filed in 1986 would not receive a trial until 1990. Yet, as of May 1986, the order had not been modified to take account of increased filings.

any of the parties. This order has been modified and supplemented by case management orders as needed, pursuant to suggestions of the parties or, more often, the perceptions of the court or special masters.

Another model for formulation of case management orders consists of issue-by-issue and case-by-case responses to problems as they arise. For example, when a judge saw that each defendant felt compelled to participate in every motion by filing a written statement, that judge created a presumption that each defendant would join in the motion of any other defendant unless the defendant otherwise informed the court. This "opt out" procedure simplified the motions practice of the court and the paper-filing demands on the clerks' office. As similar issues arose in the course of pretrial and trial of asbestos cases, orders were issued that would deal with the problems for all future asbestos litigation. These orders, in turn, have been transported by counsel to neighboring state and federal courts, which have adopted them and benefited from the experience of the first judge.[92]

In summary, pretrial specialists identify case management issues and consult with lawyers and other specialists to find resolutions of these problems. The process is not static. Caseloads change, as do the procedural and substantive contexts in which case management orders operate. Continuous exploration of alternatives and revision of prior approaches based on experience and feedback have been features of successful case management.

Dispersion of Cases

Another factor that may affect the success of a method of assignment is whether the cases are retained on the docket of a single judge or dispersed among the other members of the court. As shown above, in Eastern Texas and Northern Ohio the cases are not dispersed, because the methods used to dispose of cases depend on the specialist as a central participant.[93] Individual trials are

92. These and other case management orders were discussed in T. Willging, *supra* note 4, at 15–24. Dissemination through the medium of the Federal Judicial Center or the Administrative Office of the U.S. Courts may also be a trigger for creation of case management orders. The Center maintains a file of asbestos case management orders that is available upon request. The Clerks' Division of the Administrative Office also collects and disseminates such orders.

93. It is worth noting that the use of specialists concentrates a considerable amount of power in a single judge. Attorney-specialists will be repeatedly appearing before the same judge and may be under special pressure to conform to the expectations of that judge. Any predispositions of the judge or subtle biases in the case management procedures are multiplied by the size of the caseload.

not an element of either plan. In the nonspecialist courts that have scheduled trials and steadily moved their asbestos dockets, the cases have been fairly distributed among all judges who are not disqualified for some reason.[94] Recent activity in both Massachusetts and New Jersey has involved dispersion of cases to all judges.

Dispersion of cases seems important in districts in which the asbestos litigation is seen as a burden to the entire court. A widespread impression among lawyers is that federal judges do not like asbestos cases. Some of the judges in this study confirmed that impression, but most did not. All seemed willing to handle their fair share of the cases, but there were references to judges who balked at handling any asbestos cases.[95]

Negative judicial attitudes toward asbestos litigation may reflect the mystique that emanates from descriptions of asbestos litigation as a "crisis."[96] Those attitudes may be altered by showing the widespread experience of judges who have presided over some asbestos trials and many settlements; they appear to have found that asbestos cases can challenge the creativity of federal judges and reward judicial management efforts. Negative attitudes toward asbestos litigation underscore the need for creation of a system to manage the cases. Dispersion of cases to all eligible judges has generally served to shatter the twin myths of complexity and burden. Use of a committee system to allocate cases tends to assure fairness. Two courts demonstrated leadership by assigning cases based

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94. It is worth noting that a sizeable number of judges have recused themselves from asbestos litigation, generally because of a close relationship with one of the many law firms or because of financial interests in one of the many corporate defendants.

95. We were unlikely to encounter such judges in this study because judges were selected for interviews based on their participation in a recent asbestos case. In some districts, some of the assigned judges left their asbestos cases in a dormant state. When a new judge was appointed to the court, these judges selected their asbestos cases for assignment to the new judge. In one court, the accumulated asbestos caseload resulted in the creation of a specialist.

96. *See generally* T. Willging, *supra* note 4, at 1–6.

Federal judges exhibit a wide range of attitudes regarding federal jurisdiction over diversity cases. *See, e.g.,* Report of the Proceedings of the Judicial Conference of the United States, Mar. 12–13, 1986, at 16–67 (requesting that Congress eliminate diversity of citizenship jurisdiction under 28 U.S.C. § 1332); *but cf.* R. Posner, The Federal Courts: Crisis and Reform 139–47 (1985) (advocating curtailment, but not elimination, of diversity jurisdiction); A. Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents 7–8 (Feb. 15, 1987) (on file at the Federal Judicial Center) (abolition of diversity jurisdiction will not eliminate the routine, relatively unimportant cases; diversity cases made federal courts preeminently important). *See also* Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal,* 91 Harv. L. Rev. 317, 332–39 (1977) (survey of attitudes of federal judges toward curtailing or eliminating diversity jurisdiction elicits wide range of views).

on reverse seniority (more experienced judges first); less experienced judges willingly cooperated.

Several courts have successfully combined specialization at the outset with dispersion after a system has been developed. By separating out the case management planning functions from the trial functions, this system focuses the efforts of the specialist on one of the unique features of asbestos litigation, namely the pretrial complexity that is spawned by multiple parties faced with complex pleading and discovery issues. The full resources of the court are brought to bear only at the stage in which they are necessary to communicate the capacity of the court to schedule firm and credible trial dates for a large number of similar cases.[97]

Dispersion of cases does, however, have its costs. Frequently, the presumption under which cases are dispersed is that they will be tried or settled on a one-by-one basis.[98] If dispersion is routinely adopted, opportunities for comprehensive solutions, such as a districtwide class action or a trial of a large group of cases with similar characteristics or an expanded settlement conference, may be lost. Some of these opportunities depend on having access to the entire pool of cases so that cases with common elements can be grouped. One solution to this limitation of dispersion is to maintain the assignment function in either a specialist judge or a specialist committee so that more comprehensive solutions may be considered on a courtwide basis.

Dispersion of cases may require coordination of assignments. A master trial list avoids imposing conflicting demands on counsel. An ingredient of the case management system in many courts is that the original assignments on the individual calendar system were bypassed to create a unified pretrial management system. When the cases are dispersed, there is a possible overlap of functions between the pretrial judge and the trial judge. To the extent that the court uses uniform pretrial rulings, problems are avoided. Matters for individual decision, however, such as ruling on motions for summary judgment or motions in limine, should be clearly assigned to one chambers or the other. There have been instances in which two judges were working on the same motion or in which lawyers were confused as to the division of labor within the court and had difficulty learning to whom a motion should be addressed. Such problems may be avoided by a standing order that demarcates the line.

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97. *See generally* T. Willging, *supra* note 4, at 24–31.

98. An exception is the District of Maryland, which disperses groups of cases for trial each month.

Effects of Special Treatment

In several districts, an effect associated with separation of asbestos cases for special assignment is that asbestos cases have a longer queue. For the ten courts studied, the median time between filing and termination for all terminated asbestos cases was 641 days (mean = 756). That time far exceeds the median time for all nonmotor vehicle personal injury cases in all districts, which was thirteen months (390 days) in the year ending June 30, 1985.[99] The comparable time period for nonasbestos products liability cases in the ten study districts is 409 days (mean = 562).

The reader should not, however, rush to the judgment that special treatment causes the delay in disposition of asbestos cases. Asbestos cases have many unique features that could be expected to lead to delays, especially the presence of multiple parties (and the associated settlement complications),[100] stays of cases pending appellate decisions,[101] and the long latency period, with its associated discovery complications and evidentiary disputes.[102] After all, the mean and median times for disposition of all cases are simply aggregate figures that focus on a central point; it is not necessarily unreasonable that asbestos cases, with their distinct complications, have taken more than the mean or median length of time to be ready for trial. The key question at this time is whether the special treatment of dispersing asbestos cases at a rate slower than the average for the court is warranted once a pretrial case management system has been established.

In most jurisdictions, pretrial management coupled with a few trials renders asbestos litigation routine. Judicial involvement in the typical case is generally limited to application of standard rulings or participation in a settlement conference. New substantive issues are relatively rare and some courts have established procedures to dispose of these issues on a districtwide basis. If a trial is deemed necessary, judicial involvement will increase, but this is a rare event. The norm is that cases settle when they are called for trial.

In jurisdictions in which the cases have become routine, justification for special trial systems is elusive. If special treatment results

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99. Administrative Office of the U.S. Courts, Annual Report of the Director 318 (1985).

100. *See generally* T. Willging, *supra* note 4, at 7-10 and sources cited therein.

101. See the discussion *supra* at note 81.

102. *Id.; see also* Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation,* 70 Iowa L. Rev. 141, 190-98 (1984) (issues relating to knowledge of dangers and determination of defects in asbestos products).

in substantial delays for asbestos trial assignments in comparison with similar cases, are there special features of asbestos litigation that might justify the delays? Two justifications are presented, one from the perspective of the court, the other from the perspective of the defendants. From the court's perspective, assignment of cases for trial in limited numbers represents an implicit allocation of resources to one type of litigation. This assumes, of course, that the cases will demand large amounts of judicial resources, a contention that this report contradicts. Assume, however, that scheduling of asbestos litigation for trial may drain scarce judicial resources (perhaps because of a general impasse in settlement negotiations between opposing lawyers). Even in those circumstances, the only grounds for distinguishing asbestos cases from other cases appear to be special "cash flow" problems that asbestos defendants may be experiencing. From the defendants' perspective, cash flow is the main justification for such special treatment. The two arguments converge. Both rationales cede power to defendants to control the trial docket by acceding to short-term threats of trials.[103]

The cash flow justification generally is based on representations of counsel in informal contexts. Competent evidence of cash flow problems might justify delays;[104] other alternatives, however, should be considered. A court could reasonably leave the issue for the parties to resolve, on the assumption that the plaintiffs can demand evidence of financial straits and can tailor the timing of payments to the financial position of the defendants or the Wellington facility. Another solution would be to leave the question of solvency to a forum, such as a bankruptcy court or a court considering a nationwide class action, that provides a structure to apportion assets fairly to all claimants, to assess plans for future operations, and to evaluate a defendant's ability to make payments.

Resolution of the "cash flow" debate is beyond the scope of this report. The issue deserves attention because it appears that several courts have, perhaps without extensive deliberation or based on outdated assumptions about the complexity of asbestos litigation, failed to allocate the resources to asbestos cases that their numbers

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103. Long-term employment of a trial strategy deprives defendants of the benefits of settlements, which they have chosen in a high percentage of cases. These benefits include lower transaction costs and reduction of risks of high awards that, in turn, increase the value of all cases.

104. *Cf. In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 305-06 (6th Cir. 1984) (evidence of limited fund required before certification of a mandatory class action under Fed. R. Civ. P. 23(b)(1)(B)); *In re* Northern Dist. of Cal. Dalkon Shield I.U.D. Prods. Liab. Litig., 693 F.2d 847, 852 (1982), *cert. denied*, 459 U.S. 1171 (1983) (evidence of net worth, earnings, and available insurance necessary to establish foundation for mandatory class action based on limited fund).

demand. This special, delayed treatment for asbestos litigation may be a by-product of case management that was necessary, at first, to tame uniquely unruly characteristics of asbestos cases. Once pretrial systems are in place, however, it appears that the main feature of asbestos litigation is the number of cases. Special treatment for this aspect of the problem should be aimed toward scheduling cases for trial on a group or individual basis.

Once the litigation has been routinized by pretrial management, no justification for delayed trials has been encountered in this study. Experience in jurisdictions that have committed resources to the problem suggests that the investment required is minimal, far less than the resources normally commanded by similar cases.[105] Failure of courts to allocate those resources has generated criticisms[106] of the courts. These criticisms call for either a change in practice or a reasoned response.

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105. T. Willging, *supra* note 4, at 10-14 (discussing case weights for asbestos cases and other products liability cases); *see also* S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980); discussion *infra* at notes 309 to 318.

106. Hensler, *supra* note 1, at 78-80; *see also* Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 534-39 (1986) (pressure for fast, efficient dispositions promotes a decline of interest in trials and adjudicative procedure).

V. STANDARD PRETRIAL PROCEDURES: PAPERWORK AND DISPOSITION MANAGEMENT

As prior discussion suggests, there are two different, but overlapping, types of pretrial management, directed at distinct problems. What is termed "paperwork management" is directed at complexities caused by the multiplicity of parties and claims. The purpose is to minimize unnecessary clerical and judicial attention to repetitive paperwork by establishing standard pleadings and rulings where appropriate. Such management may indirectly facilitate disposition of a case by easing the achievement of a state of readiness for trial or by creating some predictability about the trial process.

On the other hand, "disposition management" relates primarily to complexities caused by the total number of asbestos cases within the district, regardless of their complexity. This management is designed to bring cases to disposition by scheduling trials and, if necessary, presiding at settlement conferences, trials, or both. The effect on caseload should be direct. Both systems are necessary; coordination of the two needs is an ingredient of successful management of asbestos litigation. In both of these areas, this report builds on prior work.[107]

Paperwork Management

Standard pretrial procedures have been developed, and continue to be developed and refined, by the parties and the courts. Efforts to streamline the processes and reduce unnecessary paperwork are relatively widespread and uncontroversial. Even though some counsel on both sides oppose consolidation for trial, counsel for plaintiffs and defendants tend not to object to pretrial consolidation of cases. Pretrial problems, however, remain evident in one or two

107. T. Willging, *supra* note 4, at 15–23; *see also* National Center for State Courts, Judicial Administration Working Group on Asbestos Litigation, Final Report (1984) (standard procedures and model form proposed); Manual for Complex Litigation, Second, *supra* note 90 (comprehensive discussion and forms for management of mass tort cases).

districts that have shown little judicial management in the past and that exhibit serious lack of cooperation among counsel.

Almost all districts have some form of standard interrogatories, designed to prevent a proliferation of questions and answers directed at the same subject. In a district that does not have such an order, defendants' lawyers have informally worked out an agreed procedure for filing a single set of interrogatories. Lawyers report that standard forms generate form responses that can be adapted by paralegals to the facts of each case and reproduced on the word processing system. In districts without a single order governing all the litigation, the lawyers usually have agreed to follow the order of the first judge-specialist even after asbestos cases were dispersed to all judges. One lawyer observed that they were "conditioned" by the original order.

Exchange of pretrial expert reports is the norm in almost all of the districts. The single clear exception is a district with a major backlog of cases and major contentiousness among the lawyers. In that district, the contentiousness of the lawyers, as exhibited by continuing discovery disputes and lack of cooperation on exchange of basic information, has interacted with a lack of effective judicial management to create a backlog. Absent a clear structure for pretrial management, a single lawyer who chooses to obstruct the pretrial process has the power to do so. The backlog created through this pretrial by combat, in turn, serves the interests of the defendants in postponing payments and reducing the settlement value of cases.[108]

Districts with well-managed scheduling orders, including firm trial dates and discovery deadlines, on the other hand, promote cooperation among counsel even in the absence of a standard order requiring exchange of information or medical reports. The scheduled deadline creates a need to cooperate by imposing a professional mandate on both sides. Reciprocal concessions then serve to help the system work.

In some instances, standard pretrial management arises through the cooperative behavior of the lawyers. For example, as discussed previously, the lawyers for both sides in New Orleans created a document depository to store discovery materials, with the effect of reducing the amount of paperwork filed in the court and building a framework to avoid or limit duplication.[109] Similarly, attorneys

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108. *See* D. Waterman & M. Peterson, Evaluating Civil Claims: An Expert Systems Approach 8 (1985) ("A claim is worth less if the claimant has an immediate need for money. Timing is particularly important. We found that legal experts believe that case value increases as the trial date approaches.").

109. See the discussion *supra* at note 65.

have developed form complaints, answers, motions, and interrogatories, all without a court order.

Few courts have formally used standard orders to establish uniform pretrial, trial, or evidentiary rulings. Perhaps to maintain the decision-making autonomy of each individual judge, courts tend not to adopt, as standing orders, the rulings of a judge specialist who managed the pretrial process.[110] Individual judges, nevertheless, generally subscribe to these orders on a case-by-case basis, with exceptions limited to disagreement over fundamental, unsettled principles. While some uncertainty prevails, counsel seem able to predict the vast majority of pretrial rulings.

At the same time, most lawyers interviewed would prefer the clarity and predictability of a single districtwide asbestos case management order. Any such order should be tailored specifically to the needs of asbestos litigation. Application of a standing order designed for other cases may be counterproductive. For example, in the District of New Jersey, a standard pretrial order is required in all civil cases.[111] As applied to asbestos litigation, this order requires the listing of hundreds, even thousands, of exhibits in each case. A typical filing is about four inches thick, may cost $10,000 to $15,000 in paralegal and legal time to produce, and is filed before a trial is scheduled. In one plantworker case, involving multiple plaintiffs, the bill for photocopying was $15,000. Plaintiffs and defendants roundly criticize the process as, in the words of one, "thoroughly useless." The rationale for the extensive pretrial order is that it imposes the burden of preparation of the cases on the parties and their lawyers and does not waste the court's time in structuring the pretrial preparation in each case. However laudable this goal is in other contexts, it is of dubious relevance to asbestos litigation. To deal with the repetitiveness of asbestos cases, preparation of a special pretrial system, such as a model pretrial order for asbestos cases, would limit the imposition of unnecessary expense and paperwork on the parties. Modest investments of court resources in pretrial management of the first asbestos cases are likely to generate substantial economies for the clerks' office and the judges' chambers as well as for the parties.

A key element of a case management system is to integrate the "paperwork management" with the "disposition management."

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110. For discussion of the exceptional situations in which a court established a panel or an en banc procedure, see *infra* note 236.

111. A copy of the District of New Jersey's form, entitled "Final Pretrial Stipulation and Order," is on file with the Federal Judicial Center. *See generally* C. Seron, The Use of Standard Pretrial Procedures: An Assessment of Local Rule 235 of the Northern District of Georgia (Federal Judicial Center 1986).

Mandating discovery and a massive pretrial order without scheduling a trial date invites the filing of unnecessary paperwork that will need to be updated for trial.

In sum, in most of the courts in this study, the issues of paperwork management were few. Most courts and counsel had developed workable systems for collecting and exchanging information necessary for the settlement or trial of asbestos cases. Standard formats have been established, generally with the court's assistance, and filings are coordinated with trial and settlement needs. In the districts that failed to link the two systems, unproductive duplication resulted.

Disposition Management

Rand researchers found that "[v]ariation in the pace of disposition across courts is . . . more a matter of judicial behavior than of lawyer or litigant effort."[112] As illustrated in the previous subsection, a primary management task is to integrate the paperwork management system with the disposition management system. In disposition management, the emphasis is on firm, credible trial dates and scheduling of sufficient numbers of cases to reduce the queue of cases.[113]

The court's influence is at its maximum in disposition management: Action or inaction by the court itself has a dramatic impact on the value of a case. Failure to set a trial date generally results in a sizeable lowering of the value of a case and, conversely, scheduling of a trial date usually increases the plaintiff's bargaining power.[114] By providing rigid deadlines, the court imposes an end to the constant reevaluations that might otherwise impede settlement of cases.[115] Once the court cuts off all discovery and precludes trial

112. Hensler, *supra* note 1, at 83.

113. Discussion of grouping of cases for trial will be considered *infra* at notes 299 to 305.

114. D. Waterman & M. Peterson, *supra* note 108, at 8.

115. Courts create the context within which parties resolve actionable disputes. In Professor Galanter's terms, the courts confer "a bargaining endowment" on the parties that includes "not only the substantive entitlements conferred by legal rules," but also the "rules that enable those entitlements to be vindicated." Galanter, *The Radiating Effects of Courts*, in K. O. Boyum & L. Mather, Empirical Theories About Courts 117, 121 (1983). In addition to rules, the "delay, cost, and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants." *Id.* at 121-22. *See also* J. White & H. Edwards, The Lawyer as Negotiator 173 (1976) ("the fact that there will be a public trial if settlement is not reached is the single critical fact from which a variety of consequences about lawsuit negotiation flow").

use of new information, the ingredients for evaluation and trial become relatively constant.

Some courts link paperwork management and disposition management by setting a firm trial date at the initial scheduling conference or its equivalent. Starting from the earliest possible date given the available resources, the court will then count backwards from the trial date to impose time limits on other pretrial processes such as the filing of motions and cutoffs for various forms of discovery. The Ohio Asbestos Litigation (OAL) and the District of Maryland's standing order are prototypes of this approach.[116]

Another approach to disposition management is to set priorities among cases and prepare only those cases that appear to be ripe for trial. Courts tend to presume that all cases filed are equally ready for trial and that they should be scheduled on a first-come, first-served basis. This assumes that there are not external forces, such as the statute of limitations, driving the filing of litigation. In asbestos litigation, cases may be filed because of what one lawyer calls the "asbestos frenzy," a quite understandable phenomenon driven by the discovery doctrine used in many statutes of limitations cases[117] and by the public apprehension of the dangers of exposure to asbestos. Lawyers file cases as soon as possible to protect their clients (and themselves) from serious statute of limitations problems. Some of these cases, however, may be based on limited physical impairments at the time of filing.[118] Indeed, the long la-

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116. *See, e.g.*, T. Lambros, E. Green & F. McGovern, Ohio Asbestos Litigation Case Management Plan and Case Evaluation and Apportionment Process 30–31 (1983); *In re* Baltimore Asbestos Litig., All Cases, Memorandum and Order (D. Md. Dec. 16, 1983).

Under the OAL, there is a major wrinkle: Settlement conferences are the key events and discovery is carefully structured (and limited) so that information necessary for case evaluation, such as a medical report or an employment history, is presented early. On the other hand, information that lawyers consider necessary for trial, such as a deposition of a co-worker about exposure to specific asbestos products, is deferred until after the main settlement conference. In lieu of a full deposition, the court permits Simplified Pretrial Informational Transactions (SPRINT) interviews and has suspended Fed. R. Civ. P. 26 deposition procedures until a showing of necessity for trial is made. *In re* Ohio Asbestos Litig., OAL Order No. 32 (N.D. Ohio Feb 6, 1985) (order creating SPRINT interviews and specifying procedures); *see also In re* Ohio Asbestos Litig., OAL Order No. 40 (N.D. Ohio Sept. 18, 1985) (motions for leave to depose medical experts before trial denied subject to showing of necessity after direct testimony); discussion *infra* at notes 140 to 164.

117. Special Project, *supra* note 8, at 641–58.

118. In the Eastern District of Texas, Special Master Francis McGovern collected data from plaintiffs' files indicating that 75 percent (510 of the 684) plaintiffs for whom data was available were not disabled at the time of trial. Seventy percent (479) of those plaintiffs, however, were not working. Eighty-four percent of the nonworking plaintiffs reported that they had retired. Jenkins v. Raymark Indus. Inc., M-84-193-CA (E.D. Tex. 1986).

tency period suggests that damages may not be fully known or knowable for decades.[119]

Judge Rya Zobel in the District of Massachusetts created an innovative procedure, called the "inactive asbestos docket," to address the problem of weak asbestos cases that clog the queue and delay trials for more serious cases.[120] Judge Zobel ordered all plaintiffs' attorneys to review their files; for cases without serious disease, a procedure was created by stipulation of the parties for voluntary dismissal of those cases, subject to refiling. Defendant agreed to waive any statute of limitations defense that had not already been raised.[121]

Having an inactive procedure seems to be in the interests of all parties and the courts. Indeed, in Eastern Tennessee, the plaintiffs seized a unique opportunity to create a similar procedure without prompting by the court.[122] The result was that plaintiffs' attorneys had the ability and incentive to file in federal court only those cases that approximate a state of trial readiness. Absent a special procedure, the statute of limitations virtually compels filing a case at the first sign of asbestos disease.

An additional benefit of the inactive docket is that it may assist the lawyer in setting priorities among cases. Plaintiffs' attorneys report that it is difficult to settle a case without some payment to

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119. See the discussion *supra* at notes 7 to 18.

120. *In re* Massachusetts Asbestos Litig., M.M.L. Nos. 1-5, Stipulation Regarding Voluntary Dismissal of Cases Upon Certain Conditions (D. Mass. Nov. 13, 1985). For a further description of the system, see Lempert, *Inactive Docket Reduces Dilemma In Asbestos Cases,* Inside Litigation, 1, March 1987, at 1.

The stipulation of the parties, which was approved by the court, allows for voluntary dismissal of the cases under Fed. R. Civ. P. 41(a)(2) at the behest of plaintiff's attorney. Plaintiff may refile the complaint once as a matter of course by filing a "Notice of Refiling of Complaint," using the original docket number. No fee is charged for the refiling.

121. As of the time of this writing (early 1987), an estimated 400 to 450 cases had been assigned to the inactive asbestos docket despite the fact that one law firm resisted assigning any cases. Evaluations of cases are continuing and additions to the docket are anticipated. Estimates of the percentage of qualified cases ranged from about 25 percent to 60 percent, or approximately 850 to 2,040 cases.

122. Trial dates were scheduled promptly in federal court, generally in less than six months. Plaintiffs recognized that there were asbestos cases that needed to be filed because of statute of limitation problems that would not benefit from a speedy scheduling of a trial date. To deal with the situation, plaintiffs' attorneys filed all their asbestos cases in state courts, using the state system like a "holding tank," as one lawyer portrayed it. The state courts made no effort to schedule the cases for trial, perhaps aware of the true purpose of the filings. A federal trial could be obtained by voluntary dismissal of the state case and refiling in federal court. A saving statute permitted the refiling within one year without concern about the statute of limitations.

A by-product of this procedure is an inflation of national statistics regarding asbestos litigation. Under this system, each case is counted twice: once in the state system and once in the federal.

the client. The inactive docket provides a rationale that is more palatable to a client because review is imposed by the court. An anomaly of the inactive docket, however, is that it may inflate the statistical reporting of cases. Under Administrative Office statistical reporting procedures, the voluntarily dismissal is counted as a termination of a case and the refiling constitutes a new case even though it is given the original docket number.[123] Current statistical counting procedures do not have a category that meshes well with the inactive docket procedure.[124]

For cases that have not yet been filed, Wellington defendants have created a similar procedure, dubbed a "green card," which preserves claims (either before or after filing) by tolling the statute of limitations. Some plaintiffs' attorneys, however, have taken the position that current claims should be compensated based on the current impairment (e.g., pleural thickening), including damages for fear of development of future injuries (e.g., cancer) and for damages associated with those future injuries.[125] These attorneys have refused to cooperate with any system that fails to provide compensation for existing impairments. In some jurisdictions, Wellington defendants have responded to such demands (in cases scheduled for trial) by making payments and issuing a green card, entitling plaintiff to file another claim if serious injuries develop.

Occasionally, courts will advance a single case because of an extreme emergency. The general rule, however, is that cases should be brought to trial based on their place in the queue, which is determined by the date of filing. Even in courts that group clusters of

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123. Administrative Office of the U.S. Courts, 11 Guide to Judiciary Policies and Procedures, Statistical Analysis Manual, tit. II, § III.E, p.40, provides that "reopened or remanded actions are counted, for statistical purposes, as separate actions."

124. Because many of the inactive cases are not expected to be refiled, the alternative of keeping the cases on the docket indefinitely would not account for the reality of the situation. At present, the best option appears to be to wait until the action is at least three years old, has had no action for twelve months, and has completed all presently contemplated proceedings. This satisfies the Judicial Conference policy for terminating inactive cases. Administrative Office of the U.S. Courts, 11 Guide to Judiciary Policies and Procedures, Statistical Analysis Manual, tit. II, § III.H, p.44.

125. Courts are divided on this issue. *See, e.g.,* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (en banc) (Mississippi law allows recovery for increased risk of cancer), *cert. denied,* 106 S. Ct. 3339 (1986); Gideon v. Johns-Manville Sales Corp, 761 F.2d 1129 (5th Cir. 1985) (Texas law allows recovery for fear of cancer developing from an existing injury, asbestosis); Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (no cause of action for fear of cancer under Louisiana law in absence of proof of asbestos-related injury or proof of medical probability that such injury would result from plaintiff's exposure to asbestos). *See generally* Rosenberg, *supra* note 1 (advocating a proportionality rule to compensate plaintiffs for the increased risk of cancer caused by exposure to toxic substances); Note, *Increased Risk of Cancer as an Actionable Injury,* 18 Ga. L. Rev. 563 (1984).

cases, the clusters are formed soon after filing and include cases of the same vintage.

In summary, two points deserve emphasis. First, this study confirms the finding of the Asbestos Case Management Conference that the single most important aspect of judicial management of asbestos litigation is the setting of a firm, credible trial date. This study also reveals the need for a system to set priorities for the trial of cases. Under the current system, substantial numbers of cases are called for trial before injuries are fully manifest, while other plaintiffs die of asbestos-related disease before their cases are called for trial. The inactive docket shows promise as a vehicle for excluding the least serious cases from the trial queue. Priorities derived from plaintiff need, however, have not been created.

VI. SETTLEMENT

At the current stage of asbestos litigation, with rights of recovery firmly established, settlement is the single most important feature. A trial is a rare event, the history of which is savored and reanalyzed by trial attorneys and judges. In each district, a handful of trial verdicts provide the basic data about the values of cases. These verdicts support hundreds of settlements, a phenomenon that is not unprecedented in products liability litigation involving clear evidence of liability.[126] Settlements, in turn, establish patterns for future settlements.

As reported above, data from the Administrative Office of the U.S. Courts confirm that settlement is by far the dominant mode of disposition of asbestos cases. Seventy-three percent of all terminated asbestos cases were concluded by settlement (table 4). In contrast, jury and bench trials accounted for 3 percent of the terminations.[127] The settlement rate for personal injury products liability cases in the ten district courts in this study was also 73 percent, with a 9 percent trial rate (table 5).

The unique features of asbestos litigation may contribute to the importance and dynamics of settlement. As discussed previously,[128] general causation tends to be clearly established. Disputes arise as to whether a specific medical condition is asbestos-related and as to the seriousness of the condition, its future dangers, and the prognosis for future disability and treatments. Concentration of cases within districts and specialization of counsel are also likely to have an impact on settlement practices and outcomes, as is the presence of multiple defendants.

The primary asbestos case management decisions facing federal courts concern the settlement of cases. Disposition management inevitably brings a court to evaluate the impact of its policies on the settlement of cases. Indeed, many, perhaps most, courts structure the pretrial process in a way that is perceived to be an aid to set-

126. In the MER/29 litigation of the 1960s, after more than three years of litigation, out of more than 1,000 dispositions, there had been eleven cases tried to jury verdict. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation,* 56 Calif. L. Rev. 116, 132–33, 137–39 (1968).

127. See *supra* tables 4 and 5.

128. See the discussion *supra* at notes 30 to 33.

tlement. Diagnosis of the need for settlement intervention, selection of the most efficient mechanism to achieve the court's goals, and reevaluation of these interventions are continuing issues for courts with substantial asbestos caseloads.

Federal judges employ a wide spectrum of settlement interventions and roles in the ten districts studied. Table 8 charts those roles and activities.

TABLE 8
Overview of Settlement Practices in Ten Study Courts

	Active					
Court	Judge-Hosted Conference	Summary Jury Trial	Arbitration	Special Masters	Computer Evaluation	Traditional
Mass.	Yes	No	No	Proposed	Proposed	No
N.J.	Yes	No	No	No	No	No
E. Pa.	Yes	No	Yes	No	No	No
W. Pa.	No	No	No	No	No	Yes[a]
Md.	Yes[a,c]	No	No	No	No	No
S.C.	No	No	No	No	No	Yes
E. La.	Yes	Yes[b]	No	No	No	No
E. Tex.	Yes	No	Yes	Yes	Yes	No
N. Ohio	Yes	Yes	No	Yes	Yes	No
E. Tenn.	No	No	No	No	No	Yes

[a]Fine for late settlement imposed by at least one judge.

[b]At least two judges use summary jury trials.

[c]All but one judge holds conferences.

Seven of the districts display active judicial involvement in the settlement process, ranging from the regular hosting of settlement conferences to creation of an arbitration or summary jury trial process to the use of special masters or computer evaluations to facilitate settlement. Three of the districts exhibit traditional patterns in which the court schedules cases for trial and becomes involved in settlement only if the parties request specific participation (e.g., to help resolve an impasse). Three of the districts have dispersed the cases to a number of judges with diverse practices, displaying a full spectrum of settlement roles. One of these districts has dispersed cases widely enough to support a study of the effects of different judicial practices on similar cases involving the same lawyers and local legal culture.[129]

In her comprehensive study of settlement options for federal judges, Professor Marie Provine found that many judges prefer to

129. See the discussion *infra* at notes 168 to 170. In the other two districts, there has not been sufficient trial or settlement activity to support an evaluation at this time.

intervene selectively in cases, varying their approach according to the particular barriers to settlement presented by a case or type of case.[130] The goal is "to assess the obstacle(s) present in a particular case and respond with a pretrial plan that will enhance settlement opportunities."[131] By using this approach, judges believe they "can promote more and better settlements than can be achieved through any other approach."[132]

One approach to the measurement of the efficiency of a settlement intervention was devised by Judge Robert Keeton (D. Mass.). He formulated this test: The time invested in an activity should increase the settlement probability sufficiently that, in the long run, the trial time saved through settlements will exceed the time invested in the settlement effort.[133] This report calls into question whether this formula has been applied. Are judicial efforts at settlement of asbestos cases necessary and efficient? If called for at one time, do they continue to be necessary? Do they serve values

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130. D. M. Provine, Settlement Strategies for Federal District Judges 10–16 (Federal Judicial Center 1986).

131. *Id.* at 14.

132. *Id.*

133. *Id.* at 12–13 and app. B.

For example, if a case has an 80 percent chance of settlement without intervention and if a trial of that case would last five days, increasing the probability of settlement to 90 percent would justify an expenditure of four hours of time (40 hours X .90 - 40 hours X .80 = 4 hours). If, on the other hand, the impact on settlement is more marginal, such as increasing the probability of settlement from 98 to 99 percent, savings in trial time will justify twenty-four minutes of settlement (40 hours X .99 - 40 hours X .98 = .4 hours).

The formula is (P2 - P1)TT = BE, where P equals the probability of settlement and P1 and P2 refer to those probabilities before and after judicial intervention. TT equals the anticipated trial time (including any pretrial preparation and rulings on motions that would take place after settlement) and BE refers to the break-even point, that is, the maximum amount of time that should be invested in settlement intervention on pure efficiency grounds. For amplification of this schema, see R. Keeton, Making Wise Choices About Techniques of Judicial Involvement in Dispute Resolution (1985) (unpublished manuscript on file at the Federal Judicial Center).

This formulation assumes, of course, that time investment is the only significant factor and that judicial intervention does not improve the quality of settlements. To justify routine settlement efforts, values other than efficiency, such as improving the consistency or fairness of the settlements, need to be served.

Settlements based on computer data are likely to be qualitatively different from jury verdicts and perhaps even from other settlements. Computer-based settlements, for example, are more likely consistent with each other than are jury verdicts, which may be influenced by a host of nonrational factors. *See generally* A. Chin & M. Peterson, Deep Pockets, Empty Pockets (Rand Corp. 1985). Whether those nonrational factors improve or impede the quality of the outcome may depend on personal values. For example, jury sympathy with workers exposed to asbestos may be based on an emotional identification quite compatible with traditional tort goals of deterring future misconduct. Negotiations among attorneys may, of course, be subject to a different array of nonrational factors.

other than efficiency, such as quality of justice or fairness to parties?

Judicial intervention in settlement generally proceeds on some variation of one or two primary theories. The first is an *information gap* theory,[134] based on a judicial belief that the principal barrier to settlement is one or both parties' lack of information about the value of the case. The missing information could refer to a specific fact, such as the diagnostic report of an expert, or it could be uncertainty about the substantive or procedural law that will apply. The information gap may involve a total misjudgment of the value of a case due to inexperience of one or both lawyers. Typical remedies include tailoring discovery to supply missing facts, ruling on pretrial motions, thereby clarifying the law, or providing expert opinions about the value of the case or its strengths or weaknesses. Such opinions may originate from within the court (trial judge, other judge, magistrate) or from without (arbitrators, summary jury panels, neutral senior attorneys).

Another distinct view of the purpose of judicial involvement in settlement activity is based on a *communications gap* theory. It starts with a diagnosis that the principal barrier to settlement is the failure of the parties to communicate effectively about settlement, perhaps because of the unwillingness of either party to risk being considered weak for having broached the subject.[135] Other barriers include a lack of incentives, economic or psychological, to discuss settlement. A typical remedy is for the judge to host a settlement conference, introduce the subject of settlement first, mediate the communications between the parties, and, perhaps, create or identify some incentives for settlement.[136]

This report uses both theories to assess the need for judicial intervention in settlement. The relevant issues are these:

- Is judicial assistance warranted or necessary to aid the parties to asbestos litigation in meeting informational or communica-

134. References to information bargaining are commonplace in the literature of negotiation. *See generally* I. Horowitz & T. Willging, The Psychology of Law 280–84 (1984); H. Raiffa, The Art and Science of Negotiation 56–58 (1982).

135. It is literally textbook advice to legal negotiators that "[a]lmost without exception it is desirable to cause the opposing party in a negotiation to make the first realistic offer." J. White & H. Edwards, The Lawyer as Negotiator (1976). If both parties have read the text, there is a communications gap.

136. There is evidence that a majority of lawyers (54 percent) prefer that the judge take an active role by expressing evaluations and probing into the merits of the case. A substantial minority (36 percent) prefer a judge who "simply facilitates communication." W. Brazil, Settling Civil Suits: Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges 46 (American Bar Association 1985).

tions needs or both? If not, does settlement intervention improve the quality of settlement or treat the parties more fairly than other alternatives?

- Do disposition management practices have an effect on settlement?
- What roles have judges played in promoting settlement of asbestos litigation, including the development of alternative dispute resolution (ADR) procedures, and what is the effect of ADR?
- What is the effect, if any, of clustering similar cases?
- To what extent, if at all, have the parties been able to develop formulas for settlements?

Disposition Management Revisited

The role of setting firm trial dates as part of the management of cases toward disposition has been discussed.[137] In the opinion of the judges and lawyers interviewed, the use of firm trial dates controls the settlement process. Plaintiffs' lawyers report that the Wellington facility has an internal rule that cases not be settled unless they are on a trial list.[138] Such a rule would reinforce the importance of trial dates. Lawyers typically comment that trial dates are "indispensable," that they are "the key" to settlements, and that discussions before a trial date has been set are "fruitless." One lawyer summarized the situation bluntly: "No one pays without a trial date."

As with any generalization about a process as fluid as litigation, there is a touch of exaggeration in these opinions. Some settlements are achieved in asbestos litigation without a firm trial date, but at a dramatic discount. A graphic illustration occurred in one district shortly before an interview for this study. A case was on the trial docket and an offer of settlement had been made by counsel representing the Wellington facility. The case was bumped from the docket because of a priority criminal trial, and the offer was withdrawn. Plaintiff's lawyer reported that the case did settle because of his dying client's need for funds. The final settlement, however, was at half the original offer because of the uncertainty as to when the next trial date would be. Similarly, a group of plantworker cases settled recently without a trial date, again at

137. See the discussion *supra* at notes 113 to 116.
138. See the discussion *supra* at note 55.

what the plaintiffs' lawyers consider to be a fraction of their value.[139]

Can settlement be advanced from the courthouse steps to an earlier time without dramatically altering the terms of settlement and the quality of justice? Earlier settlements should allow all parties to avoid extensive pretrial preparation costs, at least to the extent that those costs are not necessary to evaluate a case for settlement. Early settlement also compensates a plaintiff at a time closer to the date of an injury, when the need is usually greatest. Examination of the efforts of one court to promote early settlement will help to identify its possibilities and costs.

Early Settlement Based on Computer Data: A Case Study

In the Northern District of Ohio, Judge Thomas D. Lambros and Special Masters Eric Green and Francis McGovern have designed a program, called the Ohio Asbestos Litigation (OAL), that focuses on early settlement of cases before full litigation expenses, especially deposition costs, have been incurred.[140] Cases are grouped in clusters of five each, generally organized according to occupation, worksite, and disease. At least two groups of cases proceed through the OAL process simultaneously. This report devotes considerable attention to these innovative procedures. The intent is to provide an assessment of the procedures for the benefit of courts that are using or have used similar procedures.

The OAL program is premised on addressing both informational and communications needs of the parties. To meet the former, pretrial exchange of information via interrogatories and document production is carefully structured. A special standardized questionnaire-protocol was also developed that includes the amount and types of information that the lawyers have traditionally considered necessary for settlement purposes. Trial-oriented information, such as depositions of experts, is restricted to the postsettlement conference stage. The OAL also addresses information needs by use of special masters and computers to generate data helpful for estimating case values. Communication needs are addressed by two routinely scheduled settlement conferences, 120 and 360 days after filing of the complaint. In those conferences the court uses its of-

139. *See* D. Waterman & M. Peterson, *supra* note 108, at 8.

140. For a description and evaluation of the program by one of the special masters, see McGovern, *supra* note 37, at 478–91.

fices to break down any barriers to early discussion of settlement and participates directly in the evaluation of cases.

In the OAL, the second settlement status conference (SSC II) is the main event. In preparation for the conference, the parties submit the information protocol to the court on a confidential basis. The protocol covers more than 300 variables that the special masters determined to be related to the value of a case. The judge's law clerk collects the protocols and serves as a clearinghouse for information among the participants and as manager of the details of the program.

Clerks feed these data into a computer, using rules of thumb for disputed facts (e.g., entering the facts alleged by the party with the burden of proof and flagging the item as "disputed"). These same data from over three hundred prior trials and settlements are stored in a comparative data base in the computer's memory.[141] Prior to the settlement conference, the court generates a computer printout that lists the names and final values of three closed cases that match most closely the case being examined. For each of the three cases, the computer printout lists the items (variables) that match and those that do not. One of the special masters reviews the printouts and talks with the judge's law clerk and lawyers for the parties about special characteristics of the cases that may not be captured by the computer analysis.

At the conference,[142] with the judge presiding in a courtroom, plaintiff's attorney presents a summary of the salient features of a case, comments on the evidence, and presents a settlement demand. Defendant's counsel counter with their view of the evidence and their defenses, ending with a counterproposal. A special master then projects the computer values for the three cases on a screen, discusses the special characteristics of the case at hand, and recommends a settlement range. Because of the special characteristics, the range recommended by the special master generally differs from the range generated by the computer for the three comparison cases. Counsel for the parties then bargain to resolution or impasse on each individual case. After considering all of the individual cases in a group, if differences remain—and they always do—the parties bargain about aggregate settlement amounts. If an agreement is reached, the total amount is allocated among the plaintiffs by plaintiffs' counsel and reported to the court for review and entry into the computer's data base.

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141. *Id.* at 487–88.

142. For a sample of the agenda at a conference, see Continuation of Ohio Asbestos Litigation Case Clusters Groups I and II, Settlement/Status Conference II, Apr. 9, 10, 1984 (on file with the Federal Judicial Center).

When the OAL was formulated in 1983, the court clustered the cases in two groups of five for each settlement conference. Cases were selected to include a mix of high-risk cases, such as mesothelioma victims with weak product identification evidence, and routine, low-risk cases. The object was to give each some leeway for agreeing on a total amount for the group of cases despite differences in individual evaluations of individual cases. As experience with the system increased, so did the size of the groupings: In the final settlement conference of Phase I of the OAL, fifty-six separate claims were settled.[143] In Phase II, a dramatically truncated schedule has been imposed, and a total of 150 claims will be prepared for a final settlement conference on April 20, 1987, and, if unresolved, a trial on June 1, 1987.[144]

Overall, OAL Phase I led to the settlement of all 112 asbestos cases within twenty-seven months of the implementation of the plan.[145] Each of these settlements was within the range recommended by the special master. Evaluation of the plan by the special masters and the court is currently in process. A preliminary evaluation by one of the special masters contains "mixed reviews" on criteria of cost and fairness to the parties.[146]

The clearest success of the OAL is that all cases did settle and that the parties did address the settlement of cases before the eve of trial, based on a truncated discovery process that was limited to information designed for evaluation, not trial. Traditional methods of case management do not produce such early settlements. The abbreviated discovery schedule probably reduced the transactions costs to the parties more than the expenses of the OAL increased such costs. The benefit to the court is less clear. A primary benefit may be the ability of the trial judge to plan a trial calendar without the dislocations that last-minute settlements cause. Savings in judge or magistrate time in ruling on discovery disputes or pretrial motions might have been considerable in the early days of asbestos

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143. *In re* Ohio Asbestos Litig., OAL Order No. 41 (N.D. Ohio Oct. 31, 1985). Some of these cases had apparently been discussed without settlement at earlier SSC IIs.

144. *In re* Ohio Asbestos Litig., OAL Order No. 56 & exhibit A (N.D. Ohio Jan. 16, 1987). The proposed format for the trial is to schedule ten simultaneous trials of groups of fifteen cases for each district judge. *Id.* at exhibit A, p.1. The time for full operation of the OAL system from designation of clusters to SSC II is 180 days (down from 360 in OAL I) and to trial, 260 days (down from 480). *In re* Ohio Asbestos Litig., OAL Order No. 48 (N.D. Ohio Aug. 8, 1986).

145. McGovern, *supra* note 78, at 489. The first groups of cases had been on a 480-day cycle from filing to trial. The final settlement was achieved at the SSC II, which was held at the 360-day point. Settlement of later clusters was accelerated in the last two SSC IIs. *See In re* Ohio Asbestos Litig., OAL Order No. 41 (N.D. Ohio Oct. 31, 1985).

146. McGovern, *supra* note 37, at 489-93.

litigation, before these rulings became standardized. Further benefits may be derived from satisfaction of the court's interests in promoting fair and just settlements.

A final assessment of the OAL cannot be made at this time. As Professor (and Special Master) McGovern indicates, the program should properly be seen as a "capital investment"[147] in the development of computer-based systems for settlement of mass tort cases. Recent caseload increases in the Northern District of Ohio will test the capacity of the system to operate efficiently and effectively in its home district.

Whether the program is transferable remains a serious question. Features of the plan, especially the computer-based evaluation of cases, have been exported to Eastern Texas,[148] Massachusetts,[149] and the claims facility to be created in the Manville bankruptcy. More sophisticated models remain to be tested.[150] Judge Lambros and the special masters have created a well-documented record of efforts to promote early settlements through the use of computers and other case management interventions. The Ohio results, however, seem to be primarily the product of the dynamic force of the personality of the judge who initiated the system, operating synergistically with innovative and knowledgeable special masters.[151]

Viewed as a short-term, isolated venture, the OAL does not seem justified from the perspective of judicial case management, emphasizing the use of court resources. All cases settled, but as table 6 indicates, trials in all of the study districts have been rare during

147. *Id.* at 489.

148. In Eastern Texas, a computer profile of cases was presented to the jury as part of the class action proceedings. Had it proved to be necessary, the computer data might have lent credibility to the plan to allow a single jury to assess punitive damages for the class before compensatory damages were assessed for the class. The challenge was to devise a procedure that met the state-law requirement that punitive damages bear a reasonable relationship to compensatory damages for the class. Computer data would enable the jury to make an informed decision about how representative those plaintiffs were and thereby to estimate compensatory damages for the class, the foundation for a punitive award. The Fifth Circuit approved this approach as one of two acceptable alternatives. *Jenkins,* 782 F.2d at 468 (5th Cir. 1986).

An additional use of the computer data was in calculating the total settlement amounts. Lawyers reported that the computer data were useful in that respect.

149. Professor Eric Green submitted a report to the court and the Administrative Office of the U.S. Courts describing the utility of a computer system. E. Green, Massachusetts Asbestos Litigation Feasibility Study (Aug. 22, 1986) (unpublished manuscript). He concluded that a computer-based case management and evaluation process is both feasible and desirable for the Massachusetts Asbestos Litigation. As of February 1987, the court had not obtained money or equipment to implement the report.

150. Brazil, *Special Master in Complex Cases: Extending the Judiciary or Reshaping Adjudication?,* 53 U. Chi. L. Rev. 394, 400–01 (1986).

151. *Cf.* Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U. Chi. L. Rev. 337, 359–65 (1986).

1985 and 1986. As the data in table 9 indicate, the OAL did not serve to reduce the time from filing to termination.

TABLE 9
Time from Filing to Termination of Asbestos Cases in Ten Federal District Courts

Court	Number of Terminations	Mean Number of Days from Filing to Termination	Median Number of Days from Filing to Termination
Mass.	330	1,002	911
N.J.	220	706	314
E. Pa.	594	617	555
W. Pa.	107	698	630
Md.	116	1,083	1,120
S.C.	372	723	681
E. La.	180	896	783
E. Tex.	469	814	654
N. Ohio	104	1,232	1,255
E. Tenn.	164	374	185
All cases	2,656	773	671

These data include the start-up time for a plan such as OAL as well as the time accumulated prior to consolidation of the cases in Judge Lambros's court. The first OAL order was issued in June 1983. The order concluding OAL Phase I was entered on October 31, 1985, approximately twenty-eight months (840 days) after the original consolidation. The data indicate that start-up time plus the 480-day trial track of the OAL surpasses the mean and median times for all asbestos cases in the ten districts. As modified, however, the OAL should reduce the times dramatically.

As a capital investment, the OAL shows more promise. Among the lawyers interviewed in Northern Ohio, several critics of the OAL still found merit in the use of computers to generate a range of prior settlements in similar cases. This support was not unqualified, and computer data were not seen as one of the main factors driving settlement. Indeed, one of the lawyers who found the computer data useful also was certain that lawyers could evaluate cases in their traditional way. The system seems acceptable, even valuable, to lawyers because it assembles information, using a systematic mode that parallels traditional legal models of evaluating and settling cases. Lawyers look at precedents and then at facts that might distinguish those precedents from each other. In addition, the system is attractive to lawyers because there is a built-in opportunity for a special master to adjust the range to account for less tangible variables that might affect the outcome, such as the

degree of impairment and suffering evident in plaintiff's appearance.[152]

One might reasonably ask why a court should collect and organize the data. A short answer is that only through the court is the information likely to become available to all parties. Absent a program like the OAL, plaintiffs' attorneys are the only source of complete settlement information in a given case, but they do not necessarily share this information with each other. Likewise, defendants did not, prior to Wellington, generally share settlement information with each other. Jury reporter services are sporadic in coverage of trials; settlement information is not systematically collected.[153] In that context, judicial initiatives are the only path to complete and relatively trustworthy information. In the end, the issue of whether courts should collect and distribute settlement information depends on value judgments about the proper role of courts in society.

Computer data reportedly facilitated the settlement process by giving the parties a reasonable starting point for discussions,[154] in contrast to the "blue sky bargaining" that often characterizes the early stages of settlement discussions.[155] On the other hand, lawyers in other jurisdictions and in many cases are able to bargain through those barriers without the aid of data from the court. In this study, several private firms had created or were in the process of creating data bases for settlement. Wellington reportedly will create a national data base. Such experiences suggest that the federal courts may serve a meaningful role in demonstrating to the parties a system that they may choose to adopt to improve their private dispute resolution capacities.[156]

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152. Query: Should the role of the special master—or the court, in other contexts—be to predict likely jury outcomes or to employ a model of fair adjudication based solely on legal factors and excluding factors that should not, by themselves, influence the jury, such as the appearance or attractiveness of a plaintiff or the corporate status of a defendant?

153. Daniels, Civil Juries, Jury Verdict Reporters, and the Going Rate 5–9 (1986) (unpublished manuscript prepared for delivery at the 1986 Meeting of the Law & Soc'y Ass'n, May 29–June 1, 1986, Chicago, Ill.; copy on file at the Federal Judicial Center).

Specialized litigation services, such as *Mealey's Litigation Reports: Asbestos* and the *Asbestos Litigation Reports*, regularly report settlements and verdicts across the nation, but their reports include only a fraction of the universe of settlements.

154. Brazil, *supra* note 150, at 401 (quoting McGovern: "'the lawyers could not be too far apart and still be realistic and credible'").

155. The phrase is from P. Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective 137–38 (1979). The Arusha in Tanzania describe this stage of the negotiation process as "talking to the mountain." Another commentator calls it "oratorical fireworks." C. Karrass, The Negotiating Game 134–38 (1970).

156. *See generally* D. M. Provine, *supra* note 130.

In sum, the case for long-term judicial collection of the data has to rest on improving the quality of settlements and on the value of improving public access to data relating to litigation, both of which are difficult to test empirically. Justification for judicial involvement may hinge on whether public collection of, and access to, settlement information is superior to private collection, and retention, of that data.

Another factor in the evaluation of the computer system and the other features of the OAL is the question of cost. Professor McGovern states that the total cost of the OAL during the three years of Phase I was "over $250,000" for "special masters, experts, computer runs, and other expenses of designing and implementing the OAL plan."[157] The cost per case would thus be over $2,200, distributed among more than ten parties. None of the respondents initiated complaints about the cost and no appeal of the judge's assessment of these costs was entered, despite some attorneys' misgivings about the judge's authority to impose these substantial costs on the parties. Parties might reasonably question the propriety of taxing them for capital outlays that primarily benefit litigants in other districts. Apparently, however, the cost savings per case through reduced transaction costs more than offset any party's assessment of OAL development costs. Most defendants are also active litigants in the other districts in which the program will be used. Plaintiffs are likely to use the Manville facility, which probably will incorporate some OAL features.

The price of the OAL is high and the parties pay much of the direct costs (e.g., fees of the special masters and other experts). Savings in other litigation costs may offset these expenditures. In addition to the direct costs of the OAL, there are indirect costs. Court personnel provide the support (such as data entry) and structure (such as the settlement conference and judicial planning) for the system through the judge and his clerks. Are these public expenditures justified by improvements in the process, such as freeing resources for other cases awaiting trial?

Evaluation of the OAL must also address the question of whether the process is fair to all parties. Professor McGovern reported that defendants and their attorneys "found the original OAL plan overly complex, the constant revisions disconcerting, and the court's interventionist posture constraining their ability to represent their clients as they saw fit."[158] This report's findings are

157. McGovern, *supra* note 78, at 489. *See also In re* Ohio Asbestos Litig., OAL Orders Nos. 5, 7, 42, 45 (N.D. Ohio).

158. McGovern, *supra* note 37, at 490.

similar. Some defendants' attorneys have felt that their opportunities for trial were abridged by the application of the OAL plan, especially by what they perceived as shifting formats for trials, with settlement conferences scheduled during the time needed for final trial preparation. One attorney on the defense side termed the settlements "coerced" and felt that the procedures, especially the settlement conferences, were biased toward the plaintiffs' interests and that the values of the cases were inflated.

Nor are all defendants entirely satisfied with the computer evaluation process. Some see the "rule of thumb" for noting disputes (giving the benefit of the doubt to the party with the burden of proof) as being inadequate to cope with major disputes about diagnoses of diseases. Some also see the computer evaluation and the masters' recommendations as giving the process a bias toward higher awards.

Plaintiffs and their counsel have adapted to the process more readily than defendants. Plaintiffs attend the final settlement conference and reportedly are totally satisfied that they have had their "day in court." Conversely, defendants are currently resisting efforts to require their personal attendance at the conferences. Indeed, the process may provide maximum satisfaction to the plaintiff. Participation (through counsel) and a sense of control of the decision-making process is provided by mandating relatively public negotiations.[159] Use of computer precedents limits the risk of catastrophic loss to all parties by providing a range and a process for negotiating away extreme risks. Plaintiffs (and defendants, although perhaps more reluctantly) benefit from avoidance of the wide variations that are possible in the formal legal system.[160]

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159. *See generally* Thibault & Walker, Procedural Justice (1975). In their seminal study of adversarial versus inquisitorial systems, Thibault and Walker concluded that litigants preferred an adversarial system. One of two key factors contributing to increased satisfaction with adversary procedures was the "high degree of regulated contentiousness," exemplified by the "separation of presentations, the designation of opposing representatives, and the partisan identification of the attorney with . . . [the] client." *Id.* at 119. The other major factor, which they considered to be of dominant importance, was "the maintenance of a high degree of control over its process by the disputants." *Id. See also* Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience,* 18 Law & Soc'y Rev. 51 (1984).

160. *See, e.g.,* A. Chin & M. Peterson, Deep Pockets, Empty Pockets (1985), in which the authors report wide variations in reported jury verdicts in Cook County, Ill. This report, however, should be read in context. Awards in work injury cases involving corporate defendants were double the amount for similar injuries in injury-on-property (street hazard) cases. The authors indicate, however, that difficulty controlling for the variable of lost income seriously limits the explanatory value of their general conclusion that the jury system is the primary source of the variability. Failure to examine outcomes for bench trials results in a lack of comparative data. Nevertheless, their data support the general impression, articulated primarily by counsel for corporate defendants, that "the tort system has become

The diminution of the trial option, however, has fundamental ramifications for all parties, not just asbestos litigants. If the complaints that the trial options are effectively foreclosed by the system are, indeed, well founded, justification for computer evaluations and intensive settlement conferences would have to be enormous because the result would amount to a suspension of jury trial guarantees.

The crucial issue is how the OAL system compares to available alternatives. One commentator has questioned whether special masters may be subject to subtle role pressures to design new systems and perhaps "overlook available resources and downplay the utility of adapting or refining established ways of solving problems."[161] Are lawyers incapable of evaluating asbestos cases singly or in small groups? Evidence from other jurisdictions with moderate caseloads, such as Maryland, South Carolina, Eastern Tennessee, and Western Pennsylvania, suggests, in fact, that lawyers resolve asbestos claims promptly when they are called for trial. The *Jenkins* class action,[162] with a settlement of approximately 755 cases during trial, suggests that an upper numerical limit to the ability of lawyers to evaluate and settle asbestos cases on the trial docket has yet to be reached.

Justification for the information generated by the computer depends on its utility in dealing with massive caseloads such as those experienced in the Districts of Massachusetts and Southern Mississippi or in the multitudinous claims against A. H. Robins in its Chapter 11 proceedings.[163] At those levels of caseload, the value of

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more nearly a crapshoot than an evenhanded compensation system." Feinberg, *The Toxic Tort Litigation Crisis: Conceptual Problems and Proposed Solutions,* 24 Hous. L. Rev. 155, 163 (1987).

Such broadside critiques assume that the system has changed dramatically in recent decades and that other systems would produce more systematic, consistent results while remaining attentive to individual differences among litigants. Examination of alternative systems, however, does not necessarily support that conclusion. In their classic study of judicial decision making in criminal sentencing, Partridge and Eldridge found considerable disparity among judges in an experimental context in which all respondents reviewed the same presentence report before making their (hypothetical) decisions. T. Partridge & W. Eldridge, The Second Circuit Sentencing Study (Federal Judicial Center 1974). *See also* Hensler, *supra* note 1, at 117–19 (alternative administrative systems are not encouraging).

161. Brazil, *supra* note 150, at 402.

162. Jenkins v. Raymark, No. M-84-193-CA (E.D. Tex. 1986). *See also Texas Class Action Settles for More Than $100 Million,* Mealey's Litig. Reps.: Asbestos, Apr. 11, 1986, at 4,089.

163. More than 327,000 claims have reportedly been filed with the bankruptcy court. Cooper, *Robins Buy-Out Offer Withdrawn,* Nat'l L.J., Feb. 23, 1987, at 3, 30. Professor Francis McGovern has also been appointed as a special master in those proceedings.

judicial settlement intervention should be compared with the alternatives of mass trials, with their magnification of the risks to the parties. In those cases, however, an educated hunch, informed by the general experience in class action litigation,[164] would be that none of the parties would be willing to entertain the risk of a megatrial. So again, factors other than judicial intervention might be sufficient to bring about settlement.

In summary, serious concerns about the wisdom and efficiency of the OAL exist from both short-term and long-term perspectives. Continuing modification of this dynamic program makes final evaluation impossible. It is likely that the court's own reevaluations anticipate many of the points discussed here. Investment of judicial resources into intensive settlement efforts may be of great benefit to the parties, but the justification for imposing some of the costs on the public is questionable.

Computer-based information systems could be generated privately by the parties, who seem to recognize the benefits. Public collection of the information, however, is more likely to allow other litigants access to the information and the means of developing a system. Courts may benefit from the promotion of alternative dispute resolution processes. Computer-assisted settlement shows long-term prospects of aiding jurisdictions with major asbestos caseloads. Some public-private investment in computer-based systems may be warranted to demonstrate feasibility. At all times, however, the guarantee of the right to trial by jury for parties who choose not to pursue alternative dispute resolution procedures must be preserved.

Early Settlement Through Fines

The early settlement feature of the OAL is clearly the exception in the districts studied. The norm is for the parties to settle at the courthouse steps, after they have completed discovery. Senior Chief Judge Hubert I. Teitelbaum in the Western District of Pennsylva-

164. *See* Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits*, 60 B.U.L. Rev. 542, 544-47 (1980). *See also* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 Geo. L.J. 1123 (1974); Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 Mich. L. Rev. 308, 308-09 n.6 (1985); *In re* School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir. 1986) ("[T]he realities of litigation should not be overlooked in theoretical musings. Most tort cases settle, and the preliminary maneuverings in litigation today are designed as much, if not more, for settlement purposes than for trial. Settlements of class actions often result in savings for all concerned.").

nia and District Judge Joseph H. Young in the District of Maryland impose sanctions for late settlement of cases, including asbestos litigation.[165] Reports from both jurisdictions indicate that these practices are effective in fostering marginally earlier settlements in asbestos litigation than is the norm for those two courts.

In the District of Maryland, Judge Young's order imposes a fine of $1,000 per day for any asbestos case settlements announced later than approximately ten days before the scheduled trial date.[166] If any of the asbestos cases in the cluster scheduled for trial settle at any time, the fine is imposed on the party found responsible for the delayed settlement.[167] Judge Young has not imposed any fines and all of his cases have settled within the guidelines. Attorneys complain about the order and question its legality, morality, constitutionality, and fundamental fairness, but, sometimes in the same sentence, they confess that it works. A similar report was received from Western Pennsylvania regarding Judge Teitelbaum's imposition of jury costs on the parties for delayed settlements. A reason for its success is that lawyers want to avoid the embarrassment of having sanctions imposed on them.

Imposing fines for late settlement, of course, is not comparable to an OAL program that drastically alters the time of settlement and avoids much pretrial discovery. These orders may have marginal impact on the parties' transaction costs. Looking at judicial economies, the orders require little judicial effort to implement, are largely self-enforcing, and allow a court to plan its trial schedule more efficiently.

Judicial Settlement Roles

The major finding of this report is entirely consistent with that of Professor Provine in her seminal study of the settlement roles of federal judges:[168] Judges engage in a wide variety of settlement

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165. For a case that concludes that a court has the inherent power to impose a sanction on an attorney for late settlement of a case, see Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985).

166. *In re* Key Highway, Fairfield and Sparrows Point Shipyard—Asbestos Cases, January 1986—Groups I & II, Memorandum and Order (D. Md. Nov. 1, 1985).

167. *Id.* at 5–9. The mechanism for determining the party responsible is similar to the cost-shifting features of Fed. R. Civ. P. 68. Each party (or group, if negotiations are conducted in group fashion) must submit a sealed envelope containing its last settlement offer to the clerk of court, on the day after the deadline for announcement of the settlement. If no offer was made, that fact should be indicated or the party can simply decline to file a sealed envelope. The fine will be imposed on the party whose final offer differs most from the final settlement figure or who failed to participate in negotiations at the earlier time. *Id.*

168. *See generally* D. M. Provine, *supra* note 130.

roles and use a wide range of alternative dispute resolution systems, including summary jury trial, mediation, and arbitration. Her chronicling of the variety of settlement practices previewed my conclusion that in the context of asbestos litigation all judicial actions "work" to produce settlements. A disturbing feature of findings in the current report, however, is that the traditional scheduling of a firm trial date, coupled with benign neglect until the day of trial, also works.

The District of Maryland's dispersion of cases among judges results in a microcosm of the universe of settlement practices—an interesting natural "experiment." The distribution of cases is not to be confused with a controlled scientific experiment, but some suggestive comparisons emerge. Similar clusters of cases are assigned randomly to different judges. The only consistent difference among the cases is the assigned judge. In this district, cases are grouped by disease, jobsite and occupation, and plaintiffs' counsel. Generally, two clusters of four to seven cases each are assigned on a rotating basis to one of seven judges for trial each month.[169]

Lawyers reported four contrasting settlement styles used by the seven judges. Judge A becomes actively involved in the details of the negotiations, bringing all lawyers into chambers for what may turn into marathon sessions. In a case scheduled for a jury trial he will engage in "shuttle diplomacy" if the parties consent on the record, which they invariably do. Lawyers talk to him off the record about their offers. He is knowledgeable about prior settlements and not reluctant to press the lawyers to bring offers into line with previous outcomes. When it appears to be useful, he will express tentative rulings on disputed issues (lawyers report that this tends to rigidify the posture of the party anticipating a favorable ruling, thereby reducing bargaining flexibility). Judge A has had well-known successes in settlement of complex litigation.

Judge B simply sets the cases for trial and expects that he will be informed of settlement before the trial date arrives. He issued a standing order imposing fines for delayed settlements. While generally favoring settlement, he does not become involved directly. If the parties inform him that they could use some help in settling a case, which happens occasionally, he will refer the matter to a magistrate.

Judges C and D exercise what one lawyer characterized as "cool control" over the settlement process. They monitor the progress of negotiations and are seen as willing to become involved if neces-

169. *In re* All Asbestos Cases, Memorandum Opinion (D. Md. Dec. 16, 1983) and attachment A (Asbestos Claims Trial Schedule).

sary. Judge C does not provide explicit evaluation of cases, but is likely to point out the weaknesses of a case. He does not try to hold parties to prior settlement levels. Judge D attempts to determine whether there is a critical mass of agreement just short of settlement. In those circumstances he will become involved; otherwise, he will listen to the views of the lawyers as to whether judicial involvement will help.

Judges E and F are somewhat more detached from the process. They will ask whether negotiations are taking place, but rarely, if ever, intervene directly in those discussions. While they indicate that they are available to stimulate settlement if necessary, lawyers perceive them as relatively aloof from settlement.

Judge G's approach is less clearly developed. He is seen as friendly and accommodating, with an interest in settlement, but mostly in the role of a referee. He has not been directly involved in the negotiations, nor has he suggested specific values for cases.

In this single district then, there is one judge who is very active in settlement discussions, three judges who are moderately active, and three judges who are relatively inactive. Yet, virtually all of the cases settle. In 1985 and 1986, only one case was disposed of by jury trial (see table 6). Judge B's cases settle a week before trial; all the others on the eve of trial or during the early stages of trial. None settles without a trial date.

At this stage of asbestos litigation, each of the settlement interventions in the District of Maryland appears to have the same effect, assuming that there is no difference in the quality of the settlements. At a minimum, this indicates that the settlement activity of the trial judge is not the primary reason for settlements. Lawyers in the district confirm this conclusion. They report that settlements have become easier after an initial flurry of trial activity and settlements established values for the cases. Unless future trials change those values, they serve to set a range for settlements and render them more routine.

There were similar effects in other districts in which judicial involvement in settlement is rare. In Eastern Tennessee, for example, the disposition rate exceeds that of other districts (see table 9), and no jury verdicts have been recorded after 1983 (see table 6), yet judicial expression of opinions about the value of a case reportedly would contravene accepted norms in the local legal community.

Harking back to Judge Keeton's formula for assessing the utility of a case management technique,[170] does judicial involvement in

170. R. Keeton, *supra* note 133.

settlement discussions save judicial resources? The normal settlement rate for asbestos cases being greater than 97 percent of the cases called for trial, there is a ceiling effect, allowing little room for improvement. Marginal efforts to induce settlements may consume more judicial time than they save. Using an estimate, generated from interviews, that an asbestos trial would last forty hours and that judicial intervention can raise the probability of settlement from 97 to 99 percent, less than one hour (.80 hours)[171] of judicial involvement in settlement would be justified on efficiency grounds.

Efforts to produce earlier settlements appear justifiable only on grounds of improving the quality of settlements; efficiency grounds will support little more than a system of imposing fines for delayed settlements or a brief judge-hosted conference.

Given the above finding about the marginal utility of settlement intervention, what types of activity do attorneys see as productive or counterproductive? In general, parties seem most responsive to judicial efforts at settlement that meet their information needs. For the most part, these lawyers are repeat players in the settlement game and have established communication patterns that are likely to be altered only by dramatic judicial intervention, such as the imposition of fines for delayed settlements or massive restructuring, as in the OAL.

On the other hand, as U.S. Magistrate Wayne Brazil observed in his study,[172] lawyers welcome the informed opinion of a judge on the merits of the case or on some aspect of the procedure. Presumably, lawyers treat these opinions as new information that may aid them in forecasting the probable outcomes and assigning a value to the case. Lawyers did not, however, welcome a cursory or superficial opinion. However steeped a judge may be in the prior values of cases, expressions of opinions based on a brief discussion or review of a file were not credible. At a minimum, lawyers saw it as essential that a judge review the medical reports and get information about compensatory damages in a specific case. Application of a simple formula, such as splitting the difference in the settlement

171. For the formula and further discussion, see note 133 and accompanying discussion.

172. W. Brazil, *supra* note 136, at 39-56. Based on his survey of lawyers, Brazil concluded that lawyers involved in litigation "believe that a judicial officer's opinions will contribute most to settlement negotiations when it is clear that the judge is approaching the case with an open mind and an impartial disposition, learns the facts, contentions, and the relevant law, then analyzes the matter with a visible logical rigor and with penetrating questions, questions that cut through the irrelevancies and the smoke to focus the litigants' attention on the pivotal issues and the key evidence." *Id.* at 48.

range for prior cases with similar diseases, may interfere with negotiations based on more refined assessments. Lawyers look to the court for new information that will aid their own evaluations. They do not seek casual judicial usurpation of their role. One lawyer stated the ideal as a "solid intuitive judgment without arm-twisting." Another would like a "good listener who expresses an opinion." Judicial familiarity with the record in the case seemed to promote respect for the opinion of the court and candor from the lawyers when they present their negotiating positions to a judge.

Again, the OAL procedure provides a useful reference point. Lawyers in all the districts in this study appear to be quite interested in learning about systematically collected settlement information, whether computerized or not. Trial verdict reports are notoriously weak and information about settlement is often not made public.[173] Without the expense or outside expertise required by the OAL, Judge Stanley Brotman of the District of New Jersey aided the settlement process by keeping a chart listing all previous offers and the final amount of settlements. He found this information useful in mediating the settlement of all cases in his division. In his court, a single jury trial informed the parties of his procedural and evidentiary rulings and the jury verdict gave a sense of the value of cases.[174] Judicial collection of information about prior settlements, whether by chart or computer, directly serves the needs and interests of lawyers.

Another settlement-related activity concerns the clarification of the rules of the road. Trial judges have exclusive control of information about trial procedures and evidentiary rulings. At this stage of asbestos litigation, most rulings have become standard.[175] To the extent that they have not, rulings and forecasts of rulings serve to allow a more precise analysis of the probabilities of success in each case.[176] In the same vein, lawyers object to some courts' perceived practice of postponing rulings on motions for summary judgment so that more defendants are available to contribute to a settlement. On the other hand, in one district defense liaison counsel requested such deferrals. Deferral of rulings for the sole pur-

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173. Daniels, *supra* note 153, at 5–9.

174. A single trial may produce an extreme result, an outlier. In that event, however, the side that felt disadvantaged by the result would likely press for further trials. *See generally* Priest & Klein, *The Selection of Disputes for Litigation,* 13 J. Legal Stud. 1 (1984).

175. See the discussion *supra* at notes 101 to 111.

176. Constraints related to the judicial role may inhibit the informal rendering of what could amount to advisory opinions issued without benefit of briefing or argument. *See, e.g.,* Resnik, *Managerial Judges,* 96 Harv. L. Rev. 374 (1982); Elliott, *Managerial Judging and the Evolution of Procedure,* 53 U. Chi. L. Rev. 306 (1986).

pose of obtaining a settlement contribution from a party who is not liable seems difficult to justify.[177]

Mediation by judges[178] received mixed reviews from the attorneys interviewed. In one situation, the judge ordered the parties to exchange offers and submit their "bottom line" authority to him in a sealed envelope so that he could see whether there was room for settlement. When the offers showed no overlap, he announced that fact and aborted the process. Lawyers in that district felt that a more intense form of mediation would be helpful, and that it is unrealistic to expect that lawyers will reveal their true authority, even under seal to a federal judge.[179] Instead, they felt that a solid review of each case by a judge-mediator (taking perhaps one half-hour per case) would provide a starting point for persuading parties to alter their stated positions.

An attorney in another district criticized judicial mediation as tending to put pressure on the plaintiff, who is more likely to be present at a settlement conference, than on the absent defendant.[180] Equal application of pressure seems to be a general standard by which lawyers evaluate fairness in mediation efforts; however, in some circumstances, selective pressure on one party may be justified.[181]

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177. In many instances, the perceived practice may be a product of the existence of a material issue of fact sufficient to survive a motion for summary judgment. The recent decision in Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986), may reduce the frequency of denials of motions for summary judgment.

In several of the districts studied, this problem rarely arose because the plaintiffs voluntarily (albeit sometimes under threat of sanctions) dismiss cases in which product identification is clearly insufficient. At least one judge has a general policy of not granting motions for summary judgment, but granting a motion for directed verdict and perhaps imposing sanctions for including a defendant without sufficient product identification to present the case to the jury. *See, e.g., In re* Asbestos Litig., Memorandum Order, Misc. No. 8482 (W.D. Pa. Dec. 13, 1983). *See also* T. Willging, *supra* note 4, at 20–21 (discussing standardized sanctions).

178. We use the term *mediation* in the sense of direct efforts by a third party (here, a judge) to influence both parties to alter their positions and reach a compromise.

179. Other judges have encountered this same problem. *See, e.g.,* D. M. Provine, *supra* note 130, at 26.

180. In the OAL, defendants sought a writ of mandamus to restrain Judge Lambros from requiring corporate and insurance executives to attend all pretrial and trial proceedings until the termination of their cases. *In re* Ohio Asbestos Litig., OAL Order Nos. 49–51 (N.D. Ohio Aug. 29–Sept. 4, 1986). The Sixth Circuit granted a stay of the order pending a hearing on the writ of mandamus. *See In re* AC & S, Inc., Case No. 86-3821 (6th Cir. Sept. 5, 1986).

181. The equal pressure position assumes that each party begins from a point equidistant from a final settlement amount or range. It may also presume that each party has equal bargaining power. Unequal pressure may be warranted when one party is unreasonable in its demands and the other party is reasonable. Judicial efforts to prevent an unconscionable result may also justify intervention on the part of the party with little bargaining power. *See* D. M. Provine, *supra* note 130, at 32–34.

In general, the success of mediation depends on deep involvement in the facts and dynamics of the litigation so that the judge as mediator can contribute information that will invigorate the settlement dialogue.

Alternative Dispute Resolution

Of the most common alternative dispute resolution processes (summary jury trial, minitrial, arbitration), only summary jury trial has had extensive use in more than one of the districts studied. Arbitration is being tested on a large scale in the Eastern District of Texas and has been used in some asbestos cases in the Eastern District of Pennsylvania. Judge-hosted settlement conferences—the most traditional of all the methods—are used in at least seven of the study courts.

Summary jury trials. Summary jury trial procedures involve a relatively brief presentation of a case, generally without live witnesses, to a mock jury, followed by a settlement conference.[182] Summary jury trial procedures have become relatively popular among federal judges during the past decade, and courts have used the procedures for a wide range of cases.[183] Judges and magistrates who have used summary jury trials conclude that "it is likely to be most helpful when lawyers differ significantly in their assessment of the way the jury will react to the case, and when this disparity is unlikely to disappear without the active intervention of the court."[184]

Two of the courts in this study have used summary jury trials in asbestos litigation—the Eastern District of Louisiana and the Northern District of Ohio. In the Eastern District of Louisiana, Judges Martin L. C. Feldman and Charles Schwartz, Jr., have reported experience with summary jury trial procedures. Almost all of the cases reported to the Federal Judicial Center had settled or were expected to settle without a full trial. During 1986, Judge Schwartz presided over twenty summary jury trials, using seven days of trial time. Cases were clustered in groups of ten for pretrial preparation. Eighteen cases scheduled for summary jury trial settled before the scheduled summary trial and an additional eleven cases settled before they could be scheduled for summary trials.

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182. *See generally* D. M. Provine, *supra* note 130, at 68–76 and sources cited therein; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366 (1986).

183. D. M. Provine, *supra* note 130, at 68–71.

184. *Id.* at 71.

Judge Feldman reported that two summary jury trials and a settlement conference took twenty-three hours of time and saved approximately five weeks of trial time.

Judge Thomas D. Lambros, who established the OAL, also created the summary jury trial procedure. In two of the early clusters of cases in the OAL, summary jury procedures were planned. The first cluster of ten cases settled on the eve of summary jury trial.[185] The second cluster was scheduled for a three-day consolidated summary jury trial in September 1984.[186] Two panels of six jurors each heard the same presentations. The results were at the extreme positions of each side. One panel returned all defendants' verdicts; the other exonerated some defendants and assessed punitive damages against others. The total award for six plaintiffs was $8.3 million, with $1.6 million being punitive damages. The panel that returned all defendants' verdicts gave an advisory opinion on damages: $9 million.[187] The cases settled on the eve of trial in January 1985 for an undisclosed amount.[188]

Interviews with lawyers suggest that the use of summary jury trial procedures in asbestos cases in the Northern District of Ohio may be "overkill." Under the OAL plan, summary jury trial comes on top of other settlement-enhancing strategies such as the use of computerized case matchings, opinions of neutral special masters, and relatively formal judge-hosted settlement conferences. Do the parties acquire more information about case values through the summary jury procedure? At the early stages of the OAL, there was little information about case values because there had been few, if any, trials of asbestos cases. Summary trials may have served as the basis for establishing a sense of what jury outcomes were possible. As such, they may have substituted for the few early trials that were held in asbestos cases in most of the other jurisdictions studied. Summary jury trials have not been used for asbestos cases in that district since 1984.

The underlying theory supporting summary jury trials is that they provide "what appears to be a reliable estimate of the probable result before a real jury"[189] and that such an estimate will

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185. *In re* Ohio Asbestos Litig. Insulation Case Groups I and II, OAL Order Nos. 14-16, 23 (N.D. Ohio May 23–Oct. 31, 1984).

186. *In re* Ohio Asbestos Litig., OAL Order No. 20 (N.D. Ohio Aug. 30, 1984).

187. *In re* Ohio Asbestos Litig. Insulation Case Groups III and IV, OAL Order No. 22 (N.D. Ohio Oct. 5, 1984). Each jury rejected state-of-the-art and fiber defenses.

188. *In re* Ohio Asbestos Litig., OAL Order No. 29 (N.D. Ohio Jan. 17, 1985).

189. D. M. Provine, *supra* note 130, at 68.

reduce the bargaining distance of the parties. Use of computer aids and special master opinions proceeds on the same information-needs theory. Viewed this way, the summary jury trial seems redundant. These summary proceedings impose additional pretrial costs on the parties—costs not incurred in settlements in other districts. By imposing an additional, costly barrier to be hurdled by a party intent on trial, the procedure threatens to increase the costs of litigation, contrary to the goals of the OAL.

A deeper and more general criticism of the summary jury trial procedure is that it is unpredictable and likely to be even more variable than jury verdicts issued after full trials[190] or, for that matter, decisions by judges on the same or similar matters. In both the Northern District of Ohio and the Eastern District of Louisiana there were reports of one-sided summary jury trial verdicts that encouraged one or both sides to resist settlement.[191] Unpredictability has at least two major ramifications. The results of the summary jury trial may undermine the information generated by the computer matching process or by the special master, perhaps raising one party's expected outcome beyond the bargaining range suggested by those settlement aids. In the worst case, the verdict could lead to elimination of any overlap in settlement authority. In addition, by producing an outlying result (e.g., a verdict of no liability or a high monetary award), the summary verdict may simply encourage one party to hold out for an outcome close to that verdict. Increased unpredictability may increase pressure for settlement by providing information about the risks of jury trial, but that pressure is likely to be skewed toward the summary jury outcome.

Finally, it appears that the time demands of a summary jury trial would exceed the marginal gains in settlements for current

190. See the discussion *supra* at note 160. In general, one would expect a jury hearing summary information to be less accurate in its judgments than one hearing full evidence, but perhaps the summary jury trial operates counterintuitively on this point. One can posit that a jury gets confused from too much information and that a concise presentation improves their capacity to grasp the issues. Empirical evidence, perhaps from laboratory studies, would be useful on this point. *Cf.* Posner, *supra* note 182, at 390 ("depending on the variance among juries, an arbitrator who is an experienced trial lawyer may render a decision more representative of what the average jury would come up with than the decision of any single jury").

191. In the Eastern District of Louisiana, a lawyer reported the following summary jury verdicts and actual settlement amounts in asbestos cases in late winter and early spring of 1986.

Case	Summary Jury Verdict	Settlement Amount
A	$35,000	$90,000
B	$0	$50,000
C	$0	$35,000
D	$80,000	>$250,000

See also Walsh, *Teacher Pursues Hospital Suit After Court Experiment Fails,* Washington Post, June 26, 1986, at C1.

asbestos cases.[192] As noted above, Judge Keeton's formula allows little time for judicial settlement activity when trials are expected in fewer than 3 percent of all cases, and especially when trials are reasonably short, such as one week. Any benefit from summary jury trial is likely to be when there is a lack of jury verdict information about a specific type of litigation like asbestos. After a number of cases have been tried or settled, traditional sources of evaluation are likely to be superior.

Arbitration. In only one of the courts in this study have arbitration procedures been used systematically and extensively for asbestos cases.[193] In the Eastern District of Texas, as part of the settlement of the *Jenkins* case, two plaintiffs' attorneys and counsel for the Wellington facility agreed that cases filed after the cutoff date for the class action would be subject to an alternative dispute resolution procedure. The procedure applies to approximately 1,000 pending cases and the parties envision submitting 60 cases per month.[194] Each party designates an "arbitrator selector." The two selectors meet to choose a list of arbitrators who will decide the cases.[195]

As the cases are certified for arbitration, plaintiff's attorney supplies the defendants with all information necessary for evaluation of cases, such as physician's reports, test results, and medical records. If defendant chooses, plaintiff must submit to a medical exam by a physician of defendant's choice. Defendant may also insist on a thirty-minute videotaped interview of plaintiff.[196] Prior to arbitration, the parties have agreed to a forty-day period in which they will "negotiate in good faith and make a bona fide effort to resolve each case by negotiation."[197] If not settled within

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192. *See* Posner, *supra* note 182, at 383-85.

193. Among the ten courts in which court-annexed arbitration is in force on an experimental basis, only one (Eastern Pennsylvania) reported more than 1 percent of its arbitration cases to be asbestos product liability cases. In that district, 2 percent of its arbitration cases (approximately 486 cases) were in that category. Federal courts in the Northern District of California, Western District of Texas, and Western District of Michigan each reported 1 percent asbestos cases, indicating a total of about eleven cases in all three districts. B. Meierhoefer & C. Seron, Court-Annexed Arbitration in Ten Pilot Federal District Courts: A Status Report 23, table 6 (Federal Judicial Center 1987) (unpublished manuscript).

194. Jenkins v. Raymark Indus., Inc., No. M-84-193-CA, Order & Alternative Dispute Resolution Agreement, section II (E.D. Tex. Sept. 19, 1986). For a description of the plan, see *Two-Step ADR Plan Set Up For Texas Asbestos Cases*, 5 Alternatives 33 (1987).

195. *Jenkins, supra* note 194, at section V.

196. *Id.* at section II.

197. *Id.* at 2-3.

that time period, they are placed on a list for arbitration within a ninety-day period.[198] Judge Robert M. Parker, who presided over the class action, designated U.S. Magistrate Harry W. McKee as a "special monitor" to oversee the implementation and operation of the procedure.[199] The progress as of February 1987 was that twenty-nine of the thirty cases in the first group were settled and the other case was placed on the pleural registry (inactive docket). In the second month, twenty-nine of fifty cases settled, two were placed on the pleural registry, ten were deferred, and nine were passed to the arbitration stage. Indications are that this procedure will not be able to keep up with the pace of new filings, which is currently estimated at 100 to 150 new cases per month in the Beaumont division of the court. It is significant that the prearbitration settlements occur without a firm trial date. The credible threat of another class trial seems to operate as a substitute incentive for settlement.

Evaluation of an arbitration program, like evaluation of other case management systems, should be based on criteria of fairness, efficiency, and quality of results. As to fairness, at this stage of the operation of the program, only structural fairness can be examined. Because the system was designed by parties who appear to have roughly equal bargaining power and because it is balanced in its terms, it is logical to assume that it is fair to all parties. Arbitrators, selected by equal action of the parties, are directed to review and decide issues described in a neutral manner.

As to the quality of results, it is too soon to judge. Information about the views of the participants would be necessary. As to efficiency, the Keeton criteria point toward a different conclusion than in their application to summary jury trial. As designed by the parties, the arbitration program requires little judicial involvement. Appointment of a magistrate to monitor the program reduces the judge's involvement even further. A danger is that the process will

198. *Id.* at 4–5. The arbitrator can make one of seven findings: (1) no asbestos-related disease, (2) pleural changes with restrictive impairment, (3) pulmonary asbestosis, (4) asbestos-related cancer, (5) confirmed mesothelioma, (6) pleural changes with no restrictive impairment, recommending placement on the pleural inactive docket, and (7) other. In making an award of damages, the arbitrator is directed to consider the "age of the plaintiff, the degree of asbestos related disability, extent and type of exposure to asbestos, smoking history, significant non-asbestos health problems relating to any disability, lost wages, dependents, medical records and other reports, increased risk of cancer, progression of asbestos-related injury, and pain and suffering." *Id.* at 5–6.

199. *Id.*, order at 1. The court may have authority to impose sanctions, including attorneys' fees, if the parties fail to live up to their agreement to negotiate in good faith. Fed. R. Civ. P. 16(f) and 23 and the inherent authority of the court may be sources of such a power.

become duplicative in the sense that one or both of the parties will insist on their right to trial and thus impose additional transaction costs on each other, adding preparation for trial to preparation for arbitration. Given that trial will be on a class action basis, however, trial transactional costs are lower than otherwise would be the case.

Another aspect of the efficiency question is whether arbitration is necessary. The arbitration procedure seems to be a device that modulates the flow of cases through the system. These lawyer-specialists know well the values of the cases. The *Jenkins* settlement itself demonstrated the existence of a formula acceptable to all parties for the global settlement of cases; the lawyers involved themselves assert that they know the value of cases. At the same time, the postures of the parties indicate that the limiting factor is cash flow: the ability of defendants, including the Wellington facility, to pay for all the cases in current dollars.

While cash flow is certainly a major concern expressed by defendants, it does not obviate the need for arbitration. Even if the parties can agree on an average value for each case, some procedure will be necessary for the parties to classify cases and obtain information about their values. In *Jenkins,* Special Master McGovern laid the groundwork for the settlement by systematically collecting information about the cases. The negotiation-arbitration procedure established in *Jenkins II* should be only marginally more expensive than a computer system. The arbitration system reserves the principal role in evaluating, settling, or trying cases for the parties. The role of the arbitrator is to provide an expert appraisal for those cases in which the parties agree that such an appraisal will be useful.

An additional feature of an arbitration system is that it removes a batch of routine cases from the court's docket. In doing so, it lessens the need to create an alternative administrative mechanism that could result in a new bureaucracy (such as a special court or compensation tribunal).[200] This may be an advantage or disadvantage depending on one's perception of the need for a relatively permanent administrative or judicial system to manage toxic tort cases.[201]

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200. *See, e.g.*, Hensler, *supra* note 1, at 117–19.

201. *See, e.g.*, Weinstein, *supra* note 1, at 15–21; *see also* Hensler, *supra* note 1, at 110–24.

Settlement Formulas

Ordinarily, one would expect that parties who repeatedly litigate large numbers of cases with each other would develop formulas to resolve disputed cases on a routine basis.[202] Such formulas exist, and some lawyers have little difficulty setting values for asbestos cases.[203] Asbestos cases have, however, shown resistance to universal application of formulas to dispose of a backlog of cases.[204] What are the barriers to use of settlement formulas? The primary barrier to the disposition of cases is the absence or paucity of trial dates in some courts.[205] Conversely, in those districts with firm trial lists and calendaring systems, dispositions are relatively high.

Formulas are evident in several contexts in asbestos litigation. Low-visibility evidence of formulas can be found in districtwide and even nationwide settlements between clients of one plaintiff's attorney and a single defendant. Examples of this type of settlement were evident in at least half of the jurisdictions in this study. Because it is not a complete termination of the case, this type of settlement will not appear in statistical analyses of the disposition of asbestos cases. Before the creation of the Wellington facility, districtwide settlements were a major feature of the asbestos litigation landscape. Nonparticipants in Wellington continue to employ them. For example, a recent agreement between Raymark Industries, Inc., and the law firm Blatt & Fales of Barnwell, South Carolina, may result in the settlement of 10,000 to 15,000 claims against Raymark around the nation. In their agreement, the parties created a fund to pay claimants an average of $2,821 per case, to be allocated under judicial supervision in a settlement class action.[206] Raymark has issued a call for similar settlements on a nationwide basis.[207]

In other agreements with single defendants, there is an established figure that will be paid when plaintiff submits evidence of a specific diagnosis and evidence of plaintiff's exposure to one of de-

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202. *See, e.g.*, T. Willging, *supra* note 4, at 9–10.

203. *Cf.* Hensler, *supra* note 1, at 95 (discussing "block settlements").

204. *Id.* at 87–89.

205. *Id.* at 97–108. *See also* T. Willging, *supra* note 4, at 24–28.

206. *Raytech, Blatt & Fales Agreement May Settle 10–15,000 Cases,* Mealey's Litig. Reps.: Asbestos, Dec. 12, 1986, at 5,435; 5,496. The mechanism used is the creation of a trust fund and filing of a motion for class certification of a settlement class to obtain judicial approval of the settlement. *Id.* at 5,500. The case has been filed in the District of Kansas. Wells v. Raymark Indus., Inc., No. 87-1016-K (D. Kan. filed Jan. 12, 1987). The procedure was recommended by a law professor who specializes in legal ethics.

207. *Raymark Threatens Bankruptcy; Asks To Pay $2,000 Each Case,* Mealey's Litig. Reps.: Asbestos, Apr. 11, 1986, at 4,090.

fendant's products. The amount may vary with the type of diagnosis, but not with any further characteristics of plaintiff's case. Plaintiff's attorney simply allocates the same amount to all plaintiffs with the same diagnosis.

Defendants' incentives for such agreements appear to be an effort to hold down litigation costs and to establish a firm basis for financial planning to accommodate a known liability. Defendants' attorneys may gain valuable business by showing that efficient legal services will lower litigation costs, perhaps beyond that attained by counsel in other regions of the country who handle similar cases. A further incentive, of course, is that early settlements are at a discounted rate, as much as one-half less than the value at the courthouse steps.

Plaintiffs generally have an interest in prompt payments to meet ongoing living expenses. Plaintiffs' counsel may also have a need for settlements with some defendants to finance the litigation. This seemed particularly important in districts like Massachusetts and New Jersey where few cases had been scheduled for individual trials at the time of the districtwide settlements. Unless plaintiff's fee is adjusted for the stage of the case at disposition, the attorney will benefit from the savings in transactions costs.[208] Plaintiffs also have an interest in dealing individually with defendants because they feel that they are able to obtain a larger overall settlement than group negotiations would bring.[209]

Another type of formulaic settlement is that in which all or most of the plaintiffs in a jurisdiction settle with all or most of the nonbankruptcy defendants. In the recent class action in the Eastern District of Texas, 741 cases settled for a total of approximately $138 million.[210] The underlying settlement formula was linked to the average value of prior settlements or verdicts achieved by each plaintiffs' attorney for each category of disease. A computer data base compiled by Special Master McGovern was used to calculate the final amount. Allocation of the settlement was achieved by order of the court, exercising its power to review class action settlements, based on allocations recommended by plaintiffs' counsel.

Allocation of settlements among defendants has created problems in the past.[211] Creation of the Wellington facility has resulted

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208. *See* Kritzer, Felstiner, Sarat & Trubek, *The Impact of Fee Arrangement on Lawyer Effort,* 19 Law & Soc'y Rev. 251 (1985).

209. *See, e.g.,* Hensler, *supra* note 4, at 95–97.

210. Jenkins v. Raymark Indus., Inc., No. M-84-193-CA (E.D. Tex. 1986). *See also Texas Class Action Settles for More Than $100 Million,* Mealey's Litig. Reps.: Asbestos, Apr. 11, 1986, at 4,089.

211. Hensler *et al.* found that "defendants in most jurisdiction have not been able to agree on a routine or formula for allocating damages among themselves." Hensler, *supra* note 1, at 89. *See also* T. Willging, *supra* note 4, at 9–10.

in an internal allocation process for those defendants who signed the Wellington agreement.[212] External allocations continue to be worked out in each jurisdiction. In the New Jersey settlement of the Manville plantworker cases, the parties and the court developed a market-share formula for allocation of damages: Defendants' shares of the total settlement amount were based directly on the tonnage of asbestos that had been shipped into the plant by that defendant.[213]

Allocations to Plaintiffs

Concerns have been expressed about the allocations of global or group settlements to individual plaintiffs.[214] The major concern appears to be that plaintiffs' counsel may bow to pressures from more aggressive clients with less serious injuries and allocate greater damages than their injuries would otherwise warrant. The source of the difficulty lies in the absence of an authoritative judgment (i.e., verdict) fixing the value of each claim. Because this problem is inherent in any group settlement of claims, the treatments devised by lawyers and judges deserve attention.

The most direct treatment of the issue is to find a credible substitute for the authoritative jury verdict. In some cases, this may not be possible without a separate set of trials or minitrials. In limited circumstances, however, judicial involvement in the allocation allays concerns that plaintiffs' counsel is acting unethically by unilaterally distributing the proceeds of a group settlement. The recent settlement between Raymark and Blatt & Fales relies on judicial supervision of the allocations, using the procedural mechanism of judicial certification of a class action pursuant to Fed. R. Civ. P. 23. Under rule 23(e), the court has an explicit duty to review the settlement of a certified class action. Similarly, in the New Jersey settlement of a group of plantworker cases, the federal district court appointed a retired state court judge as special

212. Wellington, *supra* note 5, at 388: "[T]he producers in our group . . . developed a formula based on data relating to their past litigation experience. The formula allocates a liability share to every subscribing producer for all claims brought to the Facility." Outside of Wellington, defendants have established settlement patterns that are predictable. For example, Manville estimates that its share of future settlements will be approximately 27 percent. *Wellington Said To Be Paying an Average of $72,000 Per Case,* Mealey's Litig. Reps.: Asbestos, Dec. 26, 1986, at 5,513.

213. *Cf. In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd,* Nos. 1140 *et al.* (2d Cir. Apr. 21, 1987).

214. *See* Hensler, *supra* note 1, at 96–97.

master to review each of the cases and make allocations from the settlement fund.[215]

Judge Lambros also reports that he reviews allocations made by the plaintiffs before having his clerk enter the data on the computer. Judge Parker reviewed the settlement in *Jenkins* as part of his role of presiding over the class action. Because of the numbers involved, he reports that he randomly sampled plaintiffs' counsel's recommendations to test their fairness. Access to the computer data undoubtedly bolstered this process. Judge Stanley Brotman in the District of New Jersey reports that he reviews the final settlement amount with each individual plaintiff, on the record, immediately after the settlement conference. The familiarity of these judges with the cases and their systematic collection of information about prior settlements gives them the ability to evaluate the fairness of an individual allocation.

In other jurisdictions, the amounts of settlements from prior defendants have to be reported to the court before trial of a case so that contributions issues can be managed in the trial. This gives a judge the opportunity to review the fairness of allocations if any question arises from any source.

In addition to judicial monitoring of allocations, the parties and lawyers have opportunities to ensure that allocations are fair. Most lawyers indicated that they started and ended their negotiations with discussion and evaluation of individual cases. Plaintiffs' lawyers generally have two or three members of the law firm review the files and estimate a value for the case. Differences are discussed within the firm. If cocounsel is one of the national firms that specialize in asbestos litigation, another layer of review is added. Similarly, defendants review cases individually and set a value.[216] In the case of Wellington defendants, regional counsel's appraisals are subject to review at a national level. At least in some jurisdictions, Wellington insists on having an individual allocation for each plaintiff. Presumably, checks are made out to each individual and waivers or releases received from each plaintiff.

In the course of negotiations involving a major group of cases, it may be that defendants accede to evaluations and allocations by plaintiffs' attorneys as long as the average value does not exceed what the client is willing to pay. In this case, the allocation appears to be primarily that of plaintiffs' counsel, and there is a professional ethical concern that can only be fulfilled by full disclosure

215. Austin v. Johns-Manville, No. 75-754 (D.N.J. filed May 6, 1975).

216. One of the lawyers interviewed says that he uses the defendant's worksheets from the negotiations to help make the final allocations.

to the clients.[217] In the OAL, all clients participate in the settlement process so that full disclosure of the allocations is a natural outgrowth of their experience.

Overall, the allocations problem seems to be primarily theoretical. There are no reports of complaints to bar grievance committees about allocations. Allocations problems have their origin in the clustering of cases according to plaintiffs' counsel, a system that is vital to the evaluation and settlement of large groups of cases. That specialist lawyers and judges make the allocations in lieu of a jury verdict renders the system more workable, predictable, and responsive to the needs of individual plaintiffs. Changes should not be imposed without concern for the centrality of clustering to the case management system.

Conclusion

Asbestos litigation in most of the districts studied has shifted into a settlement mode. With few exceptions, cases settle shortly before or during trial. Efforts to accelerate the time of settlement have been successful, but major abbreviation of the pretrial process has demanded herculean efforts and raised questions of fundamental fairness. Fines for late settlements have proved to be efficient means of producing marginal gains in the timing of settlements. Lawyers have demonstrated an ability to settle cases with or without judicial assistance and the form of the judicial settlement role does not seem to affect the fact of settlement. The outcome is that cases settle when called for trial and they settle in whatever numbers they are called, whether individually, in clusters of five to fifty, or in a districtwide class action of hundreds of cases.

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217. Model Code of Professional Responsibility DR 5-106 (1982); Model Rules of Professional Conduct Rule 1.8(g) (1985). These two rules are substantially identical. Rule 1.8(g) provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

See also Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975); Annot., *Conduct of Attorney in Connection with Settlement of Client's Case as Grounds for Disciplinary Action*, 92 A.L.R.3d 288 (1979).

VII. ALTERNATIVE TRIAL STRUCTURES

Disposition management achieves results through setting firm trial dates. Settlements, including group and global settlements, occur in the wake of a court's disposition management. What are the effects of various trial structures, such as individual trials, consolidated trials, and class actions? The main focus is on the number of cases grouped together for common treatment, but this report also looks at different structures, such as bifurcation and reverse bifurcation, that may be applied to the trial of individual or group cases.

The structure of trials determines the structure of the settlements. A simple illustration makes the point: Individual scheduling of cases produces individual settlements and a class action structure produces class settlements. Unlike the variations in settlement practices, variations in trial structure are likely to make a major difference in the rate of dispositions. Indeed, these variations are probably the prime determinants of disposition rates.

Many assume that litigation is a case-by-case process, with the focus on the individual claimant.[218] Class litigation challenges these assumptions, whether it be an antitrust class action, a consumer class action, or, more rarely, a mass tort class action. In all of these actions, however, unless individual relief is so minimal that distribution to the class would be uneconomical, damages ultimately must be allocated to identifiable individuals who are members of the class. As discussed in the last section, leaving these allocation decisions to the lawyers presents difficult, but not insurmountable, problems.

The structures discussed in this section all require that lawyers, judges, or juries will make informed decisions about the amount of damages that each individual should receive. Grouping of cases for pretrial or trial purposes should not be understood as necessarily leading to a conglomeration of all claims for all purposes. Properly used, grouping of cases organizes them for collective decisions on the common issues, with individual applications to follow. Group

218. *See, e.g.*, Hensler, *supra* note 1, at 108.

settlements or consolidated trial decisions are not a license to treat unequal cases equally.

Overview

In the ten districts studied, the variation in pretrial and trial structures ranged from fully individual treatment of each case to a districtwide class action, with multiple variations in between. Table 10 charts those variations according to the degree of consolidation used and the type of trial calendar.

TABLE 10
Overview of Pretrial and Trial Structures for Ten Study Courts

Court	Consolidation		Type of Trial Calendar
	Pretrial	Trial	
Mass.	Yes	No	Master
N.J.	Yes	No	Individual
E. Pa.	Yes	No	Master
W. Pa.	No	No	Individual
Md.	Yes	Yes	Master
S.C.	Yes	Yes	Single judge
E. La.	Yes	No	Master
E. Tex.	Yes	Yes	Single judge
N. Ohio	Yes	Yes	Single judge
E. Tenn.	No	No	Individual

Four of the courts in this study organized the trial of asbestos cases around the individual case. In the most individual system, in Eastern Tennessee, cases were assigned to judges and set for trial on individual judges' calendars. In Western Pennsylvania, all trials have been scheduled on an individual basis, even when the cases were assigned to a single judge. In Eastern Pennsylvania, cases are put on a master asbestos trial list, with trials scheduled on an individual basis. At least one judge in that district, however, has presided over a consolidated trial of fifteen cases.[219] In Massachusetts, large blocks of cases (fifty or more) are scheduled for settlement conferences, but the trial list of cases that do not settle is on an individual basis.

In some of the districts, the structure of pretrial consolidations and dispersion of nonsettled cases for trials operates like a micro-

219. Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 383 (E.D. Pa. 1982), *aff'd sub nom.* Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985).

cosm of the national multidistrict litigation procedure.[220] In the Eastern District of Louisiana, cases are consolidated for pretrial purposes, but trials will be on an individual, sequential basis. In New Jersey, two major cases have involved large numbers of plantworkers, handled on a group basis. Other individual claims are managed on an individual basis, with some overarching legal issues carved out for consolidated treatment by the court. In Camden, cases were grouped and subgrouped together for settlement purposes; trial, however, was on an individual basis.

In the Districts of Maryland, Northern Ohio, and South Carolina, cases have been consolidated for pretrial and trial purposes. In none of these districts, however, has there been a trial to verdict of a full group of cases.

In the Eastern District of Texas, Judge Parker has experimented with various trial groupings to deal with the massive caseload in that district. In what Judge Parker later declared to be a failure, the court set up a "trial in the round" in which multiple juries heard the common evidence and then individual damage claims.[221] Inconsistent liability verdicts arising out of separate jury deliberations were not reconcilable with notions of fairness and justice. A modification of this procedure involved a trial of four bellwether cases from a cluster of thirty, with verdicts in the four cases binding the remaining twenty-six on the common issues.[222] Finally, Judge Parker certified an opt-out class action for approximately 755 cases (which settled after presentation of the plaintiffs' case at trial) and a mandatory class for approximately 1,000 remaining cases.

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220. 28 U.S.C. § 1407 (1986).

221. For a summary discussion of this experiment, see Green, *supra* note 102, at 221–23; Arthurs, *Texas Judge Rides Herd on Asbestos Suits,* Legal Times, May 19, 1986, at 1, 4–7.

222. Newman v. Johns-Manville, Civil Action No. M-79-124-CA (E.D. Tex.), *mandamus denied sub nom. In re* Armstrong World Indus., Inc., No. 84-2690 (5th Cir. Nov. 26, 1984). *See also id.,* Petition for Writ of Mandamus at 4–5 (5th Cir. Nov. 26, 1984). A panel of the Fifth Circuit denied the petition for writ of mandamus and motion for stay of the proceeding in a per curiam summary order filed on November 27, 1984. After a verdict for the four bellwether plaintiffs, all of the cases settled. A copy of the special verdict forms used in *Newman* is on file at the Federal Judicial Center. For further descriptions of these trials, see M. Selvin & L. Picus, The Debate Over Jury Performance: Observations from a Recent Asbestos Case (Rand Corp. 1987); Arthur, *Texas Judge Rides Herd on Asbestos Suits,* Legal Times, May 19, 1986, at 1; Hensler, *supra* note 1, at 42, 65.

Alternative Structures

None of the procedures discussed below was designed with mass toxic tort cases in mind. Federal class action rules have not been amended in two decades. Rules regarding consolidation of cases have a broad flexibility, but lack clear guidance and the capacity to produce a final judgment applicable to members of a class not before the court. Multidistrict litigation procedures were created almost twenty years ago with an eye toward pretrial management of complex commercial litigation. Parties resist application of collateral estoppel rules to individual tort claims, inhibiting any potential benefits.

Calls for reform of procedures for mass litigation have been heard frequently in the recent past.[223] Nevertheless, asbestos cases currently clog the dockets of federal (and state) courts. Litigants, lawyers, and judicial personnel involved with asbestos cases are unlikely to benefit from the slow-moving, politicized reform process. Current participants in the litigation process are more likely than legislators and rule-making bodies to be able to create a solution tailored to the unique characteristics of asbestos litigation.

It is questionable whether reform of toxic tort procedure will be timely enough to meet the needs of asbestos litigants. Delay penalizes litigants in an uneven fashion, resulting in major discounts of plaintiffs' causes of action.[224] Existing legal tools for management of large numbers of asbestos claims are discussed on the premise that courts need readily available methods to manage existing, growing caseloads.

Consolidation. Federal Rule of Civil Procedure 42(a) vests broad discretion in district judges to consolidate for "a joint hearing or trial" any matters in issue in "actions involving [one or more] common question[s] of law or fact."[225] Rule 42(a) has wide applica-

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223. *See, e.g.,* ABA Section of Litigation, Report and Recommendations of the Special Committee on Class Action Improvements, 110 F.R.D 195 (1986); Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act,* 64 Tex. L. Rev. 1039 (1986); Panzer & Patton, *Utilizing the Class Action Device in Mass Tort Litigation,* 21 Tort & Ins. L.J. 560 (1986); Rubin, *supra* note 1, at 448-49; Williams, *Mass Tort Class Actions: Going, Going, Gone?,* 98 F.R.D. 323 (1982).

224. See the discussion *supra* at notes 108, 114-15.

225. Fed. R. Civ. P. 42(a) provides:

> *(a) Consolidation.* When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

bility to asbestos litigation. Its flexibility allows district courts to create procedures on a districtwide level that mimic the procedures created by Congress for multidistrict litigation. Cases can be consolidated according to case characteristics for discovery, settlement, or trial purposes. Consolidations can be imposed on all or part of the asbestos caseload by the court as a whole or by individual judges. Appellate courts have given considerable deference to the judgments of trial courts on consolidations.[226] One appellate court concluded that properly grouped asbestos cases "present precisely the kind of tort claims a court should consider consolidating for trial."[227]

In considering whether to consolidate cases or issues, a district court needs to balance a host of factors, including "specific risks of prejudice and possible confusion[,] . . . the risk of inconsistent adjudications, the burden on parties, witnesses and available judicial resources," and the relative time and expense of individual adjudications as compared with consolidated adjudications.[228] In evaluating specific risks of prejudice, the burden is on the objecting party to demonstrate the prejudicial effects.[229] Preventive steps, such as use of notebooks and tabs for each case, repeated cautionary instructions, or use of special verdict forms have been accepted as likely to prevent any prejudice that might otherwise infect the proceedings.[230]

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226. *See, e.g.,* Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985) (decision to consolidate is "purely discretionary" subject to review on a "clear abuse of discretion" standard); Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 383 (E.D. Pa. 1982), *aff'd sub nom.* Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985); *see also* Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250 (S.D. Tex. 1985); *In re* All Asbestos Cases, Memorandum Opinion (D. Md. Dec. 16, 1983). *See generally* 9 C. Wright & A. Miller, Federal Practice and Procedure §§ 2383-2384 (1971).

227. *Hendrix,* 776 F.2d at 1497.

228. *Id.* at 1495. *See also* Arnold v. Eastern Air Lines, 681 F.2d 186, 193 (4th Cir. 1982), *cert. denied,* 460 U.S. 1102 (1983).

229. *See, e.g.,* Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1012 (5th Cir. 1969); *see also Neal,* 548 F. Supp. at 383 ("defendants have not shown any demonstrable prejudice"). *Cf. Hendrix,* 776 F.2d at 1495 (requiring a showing of "specific risks of prejudice and possible confusion").

230. *See, e.g., Hendrix,* 776 F.2d at 1496-97 (notebook tabbed for each plaintiff and each defendant; repeated cautionary instructions); *Neal,* 548 F. Supp. at 383 (special interrogatories); *Wilson,* 107 F.R.D. at 255-57 (special interrogatories, appended to the opinion). In Newman v. Johns-Manville, Civ. Action No. M-79-124-CA (E.D. Tex.), Judge Parker used a stipulated product list, including dates of manufacture, to guide the jury's decisions. A special verdict form led the jury through each of the elements of the cause of action as to each product, including dates for knowledge of the dangers of asbestos for each defendant (uniformly found to be 1945), and any award for each of the four plaintiffs against each of the defendants. The jury verdicts were returned on October 24, 1984. A copy of the verdict form is on file at the Federal Judicial Center. For a discussion of the jury deliberations in that case, see M. Selvin & L. Picus, *supra* note 222.

Common factual and legal issues that have served as a basis for consolidated trials or hearings include

- all issues relating to whether defendants negligently failed to adequately warn workers of the dangers of working with asbestos and whether the failure to warn was the proximate cause of plaintiffs' injuries (including the state-of-the-art defense);[231]
- whether plaintiffs' claims were barred by the statute of limitations;[232]
- whether products supplied by defendants to plaintiffs' worksite were the proximate cause of their injuries;[233]
- whether defendants' conduct was so outrageous as to warrant punitive damages;[234]
- whether the "government contractor defense" bars liability;[235] and
- whether the state-law exclusion of the state-of-the-art defense in asbestos litigation violates equal protection of the laws.[236]

Courts have emphasized the economies that can be achieved by organizing the consolidated cases according to common elements. For example, in *Hendrix,* the court observed that "[a]ll of the appellees . . . were insulators and had worked out of the same union hall . . . during the same time frame." Each suffered from asbesto-

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231. *Hendrix,* 776 F.2d at 1494–95. *Cf. Neal,* 548 F. Supp. at 366 (separate trials for individual damages only). Regarding the repetitiveness of the state-of-the-art defense, see *Wilson,* 107 F.R.D. at 251–52.

232. *Neal,* 548 F. Supp. at 366 n.3.

233. *Id.* at 366. In *Wilson,* the issue of proximate causation based on exposure to defendants' products was the subject of separate trials for groups of five plaintiffs. 107 F.R.D. at 253. In *Hendrix,* four cases were consolidated and all issues were included in a single phase.

234. *Neal,* 548 F. Supp. at 366; *Wilson,* 107 F.R.D. at 252.

235. Tefft v. A.C. & S., Inc., slip op. (W.D. Wash. Sept. 15, 1982) (Lexis: Genfed library, Courts file) (separate trial for issue of whether the "injury-causing aspect of the product was . . . in compliance with a specific mandatory government contract specification relating to design or warning," which is a statutory bar in Washington state); *but cf.* McCrae v. Pittsburgh Corning Corp., 97 F.R.D. 490, 493 (E.D. Pa. 1983) (rejecting motion from three of eighteen defendants for "Phase I" trial for government contract defense as "unwieldy and confusing" as applied to fourteen plaintiffs).

236. *In re* Asbestos Litig., 628 F. Supp. 774 (D.N.J. 1986). In this action the district court sat en banc to establish the law of the case for all cases in the asbestos litigation in the District of New Jersey on the availability of the state-of-the-art defense. *Id.* at 775. The court ruled, 8–5, that "under New Jersey law the state-of-the-art defense is not available, against a strict-liability claim, to a defendant-manufacturer of products containing asbestos." *Id.* The court then certified an interlocutory appeal to the Third Circuit.

sis and was treated by the same physician, and they had "nearly identical" medical prognoses.[237]

In addition to organizing consolidations to conform to the major legal and factual elements of a case, there are practical considerations that make it desirable to limit consolidation of asbestos cases to those involving the same counsel for the plaintiffs. Often asbestos cases present themselves in that format naturally; workers from the same jobsite tend to seek the same lawyer-specialist. Consolidating by lawyer serves generally to keep the trial as simple as possible and to minimize settlement complications.

For resolution of legal issues within a district, consolidation allows a court as a whole to resolve a particular legal issue for all cases.[238] Combined with the interlocutory appeal procedure of 28 U.S.C. § 1292, consolidation can lead to reasonably prompt resolution of major issues.[239]

Class actions. Authority for courts to certify class actions in mass tort litigation, such as that involving asbestos products, is a challenging and oft-discussed issue.[240] It is beyond the scope of this report to build on that mountain of legal commentary or to synthesize it. Review of class action cases that relate directly to management of asbestos litigation is apt.

The Advisory Committee on Civil Rules clearly contemplated that "mass accident" cases would ordinarily not find suitable accommodations in the class action provisions of Federal Rule of Civil Procedure 23. The committee concluded that the individual injury and damages issues meant that "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits

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237. *Hendrix,* 776 F.2d at 1496. *See also Neal,* 548 F. Supp. at 383 ("all fifteen claims arose out of the exposure of a group of employees working at the same plant over substantially the same period of time to asbestos fiber and dust allegedly supplied to the plant by supplier defendants").

Similarly, after hearings involving all counsel, six judges of the District of Maryland entered an order of consolidation setting criteria for grouping of cases by liaison counsel. They were: "(1) common worksite; (2) similar occupation; (3) similar type of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged (*e.g.,* lung, colon, mesothelioma)."

238. *See, e.g.,* cases discussed *supra* at notes 235 and 236.

239. *See, e.g.,* Neubauer v. Owens-Corning Fiberglas Corp., 686 F.2d 570, 571 (7th Cir. 1982) (statute of limitations), *cert. denied,* 459 U.S. 1226 (1983); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 336-37 (5th Cir. 1982) (collateral estoppel).

240. See authorities cited *supra* at note 223. *See also* Note, *Mass Exposure Torts: An Efficient Solution to a Complex Problem,* 54 U. Cin. L. Rev. 467, 473-98 (1985); Comment, *Affirmative Judicial Case Management: A Viable Solution to the Toxic Product Litigation Crisis,* 38 Me. L. Rev. 339, 352-60 (1986); Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency,* 47 Albany L. Rev. 1180 (1983).

separately tried."[241] Until recently, this dictum set the tone for treatment of motions for class certification in mass tort actions.[242] Asbestos claims were denied class action status.[243]

Two recent decisions have altered the trend. In *Jenkins v. Raymark Industries, Inc.*,[244] the U.S. Court of Appeals for the Fifth Circuit, in an interlocutory appeal, affirmed an order issued by Judge Robert M. Parker of the Eastern District of Texas certifying a class under rule 23(b)(3)[245] composed of 755 asbestos personal injury claims filed in that district prior to January 1, 1985. Against the backdrop of an "avalanche of litigation," the likelihood that the trend of filings would continue, and the delays in the trial queue,[246] the court of appeals found that the class met all prerequisites of rule 23(a)[247] and the requirements of rule 23(b)(3).[248] On the question of whether common issues "predominate" over individual questions, the court ruled that the test is whether "common issues . . . constitute a significant part of the individual cases" and found that jury decisions in this case will "significantly advance the resolution of the underlying hundreds of cases." Therefore, the court found no abuse of discretion in Judge Parker's conclusion on that issue.[249]

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241. Fed. R. Civ. P. 23, Note of Advisory Committee on Rules, 1966 Amendment, subdivision (b)(3) (1986).

242. *See, e.g., In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852-54 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re* Federal Skywalk Cases, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982). In each of these cases, the district court had certified a class action and the court of appeals reversed. In the *Dalkon Shield* case, the district court had certified a statewide class action on the issue of liability under Fed. R. Civ. P. 23(b)(3) and a nationwide class action on the issue of punitive damages under Fed. R. Civ. P. 23(b)(1)(B); the court of appeals ordered both classes decertified.

243. *See, e.g.*, Yandle v. PPG Indus., 65 F.R.D. 566 (E.D. Tex. 1974) (action by 570 employees and survivors at single asbestos plant not certified because common questions of law and fact do not predominate over individual one, and class action is not the superior method for adjudication).

244. 782 F.2d 468 (5th Cir. 1986).

245. Fed. R. Civ. P. 23(b)(3). Such a class is commonly referred to as an "opt out class" because plaintiffs have the option of refusing to be included in, and bound by the outcome of, the class trial. *See* Panzer & Patton, *supra* note 223, at 566.

246. *Jenkins*, 782 F.2d at 470.

247. The prerequisites to a class action are numerosity ("the class is so numerous that joinder of all members is impracticable"), commonality ("questions of law or fact common to the class"), typicality ("claims . . . of representative parties are typical of the claims . . . of the class"), and adequacy of representation ("representative parties will fairly and adequately protect the interests of the class"). Fed. R. Civ. P. 23(a) (1986). *See also* Panzer & Patton, *supra* note 223.

248. The requirements of Fed. R. Civ. P. 23(b)(3) are district court findings that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

249. *Id.* at 472-73. *See also In re* School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986) ("resolution of one issue or a small group of them will so advance the litiga-

The common issues found to be included in the *Jenkins* class were product defectiveness as to each defendant's products, identification of products to which plaintiffs were exposed, the date each defendant knew or should have known of the dangers related to their products (the state-of-the-art defense), and gross negligence and punitive damages.[250] On the question of "superiority" of the class action device under rule 23(b)(3), the court held that "Judge Parker's plan is clearly superior to the alternative of repeating, hundreds of times over, the litigation of the state of the art issues."[251]

Shortly after the Fifth Circuit decided *Jenkins,* the U.S. Court of Appeals for the Third Circuit, also in an interlocutory appeal, affirmed the conditional certification of an "opt out" class action for asbestos property damages actions brought by local school authorities.[252] As in *Jenkins,* the court looked at some of the characteristics of asbestos litigation, especially the inconsistency of jury verdicts, and found that "the highly unusual nature of asbestos litigation" influenced its decision to approve the certification.[253]

The common issues found in the *School Asbestos Litigation* were the "health hazards of asbestos, the defendants' knowledge of those dangers, the failure to warn or test, and the defendants' concert of action or conspiracy in the formation or adherence to industry practices."[254] Despite "serious concern" about manageability, the court applauded the district court's "willingness to attempt to cope with an unprecedented situation in a somewhat novel manner" and concluded that the appeals court did "not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date."[255]

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tion that they may fairly be said to predominate"). *See generally* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1778 (1986 ed.).

250. *Jenkins,* 782 F.2d at 470–71. The jury was also to decide all the individual issues in the cases of the class representatives. Punitive damages would be awarded as a proportion of actual damages to be determined in minitrials after the class proceedings. *Id.* at 474–75.

251. *Id.* at 473.

252. *In re* School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986). The court rejected a proposed mandatory class action for punitive damages under Fed. R. Civ. P. 23(b)(1)(B) and affirmed the district court's denial of certification under Fed. R. Civ. P. 23(b)(2) class action. *Id.* at 1002–08. The rule 23(b)(1)(B) class was rejected because findings of a limited fund were not based on evidence of insolvency and because all of the property damage claims were not included in this action. *Id.* at 1008.

253. *Id.* at 1011; *see also id.* at 1000–01.

254. *Id.* at 1009.

255. *Id.* at 1011. The court also observed that the district court might find additional common issues or that it might decide to decertify the class altogether if manageability problems proved to be insurmountable.

Although there is "growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment,"[256] these are the first appellate cases that extend the trend to mass toxic tort situations in which the harms were spread over time and were not the product of a single incident.[257] As the Third Circuit observed, courts have come to realize that a class action "need not resolve all issues in the litigation"[258] and that rule 23 has the flexibility of permitting subclasses to deal with variations of a major issue.[259]

Without negating the possibility and desirability of reform in class action procedures as applied to mass tort litigation, the evolving law of class actions does permit flexible applications to asbestos litigation. When limited to the cases filed in a particular district, as in *Jenkins,* the legal complexity shrinks considerably: In no event will the law of more than one state be applicable to the claims of class members. The local form of the class action tempers traditional concerns about individual notice, interference with attorney-client relationships, and other aspects of manageability. While the stakes will be high in most districtwide actions, they will not approach the monumental proportions of a nationwide class like the Agent Orange class action or even the asbestos school litigation.

Who will opt into a rule 23(b)(3) class? The *Jenkins* and *School Litigation* cases are likely to differ in this regard. In the districtwide class in *Jenkins* incentives for plaintiffs to participate flowed from the fact that the two co-lead counsel represented the vast majority of plaintiffs in the district. While their preference might be for trials of smaller groups of plaintiffs, the judge found the class mechanism superior. A class action became the only means to gain immediate trials and results for their clients. As lead counsel, they also had relative confidence that they would be awarded adequate fees, which are controlled by the trial judge: The judge's award both reduced the normal contingent fee amounts and resulted in a large award.[260]

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256. *Id.* at 1008.

257. The Agent Orange litigation was a precursor. In that case, the Second Circuit refused to block certification of a nationwide class action by denying a writ of mandamus. *In re* "Agent Orange" Prods. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980), *modified,* 100 F.R.D. 718 (1983), *mandamus denied sub nom. In re* Diamond Shamrock Chems. Co., 725 F.2d 858 (2d Cir. 1984), *cert. denied,* 465 U.S. 1067 (1984).

258. *In re School Asbestos Litig.,* 789 F.2d at 1008, citing Fed. R. Civ. P. 23(c)(4)(A). For further discussion of severance of issues and use of subclasses in mass tort class actions, see Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency,* 47 Albany L. Rev. 1180, 1221–29 (1983).

259. *In re School Asbestos Litig.,* 789 F.2d at 1010 n.11; Fed. R. Civ. P. 23(c)(4)(B).

260. *See* Jenkins v. Raymark Indus., Inc., No. M-84-193-CA, Notice of Proposed Class Settlement (E.D. Tex. June 6, 1986), *reprinted in* Mealey's Litig. Reps.: Asbes-

For counsel not appointed as lead counsel—and perhaps not part of the litigation team at all—there is a decided disincentive to recommending that their clients opt into the procedure. These counsel would be forced to surrender control of their cases to the trial team and would have to forgo or compromise their fees. Their clients also may have a disincentive for joining the class action. A plaintiff with a meritorious claim may be more likely to receive a higher award.

In the school litigation, on the other hand, the plaintiffs' and their lawyers are located across the nation and have more options. In many jurisdictions, the cases are pending in state courts. Local decision making seems likely to favor plaintiffs. Some lawyers speculated that only the smaller school districts and those with weaker cases will not opt out of the national class. Presumably, a similar hemorrhage would occur in a nationwide class of personal injury plaintiffs.

Defendants objected strenuously to the class action procedure in *Jenkins* and were unsuccessful in the court of appeals. Their preferred procedure was to have a limited number of plaintiffs consolidated, with a bifurcated procedure to control a jury's decisions. Behind the legal arguments, their cash flow concerns loomed large. Even the settlement was seen by some as a "train wreck" for defendants. Districtwide or nationwide structured settlements, geared to the cash flow capacity of the defendant, are a device that may ease those problems in any future class actions.

The structure of the class action trial in *Jenkins* resembled that of the *Newman* case in that the jury would have been asked to return special verdict forms.[261] Alternative classwide bases for calculation of punitive damages were conditionally approved by the court of appeals.[262]

The evolution of the *Jenkins* case seems instructive. Judge Parker first presided over individual trials, then used collateral estoppel (discussed below), experimented with the "trial in the round," and then with consolidation of thirty cases. A stepladder effect is evident. When he began to discuss the possibilities of a districtwide class action, the lawyers saw this as no idle chatter. Thor-

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tos, June 13, 1986, at 4,490 (fee of 20 percent awarded to all plaintiffs' counsel; additional 1 percent awarded to class counsel, for a total award of $22.51 million; a contingent fee of 33 percent would have produced an award of $35.7 million). *See also Judge Parker Awards 20 Percent Fee in Texas Class Action, id.,* June 13, 1986, at 4,407.

261. See the discussion *supra* at note 230.

262. *Jenkins*, 783 F.2d at 474-75. The jury could find an aggregate amount for punitive damages or find an amount for each class member to receive in relation to each dollar of compensatory damages.

ough mastery of the trial issues, in part through the careful construction of special verdict forms, smoothed the way for a credible scheduling of a class action trial. In other districts, threats of class trials or mass consolidations have been treated as judicial puffery, perhaps because the lawyers recognize that experience with individual trials is a precondition to management of a mass trial.

The two specialist judges—Judges Parker and Lambros—both exhibit variations of a stepladder effect. The numbers of cases in the OAL clusters have increased steadily as the court and lawyers gained more experience and familiarity with the system. Judges who choose not to specialize could likely combine more cases for trial after they have assimilated the experience of a trial of an asbestos case.

Multidistrict litigation procedures. In 1968, Congress created the Judicial Panel on Multidistrict Litigation (JPMDL) with authority to transfer civil actions filed in different districts to any district "for coordinated or consolidated pretrial proceedings."[263] The purpose of a transfer is "for the convenience of the parties and witnesses and . . . [to] promote the just and efficient conduct of such actions."[264] Multidistrict proceedings have been used to consolidate and simplify discovery in some nationwide product liability actions.[265] Asbestos personal injury claims, however, have been refused multidistrict proceedings on several grounds, especially the "virtually unanimous opposition of the parties to transfer."[266]

More recently, the panel denied multidistrict treatment to twenty school property damage claims, in part because the panel was not "persuaded that these common questions of fact will predominate over individual questions of fact presented in each action."[267] The panel also observed that "the great majority of par-

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263. 28 U.S.C. § 1407(a) (1986). The panel has authority to initiate a motion to transfer a group of cases. 28 U.S.C. § 1407(c)(i).

264. 28 U.S.C. § 1407(a).

265. *See, e.g., In re* Richardson-Merrell, Inc., "Bendectin" Prods. Liab. Litig. (No. II), 533 F. Supp. 489 (J.P.M.D.L. 1982); *In re* "Agent Orange" Prods. Liab. Litig., MDL No. 381 (unpublished opinions dated 5/8/79 and 10/18/83); *In re* A. H. Robins Co., Dalkon Shield IUD Prods. Liab. Litig., 406 F. Supp. 540 (J.P.M.D.L. 1975) (per curiam). At least nine products liability cases had been transferred to the panel as of July 1984. Transgrud, *Joinder Alternatives in Mass Tort Litigation,* 70 Cornell L. Rev. 779, 803-04 n.138 (1985).

266. *In re* Asbestos and Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906, 910 (J.P.M.D.L. 1977). *See also In re* Asbestos Prods. Liab. Litig. II, MDL No. 416 (J.P.M.D.L. 1980) (unpublished opinion). For further discussion of the history of the MDL panel's treatment of asbestos personal injury cases, see Hensler, *supra* note 1, at 57-60.

267. *In re* Asbestos School Prods. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.D.L. 1985). That conclusion, of course, differs from that of the Third Circuit on the same subject and from that of the Fifth Circuit on the importance of the common issues in personal injury asbestos litigation. At the same time, the panel observed that

ties responding to the Section 1407 motion [filed by three defendants] opposes centralization."[268]

Respondents were not systematically asked about MDL procedures. Two lawyers, one representing plaintiffs, the other representing a major defendant, opined that in hindsight the opposition to MDL certification was knee-jerk and short-sighted. Recognizing that MDL rules need updating to cope with mass tort litigation, the defendant's lawyer saw value to the organizational structure that MDL certification would provide, especially that it would coordinate discovery. Discovery management would help defendants avoid the apparent contradictions when responses by local counsel in early cases are compared with more complete information available to national counsel.

A major deficiency in MDL procedure is that the panel does not have statutory authority to transfer cases for trial. Despite this, courts have developed creative ways to extend the jurisdiction of the transferee court if a single trial appears to be appropriate. For example, in the *Agent Orange Litigation,* the transferee judge certified a class action. In the *Bendectin Litigation,* the transferee judge, after being rebuffed in an effort to create a mandatory settlement class action under rule 23(b)(1)(B),[269] consolidated all cases within his district and any others who voluntarily opted into the consolidated proceedings.[270] In other cases, the transferee judge, using authority under section 1407 to rule on pretrial motions, may grant motions for change of venue to the transferee district, if that district is one in which the action "might have been brought."[271]

Occasionally, the MDL panel has split litigation on the basis of differences in the claims and transferred cases to more than one district.[272] The panel has also recognized the authority of a trans-

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"the common questions of fact involved in these actions have been extensively litigated for the past ten years in connection with thousands of personal injury actions arising from alleged asbestos exposure." *Id.* at 714. The fact that the panel recognizes the repetitiveness of the litigation and denies multidistrict status underscores the strength of their opinion that consolidated pretrial proceedings would not aid the management of the litigation.

268. *Id.* at 714.

269. *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984).

270. *In re* Bendectin Litig., MDL No. 486, Order of Consolidation and Separation (S.D. Ohio Nov. 16, 1983), No. 85-3858, *argued* (6th Cir. Oct. 9, 1986).

271. 28 U.S.C. § 1404(a) (1986). The leading authority is Pfizer, Inc. v. Lord, 447 F.2d 122 (2d Cir. 1971). *See generally* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction 2d, § 3866 (1986). The panel explicitly recognizes the power of the transferee judge to rule on motions for change of venue as a method of consolidating actions for trial, Judicial Panel on Multidistrict Litigation, Rules of Procedure, Rule 11(b) (1986 ed.), and the practice has become "an accepted procedure." Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D 575, 581 (1978).

272. *See, e.g., In re* Sugar Indus. Antitrust Litig., 399 F. Supp. 1397 (J.P.M.D.L. 1975) (similar claims bifurcated and transferred to separate eastern and western dis-

feree court to establish separate discovery tracks based on the nature of the factual issues or the existence of multiple defendants.[273] Such powers seem to be prerequisites to any practical application of MDL procedures to proceedings with as many claims and defendants as are typical in asbestos litigation. Different treatment of claims from various states—perhaps combining all cases from districts within a state—would minimize differences in pretrial discovery and motions based on difference in state law.[274]

Bankruptcy. Discussion of alternative structures for judicial resolution of asbestos claims would not be complete without pointing out the role of the bankruptcy courts as a forum for the collective resolution of claims against asbestos defendants. At least six manufacturers of asbestos products have filed for Chapter 11 reorganization in bankruptcy court.[275] The mass treatment of cases in Chapter 11 exhibits striking parallels to the class action device.[276]

Participants in the formulation of the reorganization plan are forced to deal on a class basis with the unliquidated claims, present and future, of asbestos plaintiffs. Mechanisms created in the bankruptcy process, such as the Manville alternative dispute resolution facility, may provide examples of how to deal with classwide issues.[277] The Manville facility is expected to approximate the

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tricts because of production and marketing differences arising from geographical differences); Penn Central Secs. Litig., 325 F. Supp. 309 (J.P.M.D.L. 1971) (per curiam) (claims against same defendant transferred to separate districts because of differences in the claims). *See also In re* Petroleum Prods. Antitrust Litig., 419 F. Supp. 712, 714-15 nn.2-3 (J.P.M.D.L. 1976) (panel considers subgrouping of similar claims and transfer to more than one transferee district).

273. *See, e.g., In re* Multi-Piece Rim Prods. Liab. Litig., 464 F. Supp. 969, 974 (J.P.M.D.L. 1979) ("The transferee judge, of course, has the authority to group the pretrial proceedings on different discovery tracks according to the common factual issues or according to each defendant"); *In re* Upjohn Co. Antibiotic "Cleocin" Prods. Liab. Litig., 450 F. Supp. 1168, 1170 (J.P.M.D.L. 1978). 28 U.S.C. § 1407(a) explicitly recognizes the power of the panel to create or permit separate tracks or subgroups for discovery by providing that "the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any such claims before the remainder of the action is remanded."

274. See the discussion *supra* at notes 258 to 259.

275. *See supra* note 29.

276. *See generally* Note, *Strategic Bankruptcies, supra* note 29; Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings,* 96 Harv. L. Rev. 1121 (1983).

277. The Manville reorganization plan was approved by the bankruptcy judge pursuant to the "cram down" provisions of the Bankruptcy Code. *In re* Johns-Manville Corp., 82 B 11656/76, Determination of Confirmation Issues (Bankr. S.D.N.Y. Dec. 18, 1986), *reprinted in* Mealey's Litig. Reps.: Asbestos, Dec. 26, 1986, at 5,531. The plan provides for creation of two trust funds to compensate personal injury and property damage claimants. An operating company is created that will fund the two trusts in an amount specified in the plan. An injunction will protect the operating company from future asbestos claims and punitive damages claims. All claims, therefore, will be processed through procedures involving the trusts.

functions of the privately organized Wellington facility and the arbitration process created in the *Jenkins* settlement. In one way, bankruptcy courts may be superior to trial courts: Bankruptcy courts are designed to gather information about finances, scrutinize the finite resources of the defendant, evaluate the reality of claims of poverty, and create a plan that responds to the debtors' financial limits. In this way, the bankruptcy court actions approach those of a nationwide class action against a single defendant.

There are two types of alternative structures that apply mainly to case-by-case litigation: collateral estoppel and bifurcation.

Collateral estoppel. Despite the fact that offensive collateral estoppel is technically available to preclude relitigation of issues by a party that has had a full and fair opportunity to litigate,[278] the doctrine has had little success in expediting asbestos litigation.[279] In tort litigation, collateral estoppel necessarily operates on an issue-by-issue basis and cannot be used to resolve the individual issues of exposure, proximate cause, and injuries.[280] Because there is no self-evident test as to when collateral estoppel may be invoked, the doctrine itself generates litigation that can be at least as duplicative and unproductive as the original issue.[281] A carefully structured trial, with special verdict forms that precisely delineate repetitive issues, may produce results that are useful within a given district. Yet even that approach cannot guarantee results: A settlement before final verdict, as occurred in the *Newman* case in the Eastern District of Texas, may foreclose efforts to establish the prerequisites for issue preclusion.[282]

Several plaintiffs' attorneys indicated that collateral estoppel would be their preferred approach. The likely outcome, however, would be to focus on the individual issues in a case, such as the plaintiff's injuries and exposure to specific products. Such a procedure may take much of the punch out of plaintiff's case by focusing attention away from the asbestos industry; several plaintiffs' attorneys articulated this reservation in discussing bifurcation.[283]

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278. *See generally* Parklane Hosiery v. Shore, 439 U.S. 322 (1979); Blonder-Tongue Laboratories v. University of Ill. Found., 402 U.S. 313 (1971); Green, *supra* note 102, at 147–52.

279. *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982); *see also* Green, *supra* note 278, at 224 ("collateral estoppel has little potential to make a significant contribution in resolving the judicial administration difficulties engendered by asbestos litigation").

280. Green, *supra* note 278, at 186–207; Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 Ariz. St. L.J. 45, 52–53.

281. Green, *supra* note 278.

282. Newman v. Johns-Manville, No. M-79-124-CA, Special Verdict (E.D. Tex. Oct. 24, 1984); Note, *Use of the Bifurcated Trial to Avoid Collateral Estoppel and the Expanding Concept of Final Judgment*, 7 Sw. U.L. Rev. 161 (1975).

283. *See also* Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 Ariz. St. L.J. 45, 52–61 (collateral estoppel not efficient for asbestos

An alternative to the forced use of collateral estoppel may be the agreement of the parties to be bound by the results of a test case, a device frequently used to resolve multiple antitrust litigation.[284] In one district it was reported that plaintiffs refused to risk being bound by a single trial. On the other hand, in the *Newman* case,[285] the court's use of consolidation procedures took the choice away from the parties as to whether they would be bound by the bellwether results in the consolidated cases.

Bifurcation. Bifurcation of trials into liability and damages phases is committed to the discretion of the trial court by rule 42(b) to the extent that the process does not intrude on the right to a jury trial guaranteed by the Seventh Amendment to the Constitution.[286] The Seventh Amendment does not create a general barrier to bifurcation of separable issues that are distinct and independent from each other.[287] If, however, an issue such as damages is "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty," bifurcation might violate the Seventh Amendment.[288]

Generally, a court has discretion under rule 42(b) to bifurcate distinct and independent issues. In exercising its discretion, a court is called on to consider any prejudicial effect that bifurcation may have on the outcome of the case, the convenience of the parties and the court, and any saving of resources.[289] Because there are serious concerns that the time savings from bifurcation may accrue at the expense of altering the outcome of the case, bifurcation decisions are to be made on a case-by-case basis.[290] Typically, time sav-

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cases because they settle without injecting the additional issue of collateral estoppel).

284. Panzer & Patton, *supra* note 223, at 561.

285. See the discussion *supra* at notes 225 to 239.

286. Fed. R. Civ. P. 42(b) (1986) provides:

> (b) Separate trials. *The court,* in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, *may order a separate trial of any claim,* cross-claim, counterclaim or third party claim, *or of any separate issues* or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States. [Emphasis added.]

287. Rodriquez v. Banco Cent., 790 F.2d 172, 180 (1st Cir. 1986); *see also* 7A C. Wright & A. Miller, Federal Practice & Procedure § 1801, at 268 (1972).

288. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931); *see also* Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1024-26 (5th Cir. 1983), and cases cited therein.

289. Yung v. Raymark Indus., Inc., 789 F.2d 397, 400-01 (6th Cir. 1986) (trifurcation); Lis v. Robert Packer Hosp., 579 F.2d 819, 823-24 (3d Cir.), *cert. denied,* 439 U.S. 955 (1978).

290. *Lis,* 579 F.2d at 824.

ings will be generated by hearing first an issue that will dispose of an entire case, such as causation-in-fact.[291] A danger of bifurcation, however, is that it may result in a "sterile or laboratory atmosphere in which causation is parted from the reality of injury."[292] Hence, bifurcation is generally limited to cases in which "'the evidence pertinent to the two issues is wholly unrelated' and the evidence relevant to the damages issue could have a prejudicial impact on the jury's liability determination."[293]

In asbestos litigation, because any time savings generally accrue from hearing the issue that is most highly disputed, courts have often used a variation of bifurcation dubbed reverse bifurcation.[294] In this variation, the first phase of the trial deals with whether plaintiff has an asbestos-related disease and, if so, what were the extent of the injuries and compensatory damages suffered as a result. Usually, a finding on the amount of damages is sufficient to settle the case.

In another variation—reverse trifurcation—plaintiff first presents evidence for a jury decision on whether an asbestos-related disease is present. If the disease if proved, then evidence of exposure to, and defects in, defendants' products follows. Evidence of damages concludes the trial. Another type of trifurcation involves restricting evidence on punitive damages until after causation-in-fact and compensatory damages have been proved. Still another form of reverse trifurcation recommended by a defense lawyer is to begin with evidence of product exposure and thereby exclude any defendant whose product is not linked to the plaintiff(s). Only then would damages be shown, followed, if necessary, by proof of liability and punitive damages.[295]

Defendants applaud the reverse procedure because it focuses the evidence on the plaintiff and away from the asbestos industry. Plaintiffs object because they see the procedure as invariably focusing on the weakest part of their case, whether that be causation-in-fact or damages.[296] From the court's perspective, focusing on indi-

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291. *See, e.g., In re* Beverly Hills Fire Litig., 695 F.2d 207, 216–17 (6th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983).

292. *Id.* at 217.

293. Helminski v. Ayerst Laboratory, 766 F.2d 208, 212 (6th Cir.) (quoting 9 C. Wright & A. Miller, Federal Practice and Procedure § 2390 (1971)), *cert. denied,* 106 S. Ct. 386 (1985).

294. Several district judges in the Eastern District of Pennsylvania use reverse bifurcation procedures for most asbestos cases.

295. Yet another variation of reverse trifurcation was approved in a recent appellate decision, Yung v. Raymark Indus., Inc., 789 F.2d 397 (6th Cir. 1986): Trifurcation of statute of limitations, liability, and damages, in that order, was approved based on efficiency in trying the dispositive issue first and on lack of prejudice.

296. The Fourth Circuit, in an unpublished opinion, recently rejected a challenge to bifurcation procedures used to establish general causation before other elements

vidual damages avoids the necessity of time-consuming evidence relating to the state of the art and punitive damages. The parties agreed to exclude these two issues from phase II of the class action in the Eastern District of Texas. Their treatment signifies that the differences in the interests of plaintiffs, defendants, and the courts are reconcilable.

The question remains, however, as to whether exclusion of evidence on the dangers of asbestos permits a fair jury assessment of damages in a given case. A full assessment of damages to an individual requires information about future injuries that are likely to develop.[297] In the context of asbestos litigation, all of these procedures at this stage should be seen as alternative ways of obtaining information with which to settle a case. Rarely does a case proceed to full trial. A jury that is unlikely to hear phase II or III of a trial will not have an opportunity to compensate for any narrowness in its phase I verdict. As juries are exposed to less of a case, one might expect their decision making to be less thorough and predictable than with the alternative of a full trial, but there is no empirical evidence on this point.[298] In those rare cases that appear to need jury decision making, the alternative of a full trial or even a full summary jury trial may be fairer and more accurate, albeit less efficient, than bifurcated trials.

Clustering: How and How Many

The core issue in alternative trial structures is one of numbers: How many cases can judge and jury manage and comprehend in one (extended) sitting? Answers vary dramatically across districts. In Massachusetts, lawyers see trial of more than one case as a violation of fundamental due process rights. Defendants argue that in

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of liability and damages in a products liability case. Wheelahan v. G. D. Searle & Co., No. 86-1598 (4th Cir. Mar. 16, 1987). The court concluded that, while "bifurcation to determine causation in the abstract is not permissible," a personal physician's testimony could be limited to capacity of Copper 7 IUDs to produce injuries in general. *Id.*, slip op. at 5–6. Another challenge to bifurcation procedures in a toxic tort context is pending in the Sixth Circuit. *See In re* Merrell Dow Pharmaceuticals "Bendectin" Litig., No. 85-3858 (6th Cir. argued Oct. 9, 1986).

297. *See, e.g.*, Note, *Increased Risk of Cancer as an Actionable Injury*, 18 Ga. L. Rev. 563 (1984). *Cf.* Rosenberg, *supra* note 1, at 885–87 (discussing risk of future injury as a compensable injury).

298. Such evidence may become available in the near future. The National Science Foundation has awarded a grant to Professor Irwin A. Horowitz of the University of Toledo Department of Psychology to study, in a laboratory setting, the effects of various forms of bifurcation on jury decision making. National Science Foundation, An Experimental Study of Information Processing in Complex Litigation, Grant No. SES-8609892 (1987).

a mixture of cases, the strong bootstrap the weak. One defense counsel thought that defendants can win a single trial, but not a consolidated one. Reality seems more complex, however, in that defendants won a consolidated trial involving approximately fifty plaintiffs in the Southern District of Texas. Bifurcation of the proceedings may have affected that result.

In most districts, plaintiffs' lawyers expressed a preference for the individual trial on the grounds that it permits them to highlight their client's injuries and not have the individual be lost in a crowd of similar cases. Nevertheless, most plaintiffs' attorneys have adapted to the demands of the asbestos caseload. One experienced national plaintiffs' counsel asserts that clusters of thirty-five work, but that clusters of fifty do not. A Texas defense lawyer expressed a preference for consolidation of groups of fifty, with the proviso that bifurcation be used. Both of these preferences, however, seemed to be influenced by the defendants' verdict in a set of fifty consolidated cases in the Southern District of Texas. This preference, of course, was in comparison with a class action. Two Texas plaintiffs' lawyers' preferences were for groups of thirty rather than a class action.

Recent empirical evidence, based on laboratory simulations of a toxic tort case, suggests that there may be some validity to the views of lawyers on both sides.[299] When a seriously injured plaintiff is included with a group of less seriously injured plaintiffs, the awards for the latter are higher than if they were tried separately.[300] On the other hand, the award to the seriously injured plaintiff is less than it would be if the trial were separate. However, the seriously injured plaintiff faces a higher likelihood of a defense verdict on liability. When the jury is aware that bellwether

299. Horowitz & Bordens, The Effect of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decisions (unpublished manuscript 1987) (on file at the Federal Judicial Center).

300. This phenomenon apparently is illustrated by the jury verdict in the consolidated trial in Newman v. Johns-Manville, No. M-79-124-CA (E.D. Tex. Oct. 24, 1984). One severely disabled plaintiff was expected to receive a much higher award than the other three consolidated plaintiffs, whose injuries were disputed and less visible. Rand research reported, after interviewing the jury, that the jury decision "was based on the belief that all of the plaintiffs would eventually become as sick as the single disabled plaintiff." Hensler, *supra* note 1, at 42. They concluded that the jury treated probabilistic evidence in an absolute fashion. *Id.* The criticism seems to miss the mark. The jury is called on to make an absolute judgment on the question of whether plaintiffs will suffer future injuries. *See, e.g.*, Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129 (5th Cir. 1985) (Texas law requires full compensation for present injuries and future consequences; no separate cause of action is allowed for a cancer that develops after verdict). If the jury's only information is probabilistic, their role is to make the best judgment possible with the limited information available.

plaintiffs represent hundreds of other plaintiffs, the compensatory and punitive awards were higher than if the jury was given the specific number of plaintiffs represented by the bellwethers.[301]

Numbers included in consolidated clusters may differ from the number of individual claims presented to a single jury in one sitting. In the *Jenkins* class, thirteen named plaintiffs' cases were presented to the jury. In the *Newman* case, four bellwether plaintiffs represented the cluster of thirty. Judge Gibson in the *Wilson* case found that the jury could follow five cases at a time.[302] In Maryland, clusters were set at a maximum of ten, based on the understanding that a jury could not distinguish more than eight to ten cases. At bottom, however, experiences with juries in deciding groups of cases are so limited that it is difficult to generalize. Whether these armchair judgments reflect the upper limits of a jury's capacity to distinguish cases remains uncertain. It may be a subject that can only be systematically examined in a social psychology lab rather than in a natural setting.

Another limit on the number of cases is the workload on the specialist-lawyers in each district. As a practical matter, courts make accommodations with the lawyers, sometimes pressing for expansion of the capacity of the firm to handle cases. In one district, the number of pulmonary specialists who could serve as experts was perceived as a limit on the flow of cases. In some districts, the lawyers devote more resources to asbestos litigation than courts do. One effect of this is that lawyers can manipulate the system by demanding trials. In one district a Wellington regional counsel was engaged in a power struggle with the state court over the trial schedule for the year. He reasoned that he had more lawyers than the court had judges and that, by proceeding to trial in all cases, he could conform the list to his wishes.

The above discussion assumes that grouping of greater numbers of cases produces greater caseload movement. That is not universally true. In the Eastern District of Pennsylvania, the court experimented with consolidation of cases[303] and decided to return to single trials, dispersed among all the judges of the court. In this large metropolitan court, that strategy has served to dispose of substantial numbers of cases. In the Eastern District of Tennessee, the court also has a high percentage of dispositions based on a policy of

301. Horowitz & Bordens, *supra* note 299.

302. Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 250, 253 (S.D. Tex. 1985).

303. *See, e.g.*, Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982), *aff'd sub nom.* Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481 (3d Cir. 1985).

assignments to individual judges who generally schedule individual trials. Consolidation in those districts might be unnecessary.

Because most cases settle, consolidation in groups may ease the work of lawyers. Careful selection of cases for consolidation can pinpoint economies of scale beyond the traditional groupings based on worksite, disease, and plaintiffs' counsel.[304] Groupings by worksite may narrow to the point that exposure witnesses are the same. Groupings by disease may be refined to the point of having a single treating physician, allowing easier and more efficient scheduling of expert witnesses. Courts generally delegate the task of grouping cases to counsel, under guidelines set by the court.[305]

Conclusion

As experience with asbestos litigation has evolved, resolution of common issues has become more routine, at least in theory. Individual trials in the early years may have contributed to the evolutionary discovery of evidence of liability.[306] These trials helped achieve a major goal of the tort system, namely, holding public and private entities accountable for behavior that damages or threatens public health and safety.[307] As asbestos litigation has reached a mature stage, the time seems ripe for conversion of judicially established rights into routine claims. This has been successfully managed in some courts, but not in others. Traditional case-by-case litigation of common issues works in some courts because the parties have been able to settle cases routinely.[308] In other courts, the task of building an experience base of litigation upon which to rest routine settlements is far from completion.

Asbestos cases routinely settle when firm credible trial dates are set. As larger numbers of cases are combined for joint trial, whether it be a class action or a consolidated trial, the group of cases settles. As long as trial is a viable alternative and the court shows some capacity to meet that trial date, parties have settled their cases. Because the system has evolved into a settlement system, the capacity of juries and judges to comprehend the

304. T. Willging, *supra* note 4, at 28–29.

305. *See, e.g., In re* All Asbestos Cases, Memorandum Opinion (D. Md. Dec. 16, 1983).

306. *See generally* Brodeur, *supra* note 21.

307. *Id.*; Hensler, *supra* note 1, at 110–12; G. Eads & P. Reuter, Designing Safer Products (1983).

308. *Cf.* Hensler, *supra* note 1, at 66–67 ("Some repetitive litigation of substantive issues can be intuitively sound . . . . But these considerations do not require that common issues remain open forever.").

number of cases is not the primary limit. The main question has become: How many cases can the lawyers evaluate and the defendants pay within a structured time period? Those factors may be more malleable than the capacity of juries or judges to process cases.

Finally, trial structures need to be integrated with the court's assignment system. If fewer judges are available to manage the caseload, there is more need for a group approach to trials. If greater resources are available, more traditional approaches work. Under traditional approaches, however, a court may invest more time than is necessary in applying a case-by-case management system. Even if little time investment is required—an issue to be discussed in the next chapter—separate treatment of each case tends to delay settlements.

VIII. SPECIAL BURDENS ON COURT PERSONNEL

Whether asbestos cases present a special burden to courts with high concentrations of cases needs to be viewed in the context of a court's entire caseload. Two points help to set the stage. First, cases in the early years were concentrated in coastal regions or port cities, with resulting concentration of burdens in those areas. Second, asbestos litigation was superimposed on existing dockets, which generally were full. Indeed, data on weighted filings show that the last time the federal courts met the accepted congressional-judicial standard of 400 weighted filings per judge was in 1979, just before federal asbestos filings jumped from hundreds per year to a rate of more than 7,000 cases per year in the first half of 1986.[309] Lag time between the early filing of cases and the processing of new appointments to the bench meant that burdens imposed in one time period were relieved years later, if at all.

Current data show that a large percentage of the increase in tort filings in the federal courts during the past decade can be attributed to asbestos cases. Using estimates of 16,000 asbestos cases filed in federal court as of 1985, Galanter concluded that asbestos cases accounted for a large portion of the growth of products liability filings in federal courts between 1973 and 1985.[310] Federal Judicial Center data indicate that those figures are conservative and that 20,837 asbestos cases were filed in the federal courts as of 1986.[311] Asbestos filings account for a major increase in the demand on judges' time imposed by products liability cases. In 1979, products liability personal injury cases were ranked ninth and constituted 1.85 percent of estimated judicial time; in 1985, such cases ranked fourth and asbestos cases alone accounted for 2.38 percent of estimated judge time.[312] This bulge of filings was superimposed on a

309. *See supra* table 9. *See also* Flanders, *What Do the Federal Courts Do,* 5 Rev. Litig. 199, 201-03 (1986) (weighted filings per judgeship have passed the agreed threshold of 400 for creation of new judgeships and currently are up to 469).

310. Galanter, *The Day After the Litigation Explosion,* 46 Md. L. Rev. 3, 24-25 (1986).

311. *See supra* note 45 and table 1.

312. Flanders, *supra* note 309, at 206. The estimate of judge time is based on the most recent time study conducted by the Federal Judicial Center. S. Flanders, The 1979 Federal District Court Time Study (Federal Judicial Center 1980).

caseload that had increased by 123 percent between 1975 and 1984.[313]

Some courts addressed the new burden by concentrating early efforts on the management of the new caseload, with the effect of greatly reducing future burdens. After management systems and pretrial and trial rulings became established, judicial burdens lessened and asbestos cases became simpler than typical products liability personal injury cases.[314] Other courts gave priority to other types of cases. In those courts, asbestos cases were singled out for special treatment, generally delegated to a magistrate for pretrial action, and not scheduled for trial. Those courts continue to face a mounting, but largely unmet, burden of asbestos litigation. On the other hand, those courts have husbanded scarce judicial resources for other priorities. Not investing judicial resources into asbestos litigation has allowed at least one court to trim its backlog of other civil cases.

In a study that included four of the federal district courts involved in this study (Eastern Texas, Eastern Pennsylvania, Massachusetts, and New Jersey), the Rand Corporation's Institute for Civil Justice concluded that courts were not devoting the resources to asbestos cases that their numbers would otherwise command: "No court for which we have information devotes more than 1 percent of its judicial resources to asbestos case management even when asbestos cases account for a substantial portion of the civil caseload."[315] The current study finds a greater investment of judicial resources in some districts, notably Eastern Texas and probably Eastern Pennsylvania and Northern Ohio, yet the conclusion is similar: Most courts have not allocated resources sufficient to schedule asbestos cases for trial within the same time period as similar nonasbestos cases.

Judicial burdens seem concentrated in the early stages of managing the litigation. Most courts developed special case management procedures. In one court two judges worked on creating a procedure and having a hearing with counsel to discuss the proposals, investing a total of three judge-weeks in the process. In one of the specialist courts, the judge spent 50 to 75 percent of his time for two years in creating and implementing an intensive case management program. Another judge, who was relieved of new civil case

313. Galanter, *supra* note 310, at 15–16. Aside from asbestos litigation, however, much of the increase involved student loan and Social Security cases, which have relatively low case weights (.2637 and .0356, respectively). S. Flanders, *supra* note 312, at 53–54. *See also* Galanter, *supra*, at 17.

314. See the discussion *supra* at notes 47 to 74.

315. Hensler, *supra* note 1, at 79.

assignments for more than one year, devoted 40 to 50 percent of his time to developing case management orders, ruling on motions, and presiding at trials.

One judge combined trials with issuance of problem-solving case management orders, spending approximately 30 percent of his time for a year and a half in the trial and management of asbestos cases. Combined with managing an existing docket of civil cases (with no new civil cases drawn during the period) and keeping up with the criminal docket, this judge felt that his involvement was "pervasive."

Not all of the case management development involved major burdens on judges. Some tasks can be delegated. In one court, the judges delegated the task of creating an order to the magistrate, who met with counsel and worked out the details of a thorough order, including a procedure for clustering cases, use of master pleading, a scheduling format, and a trial list. In a court that uses an individual assignment system for asbestos cases, one judge delegated the drafting of a case management order to his law clerk. The clerk got in touch with counsel and put together a draft that included consolidated pretrial discovery, standard interrogatories, and a scheduling order for clusters of cases.

As reported above,[316] judicial burdens were measured by accordion files of records during the first trials of asbestos cases. Of the courts that invested substantial resources into asbestos cases between 1980 and 1985, none report burdens that are disproportionate to the volume of cases. Some report that there is absolutely no burden from the cases and that they rarely have any involvement because the cases generally settle. Judges who handled a disproportionate share of the early cases have been able to return to their normal dockets after dispersion of cases to other judges. Often rulings on nondispositive motions, such as motions in limine, are deferred so that judicial efforts will not be wasted.

Judicial burdens from asbestos litigation should be measured in relation to the number of cases involved. In the Eastern District of Texas, the class action trial and previous consolidation of groups of cases absorbed a considerable proportion of Judge Parker's time. Pretrial, trial, and postsettlement phases of the class action demanded about 50 percent of his time for several months, including twenty-five days of trial time. During the entire year of that trial (1986), Judge Parker estimates that he spent not more than 25 percent of his time working on asbestos litigation. Seven hundred and forty-one cases were settled in the class action. Using the current

316. See the discussion *supra* at notes 51 to 52.

weighted case measurement, with asbestos cases weighted at 1.51,[317] disposition of 741 cases equals 1,119 weighted cases, the equivalent of almost three judge-years of 400 weighted cases per year.

In the District of Massachusetts, the clerk of court reports that 3,286 asbestos cases (4,962 weighted cases) were pending as of April 30, 1986. This constitutes more than twelve judge-years worth of cases. For several years, judicial efforts had primarily been limited to the assignment of a magistrate. Beginning in 1985, Judge Rya Zobel was assigned to the pretrial management of asbestos cases. She created a management system and presided at several trials. Her creation of the inactive asbestos docket is expected to result in the voluntary dismissal of large numbers of cases (an unknown fraction of which will have to be reopened later). Establishment of a system for computer tracking of cases is expected to enhance the capacity of the court to move large blocks of cases to settlement or consolidated trials. All of these efforts are likely to demand a small fraction of the burden predicted by the weighted case system.

In sum, half of the courts indicated that asbestos cases have never been a special burden. The vast majority report that any burdens have been proportionate to the number of cases. None shows an investment of resources that meets or exceeds the estimates projected by the current case-weighting measures. Problems that remain in districts like Massachusetts relate to marshaling the judicial resources necessary for a credible plan for disposition of a large backlog.

Clerks' Office Burdens

To a large degree, the paperwork management problems of clerks' offices have been described in an earlier report.[318] A special

317. Current estimates of judicial time required by various cases are derived from S. Flanders, *supra* note 312. The 1979 time study preceded the creation of a separate classification for asbestos cases in October 1984, so that there is no current measure derived exclusively from judicial experience with asbestos litigation. On the assumption that almost all asbestos cases were included as personal injury products liability cases prior to October 1984, supported by the conclusion in this report that asbestos cases are comparable to other personal injury products liability cases (see the discussion at notes 48 to 50 and tables 3 to 5), the case weight for that type of case, 1.5119, is used in this report.

The case weight of 1.5119 applies to personal injury products liability cases based on diversity of citizenship jurisdiction, which was the jurisdictional basis for 93.5 percent of all federal asbestos filings and 91.7 percent of the asbestos filings in the ten federal district courts in this study. In the study courts, 0.65 percent of the cases had a U.S. defendant as the basis asserted by plaintiff for jurisdiction and 8.65 percent were based on plaintiff assertions of federal question jurisdiction.

318. T. Willging, *supra* note 4.

problem identified in several courts was the lack of ability to develop accessible and detailed information about the asbestos caseload to aid in the design of case management systems. Computerization of asbestos records facilitates clustering of cases from a data base of hundreds of cases.

Courts that have developed data bases of asbestos cases have done so by piecing together resources, especially computer expertise. Most courts did not develop a computer capacity until a backlog of hundreds or thousands of asbestos cases had accumulated. Construction of a data base from existing records required duplicative and laborious efforts. The experiences of clerks' offices dramatize the need for automated court records for civil cases, the development of which is in process.[319]

Many clerks' offices have created specialized units to deal with asbestos filings. Until pretrial management systems such as master dockets and standard pleadings were developed, there were few economies of scale. Generally, additional personnel were needed to cope with the mountain of paperwork and flood of required notices.

Delegated Burdens: Magistrates and Law Clerks

In some jurisdictions, judges were able to delegate some of the more intensive demands of case management to magistrates, deputy clerks, and law clerks. In the Eastern District of Louisiana, for example, Magistrate Michaelle Pitard Wynne and Judge Martin L. C. Feldman attended the Asbestos Case Management Conference in Baltimore in June 1984. On their return a committee of judges delegated the work of creating a case management plan to the magistrate. She combed through the cases, looking for patterns and categories for clustering, convened a group of lawyers to discuss management issues, and produced a draft plan that was largely adopted by the court. A major function served by the magistrate's involvement was to discover the common ground of proposals presented by judges and lawyers and to prevent unproductive confrontations. The final product has been accepted by all. Pretrial management by the magistrate, including ruling on discovery disputes and presiding at settlement conferences, flowed naturally from this experience.

In other districts, notably Massachusetts and New Jersey, the experience of the magistrates has not been so fruitful. Without the

319. *See* Federal Judicial Center, Five-Year Plan for Automation in the United States Courts (1987 update).

support of a trial schedule, the magistrates served to attend to the details of pretrial management. Lack of an overall management plan, however, minimized the effectiveness of their intensive efforts.[320] The difference leading to effective use of magistrates in Eastern Louisiana has been the availability of a committee of judges in that district to schedule trials and the absence of equivalent support in the other two districts.

In the Eastern District of Texas, Magistrate Harry W. McKee has created a computerized system for monitoring the effectiveness of the alternative dispute resolution system created by the parties. By tracking the progress of this phase of the class action settlement, the magistrate undertakes a task that would otherwise impinge on the judge's availability for trials.

Several courts have responded to the specialized nature of asbestos litigation by creating a new specialist, the asbestos law clerk. Generally supported by special funds allocated by the circuit judicial council after a showing of special need, these clerks supplement the court's normal staff of clerks.[321] Since their positions are temporary, they serve to alleviate some of the judicial burdens without creating a permanent position in response to what might be a transient phenomenon.

In the Eastern District of Louisiana, the asbestos law clerk serves two primary functions. She serves as the front line, day-to-day administrator of the case management orders, enforcing deadlines and communicating with parties about their needs and the progress of the cases. She also serves as the research resource for all of the judges assigned to asbestos litigation and is not assigned to a single chambers. From this vantage point as clerk to all of the asbestos judges, she can coordinate the court's responses to motions that are duplicative and overlapping and afford the judges an opportunity to develop consistent positions among one another.

In the Northern District of Ohio, Judge Lambros uses an asbestos law clerk in a similar fashion. Communication with counsel and collection of the data protocols is the clerk's primary function, but not to the exclusion of traditional legal research and drafting of

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320. *See* Hensler, *supra* note 1, at 82 ("In the federal courts in Massachusetts and New Jersey, close judicial control of discovery schedules and the imposition of conventional cut-off dates without assignment of trial dates seem to have expedited a process for its own sake, ignoring the reality about dispositions in those courts"). *See also* T. Willging, *supra* note 4, at 15–17.

321. A limited amount of funding—approximately $2 million in fiscal year 1987—is distributed among the circuits for temporary positions to deal with emergencies. Applications for a temporary position like an asbestos law clerkship are submitted through the chief judge of a district to the circuit judicial council for approval.

For a description of the process of allocation of temporary asbestos courtroom deputies by the Administrative Office, see T. Willging, *supra* note 4, at 13.

orders. All pleadings are reviewed by the clerk, and matters of import brought to the judge's attention. One of the former asbestos law clerks has now been appointed as special master, and others are now available as the OAL plan moves into a phase of more routine operation.[322]

The availability of an asbestos law clerk, used collegially as in the Eastern District of Louisiana, should function to give the court direct access to expertise about a specialized, repetitive form of litigation. Myths have arisen that asbestos litigation is exceedingly complex and difficult to master. A specialist clerk can aid in the process of demystification that judges have experienced once they become familiar with the litigation.

To summarize this chapter, some courts have devoted substantial resources to asbestos litigation. This investment has generally paid dividends in term of reducing the time demands of later cases below their weighted case value. In other courts, however, lack of early investment of resources resulted in a backlog that now challenges an entire court. Perhaps because asbestos cases have become simpler than other products liability personal injury cases, the burden of asbestos litigation has not approached the demands projected by weighted case measures. Further investment of resources will be necessary to reduce backlogs that have developed in some courts.

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322. *In re* Ohio Asbestos Litig., OAL Order No. 56 (N.D. Ohio Jan. 16, 1987).

IX. FILING TRENDS AND CASE DISPOSITIONS

Discussion of disposition management and alternative trial structures leads to the conclusion that courts need to gauge their resources and schedule numbers of cases for trial in a mode that will bring them to trial within a reasonable time. Data suggest that the number of cases scheduled for trial will have to increase dramatically to make inroads on the backlog of cases and even to keep pace with current filings.

Data on asbestos case dispositions, however, have a low level of reliability due to several idiosyncratic features of asbestos litigation. Cases are not officially terminated until the clerk files a form with the Administrative Office of the U.S. Courts denoting the final disposition. In asbestos litigation, this may mean that final settlement papers have been filed as to all defendants who are not in bankruptcy. With an average of twenty defendants, one should expect that recorded dispositions will lag behind the reality of settlements. In cases involving multiple claimants, the termination cannot be recorded until all settlements are filed.[323] Mass settlements, such as the *Jenkins* class action, cannot fully be recorded until individual settlements are accepted and recorded. Partial settlements with individual defendants, such as the Raymark-Blatt & Fales agreement, are not recorded at all in the Administrative Office data, skewing the data further toward understating the number of dispositions.

With this major caveat, what follows is the only available quantitative data on asbestos case filing and dispositions in federal courts.

Table 11 shows an overall ratio of filings to dispositions in the years 1985–1986 of 3.7 to 1. For every recorded case disposition, there are 3.7 new cases filed in the ten courts studied. Major filings in Massachusetts and Eastern Texas in 1985 and Northern Ohio in 1986 inflate the results, but even without those extremes, the

323. In the District of Maryland, this meant that of eighty-seven settlements filed with the clerks office between November 1984 and May 1985, only forty-seven resulted in case terminations. Memorandum from Mark Kozlowski, Asbestos Clerk, to Joseph Haas, Clerk of Court, Nov. 6, 1985 (on file at the Federal Judicial Center).

TABLE 11
Filing and Dispositions of Asbestos Cases for Ten Federal District Courts by Year, 1981–1986

Court	Mass.	N.J.	E. Pa.	W. Pa.	Md.	S.C.	E. La.	E. Tex.	N. Ohio	E. Tenn.	Total
1981 F[a]	304	78	87	32	24	135	48	143	36	33	920
1981 D[b]	0	57	53	12	3	77	4	84	4	39	333
1982 F	571	73	140	29	50	81	35	236	16	42	1,273
1982 D	0	22	55	25	5	131	2	80	6	22	348
1983 F	554	22	142	37	125	22	27	215	14	25	1,183
1983 D	4	35	69	36	10	79	1	14	3	12	263
1984 F	628	13	201	33	76	71	70	374	6	26	1,498
1984 D	15	48	107	15	11	37	90	56	11	12	402
1985 F	740	39	309	7	153	70	74	823	94	16	2,325
1985 D	16	30	165	14	52	27	50	84	72	27	537
1986 F[c]	180	2	159	31	144	55	82	305	853	11	1,822
1986 D[c]	293	7	133	6	33	9	30	64	1	15	591
Total F[d]	3,090	325	1,134	197	625	590	362	2,480	1,063	210	10,076
Total D[d]	330	220	595	108	116	372	180	469	104	164	2,658

[a]F represents filings for the calendar year.

[b]D represents dispositions for the calendar year.

[c]Figures for 1986 are for the period from Jan. 1, 1986 to June 30, 1986.

[d]These totals include filings and dispositions prior to 1981 and therefore do not represent the totals of the columns.

number of new filings would far outstrip dispositions. New filings have increased dramatically in 1985 and the first half of 1986, reflecting a national increase in asbestos filings in all federal courts, as shown in table 12. Since 1984 the rate of recorded dispositions per year has increased, with the largest increase being in 1986 when the rate more than doubled.

More than half of all federal asbestos claims were filed in the two and a half years from January 1, 1984, to June 30, 1986. To keep pace, courts will have to increase the number of cases scheduled for trial.

Reports from interviews mirror some of the statistical data and also underscore the limitations of the numbers. In Eastern Pennsylvania, for example, the court was on schedule to finish all 1985 filing by the end of 1987. In Northern Ohio, the court was in the process of creating and testing modified case management plans to deal with a new wave of cases. In South Carolina, the court scheduled a fall 1986 special term of court to clear the asbestos backlog. In Eastern Texas the parties began using the arbitration process to dispose of the cases filed after January 1, 1985. In Eastern Louisiana and Maryland, the courts were scheduling cases filed in 1986

TABLE 12
Asbestos Cases Filed in
All Federal District Courts by Year, 1974–1986[a]

Year	Number	Percentage
1974[a]	1	0
1975[a]	22	0
1976[a]	53	0
1977[a]	149	1
1978	272	1
1980	1,450	7
1981	1,955	9
1982	2,208	11
1983	2,379	11
1984	3,269	16
1985	4,832	23
1986[b]	3,560	17
Total cases	20,837	

[a]Filings for 1974–1977 include only those cases terminated after July 1, 1977. *See supra* note 45.

[b]Figures for 1986 are for the period from January 1 to June 30.

for trials in 1989 and 1990, respectively. There were indications in most districts of an awareness of the backlog and of a plan to reduce it. Not all of the plans, however, called for movement of a sufficient number of cases to reduce the backlog if filings continue at the current rate.

What is the prognosis for asbestos injury litigation? The lawyers interviewed did not have a uniform picture of future trends. Most, however, were of the opinion that the major wave of massive, intensive exposure has passed with the filing of most shipyard worker cases. New cases represent exposure to asbestos during the 1960s, just prior to the widespread adoption of more stringent precautions in the 1970s. While fewer cases could be expected from the less intense exposure of the 1960s and 1970s, many expected the injuries to be more serious, on the average. Long-range forecasts indicate that the numbers of cases in all courts will double, but that the rate of filing will taper off considerably in the next ten years.[324]

Whether filings will continue to grow in the federal courts depends, at least in part, on how plaintiffs' counsel perceive the capacity of those courts to resolve their claims fairly and relatively expeditiously. One set of factors influencing plaintiffs' choice between federal and state forums relates to relatively fixed proce-

324. See the discussion *supra* at notes 11–18.

dures, such as jury size and voting rules (e.g., accepting nonunanimous verdicts), discovery limits, and rules of evidence. The other major set of factors, one that varies over time and in relation to the state courts, is the amount of delay in securing a trial date. In several districts in which federal courts had proved to be slower than state courts, some plaintiffs' lawyers stated that they had filed or planned to file future cases in state courts. In Massachusetts and New Jersey, the figures in table 11 show a drop in filings. In other districts, the predicted reductions did not occur.

In short, data on dispositions and filings give no grounds for optimism about prospects for eliminating the backlog of asbestos cases. Unless current plans are modified to take account of the reality of continued filings, so that the rate of dispositions exceeds new filings, by definition no progress will be made on that backlog. Waiting for Wellington to settle future cases seems impractical, given Wellington's current policy of waiting for the courts to schedule trials. Polite curtsies are a prelude to waltzing in circles.

X. THE FUTURE: NEW WAVES OF TOXIC TORTS?

What can be learned from this study of asbestos litigation that might be useful in dealing with other forms of litigation? Does asbestos litigation portend a massive wave of toxic tort litigation that will overwhelm the capacities of courts, as many predict? If so, what are the features of asbestos litigation that are likely to repeat themselves in these new waves of toxic torts? If not, what are the features of asbestos litigation that render it unique?

The past decade's wave of asbestos litigation was a unique phenomenon, unlikely to be repeated in the foreseeable future. Recurrence would require the convergence of a unique combination of factors. No historical analogues to asbestos litigation have been uncovered. Nor were the judges, clerks, and lawyers interviewed in this study able to point to any equivalent type of litigation on the horizon of the landscape of contemporary litigation.

What are the factors that set asbestos litigation apart from other types of litigation?[325] As discussed in chapter 2, unique features of asbestos litigation include

- a long latency period, exceeding ten years and as long as forty to fifty years;
- widespread use of a dangerous product during the latency period;
- dangers known or knowable to manufacturers who suppress information;
- clear capacity to cause serious injuries (general causation);
- serious injuries to users;
- large numbers of lawsuits, concentrated in regions of more intense occupational use;

325. Our taxonomy of cases excludes those claims that result from a single event with a clear cause and relatively immediate injuries, such as the Bhopal gas leak, the MGM Grand Hotel fire, airline crashes, and the like. For a taxonomy that begins with the premise of a mass disaster and distinguishes among disasters according to causation, timing of injuries, and applicable law, see Weinstein, *supra* note 1, at 1-15.

- unclear causation-in-fact due to other potential causes, including similar products of other defendants;
- large numbers of defendants and cross-claims for contribution based on joint and several liability.

The absence of any one of these factors would have dramatically altered the number or nature of asbestos cases. A shorter latency period would have reduced the numbers of cases that could have accumulated without general awareness of the dangers of asbestos products. As it was, asbestos disease is subtle and insidious at its early stages, masking its severity. That the injuries are serious leads to two types of complications. First, serious injuries produce a high rate of litigation because the losses to the victims are large enough to provide incentives for victims to seek redress and for lawyers to accept cases on a contingent fee basis. Second, the progression of the injuries raises concerns among those exposed that they may be in the early (latent) stages of developing those serious injuries. Driven by the statute of limitations, more cases will be filed and disputes about diagnoses are likely to proliferate.

A less useful and popular product would also have reduced the numbers by lessening exposure. Absence of regional concentrations and dispersion among districts would allow individual assignment systems to operate effectively and avoid delays caused by infusion of large numbers of cases into a relatively few courts and law firms.[326] The long-term suppression of knowledge in the asbestos industry likewise was a key to allowing cases to accumulate. Public knowledge could have triggered preventive measures. The clarity of general causation also leads to increased numbers of cases, because the prospect of recovering damages is high and the cases are attractive to lawyers operating on a contingent fee system.

As to the nature of the cases, changes in any of the last two factors would substantially reduce the complexities of asbestos litigation. Clear causation-in-fact, which occurs when the injuries are unequivocally associated with the hazard, such as the burns from a fire or the sudden hair loss associated with MER/29, simplifies litigation vastly. Where injuries have multiple causes (e.g., injuries such as lung cancer), or diagnoses are debatable, or multiple products might have caused the injuries, disputes about any of those issues can be used to support a credible claim for separate trials for each plaintiff. All three of these factors coincide in asbestos litigation, making trial a possibility and mass treatment more problematic.

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326. Hensler, *supra* note 2, at 86-87.

Finally, the number of defendants in asbestos litigation has been a major source of complexity, beyond the paperwork. Failure of defendants until recently to establish formulas among one another for allocation of damages caused delays and complication in settlements and pretrial rulings. Insurance disputes multiplied and magnified into massive litigation. Had the claims involved a single defendant, they would have been simplified and perhaps treated in a mass forum, probably a bankruptcy court.

How does the asbestos experience and identification of these factors apply to other cases? Table 13 (see page 124) illustrates the application of the characteristics of asbestos litigation to some current and historical candidates for special treatment by the courts.

A lengthy latency period produces two complicating effects: It allows a large number of cases to accumulate, and it makes information about exposure relatively inaccessible and difficult to discover. Cases involving products on the market for a brief time, with immediate claims, such as Bendectin or MER/29, tend to generate a modest, more manageable number of cases than those with long latency periods.

Widespread occupational or consumer use of a product is another key ingredient of mass litigation. Chemicals like formaldehyde that are used extensively in such common products as plywood and wash-and-wear clothing are prime candidates. For formaldehyde litigation to approach the complexity of asbestos litigation, however, at least four additional conditions would have to be met: (1) serious injuries resulting from those common uses of formaldehyde; (2) clear expert evidence of general causation; (3) evidence of suppression of safety information; and (4) multiple products manufactured by different defendants contributing to those injuries. These contingencies have not materialized to date, and it seems unlikely that they will. In fact, reports of serious injuries are rare. More importantly, early litigation has served to alter manufacturing practices to prevent dangers, for example, by reducing formaldehyde-treated wood in mobile home construction.

Another essential element of a litigation explosion is the clarity of general causation, that is, the capacity of the substance to cause the injuries alleged. General causation is essential to finding a legal right. Without this critical determination, as in Agent Orange cases to date and the major Bendectin consolidation in the Southern District of Ohio, plaintiffs see no point in pursuing large numbers of cases. Lack of proof of the ability of most other toxic products to cause serious injuries, or of the ability of science to detect any causal relationships, limits potential litigation. Among contem-

TABLE 13
Asbestos Characteristics Applied to Other Types of Litigation

Characteristic	DES	Agent Orange	Dalkon Shield	Silicosis	Ground-water	Bendectin	Formal-dehyde	Tobacco	Radiation[a]	MER 29	Thalido-mide	Black Lung
Long latency period	Yes	Too soon to tell	No	Yes	Yes	No	Possible	Yes	Yes	No	No	Yes
Serious injuries	Yes	Yes	Yes	Yes	Yes	Yes	Few to date	Yes	Yes	No	Yes	Yes
Widespread product use	Yes[b]	Yes[b]	Yes[b]	No[b]	No[b]	No[b]	Yes	Yes	—[c]	2 years only	Yes[d]	Limited, occupa-tional
Large numbers of cases (>1,000)	No[e]	Yes	Yes	No	No	Yes	Yes	Yes[f]	Yes[g]	Yes[h]	Yes[d]	Few court cases
Dangers known or knowable, but suppressed	Arguably knowable	Disputed	Yes	No infor-mation	Varies	Disputed	Disputed	No	Yes	Yes	Yes	N.A.
Clear general causation	Yes	No	Yes	Yes	No[i]	No	No	No	Yes	Yes	Yes	Yes
Unclear causation-in-fact	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
Large numbers of defendants	Yes[j]	No[k]	No	Yes[j]	Yes	No	Probably	Limited	No[l]	No	No	No

[a]Allen v. United States, 588 F. Supp. 247 (D. Utah 1984), *rev'd on other grounds* 816 F.2d 1417 (10th Cir. 1987). [b]Product use is limited to a discrete population. [c]There is no single product associated with radiation dangers. [d]Most of the cases resulted from marketing this product in Europe. [e]Approximately 500 cases have been reported. [f]There are large numbers of potential cases without any regional concentrations. [g]*Allen v. United States* involved 1,192 claims. [h]5,000 injuries and 1,500 cases are the estimates in Rheingold, *supra* note 126. [i]The clarity of causation varies from case to case. [j]The identity of the defendant whose product caused the injury is often traceable. [k]There were seven defendants at the conclusion. *See infra* note 330. [l]A large number of defendants is possible in radiation cases; *Allen v. United States* did not involve large numbers of defendants.

porary cases or activities, only sand-blasting (silicosis), high levels of radiation (which tend to be single-event disasters such as at Chernobyl), and Dalkon Shield injuries fit this criterion.[327] The latter has produced claims in excess of 300,000 during the bankruptcy process, but the presence of a single defendant, coupled with the capacity of the bankruptcy court to consolidate the claims, results in a single massive case in contrast to the tens of thousands of scattered asbestos cases.[328]

MER/29 is a historical example of a case with clear evidence of general causation, but the total number of cases filed was about 1,500 because the product was only marketed for two years and the injuries were patent. Pneumoconiosis (black lung) might have been seen as a historical analogue. Like asbestos workers, miners had widespread occupational exposure resulting in a disease attributable to dangerous working conditions. However, there was no third-party liability of suppliers of raw materials or products as in the asbestos industry. In the absence of a clear right of recovery in the courts or under workers' compensation laws, the victims and their unions channelled their energies into creation of a legislative remedy and an administrative claims procedure.[329]

Injuries caused by dioxin, as in the Agent Orange case or in litigation involving polychlorinated biphenyls (PCBs), come closest to asbestos litigation in terms used in table 13. Products such as Agent Orange had widespread use, leading to large numbers of

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327. Toxic shock syndrome may also fit this category, but the cases are relatively few, the latency period short, and the warning relatively promptly heeded. *See* Weinstein, *supra* note 1, at 9; *see also* T. Riley, The Price of a Life: One Woman's Death from Toxic Shock (1986).

328. Prior to the bankruptcy, at least one court separated all Dalkon Shield cases for special treatment, resulting in delays. Other courts continued to treat the cases in the normal fashion and avoided special delays.

329. Federal legislation to provide compensation for victims of pneumoconiosis arose out of the failure of state worker's compensation programs to compensate miners who were victims of the disease. Ramsey & Haberman, *The Federal Black Lung Program—The View From the Top,* 87 W. Va. L. Rev. 575, 575 (1985). Unlike asbestos workers, coal miners had little or no opportunity to sue third parties based on products liability theories. Excluded from state workers' compensation programs and barred from suing their employers, coal miners had no legally recognized right to compensation for their injuries until Congress enacted the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). The statute has been amended three times (in 1972, 1977, and 1982) and is codified at 30 U.S.C. §§ 901–962 (1982). Congressional efforts to simplify eligibility determinations by creating liberal presumptions caused complaints from industry. Eligibility definitions have come "almost full circle" as a result of restrictions on eligibility in the 1982 amendments. Ramsey & Haberman, *supra,* at 578.

Those who champion administrative alternatives to litigation of asbestos cases should be aware of the difficulties in the black lung program. Rand researchers concluded that the black lung program's "history has not been encouraging." Hensler, *supra* note 1, at 118.

claims of serious injuries, even presuming a relatively short latency period. If the latency period exceeds the time preceding the litigation, or if the court of appeals reverses the dismissal of the "opt-out" cases, there may yet be claims for injuries that manifest themselves at a later time. If dioxin products are found to be capable of causing distinctive and serious injuries, proliferation of the litigation is likely to follow.

Two other features distinguish Agent Orange cases somewhat. First is the presence of a more manageable number of defendants, starting with five.[330] Second is the use of multidistrict litigation (MDL) procedures and a nationwide class action to manage the litigation, following a strategic decision by plaintiffs' counsel to consolidate cases and by lawyers for Dow Chemical Co. and for plaintiffs to petition jointly for MDL treatment.[331] The contrast with asbestos litigation is stark. All of the Agent Orange cases were managed by two judges in succession (assisted, of course, by magistrates and special masters), whereas it is likely that hundreds of judges will be involved with asbestos litigation.

Knowledge of dangers and suppression of that information limits the degree to which litigation about a product will expand to the proportions of asbestos litigation. One expects that the very occurrence of the asbestos litigation explosion will modify corporate behavior in that regard. There is some evidence that such deterrent effects have occurred.[332]

Cigarette litigation has some of the ingredients that might spawn an outpouring of cases. A favorable ruling on liability is likely to produce a national flood of litigation. Individual injuries and damages would have to be proved on a case-by-case or formulaic basis. Each case, however, would probably target the one or two manufac-

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330. P. Schuck, *supra* note 18, at 45 (1986). Ultimately, seven defendants were before the court in the Agent Orange litigation. Weinstein, *Foreword: Modern Teaching at Brooklyn Law School—The Example of Toxic Torts,* 52 Brooklyn L. Rev. 329, 331 (1986).

331. P. Schuck, *supra* note 18, at 48–50.

332. Evidence of a possible link between fiberglass products and lung cancer sparked corporate reports of intent to investigate the dangers and take appropriate action. Shabecoff, *Evidence Grows on Possible Link of Fiberglass and Lung Illnesses,* N.Y. Times, Mar. 15, 1987, at 1. Data filed with regulatory agencies have been modified to disclose the risk of lung cancer. Representatives of the manufacturers stated that the changes were made "because of their policy of keeping the public informed and because it was the law. But they also conceded that it was necessary to protect themselves against possible future lawsuits." *Id.*

Similar reports have emanated from corporate law departments. Efforts to prevent products liability litigation through safer designs and more adequate warnings have been reported. *See, e.g., Profile: Preventive Law a Major Priority at Emerson Electric Co. in St. Louis,* 5 Alternatives to the High Cost of Litigation 35 (March 1987).

turers of products that plaintiff regularly used. Proof of exposure would also be far simpler than in asbestos litigation. The enormity of the liability might trigger recourse to bankruptcy remedies.

Groundwater chemical pollution cases have similarities to asbestos litigation, yet also exhibit major differences. While there are predictions that thousands of these cases will reach the courts,[333] that claim seems exaggerated. Groundwater cases will inevitably be dispersed among various jurisdictions. To date, only single cases against the main sources of pollution in a given locale have been attempted. These cases are technically very complex and expensive to litigate, both factors that are likely to limit the number of lawyers who become involved. Each involves different chemicals, different issues of liability, and different geological patterns—all idiosyncratic factors that leave the courts little choice but case-by-case litigation, with each case managed by a single judge. Once liability is established, large numbers of claimants could present difficult claims to the courts, requiring use of mass procedures like those used in some districts for asbestos litigation.

Finally, radiation claims have some similarity to asbestos in that general causation can be clear and individual injuries must be evaluated on a case-by-case basis.[334] The numbers of cases have not been high, but that could change if a major source of high doses of radiation is found. For example, if the radon gas found to seep into homes in some parts of the country becomes linked to solid waste materials, cases like the groundwater cases could materialize. Other instances of radiation contamination would be likely to be connected with a mass disaster, like Chernobyl, which limits

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333. Weisskopf, *Toxic-Waste Settlement Reached,* Washington Post, Sept. 23, 1986, at A3, col.4. ("Environmental lawyers predicted that the agreement [in the Woburn, Massachusetts, groundwater pollution case] will invite thousands of similar lawsuits nationwide by demonstrating to those who believe they are victims of toxic waste that damages can be won"); *see also* Changing Times, March 1987, at 114 ("A novel argument [immune system damage] may make it easier to recover damages for diseases and medical problems caused by toxic wastes that pollute water").

In another recent case involving groundwater pollution, Ayers v. Township of Jackson, 55 U.S.L.W. 2620 (N.J. Sup. Ct. May 7, 1987), the New Jersey Supreme Court upheld a claim for damages filed by residents of a township for damages caused by groundwater contamination. The court ruled that the residents could recover for damages to their "quality of life" and for the cost of medical surveillance. The court rejected claims for damages for intentional infliction of emotional distress and for "unquantified enhanced risk of diseases that had not manifested themselves." Medical surveillance could, of course, lead to large numbers of individual claims.

334. Allen v. United States, 588 F. Supp. 247, 404–06 (D. Utah 1984), *rev'd on other grounds,* 816 F.2d 1417 (10th Cir. 1987). *Allen* involved a consolidation of the individual claims of 1,192 plaintiffs. Twenty-four of the claims, selected by counsel for plaintiffs and defendants, served as bellwether cases for the group. *Id.* at 258. The court found liability and awarded compensation to ten of the twenty-four. *Id.* at 443.

the complexity because exposures all occur at the same location and at the same time. Like the *Agent Orange* and *Allen* cases, a large portion of the time of a single judge would be required.

Review of the current landscape of toxic tort disputes reinforces the conclusion that asbestos litigation is a unique phenomenon, unlikely to recur. The coalescence of large numbers of cases with clear liability and varied injuries caused by a large number of defendants seems improbable, but at the same time not impossible. The above taxonomy, derived from the asbestos experience, is designed to aid courts and policymakers in determining whether a given wave of litigation so resembles asbestos that it warrants extraordinary managerial action.

Management by Mass Tort Characteristics

While the recurrence of an asbestos-type phenomenon appears unlikely, table 13 also demonstrates that cases with some of the characteristics of asbestos are a reality. Table 14 is designed to aid in the transfer of case management information from this report to other types of mass tort litigation by isolating each characteristic and identifying relevant case management procedures.

Table 14 is largely self-explanatory. Management techniques that were tried and discarded during asbestos litigation (collateral estoppel comes to mind) are not included. Techniques that were not used, but which have the potential to be useful, such as statewide class action or MDL proceedings, are included. The list is intended to be suggestive, not exhaustive.[335]

TABLE 14
Case Management Approaches Related to Case Characteristics

Characteristics	Case Management Approaches
1. Long latency period	Pretrial consolidation for discovery
	Accumulation of discovery materials
	Computerization of records re products and exposure at different sites (by counsel)
	Multidistrict discovery, statewide or national (not used)
2. Serious injuries	Creation of inactive asbestos docket
	Automatic exchange of medical information
3. Widespread product use	Nationwide or statewide procedure for discovery and exchange of information regarding national defendant's production, distribution, and knowledge of dangers, such as MDL (not used)

335. *See generally* Manual for Complex Litigation, Second (Federal Judicial Center 1985).

TABLE 14 (Continued)

Characteristics	Case Management Approaches
4. Large numbers of cases	Assignment to single judge or committee for pretrial management
	Dispersion to all judges for trial
	Master trial calendar
	Consolidation of cases in clusters organized by case characteristics and plaintiff's attorney
	Class action, districtwide
	Class action, statewide (not used)
	Multidistrict procedures with statewide groupings (not used)
5. Dangers known or knowable, but suppressed	Discovery procedures listed in #1 and #3, above
	Consolidation of punitive damages claims (not used)
	Mandatory class action after formal findings of limited funds (not used)
6. Clear general causation	Consolidated rulings on general causation and state-of-art and other common issues—or class action
	Reverse bifurcation
7. Disputed causation-in-fact	Discovery procedures listed in #1–3, above, especially automatic exchange of medical information
	Computer data bases for case evaluation
	Alternative dispute resolution procedures, if necessary and not abused to delay trials
	Judge-hosted settlement conferences
	Special master-hosted settlement conferences
	Firm trial dates
8. Large numbers of defendants	Liaison counsel
	Private agreements among defendants to allocate awards and coordinate defense
	Standard districtwide rulings on pretrial and evidentiary motions
	Deeming of filing of cross-claims
	Opt-out motions procedure
	Master docketing systems
	Consolidation and other procedures listed in #4, above
	Assignment to single judge or committee for pretrial management

XI. SUMMARY AND CONCLUSIONS

This summary draws together major findings from the report and restates them in relation to generally accepted knowledge about case management.

1. The standard formulation regarding the capacity of firm, credible trial dates to generate case dispositions through settlement or trial applies even in the unique context of asbestos litigation.[336] Scheduling cases in large numbers and at the limits of the court's capacity to conduct trials produces dispositions. No limits to this axiom of case management surfaced in this study.

2. There is a gap in pretrial and trial structures designed to manage large groups of mass tort cases on a statewide basis. Because these cases are generally diversity cases, there is a natural commonality among cases that arise in the same state. In states with multiple districts, there is no incentive for a single district to use consolidation or class action procedures on a statewide basis. The Judicial Panel on Multidistrict Litigation has not used its apparent authority to divide cases into subgroups at the state level. The multidistrict procedure also lacks clear authority to consolidate cases for trial in a form other than a class action (if the transferee district is not a proper venue for all of the cases).

3. Consolidation under Federal Rule of Civil Procedure 42(a) and bifurcation or trifurcation (in traditional or reverse formats) are flexible mechanisms for management of mass tort litigation. These rules enable courts to shape procedures for grouping cases according to the demands of a particular form of litigation. At the same time, these novel formats create possibilities of prejudice to one or both parties.

4. Individual assignment systems break down in the face of the procedural complexity initially caused by filing a large number of cases against a large number of defendants. Absent a districtwide management system, repetitiveness and inconsistent adjudication of multiple motions are likely under the individual calendar system. Assignment of cases to a single judge for pretrial management within the district (or state) may be a useful modification of

336. *See, e.g.,* S. Flanders, Case Management and Court Management in United States District Courts 33-35 (Federal Judicial Center 1977).

the individual calendar system in such situations. Once the pretrial process is stabilized, the court can revert to the individual calendar system or consolidate the cases for mass disposition. Permanent assignment of a form of mass tort litigation for individual trials by a single judge is a form of special treatment that is likely to generate delays.

5. Special assignment of asbestos cases to magistrates or other assignments not directly linked to scheduling trials serves to delay cases beyond the time of individually assigned cases.

6. Special assignments also work. As judges and lawyers gain experience with the litigation, they tend to reduce its complexity and become able to settle or try increasingly large numbers of cases simultaneously.

7. In the early stages of litigation of similar cases, systematic collection of information about prior settlements enhances the ability of counsel to settle cases and to develop formulas for settlements.

8. All forms of judicial intervention in the settlement process, including the traditional role of intervening only upon request of the parties, lead to settlements. Establishing a clear trial structure, having standard rulings on motions, and conducting a few trials seem to be sufficient to establish case values for a large number of similar cases that involve the same lawyers.

9. Trial activity seems to level off after authoritative trial and appellate rulings establish a framework for settlements. Judicial burdens diminish sharply after initial trials.

APPENDIX
Asbestos Filings and Terminations of Selected Courts as of 1984

Court	Dispositions	Filings	Ratio
Mass.	42	1,514	.013
E. Tex.	279	1,145	.243
E. Pa.	243	593	.409
S.C.	335	414	.809
Md.	23	289	.079
N.J.	167	279	.590
E. Tenn.	134	191	.701
E. La.	15	186	.080
W. Pa.	87	144	.604
N. Ohio	20	111	.180
Total	1,345	4,866	.276

SOURCE: Federal Judicial Center, Integrated Data Base.

TABLE OF CASES

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