THE WORST SHOULD GO FIRST: DEFERRAL REGISTRIES IN ASBESTOS LITIGATION

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Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers' exposure to asbestos.[1] Specific proposals for reforming asbestos litigation, however, are almost always controversial—both in the obvious political sense that the interested parties disagree about them, and in the more objective sense that the proposals inevitably entail some difficult tradeoffs among com-

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1. The defects of asbestos litigation have already generated a considerable literature from legal scholars, judges, policy analysts, and journalists. *See, e.g.*, AMERICAN LAW INST., COMPLEX LITIGATION PROJECT, ch. 2. (Tent. Draft No. 1, 1989); 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, ch. 13, part VI, 375-81 (1991); DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 1991) [hereinafter JUDICIAL CONFERENCE REPORT]; JAMES S. KAKALIK, COSTS OF ASBESTOS LITIGATION (1983); JAMES S. KAKALIK, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819 (1992); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69; Jack B. Weinstein and Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269; Amy Singer, *Leon Silverman, $4.5 Million, His Clients $???*, AM. LAW., Oct. 1990, at 58.

I stress the word "today." There can be little doubt that earlier asbestos litigation played a constructive, indeed essential, role in enabling workers to establish the crucial facts and legal theories regarding the relevant issues, including manufacturers' knowledge, general causation, and warning. Those pioneering efforts were so successful that many of these fact-eliciting and law-elaborating functions have now largely been achieved. *See, e.g.*, *In re* Joint E. & S. Dist. Asbestos Litig.; *In re* Johns-Manville Corp., Findlay v. Blinken, 129 Bankr. 710 (E.D.N.Y. & S.D.N.Y. & Bankr. S.D.N.Y., June 27, 1991), *amended*, No. 90-3973 (Aug. 5, 1991), *argued*, No. 91-5068 (2d Cir., Feb. 24, 1992) [hereinafter *In re* Asbestos Litigation]. Although certain issues in some asbestos cases remain hotly contested—for example, specific causation of certain diseases in particular types of workers, and whether different warnings would have avoided the injury—the fact-eliciting and law-elaborating functions that remain no longer outweigh the deficiencies of the current litigation process. Even if asbestos litigation were still needed to perform these essential functions, fairer and more efficient management systems could be devised.

peting, widely-shared social values.[2]

The reform that I present here—that courts with large asbestos caseloads mandate deferral registries[3]—will also be controversial. Deferral registries are judicially-managed docketing and calendaring systems that alter the priority of trials of asbestos cases, deferring the claims of unimpaired asbestos claimants and permitting them to return to the active docket only when they develop an actual impairment or when the claims of the already-impaired plaintiffs have been heard. Ideally, registries would be created in a coordinated fashion under the guidance and authority of a legislature or a judicial conference. If necessary, however, federal district courts (and presumably state courts as well) could properly create these registries on their own initiative.

Several distinctive features of asbestos litigation militate in favor of a deferral registry. These include: (1) the great variability of the strength of claims at the time of docketing; (2) the high transaction costs of litigating asbestos claims; (3) the desperate need of many ill claimants for swift compensation; (4) the diversion of many of the available resources to unimpaired (but earlier-filing) claimants; and (5) the capacity of registries to preserve and marshal those resources more fairly and effectively on behalf of all claimants, rather than those who happen to get to them first.

Given these features of asbestos litigation, we should not be surprised to learn that some plaintiffs' and defendants' lawyers, encouraged by some trial judges, have voluntarily agreed to defer some of their asbestos claims so that other, more serious ones can be tried earlier.[4] Most courts, however, including

2. For a recent example, see Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & Com. 1 (1990) (analyzing ALI proposal for wisdom and constitutionality and concluding that suggested procedural changes would precipitate unjustifiable substantive changes).

3. These are sometimes called "pleural" registries in recognition of the fact that most of the claims that would be deferred involve some non-impairing changes to the pleurae, the outer linings of the lung. Because the registry idea need not be limited to pleura-related claims, I use a more generic label. Deferral may also be accomplished by conferring an inactive "status" in which a case is administratively closed, even if no formal "registry" docket is maintained. The "registry" label includes this less frequent alternative.

4. *See, e.g.*, Stipulation Regarding Voluntary Dismissal of Cases upon Certain Conditions at 1, *In re* Massachusetts Asbestos Litigation, M.M.L. Nos. 1-5 (D. Mass., Nov. 7, 1985) and Joint Motion of Plaintiffs and Manufacturing and Distributing Defendants to Amend Pre-trial Order No. 4 Regarding Inactive Asbestos Docket at 1, *In re* Massachusetts Asbestos Litigation, M.M.L. Nos. 1-5 (D. Mass., Nov. 7, 1985) (establishing defer-

some with very large asbestos caseloads, still have not established registries. This failure to institute registries where they would seem most serviceable probably reflects a number of factors. Some trial lawyers may oppose registries for strategic reasons, while some trial judges may doubt whether they can mandate them in the absence of the parties' consent. Finally, some lawyers, judges, and litigants may not understand how registries actually operate.

This article seeks to illuminate the strategic considerations, dispel any doubts about judicial authority, and draw upon the operational experience of existing registries to demonstrate their merits from both policy and fairness perspectives. The article consists of four parts. Part I provides necessary background concerning asbestos litigation. After noting certain problematic aspects peculiar to this litigation and summarizing available medical knowledge, I argue that, in light of the political branches' failure to address the formidable problems of efficiency and fairness raised by this litigation, the courts must devise strategies of their own to manage those problems more effectively.

Part II details the special features of asbestos litigation that make it so difficult to manage. I analyze four distinct types of individual and social costs—transaction costs, delay costs, horizontal inequity costs, and other queuing costs—that are associated with this litigation. These costs, I argue, are greatly magnified by the traditional first-in, first-out (FIFO) priority rule for bringing cases to trial.

In Part III, I describe the essential elements of a deferral registry system and contend that such a system, as an alternative to the FIFO priority rule, can significantly reduce these costs. Additionally, I explain why reliance upon voluntary creation of such registries is unlikely to be an effective response.

In Part IV, I urge that Congress and state legislatures mandate deferral registry systems by statute or, failing such action, that the Judicial Conference do so by rule. I also consider whether federal trial courts already possess the legal authority to mandate registries on their own—that is, without benefit of

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ral registry with consent of parties) [hereinafter Boston Stipulation and Boston Amendment, respectively]; First Amended Order to Establish Registry For Certain Asbestos Matters, *In re* Asbestos Cases (Ill. Cir. Ct., Nov. 7, 1991) [1990] [hereinafter Cook County Order].

either statute or the parties' agreement. After reviewing a variety of potential constitutional and other legal objections to either statute-based or rule-based deferral registries, I conclude that ample legal authority now exists for both approaches.

I. Asbestos Litigation and the Need for Court-Initiated Reforms

When asbestos fibers are inhaled,[5] they may lodge and accumulate in the lungs, where they may contribute to various pathological conditions, discussed below. Long-term asbestos exposure, scientists agree, can contribute to a variety of conditions ranging from non-impairing physiological changes that are undetectable without clinical testing, to serious, sometimes fatal, diseases. Because of poor data on exposure levels and limited knowledge about precise dose-response relationships, estimates of future asbestos-related illness and death are uncertain.[6]

Five conditions should be distinguished for present purposes. Moving from the least to the most serious, these are: (1) pleural plaque; (2) pleural thickening; (3) asbestosis; (4) lung and certain other cancers; and (5) mesothelioma (a rapidly-fatal form of cancer).[7] As explained in Parts II and III, the distinc-

5. Asbestos is the generic term used to describe a group of fibrous metasilicate minerals, including chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite. 29 C.F.R. § 1926.58(6) (b) (1991). The chemical composition and structure of asbestos confers remarkable properties of flexibility, tensile strength, and resistance to acid or fire. Consequently, for more than a century, asbestos has been used to insulate buildings, ships, steam engines, boilers, piping, ironing board covers, and brake linings, to name just a few of its applications. It has also been used as an ingredient in cement. *See In re* Asbestos Litigation, 129 Bankr. 710, 735-36. In light of asbestos's unique properties and varied uses, a large number of industrial and commercial workers in the United States and elsewhere have been occupationally exposed to it. The precise number of occupationally exposed workers in the United States is uncertain, but estimates have ranged from seven to fourteen million alive circa 1980. Estimates of "substantial" exposures range from 70,000 to four million. Derek E. Lilienfeld et al, *Projection of Asbestos Related Diseases in the United States, 1985 to 2009 (Part I Cancer)*, 45 Brit. J. Indus. Med. 283, 285-86 (1988) (reviewing earlier estimates of exposure and projected mortalities).

6. Most of the commonly-cited estimates of mortality and morbidity are based upon the projections published a decade ago in Irving J. Selikoff, Disability Compensation for Asbestos-Associated Disease in the United States 84-85 (1982). Those estimates were recently noted in Judicial Conference Report, *supra* note 1, at 2, and 129 Bankr. at 126, and discussed in *id.*, app. b at 926-31.

7. *See also* Frances Lew et al., *High Frequency of Immune Dysfunctions in Asbestos Workers and in Patients with Malignant Mesothelioma*, 6 J. Clinical Immununology, 225, 225-32 (1986) (comparing deficiencies in immune cells, ratios, or activity among mesothelioma patients and other asbestos workers without malignancies, correlating exceptions with

tion between pleural plaques and other asbestos-related conditions is particularly salient to the proposal to use deferral registries to reform asbestos litigation.[8]

The five major asbestos-related conditions differ along a number of dimensions. *Pleural plaques*[9] have been described as "discrete, elevated, opaque, shiny, rounded lesions, . . . diffuse or nodular," of the parietal pleura[10] or diaphragm.[11] They strongly indicate asbestos exposure.[12] *Pleural thickening*[13] includes certain types of lesion of the visceral pleura.[14] Unlike

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longevity of some mesothelioma patients, and speculating that asbestos causes immunosuppression).

8. Although asbestos-related conditions have received enormous attention from scientists in recent years, many important variables and relationships are not yet well understood. Partly for this reason, some of the definitions, measurement systems, and classification schemes relating to the asbestos problem are still not standardized. Thus when different researchers define terms differently, their findings may not be comparable even when they ostensibly use the same terms. Because so much turns upon precisely how asbestos claims are defined, measured, and classified, these variables remain highly controversial.

These are not simply scientific and methodological disputes. They implicate many of the important issues that arise in asbestos litigation, such as the diagnosis and prognosis of condition and harm, the testing methods used, the degree of impairment observed, the causal inferences drawn, the projection of future claims and claims values, and the way in which medical reports and clinical and epidemiological studies are interpreted and generalized. Legal issues such as statutes of limitations and procedural safeguards are also implicated by these choices. For this reason, the design and workability of a deferral registry will also be affected. The registry must specify, for example, which asbestos-related conditions will be deferred, how they will be defined, how functional impairment will be measured, how claims will be classified, and the circumstances under which deferred claims may later be returned to active status. These are difficult choices, and they are inevitably arbitrary to some extent.

9. Pleural plaques are also described in the medical literature as "circumscribed pleural fibrosis." *See* Ruth Lilis et al., *Pulmonary Function and Pleural Fibrosis: Quantitative Relationships with an Integrative Index of Pleural Abnormalities*, 10 AM. J. INDUS. MED. 145, 146 (1991).

10. The pleurae are a double membrane surrounding the lung between the lung and chest wall. The inner layer, adjacent to the lung tissue, is called the visceral pleura. The outer layer, in close contact with the inner, is called the parietal pleura.

11. American Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASE, 363, 363-64 (1986) (presenting official statement of American Thoracic Society).

12. *See* RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985) ("Calcified pleural plaques . . . are strongly indicative of exposure"); Gunnar Hillerdal, *Pleural Lesion and the ILO Classification: The Need For a Revision*, 19 AM. J. INDUS. MED. 125, 129 (1991) ("Pleural plaques are practically pathognomonic for asbestos exposure.").

13. Pleural thickening is also described in the medical literature as "diffuse pleural fibrosis." Lilis et al., *supra* note 9, at 147.

14. *See* Hillerdal, *supra* note 12, at 127 ("The main radiological difference is that the pleural plaques are always sharply demarcated against the lung parenchyma [tissue], while the visceral lesions blend more diffusely with it."); *see also id.* at 125-30 (noting a condition commonly preceding diffuse pleural thickening, benign pleural effusion [collection of fluid in the potential space between the pleurae]; and identifying five variants of visceral pleural lesion).

plaques, pleural thickening may have non-asbestos causes.[15] *Asbestosis*[16] involves non-malignant lesions of the lung tissue itself, varying from small areas of basal fibrosis to a diffuse, fine fibrosis.[17] This condition may be diagnosed clinically and functionally,[18] or pathologically.[19] Each of these three conditions manifests a range of developmental patterns,[20] local and diffuse extents,[21] clinical significance, and prognosis.[22] *Malignant mesothelioma*, a usually rapidly-fatal form of cancer,[23] is caused

15. *See id.* at 129 ("Other types of pleural lesions [besides plaques] are more nonspecific and need not have any connection with exposure to asbestos. However, in many instances, it is possible to exclude other causes with reasonable certainty. Grossly asymmetrical lesions . . . are rarely due to asbestos.").

16. Asbestosis, thus defined, is also described in the medical literature as a form of "parenchymal interstitial fibrosis." *E.g.*, American Thoracic Soc'y, *supra* note 11, at 364; *see also* 29 C.F.R. § 1910.1001, app. H (III) (1991) (setting forth OSHA medical surveillance guidelines).

17. *See* American Thoracic Soc'y, *supra* note 11, at 364. These fibroses may or may not be accompanied by large air spaces caused by asbestos fibers. *See id.*

18. *See id.* at 364, 367 (basing clinical diagnosis on seven factors).

19. *See* John E. Craighead et al., *The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Schema*, 106 ARCHIVES OF PATHOLOGY AND LABORATORY MED. 544, 559 (1982) (containing Report of Pneumoconiosis Committee of College of American Pathologists and National Institute for Occupational Safety and Health, basing pathological diagnosis on two factors, but without criteria of actual impairment).

20. "[Pleural] plaques typically show very gradual development. With time, the plaques can calcify." Hillerdal, *supra* note 12, at 126. "Diffuse pleural thickening has a similar prolonged latency; however, its development is closely associated with previous pleural effusions." David A. Schwartz, *New Developments in Asbestos-Induced Pleural Disease*, 99 CHEST 191, 191-92 (1991) (review article).

21. "Exceptionally," pleural plaques may be "very extensive, widely calcified and cuirass-like . . . ." W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 244 (2d ed. 1982). Pleural thickening may also be "focal or diffuse." American Thoracic Soc'y, *supra* note 11, at 364; *cf.* Hillerdal, *supra* note 12, at 126 (questioning significance of current classification of plaques by width and extent while noting danger of confusing large plaques with diffuse pleural thickening).

Pleural thickening has been defined as diffuse when the "pleural density extend[s] over at least one-fourth of the chest wall . . . ." Theresa C. McLoud et al., *Diffuse Pleural Thickening in an Asbestos-Exposed Population: Prevalence and Causes*, 144 AM. J. ROENTGENOLOGY 9, 11 (1985); *see also* American Thoracic Soc'y, *supra* note 11, at 364 (Pleural thickening "varies from a thin milky white discoloration . . . to a peel encasing the lung.").

The various extents of pneumoconioses [dust disesases of the chest, including asbestosis] are expressed by the radiological ratings of the International Work Office (IWO) (formerly International Labor Office). Lung fibroses are classified with two digits, respectively representing the best and second-best estimates of the NIOSH-certified chest x-ray B-reader, each estimate on a scale from 0 to 3. Extent and severity of diagnosis thus increase from 0/0 (normal) to 0/1; 1/0; 1/1; 1/2 . . . 3/3. *See* INTERNATIONAL LAB. OFFICE, GUIDELINES FOR THE USE OF ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF PNEUMOCONIOSES (1980).

22. See *infra* notes 37-40 and accompanying text.

23. *See* ANDREW CHURG & FRANCIS H.Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 288 (1988) ("Asbestos causes mesothelioma of both pleura or peritoneum, and probably of the pericardium as well"); *see also* 29 C.F.R. § 1910.1001 app. H (III) (1991) (OSHA guidelines) (Mesothelioma "[s]ymptoms. . .include shortness of breath, pain in the walls of the chest, or abdominal pain.").

almost exclusively by asbestos.[24] *Lung cancer* can also be caused by asbestos, a risk greatly compounded by smoking.[25] Whether asbestos exposure is associated with other types of cancer remains a matter of considerable debate in the medical and legal communities.[26]

Among non-malignant conditions, the most important distinction for present purposes is between claimants who are functionally impaired at present, and those who are not. Impairment is usually defined in terms of a combination of chest x-ray and pulmonary function (breathing test) results.[27] The medical literature indicates that claimants with pleural plaques unaccompanied by asbestosis are ordinarily symptomatically

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24. Gunnar Hillerdal & A.W. Musk, *Pleural Lesions in Crocidolite Workers from Western Australia*, 47 BRIT. J. INDUS. MED. 782, 783 (1990). *But see* CHURG & GREEN, *supra* note 23, at 288-89 (discussing epidemiological studies whose causal findings are particularly strong in the case of amphibole fibers but citing questions and methodological difficulties in the case of chrysotile).

25. *See* ASBESTOS: SMOKING AND DISEASE 141-70 (David M. Burns & John M. Pinney eds., 1982) (reviewing multiplicative effect of smoking, in relation to period and intensity of smoking and asbestos exposure); CHURG & GREEN, *supra* note 23, at 289 ("In contrast to carcinoma of lung, where cigarette smoking commonly plays a role, and asbestosis, where smoking may increase incidence or progression of disease, smoking appears to have no effect on mesothelioma incidence."). *But see* Janet M. Hughes & Hans Weill, *Asbestosis as a Precursor of Asbestos-Related Lung Cancer: Results of a Prospective Mortality Study*, 48 BRIT. J. INDUS. MED. 229, 229-33 (1991) (comparing incidence of lung cancer among smokers exposed to asbestos with incidence among non-exposed smokers, finding increased incidence with asbestosis but not in its absence).

26. *Compare* 29 C.F.R. § 1910.1001 app. H (II) (1991) (OSHA guidelines) ("[W]ell-conducted epidemiological studies . . . have shown a definite association between exposure to asbestos . . . and an increased incidence of lung cancer, pleural and peritoneal mesothelioma, gastrointestinal cancer and asbestosis . . . . Exposure . . . has also been associated with . . . increased incidence of esophageal, kidney, laryngeal, pharyngeal, and buccal cavity cancers.") *with* CHURG & GREEN, *supra* note 23, at 319 (noting confounding or alternative causal factors such as misdiagnosis, alcohol, smoking, and diet, in cases of ovarian, esophageal, laryngeal/esophageal, and stomach/colon cancers, respectively) *and* Richard Doll & Julian Peto, *Other Asbestos-Related Neoplasms*, *in* ASBESTOS-RELATED MALIGNANCY 94 (Karen Antman & Joseph Aisner eds., 1987) ("Neither the epidemiological data so far published nor the biological evidence is sufficiently compelling to convince us that misdiagnosis or chance is not the simplest, and most plausible explanation of the facts observed for cancer of any other site other than the lung, pleura, or peritoneum.").

27. For example, the Cook County, Illinois deferral registry provides that claims may be restored to the trial calendar if the claimant's chest x-ray has an IWO rating of 1/0 or greater, and pulmonary function studies (as given and interpreted by a board-certified pulmonologist) showing a total lung capacity (TLC) of less than 80% of predicted, or showing an oxygen-diffusing capacity of less than 70% of predicted, and an FEV-1/FVC (ratio of forced expiratory volume in one second to forced vital capacity) ratio of 75% of predicted or greater. A claim may also be restored if the claimant's chest x-ray has an IWO reading of 1/1 or greater and an oxygen-diffusing capacity on the pulmonary function study of below 80% of predicted. Cook County Order, *supra* note 4, at 9-10.

unimpaired.[28] Some studies have associated pleural plaques with comparatively modest breathing decrements,[29] but many such studies have been criticized on various grounds.[30] It is clear that diffuse pleural thickening and some of its variants can produce significant impairments,[31] although thickenings are less common than plaques.[32] Asbestosis "[s]ymptoms include shortness of breath, coughing, fatigue, and vague feelings of sickness. When the fibrosis worsens, shortness of breath occurs even at rest . . . . In severe cases, death may be caused by respiratory or cardiac failure."[33]

Reliable data establishing the number of unimpaired asbes-

28. *See, e.g.*, CHURG & GREEN, *supra* note 23, at 234 ("asbestos-associated benign pleural changes are mostly radiographic and pathologic findings that only infrequently have significant symptoms or functional consequences . . . ."); DOLL & PETO, *supra* note 12, at 2; IRVING J. SELIKOFF & DOUGLAS H.K. LEE, ASBESTOS AND DISEASE 192-93 (1978) ("[p]leural changes add little to the symptomatology of the patient"); Edward A. Gaensler et al., *Lung Function with Asbestos-Related Circumscribed Plaques*, *in* 1 PROCEEDINGS OF THE VIITH PNEUMOCONIOSES CONFERENCE 696, 697 (1988) (finding "circumscribed plaques have no measurable effect on function").

29. *See* Lilis et al., *supra* note 9 (grading pleural conditions and reporting, *inter alia*, gradual decrements of forced vital capacity (FVC) with increasing gradation of circumscribed pleural fibrosis, adjusting for duration from onset of exposure, parenchymal abnormalities, and smoking); Schwartz, *supra* note 20, at 193-96 (citing studies).

30. *See* Gaensler et al., *supra* note 28, at 696 (criticizing earlier studies associating plaques and decrement for failing to clearly distinguish plaques and thickening; advocating adequate controls for smoking, age, and employment). *Cf., e.g.*, David A. Schwartz et al., *Asbestos-Induced Pleural Fibrosis and Impaired Lung Function*, 141 AM. REV. RESPIRATORY DISEASE 321 (1990) (attributing 11% FVC reduction to circumscribed pleural plaques, but claiming only "marginal" statistical and "potential" clinical significance due to "small number of study subjects"; controlling for smoking within previous five years only).

31. *E.g.*, Gaensler et al., *supra* note 28, at 697-98 ("Diffuse thickening, unlike plaques, cause[s] a significant loss of lung function . . . strongly related to extent and thickness . . . . Rounded atelectasis [local, folded lung tissue] . . . also may be associated with functional impairment."); Schwartz, *supra* note 20, at 194 ("effect of diffuse pleural thickening on decrements in FVC is approximately twice as great as . . . with circumscribed pleural plaques"). *Compare* Gaensler et al., *supra* note 28, at 697 ("studies of benign asbestos effusion showed that . . . often recurring bloody effusions frequently result in marked functional impairment and fibrothorax [fibrosis between the pleurae] sometimes so severe as to require decortication [surgical removal]") *with* Hillerdal, *supra* note 12, at 127 ("benign pleural effusion . . . can be symptomless and unnoticed by the patient").

32. *See* Gary R. Epler et al., *Prevalence and Incidence of Benign Asbestos Pleural Effusion in a Working Population*, 247 JAMA 617 (1982) (reporting 0.2%-7% incidence of benign pleural effusion, varying with exposure); Gaensler et al., *supra* note 28, at 697 (finding incidences of 23.6% pleural plaques, 14.4% asbestosis, and 3.5% diffuse pleural thickening in mixed occupational group); *see also* note 35 *infra*; *cf.* S. David Rockoff et al., *Visceral Pleural Thickening in Asbestos Exposure: The Occurrence and Implications of Thickened Interlobar Fissures*, *in* PROCEEDINGS OF THE VIITH PNEUMOCONIOSES CONFERENCE 1200-01 (1988) (finding 40% excess prevalance of pleural thickening of fissure among asbestos workers studied but implying no relationship to generalized diffuse pleural thickening or impairment).

33. 29 C.F.R. § 1910.1001 app. H (III) (1991) (OSHA guidelines).

tos claimants are difficult to obtain because the degree of functional impairment of the exposed population is unknown; because the number of pleural plaques, diffuse pleural thickening, and asbestosis depends upon many variables;[34] and because the relative incidence of these three conditions among the total exposed population is also unknown.[35] Despite these uncertainties, the number of unimpaired claimants is almost certainly large.[36] More generally, recent claims experience and medical studies suggest that the disease mix of claims may be becoming less severe, presumably because of declining exposure levels over time and the delayed effects of protective regulations adopted years ago.[37]

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34. Some studies have reported varying incidence of asbestos-related conditions in different industries. *See* M.R. Becklake, *Occupational Lung Disease—Past Record and Future Trends Using Asbestos Cases as an Example*, 6 CLIN. INVEST. MED. 305 (1983) (reporting varying asbestosis prevalence from 3.8% in docking to 16.2% in chrysotile textile manufacturing); M.R. Becklake, Asbestos-related Pleural Disease: Distribution and Determinants in Exposed Workforces and Impact on Health (unpublished manuscript, presented at DRI Asbestos Medicine Seminar, San Diego, California, Oct. 1989) (finding incidence of plaques of 3%-16% in mining and milling, 5%-21% in secondary manufacturing, 9%-58% in insulation and construction work, and 6%-60+% in docking and shipyards). Some other variables that may affect incidence surely include the duration and intensity of exposure, and the time period between exposure and clinical observation. For mesothelioma, the types of asbestos fibers have also been implicated. *See* CHURG & GREEN, *supra* note 23, at 289 (noting that amphiboles, especially crocidolite, cause much higher incidence of mesothelioma than chrysotile).

35. *Compare* Lilis et al., *supra* note 9, at 5 (finding diffuse pleural thickening in 18% of asbestos insulator workers with pleural fibrosis) *with* Hillerdal & Musk, *supra* note 24, at 782 (observing plaques in 13.1%, and diffuse thickening in 30%, of Australian crocidolite workers claiming compensation although not specifying periods of exposure, timing of observation, or selective effect of thickening impairment on claim patterns).

36. Some studies estimate that from 25% to 75% of all claims are unimpaired. *See* THOMAS E. WILLGING, TRENDS IN ASBESTOS LITIGATION 51-52 (1987). One estimate emerges from the negotiations to restructure the Manville Trust, which classified 54.4% of reported pending cases as "pleural." *In re* Asbestos Litigation, 129 Bankr. 710, app. C. at 936 (Memorandum from Mark A. Peterson to Judge Jack B. Weinstein (May 7, 1991)). Assuming that 80% of these claims are pleural plaques only, see Lilis, *supra* note 35, and that all pleural plaques are unimpaired, at least 44% of the total would be unimpaired. (This ignores the pleural thickening cases that are also unimpaired). The CCR estimates that over one-half of the current pending claims are unimpaired claims. Letter from John Aldock, Esq., Shea & Gardner, Special Counsel to Center for Claims Resolution to Peter H. Schuck (Nov. 21, 1991) (on file with author) [hereinafter CCR Letter]. In addition, of the 1000 claims pending when the Cook County registry was established, almost one-half (462 cases) have been placed on the deferral registry. *In re* Asbestos Cases, Mulligan v. Keene Corp. and Allied Signal, Inc., No. 1-91-1305, slip op. at 5-6 n.3 (Ill. App. Ct. Dec. 27, 1991).

37. *See, e.g.*, *In re* Asbestos Litig., *supra* note 1, 129 Bankr. 710, app. C at 945; Gaensler et al., *supra* note 28, at 697 (reporting rapid decline in prevalence of asbestosis and increase of plaques, partly attributed to lower exposure threshold for plaques and increased detection); Herbert Seidman & Irving J. Selikoff, *Decline in Death Rates Among Asbestos Insulation Workers 1967-86 Associated with Diminution of Work Exposure to Asbestos*, in ANNALS OF NEW YORK ACADEMY OF SCIENCES 300, 309 (1990) (finding reduced exposure levels during this period); Hans Weill & Janet M. Hughes, *Asbestos as a Public Health*

Another important unknown concerns the proportion of unimpaired claimants who will suffer asbestos-related impairments in the future.[38] Pleural plaques are certainly markers of prior asbestos exposure, but the existing studies provide no evidence that they independently cause any progression of further asbestos-related conditions.[39] As for asbestosis, the evidence suggests that once the disease is contracted, the symptoms tend to become progressively more serious with continued occupational exposure. In some cases, this progression occurs even after exposure ceases.[40]

As a result of the conditions caused by asbestos exposure, roughly 100,000 suits for asbestos-related personal injuries are currently pending, about two-thirds of them in the state courts.[41] The number of new federal court filings increased steadily during most of the 1980s, although it declined in 1989 and 1991.[42]

Risk: Disease and Policy, 7 ANN. REV. PUB. HEALTH 171, 180-85, Table 3; CCR Letter, *supra* note 36, at 1. Apparent trends in aggregated data, however, are difficult to interpret if data categories of different sizes are affected by different variables.

38. *Compare* Irving J. Selikoff et al., *Predictive Significance of Parenchymal and/or Pleural Fibrosis for Subsequent Death of Asbestos Associated Diseases* (unpublished manuscript on file with author) (observing over 27 years that pleural fibrosis signified four-fold increase in death rate from asbestosis, lung cancer, and mesothelioma for asbestos workers, concluding that "pleural fibrosis on chest x-rays, as a result of asbestos exposure, is by no means a benign condition, in terms of risk of death of asbestos-related disease") *with* CHURG & GREEN, *supra* note 23, at 246 (criticizing results of 10 earlier studies associating plaques and other asbestos-related conditions for confounding effects of smoking) *and* Edward A. Gaensler, Asbestos-Related Pleural Plaques: Much Ado About Very Little, H-25 (Oct. 1991) (unpublished paper on file with author) (criticizing 14 earlier studies for failure to distinguish plaques from diffuse thickening and failure to control for smoking, latency, or exposure).

39. *Compare* Selikoff et al., *supra* note 38, at 10 (explaining increased risk signified by pleural fibrosis as "to a considerable extent due to effects of the exposure . . . and not necessarily to consequences of the fibrosis") *with* Gaensler, Much Ado, *supra* note 38, at H-25 ("sometimes observed excess of cancer cases [in plaque cohorts] was a reflection of the exposure and not necessarily related to the presence of plaques.").

40. 29 C.F.R. § 1910.1001 app. H (III) (1991) (containing OSHA guidelines). Gaensler reports progression in less than 20% of asbestosis cases observed over more than a decade. Edward A. Gaensler et al., *Progression of Asbestosis*, *in* PROCEEDINGS OF THE VIITH INTERNATIONAL PNEUMOCONIOSIS CONFERENCE (1988); *see also* Selikoff et al., *supra* note 38, at 6, 11 (reporting significance of asbestosis greater than pleural fibrosis in predicting asbestos-related fatalities).

41. Letter from Judge Marshall A. Levin to Judge John F. Nangle and the J.P.M.L. (May 24, 1991) (on file with author). As of March 31, 1991, nearly 31,000 actions were reported pending in federal districts by the Statistical Division of the Administrative Office of the United States Courts. Admin. Off. U.S. Cts., Civil Cases Commenced, Terminated, and Pending During Twelve-Month Periods Ending June 30, 1990 and 1991, Table C2 (Asbestos) (current unpublished data available from Statistical Division, Admin. Off. U.S. Cts.) (1984-90 data reprinted in *In re* Asbestos Litig., 129 Bankr. at 745) [hereinafter Admin. Off. data]).

42. Admin. Off. data, *supra* note 41, at Table C2. As of June 30, 1990, 33,182 cases

In 1990, the asbestos litigation caseload reached such crisis proportions that the Chief Justice of the United States appointed a special ad hoc committee of the Judicial Conference to report on the magnitude of the problem and to recommend possible solutions. This committee's report, issued in March 1991, called for Congress to adopt legislation to forestall the "impending disaster."[43] This concern was evidenced even more dramatically several months later when the Judicial Panel on Multidistrict Litigation, which in the past had refused to order a national consolidation of federal court asbestos cases, abruptly reversed its position. It has since transferred more than 27,000 cases for pre-trial purposes to Judge Charles Weiner in the Eastern District of Pennsylvania, leaving him with broad discretion to adopt new strategies for managing this caseload.[44] As discussed in Part II, the problems inherent in asbestos litigation are by no means confined to the immense caseload and the burden imposed by sheer numbers.

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were pending in the federal courts. During that year, 13,687 new claims were filed, an increase of 60% over 1989 and a record in both absolute and percentage terms. Fewer than 6000 were terminated. As of June 30, 1991, 30,806 such cases were pending. Only 7150 new cases were filed and more than 15,000 were terminated. *Id.* Federal court filings alone are of limited value in gauging the volume of asbestos litigation since plaintiffs may be filing in state courts instead, a possibility heightened by the deliberations and decision of the Judicial Panel on Multidistrict Litigation concerning transfer and consolidation of asbestos cases. *See infra* notes 44, 208 and accompanying text.

Writing early in 1991, the Judicial Conference concluded that the number of claims "has not begun to crest." JUDICIAL CONFERENCE REPORT, *supra* note 1, at 7. On the other hand, the experience of the Center For Claims Resolution suggests that the number of impaired claims may well have crested. CCR Letter, *supra* note 36, at 1. This experience presumably reflects the effects of lower occupational exposures beginning in the 1970s due to regulations issued then, which have since become steadily more restrictive. *See* Seidman & Selikoff, *supra* note 37, at 301.

43. JUDICIAL CONFERENCE REPORT, *supra* note 1, at 1.

44. Opinion and Order, *In re* Asbestos Products Liability Litigation (No. VI MDL-875), 771 F. Supp. 415 (J.P.M.L. 1991) (order transferring cases); *MDL Panel Adds 3,896 More Cases, Bringing Number of Cases Transferred to 27,880*, Asbestos Product Liability Litigation, MDL Rep. (McGuire Pub.) 4 (Oct. 15, 1991). Cases already on some form of registry may or may not have been transferred, depending on their status. Telephone Interview with Dorothy Cusker, Law Clerk to Chief Judge Michael A. Telesca, W.D.N.Y. (Jan. 30, 1992) (inactive cases were transferred); Telephone Interview with Allen Wallace, Law Clerk to Judge Robert L. Vining, Jr., N.D. Ga. (Jan. 30, 1992) (stating that cases with inactive status were administratively closed and not transferred); *see* 771 F. Supp. at 424 n.11 (requesting notification of actions resolved or in trial by transferor district clerks to facilitate exclusion from transfer by J.P.M.L.). For recent pretrial proceedings in Judge Weiner's court, *see, e.g.*, Pretrial Order No. 3, *In re* Asbestos Products Liability Litig. (No. VI, MDL-875) (E.D. Pa. filed Jan. 7, 1992) (establishing "short form" summary judgment procedure over objections); Administrative Order No. 2, *In re* Asbestos Products Liability Litig. (No. VI, MDL-875) (E.D. Pa. filed Feb. 24, 1992) (ordering information on cases for settlement conferences; staggering required lists in categories for mesothelioma, other malignancies, and asbestosis).

The courts have been left to grapple with these problems with little help from other governmental institutions. Individual states are manifestly incapable of offering any kind of systematic response to the proliferation of asbestos-related diseases or to tort litigation's inability to deliver prompt and effective justice to the parties affected.[45] Congress, which could develop a more comprehensive approach, has studiously avoided doing so with respect to either compensation or mass asbestos litigation management.[46]

No great mystery surrounds the reasons for Congress's inaction. Asbestos claims present a particularly difficult social policy problem,[47] precisely the kind from which most politicians will shrink. Any meaningful solution would require cooperation or acquiescence among influential portions of the business community, organized labor, and the plaintiffs' bar. It might require the federal government to accept a financial and managerial role in solving the problem that would have great political and fiscal implications. To count on Congress to initiate legislation in the face of such divergent forces is to place one's faith in tooth fairies. If the possibility of a comprehensive Congressional solution to the asbestos litigation crisis seems remote, the more limited remedy of establishing or authorizing deferral registries seems eminently feasible.

Federal regulatory agencies have been more responsive to the problem. The Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) have each been regulating asbestos almost from their inception

45. Here I leave aside such innovations as legislated liberalization of statutes of limitations. *See, e.g.*, CAL. CIV. PRO. CODE § 340.2(a) (West 1979) (extending statute of limitations for asbestos diseases until plaintiff is disabled). While important, such changes are essentially marginal to the problem.

46. The Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641-2656 (1988), provides for inspection and other actions concerning asbestos-containing materials in U.S. public schools, but the Act affects neither compensation for personal injuries nor litigation management. Congress's action in black lung legislation has been subject to criticism as well. *Cf., e.g.*, Mark E. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981); *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1631, 1642-44 (1986) (criticizing diagnostic presumptions in Black Lung program). *See generally* Donald DeCarlo, *The Federal Black Lung Experience*, 26 HOW. L.J. 135 (1983). *But see* JUDICIAL CONFERENCE REPORT, *supra* note 1, at 42 (dissenting statement of Hogan, J.) (endorsing applicability of Congressional Black Lung-type legislation to asbestos cases).

47. Even legal scholars, who are relatively well-informed, politically unconstrained, and objective, have not been able to agree upon the proper approach. *See, e.g.*, Epstein, *supra* note 2.

twenty years ago.[48] Although the agencies' regulations will prevent much asbestos-related disease, most of the asbestos claims with which the courts must deal now and in the near future result from exposures that occurred long ago, before the regulators addressed this problem. If present arrangements continue, many of the cases that are already in the pipeline will take decades to reach the courts.

If the asbestos litigation crisis is to be effectively managed, then, it is the courts that must do the managing. In doing so, moreover, they will have to rely largely on the tools and resources that they already possess. The obligation of the courts to take greater initiative in this matter does not arise out of any duty to address problems that the political branches are too timid to confront. Rather, it arises from a judicial duty to render justice in cases that come before them bearing legally cognizable claims.

II. The Problem

By any reasonable standard and from any detached vantage point, the current system of tort litigation is a singularly incompetent mechanism for remedying the personal injuries that asbestos plaintiffs suffer.[49] This system imposes unnecessarily high costs on individuals who have already suffered enough, and on the society that seeks to compensate them swiftly, fairly, and efficiently. It is trite but unfortunately true that the only real beneficiaries of this system are the lawyers on both sides who litigate these claims.[50]

The problem can perhaps be best understood by considering four different kinds of costs created by asbestos litigation. These are: transaction costs, delay costs, horizontal inequity

48. *See, e.g.*, 29 C.F.R. § 1910.1001 (1991) (concerning general occupational exposure to asbestos); 29 C.F.R. § 1926.58 (1991) (regulating asbestos exposure in construction work). OSHA first regulated asbestos in 1971, 36 Fed. Reg. 10,466 (1971), and has revised its regulations many times since. *See* 36 Fed. Reg. 23,207 (1971); 37 Fed. Reg. 11,318 (1972); 51 Fed. Reg. 22,612 (1986); and 55 Fed. Reg. 29,712 (1990) (proposed rule). Major portions of EPA regulations, 54 Fed. Reg. 29, 460 (1989), that would have prohibited, at various times in the next few years, the "manufacture, importation, processing, and distribution in commerce" of virtually all asbestos-containing products under authority of section 6 of the Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 (1988), were invalidated by the Fifth Circuit. Corrosion Proof Fittings v. EPA, 1991 U.S. App. LEXIS 24922 (5th Cir. Oct. 18, 1991).

49. *See supra* note 1.

50. One might also include the journalists and academics who spend their time chronicling the system and (largely) denouncing it.

costs, and other queuing costs. Although I refer to them all as costs, they include not only what economists would call efficiency (or welfare) losses but also unfairness effects.

A. *Transaction Costs*

The costs associated with litigating, adjudicating, and (if it is found to be valid) paying a claim—the costs of the lawyers, courts, and claims administrators—are often called transaction costs.[51] Some such costs, of course, would have to be borne by any system in which entitlements must be proven to be recognized. By any standard, however, the transaction costs of asbestos litigation are extraordinarily high.[52]

The recent Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation described these costs as "unconscionable" in terms both of individual trials and aggregate litigation. It referred to one federal court trial in Cleveland involving only four plaintiffs but between forty-one and fifty-eight lawyers; according to the judge's estimate, this trial generated transaction costs of between $3 million and $7 million.[53] Aggregate transaction costs may form as much as seventy percent of asbestos litigation costs. An analysis of contemporary asbestos claims, specifically those pending against the Manville Trust in April 1991,[54] led the court to conclude that "[b]ased

51. The phrase appears to have been wrenched from what may have been its original setting in R. H. Coase's seminal article, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), where it referred to the sum of get-together costs, decision and execution costs, and information costs. *See generally* Robert C. Ellickson, *The Case for Coase and Against "Coaseanism,"* 99 YALE L.J. 611, 614-15 (1989). Analysts of mass tort litigation, however, have appropriated it for a different usage.

52. The adjective "high" invites the rejoinder, "Compared to what?" My short response is, "Compared to almost any alternative compensation system that one can imagine, including some that, *mutatis mutandis*, are already in place." *See, e.g.*, WILLIAM L.F. FELSTINER & ROBERT DINGWALL, ASBESTOS LITIGATION IN THE UNITED KINGDOM 2, 25 (Am. Bar Found. Working Paper No. 8807) (concluding that British combined asbestos litigation costs are unlikely to exceed 35% of recovery, but that system is "much less effective at mobilizing possible cases and there are indications of a significant pool of uncompensated victims"); Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO ST. L.J. 825, 848-49 & n.64 (1989) ("administration and litigation expenditures of product liability consume more than three times the share of the claims dollar than do WC [worker's compensation] benefits"). Again, the high costs of asbestos litigation may well have been justified in its earlier phases, but at some point in the past, its social benefit-cost ratio almost certainly turned unfavorable. *See supra* text accompanying note 1.

53. JUDICIAL CONFERENCE REPORT, *supra* note 1, at 12-13. The Judicial Conference Report cites other examples of exceedingly costly individual trials as well. *See id.* at 13.

54. The analysis revised the often-cited 1984 Rand Institute of Civil Justice estimate that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs, i.e., witness and attorneys' fees, of which 37 cents represents defendant litigation costs.

on information now available, including overheads, insurance costs and expenditures for courts, . . . the percentage available to plaintiffs is probably close to 30 cents for every dollar expended."[55]

These costs are incurred, of course, for claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be). Even in the case of valid claims and justified awards these costs are profoundly troubling. Although transaction costs are always necessary to achieve social goals, many of the costs generated by asbestos litigation are simply deadweight losses, pure social waste that imposes costs with few offsetting benefits. These costs, moreover, are distributed in perverse, regressive ways that increase the wealth of plaintiffs' and defendants' lawyers and their satellite experts and support staffs at the expense of asbestos-injured workers at the lower reaches of the income distribution.

Finally, excessive transaction costs are a needless drain on the private funds available for compensating asbestos claims. As of July 1991, approximately fourteen former manufacturers of asbestos products had filed for bankruptcy.[56] This number does not include the numerous smaller distributors that have been targeted in the wake of absent manufacturers and who have in turn become insolvent. Even the remaining manufacturers in the industry could come under additional financial pressures if present litigation trends continue.[57] Although the

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Only 39 cents were paid to the asbestos plaintiffs. There is no indication that the situation has improved." *Id.* at 13 (footnote omitted).

55. *In re* Asbestos Litig., *supra* note 1, 129 Bankr. 710, 749 (citing JAMES S. KAKALIK, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 91 (1984)); *cf.* 128 Bankr., app. c at 952 (Memorandum from Mark A. Peterson to Judge Jack B. Weinstein, May 7, 1991).

The court went on to state that defendants' total costs for future as well as pending claims approximate "minimum costs of $19.6 billion and costs of $26 to $28 billion under the more plausible assumptions." 129 Bankr. at 907. It also found that "[a]s much as 20 billion dollars of this sum would be eaten up in transaction costs." *Id.* at 908. While these particular estimates are open to serious dispute, the court's perceptions that these costs were far too high and that successful asbestos claiming has become more or less routine, led it to limit, *inter alia*, plaintiffs' attorneys' fees against Manville, the largest asbestos defendant. The court limited such fees to 25% of each award, a ceiling regarded as excessive but necessary to obtain the attorneys' agreement to the settlement. *Id.* at 863.

56. These include Johns-Manville, Raymark, Eagle-Picher, H.K. Porter, Celotex, Carey Canada, Forty-Eight Insulations, Unarco, Nicolet, Amatex, Huxley, Pacor, Standard Asbestos, and D.I. Distributors.

57. *See* Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, FORBES, Feb. 18, 1991, at 78 (discussing successor liability exposure of Keene Corporation and others).

remaining defendants may still have insurance that covers much of their liability, the recent flurry of bankruptcies strongly suggests that this coverage may be inadequate for some.[58] Principles of joint and several liability that apply in a majority of jurisdictions, when coupled with the bankruptcy of companies that accounted for a very large fraction of the industry's market share,[59] suggest that some of the defendants who are still solvent may be subject to liabilities larger than either they or their insurers anticipated and larger than their own activities warranted.

The most recent round of "tort reform" statutes that limit joint and several liability have only marginally reduced these financial pressures.[60] In general, the new provisions do not apply retroactively to claims accruing or filed prior to their date of enactment or effectiveness, which implicates a substantial fraction of asbestos claims. For example, although the California statute abolishes joint and several liability for non-economic damages (which includes most of the damage awards in asbestos cases), the statute applies only to cases accruing after June 4, 1986.[61] According to some asbestos defendants, this excludes an estimated 35% of the 7300 pending cases from the reform.[62]

The recent Manville Trust settlement in some ways magnifies these uncertainties. Some asbestos defendants fear that the settlement may further reduce their ability to take advantage of the statutory reforms of joint and several liability, while limit-

58. Much of the remaining coverage, moreover, is excess insurance. Some of this excess coverage, unlike primary coverage indemnifies only for "ultimate net loss"; in such cases, defendants' attorneys' fees count against the policy limits. *See infra* note 103.

59. *See, e.g., In re* Asbestos Litig., *supra* note 1, 129 Bankr. at app. a (calculating Johns-Mansville's 30% share of damages on average before bankruptcy).

60. Almost half of the states have abolished or altered the doctrine of joint and several liability in all or some contexts. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2506 (West 1982) (abolishing for both negligence and strict liability claims occurring on or after January 1, 1988); OHIO REV. CODE ANN. § 2315.19(D) (Page 1991) (abolishing for noneconomic damages in negligence cases in which there is either contributory negligence or implied assumption of risk). *See generally* Cornelius J. Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability*, 62 WASH. L. REV. 233, 239-42 (1986) (surveying state laws); James J. Scheske, Comment, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. AIR L. & COM. 627, 636-50 (1988).

61. CAL. CIV. CODE § 1431.2 (West Supp. 1991).

62. *See* Mem. of Co-Def. Beneficiaries in Opp. to Certif. of Settlement Class and Approval of Proposed Settlement at 49-58, *In re* Asbestos Litig., 129 Bankr. 710.

ing the availability of other possible defenses.[63] These cumulating possibilities create an overhang of contingent liabilities. This seems likely to impair the companies' access to the capital markets, further increasing their operating costs.

The question of whether sufficient assets will be available to pay valid asbestos claims in the future is obviously critical. This will depend upon the number of claims, their quality, the size of awards,[64] the particular companies against whom judgments are entered, plaintiffs' and defendants' litigation costs,[65] disease detection technology, and other factors. Because these variables are uncertain, the future trajectory of asbestos claiming is also uncertain.[66]

Some asbestos defendants may not possess enough money to pay present and, if trends continue, future claimants the current litigation value of their claims.[67] Any gap between those claims and the assets available for payment will grow steadily as more claims are filed, especially if more defendants become insolvent.[68] This means that parties in the asbestos litigation are competing with their own lawyers for access to the same rapidly shrinking fund. Behind the rhetoric of the lawyer-client relationship lies a grim reality: the lawyers and their clients are engaged in a tragic, zero-sum game.[69]

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63. Section H of the settlement precludes direct suits against Manville and the Trust, third-party actions for contribution, impleading by co-defendants, and the introduction of evidence alleging Manville's share of liability. It also grants set-off rights for co-defendants only when plaintiffs have settled with the Trust. These limitations may prevent defendants from establishing the preconditions for taking advantage of the joint and several liability reforms. Judge Weinstein's efforts to clarify some of these matters have not been altogether successful. *See* 129 Bankr. at 869-905.

64. This will reflect, *inter alia*, injury severity, plaintiffs' attorneys' fees, medical costs, availability of punitive damages, legal rules, and local jurors' attitudes.

65. This will reflect, *inter alia*, how courts manage asbestos litigation and regulate attorneys' fees.

66. See *supra* notes 41-43 and accompanying text.

67. *See* 129 Bankr. at 751 ("Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency . . . ." (citations omitted)).

68. This statement assumes that the current efforts to inculpate new, financially secure categories of more "peripheral" defendants, *id.* at 747, will not be altogether successful.

69. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953). The most obvious conflict—that between the plaintiffs and the defendants' lawyers—is of course endemic to an adversary system and need hardly be remarked. More interesting is the conflict that exists between plaintiffs as a group and plaintiffs' lawyers as a group. This conflict arises to the extent that juries inflate recoveries to take account of the contingent fee that jurors know plaintiffs must pay, and to

B. *Delay Costs*

Asbestos litigation is remarkably protracted. As the Judicial Conference Report noted, its average duration far exceeds the eighteen-month standard, which federal laws prescribe as a target;[70] instead, the period between filing and disposition of such cases was almost thirty-one months between 1983 and 1989.[71] Cases often take a good deal longer than this.[72] Some of the delay simply exacerbates the kinds of transaction costs already discussed. An example is the cost that lawyers must bear in carrying cases for long periods of time without payment, costs that are reflected indirectly in plaintiffs' lawyers' contingent fees and defendants' lawyers' charges to their clients. Delay also imposes other, and in some ways more worrisome, kinds of costs. Delay increases uncertainty about legal outcomes, which in turn impedes settlements, insurance determinations, individual and business planning, investment in capital markets, and other socially desirable activities that cannot be undertaken in the absence of reasonably predictable outcomes.[73]

Even more troubling, perhaps, is the fact that delay, particu-

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the further extent that recovery by one plaintiff today reduces the assets available for others tomorrow (regardless of which lawyers represent them). But the most direct, troubling conflicts exist at the level of an individual plaintiff's lawyer and her own clients. Given the limited assets, early recoveries by a lawyer's clients will reduce the funds available for her other clients who happen to reach trial later. *See* Brickman, *supra* note 1, text and notes 45-60 (analyzing critically plaintiffs' attorney contingent fees); Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989). In addition, the lawyer must decide how to allocate the recovery among impaired and unimpaired clients. Asbestos defendants and their lawyers face a somewhat different conflict. Although these defendants are well-informed, sophisticated, competitive purchasers of legal and other professional services, and although at least some of them are reportedly exercising increasingly tight controls over their litigation expenses, *see* Brickman, *id.* at n.58; David Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 824-26 (1992), those who are in bankruptcy have somewhat less incentive and capacity to monitor those expenses. In such situations, closer court or creditor scrutiny of those expenses may be necessary to prevent excessive charges. A registry would relieve lawyers of these conflicts to some extent.

70. Judicial Improvements Act of 1990, Title I: The Civil Justice Reform Act of 1990, 28 U.S.C.A. § 473(a) (2) (B) (West Supp. 1991) [hereinafter Civil Justice Reform Act]; *see also* Joseph F. Sullivan, *Backlogs Snarl Civil Court in New Jersey*, N.Y. TIMES, July 1, 1991, at B2 (reporting that civil docket backlog in New Jersey violates American Bar Association standards).

71. JUDICIAL CONFERENCE REPORT, *supra* note 1, at 11.

72. For Philadelphia asbestos cases, see LEGAL INTELLIGENCER, Aug. 5, 1991, at 20-21 (presenting Asbestos Civil Trial List showing cases recently listed for trial that were filed in 1982 and 1983).

73. On the role of uncertainty in settlement, see, e.g., George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 195; Peter H. Schuck, *The Role of the Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 346 (1986).

larly in the context of asbestos litigation, raises a risk that recoveries will not occur until they can no longer do the claimant much good. Many plaintiffs die of asbestos-related diseases before their cases reach trial, and even those who survive the protracted proceedings may have to suffer their disabilities without the resources to which their claims entitle them.[74] Furthermore, in jurisdictions in which pre-judgment interest is not awarded, delay deprives successful claimants of the time value of money.

C. *Horizontal Inequity Costs*

Asbestos litigation treats asbestos claimants in ways that violate the strong norm of "horizontal equity," an important element of fairness. This norm has two postulates. The first and more fundamental one is that like cases should be treated alike. In asbestos litigation, however, essentially similar cases often receive unequal treatment. The second and reciprocal postulate is that unlike cases should not be treated alike; yet in practice, essentially dissimilar asbestos claims often receive equal treatment. I devote more attention to the second, as it is particularly tractable to the registry approach discussed in Parts III and IV.

Similar Cases, Unequal Treatment. Disparities in outcome among similar cases are endemic to a tort system that relies so heavily upon ad hoc juries, differently skilled trial lawyers, and costly evidence.[75] Such variations are magnified in the context of mass asbestos litigation, which involves the processing of approximately 100,000 pending claims in a large number of jurisdictions in a socially heterogeneous country such as the United States. While some disparities are unavoidable, those in asbestos litigation seem to exceed any reasonable bounds. In 1985, Rand researchers studying the then-completed asbestos cases in ten courts with large asbestos caseloads concluded that "similarly injured workers are treated quite differently."[76] This

74. JUDICIAL CONFERENCE REPORT, *supra* note 1, at 12.

75. See summary of data in Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 Nw. U. L. REV. 908, 919-24 (1989); W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L. REV. L. & ECON. 203, 203-20 (1988). For an example of the effect of clever lawyering, see, e.g., Lawrence I. Shulruff, *On Trial: A Videotape of a Disabled Girl's Day*, N.Y. TIMES, Jan. 4, 1991, at B14 (discussing effect of videos on jury awards).

76. HENSLER ET AL., *supra* note 1, at 116.

situation has not improved since then.[77] As recently as May 1991, the courts presiding over the disposition of the Manville Trust noted that "enormous" disparities in outcomes among similar asbestos cases continue to occur. They described trials as "much like a lottery with substantially higher verdicts in New York City, East Texas and parts of California than other parts of the country."[78]

Such a strong, persistent pattern of disparate outcomes in similar cases obviously offends our most fundamental notions of fairness. For that reason, this pattern is profoundly demoralizing to many asbestos claimants and their families. To the extent that the general public perceives this pattern, the demoralization is bound to be more widespread, discrediting our system of justice. More speculatively, it seems likely to inculcate a "lottery" mentality on the part of those exposed to asbestos and their lawyers, encouraging them to bring many claims of doubtful validity that may divert the courts' attention from more substantial claims.[79]

Dissimilar Cases, Equal Treatment. Asbestos cases are docketed, like civil litigation generally, more or less in the order in which the plaintiffs' lawyers file and prosecute the cases during the pre-trial and trial phases. This "first-in, first-out" (FIFO) prior-

77. For example, verdicts reported in 6 Mealey's Litig. Rep.–Asbestos (Mealey's Pub.) in 1991 for pleural claims ranged from zero to as high as $750,000 (Apr. 5, 1991 at 25-26; Apr. 19, 1991 at 8-9, 11-12; June 7, 1991 at 35); for asbestosis claims ranged from zero to $1.5 million (Apr. 5, 1991 at 31-32; Apr. 19, 1991 at 6, 14-15, 18); and for mesothelioma claims ranged from zero to $5.1 million (Apr. 19, 1991 at 4-7). It should be noted that the information that Mealey's receives and reports about the specific diseases involved may be very imprecise or even inaccurate. *See In re* Asbestos Litig., *supra* note 1, 120 Bankr. 648, 680 (tabulating provisional levels of maximum and anticipated midpoint payments, such as pleural claims, $30,000 (max), $12,000 (mid); asbestosis, $75,000 (max), $35,000 (mid); and mesothelioma, $350,000 (max), $146,000 (mid).

78. *In re* Asbestos Litig., *supra* note 1, 129 Bankr. 710, 749 (contrasting consolidated trial verdicts in New York City: 20 plaintiffs, 20 defense verdicts; 35 plaintiffs, $65 million plus punitive damages; 64 plaintiffs, 13 defense verdicts and 51 plaintiffs' verdicts for $35 million).

79. The claims filed by tireworkers, who generally did not work with asbestos products but who claim exposure based on the presence of asbestos products such as asbestos insulation or brakes in the tire plants, exemplify the phenomenon. Some claims have been dismissed for lack of any reliable diagnosis of asbestos-related disease. *See, e.g.*, Slaughter v. Southern Talc Co., 919 F.2d 304, 308 (5th Cir. 1990) (dismissing 421 out of 451 claims). Others have resulted in significant plaintiffs' verdicts. *See, e.g.*, *Trials: First Tire Worker Verdicts Go to Plaintiffs*, Mealey's Litig. Rep.–Asbestos (Mealey's Pub.), at 11-12 (Feb. 2, 1990). Others have produced large verdicts followed by new trials granted by the trial judge for lack of evidence of impairment. *See, e.g.*, Blue v. Fibreboard Corp., Asbestos Litig. Rep. (Andrews Pub.) 22728, 22728-30 (Cal. Super. Ct. Feb. 19, 1991, Mar. 1, 1991) (Mar. 14, 1991).

ity is so familiar that we take it for granted, especially because it has considerable superficial appeal in any claims processing system. Temporal priority, after all, rewards those who take the trouble and initiative to assert their claims with dispatch. Thus it creates desirable incentives to obtain information and to act upon it. Absent some more compelling, neutral criterion of priority, FIFO seems as good as, if not better than, any other system.

Still, FIFO is nothing more than a convention. It ordinarily meets our needs, but in asbestos litigation (which is anything but ordinary) FIFO can and often does have quite unfortunate consequences. Two features that are characteristic of, if not wholly unique to, asbestos litigation create special problems: the rapidly diminishing pool of assets available for victim recoveries and the great and perhaps growing variation in the value of claims that are now pending and, if current trends continue, are likely to be filed in the future.

It is especially striking how strongly these two characteristics undermine the moral and efficiency justifications for the FIFO rule. The shrinking asset pool available from defendants has already been discussed and needs little elaboration. If FIFO remains the rule, to the extent that the asset pool is smaller than the claims' value, some claimants will receive their full entitlement while others filing in the same jurisdiction and possessing equal or stronger claims will receive little or nothing. This disparity of outcomes will occur for no better reason than that they were exposed later, contracted their disease later, learned of their disease later, selected a lawyer who filed the claim later, or were grouped by their lawyer with a batch of other claims scheduled for later settlement. In such a situation, it seems manifestly unfair to treat claims so differently by distributing the asset pool on the basis of such arbitrary, adventitious, and morally irrelevant factors. Only if we were unable to identify any more compelling criterion might we be justified in continuing to apply the FIFO rule.

Fortunately, we are not in this bind because a second characteristic of asbestos litigation—the great variability in claims value—suggests that a better priority criterion is available. Because this variability is central to the argument against FIFO processing and in favor of registries, it requires more extensive discussion.

For present purposes, the value of an asbestos-related claim is simply the expected monetary value of that claim to the plaintiff in the current litigation market. It is equivalent to the expected jury award that the claim will produce[80] discounted by a number of factors—the litigation costs that the plaintiff and his lawyer must incur to obtain the judgment,[81] the value of the time required to accomplish this, and the probability that some or all of the judgment will not be collectible from the defendant(s). This discounted value should be equivalent to the claim's current settlement value.[82]

Which variables determine the value of different asbestos-related claims?[83] According to the professional staff at the Center For Claims Resolution, almost all of the variation in claims value reflects eight factors: (1) the severity of current symptoms; (2) the prospect of more serious symptoms in the future; (3) the plaintiff's age; (4) his smoking history; (5) his asbestos exposure history, including the product type and the length and intensity of exposure; (6) the availability of certain defenses, such as the statute of limitations, comparative or contributory fault, state of the art; (7) the jurisdiction where the claim is to be tried; and (8) how the claim will be tried, such as whether the claim is part of a mass consolidation in which punitive damages may be assessed.[84]

These variables can occasionally interact in ways that result in certain unimpaired plaintiffs receiving higher jury awards than certain impaired plaintiffs,[85] but the most important variable is the severity of current symptoms. Although relatively few

80. This expected jury award could be calculated on the basis of a frequency distribution of possible jury awards for that claim. This distribution would range from the highest possible award to a defendant's verdict (zero recovery), and would assign a discrete probability to each of these possible outcomes.

81. For the plaintiff, this would of course include the contingent fee, discounted by the (small) possibility that the court would reduce it.

82. In a different litigation system, of course, a claim's value would be higher or lower, depending upon whether those system differences generally favored plaintiffs or defendants. If the system were more efficient in eliminating deadweight losses, the new claim value might leave *both* plaintiffs and defendants better off compared to the old system.

83. For purposes of this discussion, I assume that the analysis is for a given jurisdiction; thus I do not include the considerable variation in award values for similar claims among different jurisdictions. See *supra* text accompanying notes 75-79.

84. CCR Letter, *supra* note 36, at 1-2; *cf.* Special Master's Report, *In re* Asbestos Litig., In Proceedings for Reorganization under Chapter 11 (NYAL Index No. 4000) (Nov. 3, 1990), at 11-12 (describing statistical model for extrapolating future claims against Manville Trust on basis of injury, age, living status, and jurisdiction).

85. *See, e.g.*, verdicts reported, *supra* note 79.

pleural plaque claimants are impaired according to established medical criteria,[86] they do occasionally recover substantial jury awards.[87] It is not clear why juries award damages to plaintiffs who are not yet, and may never become, impaired. Some of these awards may actually be for emotional distress associated with fear of asbestos-related disease.[88] Some may be intended to compensate exposed individuals who are assumed (not always correctly) to have incurred some expense to file their claims. Some may reflect the jury's prediction (which as we have seen cannot now be substantiated) that presently unimpaired plaintiffs will become impaired later. Others may reflect the jury's belief that, contrary to the weight of medical evidence, even pleural plaques are generally impairing. Still others may reflect a desire to punish defendants who distributed asbestos products. Finally, some may be simply irrational.

The striking variability in claim severity (and in claim value, notwithstanding these jury awards for pleural plaques)—most importantly, the difference between the presently impaired and the presently unimpaired asbestos claimants—seriously weakens the case for FIFO treatment of all claims. The FIFO rule does not presuppose that all claims are the same, of course, but it does imply that the only difference among cases that should be relevant to priority is the *time* when the claims were filed.

My earlier critique of FIFO is strengthened greatly, moreover, when one considers the reasons that presumably lead asbestos plaintiffs to file when they do—and most particularly, the reasons why so many of them file before they suffer actual impairment. In jurisdictions that treat unimpairing pleural conditions and subsequent impairing conditions as a single cause of action for statute-of-limitations and single-judgment-rule (sometimes called the rule against splitting causes of action) purposes, plaintiffs probably file early to avoid a subsequent bar. Coupled with a single-judgment rule, the statute of limitations creates a poignant, inescapable dilemma for the

86. *See supra* notes 28-30 and accompanying text. Indeed, in a recent Pennsylvania lower court case in which plaintiff's medical expert testified that his asbestos-related pleural *thickening* was "asymptomatic", the court held there was no cognizable cause of action as a matter of *law*. Czekaj v. Johns-Manville, No. 4-78 (Phila. Ct. C.P. Nov. 6, 1991).

87. *See, e.g.*, 5 Mealey's Litig. Rep.–Asbestos (Mealey's Pub.), at 21 (Jan. 18, 1991) ($33,000 verdict); *Verdicts Returned Against Manville Fund in Pa.*, 6 Mealey's Litig. Rep.–Asbestos (Mealey's Pub.), at 45 (June 7, 1991) (verdicts of $50,000 each).

88. *See infra* notes 131-34 and accompanying text.

unimpaired asbestos claimant. Such claimants must file a pre-impairment claim knowing that they may recover little or nothing unless an impairment appears by the trial date (hardly a contingency one would hope for); once this claim is litigated, moreover, he ordinarily will be barred from suing for a subsequently manifested impairment.[89] Even in the majority of jurisdictions where subsequent cancer is now considered a distinct disease and a separate cause of action for single-judgment-rule and statute-of-limitations purposes,[90] a registry would preserve subsequent manifestations of *non-cancer* conditions that the single-judgment rule and the statute of limitations might otherwise bar.[91]

Another probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns on a mass basis designed to multiply the number of filed cases, thereby increasing the pressure on defendants to settle cases wholesale.[92] Whatever the merits and ethics of such practices,[93] they are likely to produce an indiscriminate aggregation of cases by the lawyers such that the variation in claim values within case batches is relatively large.[94]

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89. *See, e.g.*, Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965, 984-87 & n.91, 1001-03 & nn.153, 157-59 (1988) (discussing problems of premature filing and damage assessment and describing reform jurisdictions that allow recovery for risk of future conditions, mitigate the single-judgment rule by allowing choice among separate causes of action for statute of limitations purposes, or allow a subsequent judgment for a distinct disease).

90. *See* Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117-21 (D.C. Cir. 1982) (citing cases); Wilber v. Owens-Corning Fiberglass [sic] Corp., 476 N.W.2d 74, 76 (Iowa 1991) (citing cases); VaSalle v. Celotex Corp., 515 N.E. 2d 684, 688 (Ill. App. Ct. 1987) (citing cases).

91. *See, e.g.*, Boston Stipulation, *supra* note 4, at 2; Cook County Order, *supra* note 4, at 8. In jurisdictions where, in addition, a statute of *repose* runs from an earlier date, cancer claims arising after the repose period might ironically be barred if ruled a distinct disease. In such jurisdictions, a registry might also ease the effect of the statute of limitations bar even against cancer claims that arise after the limitations period has expired by serving as probative evidence of the seriousness of an earlier, registry-preserved condition.

92. *See* Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588 at *5-*10 (D. Kan. May 30, 1990) (describing mass solicitation and cursory diagnosis of 6000 tireworkers, and denying summary judgment to plaintiffs' attorneys and doctors sued for fraud); *see also* Oliver & Spencer, *supra* note 57, at 75-79.

93. *See* Raymark Indus. v. Stemple, *supra* note 92, at 15, 23-24 (dicussing ethical violations).

94. Lawyers seeking to maximize the settlement value of a portfolio of claims would seem to have a strong incentive to batch them by mixing high-value and low-value claims in ways that make it difficult for their adversaries to discern the claims' variability.

Although these rationales for pre-impairment filing advantage such claimants under the FIFO rule, they have nothing to do with the factors—the seriousness of the claimants' injuries and the value of their claims—that should be relevant to case-processing priorities in a context of highly variable claim values. In contrast, many asbestos claimants who file relatively late in the game, and thereby receive a lower priority under the FIFO rule, presumably do so because of the latency periods associated with more serious impairments, especially mesothelioma,[95] that tend to be longer than those necessary to produce pleural plaques.[96] This suggests that applying a FIFO rule in this context is not merely irrational; it is actually perverse. It implies that the claims that present the most serious, fully developed pathologies, the highest litigation values, and the most urgent cases for immediate resolution through trial or settlement, are precisely the claims that FIFO systematically disadvantages.

The unfairness of this perverse operation of FIFO in the context of asbestos litigation can also be demonstrated by applying philosopher John Rawls' vivid test for a just rule: it is one that people would choose behind a so-called "veil of ignorance" that prevents them from knowing how the rule would affect them personally.[97] Few, if any, individuals would favor a FIFO rule if, ignorant of their own position in the asbestos litigation queue, they knew only that (1) many workers have been exposed to asbestos, (2) asbestos exposure can be dangerous or even lethal, and (3) impairment often takes many years to occur.[98] Instead, one strongly suspects, such individuals would favor a rule that gave at least temporal, if not substantive, priority to the most seriously injured and deferred the claims of the presently unimpaired.[99]

95. *See, e.g.*, CHURG & GREEN, *supra* note 23, at 289 ("The latency period (time from first exposure to appearance of disease) for mesothelioma is usually long, extending from about 15 to 60 years and averages 30 to 40 years").

96. For this reason, many plaintiffs' lawyers who file pleural plaque claims then seek to delay their placement on the trial calendar. Confidential Interview with plaintiffs' counsel (Summer 1991).

97. JOHN RAWLS, A THEORY OF JUSTICE 136-142 (1971).

98. This may be true even if we relaxed the first assumption, that is, even if people knew that they *themselves* had been exposed to asbestos but did not know whether, or to what extent, they had been or would be injured as a result.

99. There is considerable empirical evidence to support this supposition. *See, e.g.*, *In re* Asbestos Litig., *supra* note 1, 129 Bankr. 710, 780 (citing an informal survey of Asbestos Victims of America "including persons with all levels of disease, impairment, poten-

The horizontal equity gains that a registry would yield are even more striking when compared to consolidation, which is the leading non-FIFO docket-clearing technique that courts employ. Consolidation, to which some overburdened courts have recently turned out of desperation,[100] involves the aggregation of numerous asbestos claims into a single trial or a small number of group trials. The potential for horizontal inequity here is twofold. First, the criteria by which cases are chosen and grouped for consolidation are likely to be crude and categorical compared to the actual variability of the underlying claims.[101] Second, the jury awards are also likely to be similarly crude and categorical.[102]

Yet another source of horizontal inequity in the present system, probably the most important because it is surely the most common, relates to the way in which asbestos cases are settled. Typically, the lawyers for both sides agree to settle batches of cases (say, thirty to fifty at a time). The strategic considerations animating the lawyers on both sides to agree to defer some claims while batching and settling others are complicated and contingent. They include concerns about claims quality, reputation, cash flow, proximity of trial dates, time value of money to lawyers and clients, insurance coverage,[103] and other fac-

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tial future claimants and those without impairment," that found that "even those without impairment favored not seeking compensation from the Trust at this time in favor of those who are disabled, dying and dead. They would rather wait and liquidate their claim against the Trust if and when they became impaired."); *id.* at 857-61, 776-77, 779-80 (establishing that most plaintiffs endorsed settlement in the Manville proceeding giving substantial priority to claims of the impaired). Many plaintiffs have also supported the Cook County registry, even defending it against challenge on appeal. *See* Brief of Plaintiffs-Appellees, Mulligan, at 14-17, Mulligan v. Keene Corp., No. 91-1305 (Ill. App. Ct. 1991).

100. *See, e.g.*, Brickman, *supra* note 1, at Part D (discussing use of class actions and consolidation in asbestos litigation).

101. In the Hawaiian asbestos litigation, for example, the consolidated trials of 30-40 plaintiffs include both extremely serious and relatively unimpaired cases due to the system of selecting cases for trial. Counsel for each side take turns choosing which cases they wish to include in the mass trial, plaintiffs' counsel naturally selecting high-value cases, defendants' counsel preferring low-value ones. The result is a heterogeneous batch of cases. Telephone Interview with Janelle London, Law Clerk to Judge Samuel Conti, N.D. Cal., Visiting Judge in D. Haw., June 1991.

102. *See supra* note 77. In the consolidated litigation of Cimino v. Raymark Industries, Inc., 751 F. Supp. 649 (E.D. Tex. 1991), claimants received identical awards within each of five disease categories in a 2000-plus claimant group, regardless of age, smoking history, exposure history, or any other important variable.

103. Coverage of defense costs varies among differently structured layers of insurance. Defendants whose coverage of defense costs is limited to their primary insurance may well favor deferring litigation. *See supra* note 58. Other defendants, however, may have an interest in exhausting coverage subject to deductibles as soon as possible, if a

tors.[104] Whatever the precise reasons may be, the batches ordinarily consist of a mix of claims involving very different conditions and different levels of impairment, and including a substantial fraction of unimpaired claims. The lawyers, however, agree upon a single lump-sum settlement amount for the whole batch, which defendant(s) must pay. It is then up to the plaintiffs' lawyer to decide how she will allocate that sum among her many clients in that batch, a decision in which the defendants play no part.[105]

D. *Other Queuing Costs*

Because the FIFO rule generates the kinds of horizontal inequities that I have already discussed, it produces several other types of queuing costs as well. The FIFO rule tends to reduce the value to plaintiffs of any given recovery by creating a systematic mismatch between the opportunity to recover and the need for recovery. This mismatch occurs because the value of any given sum of money to the person who receives it depends on *when* he receives it. The unimpaired asbestos claimant may be able to sue now but will have a greater need for the money later, if and when more serious disabilities develop. In contrast, the claimant who waits to sue until an impairment appears and he needs the money may be too late to recover anything.

The FIFO rule also generates considerable waste in the form of litigation by plaintiffs who are presently unimpaired and who will *never* become impaired. These cases, which are now thought to be numerous, are not simply premature; they should never have been brought, and the transaction and other costs which they occasion need never have been incurred.[106] It is true that under a FIFO rule, one cannot know in advance which particular unimpaired claimants will remain unimpaired.

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layer of unlimited coverage of defense costs lies beneath. Telephone Interview with Professor Eric Green, Special Master for federal asbestos litigation in Boston, Mass. (Sept. 15, 1991).

104. *See supra* text accompanying note 84 (discussing variables relevant to claim value).

105. *See supra* note 69.

106. There is mixed evidence concerning the extent to which registries in fact encourage early settlement of unimpaired claims. Judge Rya Zobel, who presides over the federal asbestos litigation in Boston, believes that the Boston registry generally does so. Telephone Interview with Judge Rya W. Zobel, D. Mass. (June 1991). Her Special Master, however, believes that this depends upon whether the registry is mandatory, the structure of insurance coverage, and other factors. Telephone Interview with Professor Eric Green, *supra* note 103.

Ignorance in this regard is hardly an argument in favor of the FIFO rule; instead, it constitutes a strong indictment of it. Current scientific opinion strongly suggests that this category represents a very large number of cases[107] and thus is the source of great social waste. One should therefore prefer a priority rule that, unlike FIFO, minimizes that waste. The registry system discussed in Part III furnishes such a rule.[108]

III. A Partial Solution: The Deferral Registry

Although it is impossible to quantify the aggregate transaction, delay, horizontal inequity, and queuing costs produced by the FIFO rule, these costs are certainly large enough to cause grave public concern. More to the point, deferral registries can significantly reduce them.

Such registries already exist in about a dozen federal districts, including some (though not all) districts with very large asbestos caseloads.[109] These registries were established through different modes, involving some combination of pri-

107. *See supra* text accompanying note 36.

108. The FIFO rule also contributes to the incentives to file prematurely and the dilemma of the single judgment rule, discussed *supra* text accompanying notes 89-91. This may leave certain claimants inadequately compensated, which demoralizes both claimants and society and undermines the fairness of the legal system. To the extent that these rules fail to compensate the full damage sustained, they also reduce deterrence of undue risktaking on the part of industry. At this point in time, of course, additional deterrence of asbestos use would be superfluous.

109. These include the Northern District of California, the Northern District of Illinois, the Northern and Southern Districts of Mississippi, the Western District of New York, the Northern District of Ohio, and the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. State courts, often in the same locales, have followed suit (Cambridge, Massachusetts) or taken a similar lead (Cook County, Illinois).

In contrast, some of the districts with large asbestos caseloads but no deferral registries include the Eastern District of Pennsylvania, and the Eastern and Southern Districts of New York. The Southern District of New York employs a suspense calendar under Local Rule 20 for cases such as those delayed by a stay in bankruptcy or other case-specific reason. Asbestos cases have never been suspended, however, although they were separately classified on the pending calendar before the transfers to a joint docket with the Eastern District of New York and, under the subsequent J.P.M.L. Order to the Eastern District of Pennsylvania. Telephone conversation with Clifford Kirsch, District Executive, S.D.N.Y., Mar. 17, 1992. In the joint asbestos docket in the Eastern District of New York, deferral has been proposed by some parties, via the S.D.N.Y. suspense calendar or otherwise, but not instituted. Telephone conversation with Judge Charles Sifton, E.D.N.Y., Mar. 11, 1992. Distribution of payments from the Manville Trust is "structured to pay the most seriously-injured claimants first. *In re* Asbestos Litig., 120 Bankr. 648, 670; *see* text and note 175, *infra*. The Texas state courts also have not established registries and currently schedule cases for group trials according to filing date, although special provisions are made for critical cases of mesothelioma. *Cf.* Cimino v. Raymark, Inc., 751 F.Supp. 649 (E.D. Tex., 1990) (ordering average damage awards based on random verdict samples in five disease categories).

vate agreement and court order, but the consent of the parties has generally played an important, at times essential, role in setting up the systems. Most registries have been consenual at their inception with negotiations and stipulations subsequently embodied in binding court orders.[110] In addition, the plaintiffs' lawyers largely administer the systems through their decisions about which cases to defer voluntarily and about which deferred cases to reactivate. The court is most likely to be involved at this later stage, although even the reactivation decisions may not require much court supervision.

A consensual basis for registries, however, is manifestly inadequate. Existing registries cover only a small fraction of the asbestos caseload. This quite limited use is not surprising, even recognizing that they can have important benefits for both impaired and unimpaired plaintiffs and their lawyers (that is, cases involving impairment can be tried first, while the other cases can be deferred until an impairment occurs and recovery for impairment has been justified), and for defendants and their lawyers (they can minimize transaction costs and avoid paying those who are not, and will never become, asbestos-impaired). Limited registry use is unsurprising because some asbestos litigants retain overriding tactical objections to registries.[111] Most of the resistance has come from plaintiffs' lawyers but some defendants (albeit ones with a relatively small share of the caseload) have also objected.[112] Most important, a court's au-

110. The Boston registries, for example, were established first by negotiated agreement and then, at counsels' request, by a pretrial order of the court made pursuant to the parties' agreement. Boston Stipulation, *supra* note 4, at 1; Boston Amendment, *supra* note 4, at 1. In other districts, such a stipulated agreement with 100% participation is difficult to achieve.

The registries in the state and federal courts in Cook County followed many meetings among counsel to achieve as much agreement as possible, and were then established by court orders, despite one appeal. Cook County Order, *supra* note 4, at 1; *see also infra* note 112; *In re* Asbestos Cases, Mulligan v. Keene Corp. and Allied Signal, Inc., No. 1-91-1305, 2-5, 10 (Ill. App. Ct. Dec. 27, 1991) (describing agreement process, dismissing appeal).

In the Northern District of Ohio, the registry was established directly by the court in the form of the Ohio Asbestos Litigation (OAL) order. OAL Order No. 120, OAL Priority Case Management System, *In re* Ohio Asbestos Litigation, (N.D. Ohio, Dec. 26, 1990) [hereinafter OAL Order 120].

111. *See, e.g.*, *supra* text accompanying notes 92 and 103.

112. Consider, for example, the appeal of the Cook County Order by Allied Signal Corporation, a defendant sued by only two claimants; plaintiffs who supported the registry opposed the appeal. The appellate court dismissed Allied Signal's appeal for lack of jurisdiction. *Mulligan*, slip op. at 7-10.

thority to establish deferral registries over counsel's objections has not yet been established.

Although the details of the existing registries differ, they share a common goal—to supplant the FIFO-based priority of presently unimpaired claimants with a priority that favors claimants who are already impaired—and a common structure. There are three essential elements of a fully-developed registry scheme: assessment, classification, and a multi-track docket and calendar system.

1. *Assessment.* For a registry to work, an assessment of claimants' asbestos-related health status must be made at some point—at the point of the initial impairment classification, at the point at which reactivation is sought, or both. In existing registries, plaintiffs' attorneys voluntarily submit cases for deferral; thus the assessment issue ordinarily will not arise until the attorney seeks to have the case restored to the active trial docket.

Whenever it occurs, the assessment could be conducted in a number of ways. It could be based, for example, on certification by the plaintiffs' lawyers or by medical experts designated by the parties or by the court. An assessment might be required of all claimants or confined to some defined sub-set. Accurate assessments could be encouraged through a variety of mechanisms such as credentialing or assurances of neutrality.

2. *Classification.* Whether a registry is voluntary or mandatory, a system for classifying claimants' health status into diagnostic categories on the basis of the assessments is needed. The classification categories could be structured in a variety of ways with the categories being more or less numerous and refined.[113] A complex scheme might classify them into four categories (that is, unimpaired, asbestosis, mesothelioma, and cancer), and these categories could be further refined by divid-

113. In Cook County, claims that allege an asbestos-related cancer or mesothelioma and pleural cases with deceased plaintiffs remain on the active docket, while other claims are deemed "inactive" and are placed on the registry. Cook County Order, *supra* note 4, at 7. To leave the registry, or to file a new complaint, present or future plaintiffs must allege one of several court-defined conditions, accompanied by an expert affidavit certifying the diagnosis. *Id.* at 9-10; *see supra* note 27.

In Boston, voluntary dismissal under FED. R. CIV. P. 41(a) (2) is made on plaintiff's request, tolling the statute of limitations for "an asbestos-related pleural or parenchymal condition, disease or injury and/or the claims for injury or disease alleged . . . except for claims based upon wrongful death." Boston Stipulation, *supra* note 4, at 2.

ing some or all of them into several levels of impairment, or defining them on the basis of multiple criteria—for example, level of impairment, degree of anatomical abnormality, and length and intensity of exposure.[114]

Because the main purpose of a registry is to economize on costs, including administrative costs, a simple classification system would appear to be most attractive. The most straightforward, easily-administered scheme would divide claimants into two categories—impaired and unimpaired—and that is essentially what most of the existing registries do.[115]

3. *Multi-Track Docket/Calendar System.* If two categories were used, the court would establish and administer a two-track docketing and calendaring system. The court would assign unimpaired claims to a slow or "on hold" track on which they would remain pending evidence of impairment, while assigning impaired claims to a fast track for trial.[116] As noted above, the system could in principle provide for more than two tracks; a more refined classification of cases and a more differentiated

114. A system of administrative or judicial review of the classifications might also be provided. The cost of the review might be borne by the party seeking review, with the cost shifted if that party is successful on review. In Cook County, the court reviews objections to deferral and removal to and from the registry on the papers, granting hearings only in its discretion. Cook County Order, *supra* note 4, at 7; *see also infra* note 197.

115. *See, e.g.*, Cook County Order, *supra* note 4, at 5 (elaborating Cook County's definition of impairment). In the Northern District of Ohio, where a registry was established for two groups of cases, plaintiffs' counsel (a single attorney) classifies cases by disease category and suggests cases, mostly involving pleural plaque and pleural thickening diagnoses, for voluntary deferral. OAL Order 118, OAL Priority Case Management System at 2, *In re* Ohio Asbestos Litigation, (N.D. Ohio Dec. 12, 1990) [hereinafter OAL Order 118].

116. The significance of the difference between a slow track on which cases move (albeit slowly) and an "on hold" track on which cases are instead held in abeyance until an impairment appears depends largely upon court congestion in the jurisdiction. Another alternative is simply to dismiss unimpaired cases without prejudice to later refiling should evidence of impairment develop.

Existing registries reveal some variations on these themes. The Northern District of Ohio initially considered criteria for summary judgment or dismissal based on the sufficiency of medical evidence or on jurisdictional amount grounds under FED. R. CIV. P. 56 and 12(b), and the use of FED. R. CIV. P. 11 sanctions to deter the premature filing of claims. OAL Order 118, *supra* note 115, at 2. Where counsel agreed to defer filed cases voluntarily, the court originally would dismiss without prejudice under FED. R. CIV. P. 41(a) (2) subject to reinstatement under FED. R. CIV. P. 60(b) (6). But when plaintiffs' counsel objected that voluntary deferral of over 1000 cases did not constitute a voluntary dismissal under FED. R. CIV. P. 41(a) (2), the court simply ordered these cases "terminated" subject to reactivation on plaintiffs' motion. OAL Order 120, *supra* note 110, at 3, 7.

In Boston, plaintiffs may join the registry directly by filing notice with the court without a filing fee and by also notifying defendants for insurance and statute of limitations purposes. Boston Amendment, *supra* note 4, at 2.

sequencing of cases for trial would be necessary. Again, the need to minimize complexity and administrative cost militate in favor of fewer tracks.

For those claims relegated to the slow track, defendants must waive any defenses based upon the passage of time or changed conditions since the initial filing of the claim.[117] In this context, the registry provisions should be especially clear about the particular claims and conditions that the registry is preserving against both the statute of limitations and the single-judgment rule.[118] Tolling of the limitations period is essential to deferral, which in turn usually seems preferable to dismissal.[119] For this reason, the court should probably effectuate the deferral by issuing a stay rather than by dismissing the case outright.[120]

Once cases are initially assigned to a particular track, their position within the track could be based upon the conventional FIFO rule. Alternatively, it could be based upon their severity as determined by an assessment and classification.[121] The system could also provide for certain "exceptional circumstance" or "good cause" exceptions to the priority rule applied to a given track. As discussed immediately below, it must also provide for the positioning on the fast track of previously-deferred cases that later manifest an impairment.

The order establishing the registry must specify the conditions under which a claim on the slow or "on hold" track can

117. Under some existing registry plans, the formal filing and docketing of a complaint with the court is not necessary to comply with the statute of limitations. The mere registration of a deferred claim in the registry and notice to the defendant has been deemed to satisfy the "commencement" requirements for tolling the applicable statute of limitations. *See* Cook County Order, *supra* note 4, at 4. The system in Boston is similar; notice to the defendant of the claim's entry on the registry establishes the filing date for statute of limitations purposes and tolls the statute for "any asbestos-related injury, disease or condition stated . . . except for claims based upon wrongful death." Boston Stipulation, *supra* note 4, at 2; *cf. infra* text accompanying note 156.

118. *See supra* text accompanying note 90. The Boston Stipulation, *supra* note 4, at 2, is somewhat ambiguous in this respect, tolling the statute for "any claim" but then preserving defenses for diseases not alleged at first.

119. *Cf. supra* note 116.

120. *See* Bledsoe v. Crowley, 849 F.2d 639 (D.C. Cir. 1988) (finding that trial court abused discretion by dismissing case requiring arbitration rather than staying proceedings as plaintiff had requested).

121. Within any given track, claimants might be permitted to buy and sell their places on line in that track, which would have the virtue of giving priority to those claimants who value it most. This feature, however, might be objectionable on a number of ethical and policy grounds, including concerns about wealth disparities and about the risk that it would create excessively powerful incentives to file early. *Cf.* Brickman, *supra* note 1, at n.95 (describing claims trading among plaintiffs' attorneys).

move back to the fast track.[122] Certainly, subsequent evidence of an impairment that would have initially qualified the claim to remain on the fast track should result in its immediate reassignment to the fast track. The criteria of impairment, of course, might be defined in a number of different ways.[123]

The order should also address the issue of the position that a case, previously deferred but now reactivated, should occupy on the fast track. One possibility is to give it the same FIFO-based position that it would have occupied vis-a-vis other fast track claims given the date on which it was originally filed. Another is for the case to go to the end of the fast-track line. Other intermediate alternatives can readily be imagined.[124] In this connection, a significant consideration is that even if the reactivated case were placed at the end of the fast-track line, the case may still get to trial faster than if there had been no registry. In states awarding prejudgment interest for personal injury claims,[125] courts must also decide how registry filing interacts with the date when retroactive interest begins to accrue.[126]

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122. In Boston's registry, a plaintiff who develops a more serious condition may file a request to transfer to the active docket if he originally filed a complaint and paid a fee; if he originally filed only a notice of claim, he must file a fee and complaint. This may be done once as a matter of course without leave of court. The original agreement among counsel and the court order that adopted it require no medical testimony to accompany reactivation requests. Settlement arrangements, however, sometimes require the plaintiff to produce a medical certification. Boston Amendment, *supra* note 4, at 2.

In the Northern District of Ohio, court orders have established committees and conferences to identify criteria for classification, procedures for expedited appeal and arbitration, and medical monitoring. OAL Order 120, *supra* 110, at 4-6; OAL Order No. 123, Mardoc Priority Case Management Implementation Order, In re Ohio Asbestos Litigation, (N.D. Ohio Jan. 4, 1991). To reactivate a case, plaintiff must make a motion demonstrating that his condition has "progressed." OAL Order 120, *supra* note 110, at 4.

The state court in Cook County requires claimants wishing to reactivate their claims to produce medical documentation of impairment, and mandates arbitration for cases proposed for reactivation that do not appear to rise to the value of $15,000. Cook County Order, *supra* note 4, at 10, 11. Mandatory arbitration has recently been authorized for federal courts. *See infra* note 184.

123. *See, e.g.*, Cook County Order, *supra* note 4, at 5.

124. For example, the Cook County registry procedure allows an accelerated trial slot if a doctor's affidavit indicates likely death within a year. Cook County Order, *supra* note 4, at 11-12.

125. *E.g.*, MASS. GEN. L. ch. 231, § 6B (1985) (calculating prejudgment interest from "the date of commencement of the action"); Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 §§ 2 & 6 (Vernon Supp. 1990) (effective Sep. 2, 1987) (calculating pre-judgment interest from 180th day after defendant's notice of claim or filing of suit if earlier, at rate prevailing when judgment entered).

126. *See, e.g.*, Boston Stipulation, note 4 *supra* (stipulating that prejudgment interest would be calculated from date of refiling on active trial docket); order Regarding Cal-

Finally, the system could be designed to recognize certain other justifications, apart from impairment, for moving a slow track case back to a faster track. Deferral of unimpaired asbestos claims is an exception, albeit an important and valid one, to the legal system's general presumption in favor of FIFO case processing. Society might decide, however, that there are special circumstances in which the policy in favor of deferral should yield to other policies, perhaps equitable in nature, that favor a return to FIFO. It might decide, for example, that elderly claimants[127] or those who can show that delay might jeopardize important evidence[128] should have their day in court sooner rather than later, even if they are still unimpaired.

A number of other issues must be resolved in advance if the system is to have broad public support. Five issues seem particularly important: scientific accuracy and change; cancerphobia claims; medical monitoring claims; the risk of insolvent defendants; and legal structure.

Scientific accuracy and change. How accurate will the system be when general diagnostic criteria are applied to the clinical features of individual claims?[129] How responsive will the system be to future developments in scientific data and methodology? This is essentially a problem that concerns the system's assessment and classification standards and procedures. These must be sufficiently flexible and precise to accommodate and incorporate new technical developments, especially as the changes bear upon earlier detection, pleural changes, levels of impair-

culation of Prejudgment Interest, DeYoung v. Owens-Corning Fiberglas Corp., No. 84-1123-z (D. Mass. 1991) (calculating prejudgment interest from date of amended complaint for mesothelioma claimant who had failed to comply with order to either defer earlier pleural claim or to file statement); Cimino v. Raymark, Inc., 751 F. Supp. 649, 654-56 (E.D. Tex. 1990) (calculating pre-judgment interest for post-1987 cases according to statute [note 125, *supra*] and from six months after last exposure in cases filed earlier) (*citing* Cavner v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985)).

127. Claimants reaching age 70 should be removed from deferral registries and given priority preference. *See, e.g.*, CAL. CIV. PRO. CODE § 36(a) (West 1984) (setting forth conditions establishing preference for case where movant has reached age 70); Rice v. Superior Court, 185 Cal. Rptr. 853, 854 (Cal. App. 2d 1982) (finding statute mandatory "irrespective of the circumstances leading to the motion for preference"). In *Rice* preference was renewed even after voluntary dismissal. *See also* Koch-Ash v. Superior Court, 225 Cal. Rptr. 657, 658 (Cal. App. 2d 1986) (invalidating indefinite deferral of 70-year old).

128. Cook County's registry has an "exceptional circumstances" exception. Cook County Order, *supra* note 4, at 10.

129. See, for example, the technical assessment and classification criteria for the deferral registry in Cook County, Illinois, which relies both on standard x-ray classifications and on tests of pulmonary function. *Id.* at 9-10; *see supra* note 27.

ment, and the relationship among them.[130]

Cancerphobia claims. How should the system deal with claims based not upon a present functional impairment but rather upon a present fear of future impairment? The most notable example, of course, is a claim for "cancerphobia," the fear of contracting cancer in the future. This condition is now compensable in most jurisdictions, usually under the more general rubric of infliction of emotional distress.[131] Cancerphobia claims are difficult to refute, especially in the pre-trial stage. Virtually all asbestos-exposed but unimpaired workers can plausibly assert a cancerphobia claim at an early stage of the litigation, and in fact almost all of them do so.[132] Although some of these claims may well turn out to be specious, it is necessary to make a categorical decision about how the registry will treat such claims.

Cancerphobia constitutes perhaps the most serious practical obstacle to the creation of a registry. To the extent that juries are awarding damages for cancerphobia as an immediate harm, claimants will surely feel themselves disadvantaged by being placed on a deferred track and will demand the right to retain the FIFO-based priority they enjoy under the existing system. But if all unimpaireds who assert cancerphobia claims remain on the fast track, there will be virtually no claims left to defer to the slow track. The registry will become pointless and its potential advantages will vanish.[133]

This is the nettle of the problem and we must grasp it one way or the other. As between the claims of the already impaired and the claims of those who are not now (and may never be-

130. *See, e.g.*, Hillerdal, *supra* note 12, at 125-30 (recommending numerous changes in current systems of diagnosis, classification, and measurement).

131. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d 79, 83 (3d Cir. 1986) (describing New Jersey law). The elements of this cause of action differ across jurisdictions. In some jurisdictions, for example, some accompanying physical impairment or other manifestation is required. *See, e.g.*, Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 507-09 (Pa. Super. 1984) (setting forth Pennsylvania law regarding infliction of emotional distress). *See generally* David C. Minneman, Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 A.L.R. 4th 13 (1986) (discussing recovery for possibility of occurrence of future disease or for mental distress caused by fear of developing future disease).

132. CCR Letter, *supra* note 36, at 2.

133. One obvious solution is to create for cancerphobia claims a third, intermediate track between the fast and the slow ones. Yet precisely because virtually all unimpaireds now file such claims, this is really no solution at all. Given this fact, it need hardly be added that any such marginal advantage given to cancerphobia claims would further strengthen the already powerful incentives to assert them.

come) sick, but who genuinely fear becoming so, society should accord higher priority to the former.[134] The issue here is not the validity of some cancerphobia claims, but their temporal priority in the sequencing of litigation and in the distribution of resources to those who are injured and need relief.

Medical monitoring claims. The cancerphobia phenomenon is related to another difficult issue: how should a registry system deal with unimpaired plaintiffs' claims for medical monitoring, which are increasingly being recognized, particularly in non-asbestos contexts.[135] One might argue that the very premise of a registry—that future impairment should return claimants to the faster track—underscores the value of detecting future deterioration in the medical conditions of the presently unimpaired, especially the presently unimpaired who can nevertheless establish cancerphobia. As a practical matter, moreover, claimants are unlikely to forego voluntarily a cause of action that forces defendants to pay for this detection.

On the other hand, medical monitoring does entail risks and costs, and is justified only in certain circumstances.[136] The purpose of medical monitoring is to use screening to detect latent diseases at a stage early enough to improve medical outcomes, either because the prognosis is better when the disease is treated early or because the disease may be treated with less risky or costly methods if caught early. Yet some evidence suggests that these conditions are not met in the case of asbestos-

134. In addition, a registry that defers cancerphobia claims to a slower track may maximize the total resources available for recoveries to the extent that some of the weaker of those claims drop out before being litigated. To the extent that this saves resources, *all* claims involving existing loss—including both present impairments and cancerphobia—would become more valuable.

135. *See, e.g.*, *In re* Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 849-52 (3d Cir. 1990). Some asbestos cases do, however, mention medical monitoring. *See, e.g.*, Herber v. Johns-Manville Corp., 785 F.2d at 80, 83. Some jurisdictions do not recognize a claim for medical monitoring in certain circumstances. *See, e.g.*, Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990), *aff'd sub nom.* Ball v. Joy Technologies Inc., 940 F.2d 651 (4th Cir. 1991) (finding no cause of action for medical monitoring under Virginia or West Virginia law where plaintiffs have shown only exposure to defendant's product); Potter v. Firestone Tire & Rubber Co., 274 Cal. Rptr. 885, 896-97 (Cal. Ct. App. 1990) (allowing no recovery for medical monitoring without evidence "that the cancer is reasonably certain to occur"), *review granted*, 806 P.2d 308 (1991).

136. In addition to the screening cost, early detection can increase emotional and other suffering in cases where the detection cannot alter the prognosis (e.g., incurable cancer), lead to overtreatment of borderline cases, produce false negatives that lead patients to ignore symptoms and delay treatment, and produce false positives that cause unnecessary alarm and require invasive, risky follow-up tests to confirm. *See, e.g.*, Philip C. Prorok et al., *UICC Workshop for the Evaluation of Screening Programmes for Cancer*, 34 INT'L J. CANCER 1 (1984).

related diseases. In many cases, effective screening procedures are not yet available, and in others early detection does not improve the prospects of cure.[137] Where this is true, it seems difficult to justify expending the diminishing resources available for compensation in this particular way.

In jurisdictions that permit medical monitoring recoveries despite these objections, however, it may be necessary to design the registry system so that defendants pay some or all of these costs in certain categories of cases. In defining these categories, an effort should be made to limit this kind of relief to those claimants, if any, for whom medical monitoring is likely to be cost-justified.[138]

Insolvent defendants. A compelling argument for the registry is its capacity to reduce the risk of future insolvency to the remaining asbestos manufacturers, a risk that the *status quo* magnifies.[139] How, then, should a registry manage the risk that a defendant will become insolvent during the time it takes for the impairments of presently unimpaired, slow-track claimants to develop?

This is a difficult problem, but the inability to devise a completely satisfactory solution should not foreclose the establishment of a registry. The risk of defendants' insolvency will exist in any event; the only question is which claimants must bear it. The registry's answer is that those who are presently unimpaired should bear the risk.[140]

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137. *See* U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTATIVE SERVICES: AN ASSESSMENT OF THE EFFECTIVENESS OF 169 INTERVENTIONS, ch. 10 (1989) (screening asymptomatic persons for lung cancer by performing routine chest radiography or sputum cytology not recommended). OSHA regulations, however, do require medical surveillance of all employees exposed to asbestos above a certain level. 29 C.F.R. § 1910.1001(l) & app H (1991).

138. One policy approach in such cases—to limit the defendant's liability to a requirement that it purchase only "excess" health insurance coverage for the plaintiff's asbestos-related costs (that is, costs not already covered by the claimant's existing, primary health insurance policy, Medicare, or Medicaid)—appears to be impractical. CCR Letter, *supra* note 36, at 2.

139. *See supra* text accompanying notes 56-59.

140. It might seem desirable to permit plaintiffs to move for a bond securing a defendant's potential liabilities to the presently unimpaired if they can show that the defendant is probably liable but at significant risk of insolvency that threatens deferred claimants' ability to obtain payment of their claims. Under this approach, the court would evaluate this option, taking into account its cost (which would reduce the resources available for recoveries) and the benefit to plaintiffs, and the bond's level might also be periodically adjusted to reflect new scientific data and actual claims resolution experience. Although the resources available for recoveries would of course be reduced by the portion of the bond premium not related to the insolvency risk, unimpaired claimants as a group might be better off even if particular ones might be

Legal structure. As indicated earlier, all existing registries have been established by consent, most of them formalized in court orders. Other things being equal, consensual remedies should be preferred, because they can be tailored to the preferences of the parties and to local conditions, rather than having to conform to specifications prescribed by a general rule imposed by a distant rulemaker. In the unique area of asbestos litigation, however, other things are not at all equal. First, the advantages of having diverse docketing and calendaring systems for asbestos cases seem slight compared to the disadvantages. Asbestos is clearly a national (indeed, an international[141]) problem. Creating registries in some states and districts but not in others would greatly exacerbate the already significant problems of forum-shopping and inter-jurisdiction disparity. These problems are especially worrisome in asbestos litigation because of the large number of states in which the asbestos defendants do business; this allows plaintiffs the option to sue in almost any state and to choose between the state and federal courts in that state.[142] More generally, limiting registries to those to which the parties consent would undervalue the enormous social interests at stake in asbestos litigation, interests that transcend the parties' private stakes.

Even if asbestos litigation were not a national phenomenon, consent-based registries would not fully address the problems discussed in Part I. From a social perspective it is difficult to see any strong policy argument against a properly designed and operating system, but from the narrower perspective of individual parties and their lawyers,[143] there may be sound tactical

worse off. Unfortunately, this remedy appears to be impractical under present conditions. *See* CCR Letter, *supra* note 36, at 2.

141. *See, e.g.*, FELSTINER & DINGWALL, *supra* note 52, at 2.

142. This option is limited only by the rather weak constraint of the Due Process Clause on securing personal jurisdiction over large corporate defendants. *See, e.g.*, International Shoe v. Washington, 326 U.S. 310, 316 (1945); *supra* note 42; *see also* Letter from State Judges Asbestos Litigation Committee to the Judicial Panel on Multidistrict Litigation (May 24, 1991) (on file with author) (recognizing a need for coordinated solution among federal and state courts).

143. Any system that allows plaintiffs' lawyers to decide which of their cases are to be deferred will tend to aggravate a potential conflict of interest between them and their clients. The lawyers' control over which cases are deferred may encourage them to defer cases in which the plaintiff is already impaired but cannot readily prove causation—if, for example, he has a colon cancer rather than, say, mesothelioma. If these cases are as strong at this point as they will ever be, the plaintiffs may want them tried as soon as possible, while the lawyers may prefer to try the stronger cases first. *See* OAL Order 120, *supra* note 110, at 5-6 and case-list "B" (including cancer cases among deferred cases "considered . . . not sufficiently mature for trial because medical symptom-

reasons to oppose a registry. Unanimous consent to a registry, then, is more likely to be the exception than the rule—as its limited use so far suggests.[144]

Few asbestos lawyers, I suspect, would quarrel with the general proposition that the more seriously injured claimants should get to trial first. Many of them nevertheless object to a registry center on four specific grounds:[145] limited resources, defenses, carrying costs, and overbreadth.

Limited resources. Lawyers opposing registries often cite the inadequacy of the resources available for the satisfaction of asbestos claims. Plaintiffs' lawyers emphasize the risk that presently unimpaired claimants who are deferred to a registry will find only insolvent defendants when their impairments finally appear and their cases are restored to the active, fast-track calendar. Defendants' lawyers may or may not agree that their clients' resources are inadequate to cover valid claims. Some, however, stress a different but related risk—that a registry, by giving priority to the most serious cases first, will frustrate their strategy of trying the weakest claims first, winning early victories, and increasing the pressure on plaintiffs' lawyers to settle. Instead, they argue, a registry will concentrate the highest plaintiffs' verdicts and defense litigation costs up front and increase pressure on defendants to settle. This will simply exacerbate their cash flow problems, pushing them into premature insolvency. Defendants prefer that weak cases be dismissed outright and early.[146]

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atology or other proof is not presently available to adequately meet substantive or economical standards for the litigation process," but recommending alternative dispute resolution).

Even with a consensual registry, there are at least two ways to minimize this problem. First, attorneys can be required to obtain informed consent from their clients before deferring their cases. For example, an attorney for a significant number of plaintiffs in the Northern District of Ohio sent a letter to clients explaining pros and cons of joining the registry. Telephone Interview with Chris Malumphy, Law Clerk to Chief Judge Thomas D. Lambros, N.D. Ohio. Second, medical criteria can be specified as the sole grounds for deferral; *see also supra* Part III, 1 and *infra* note 188; *cf.* Brickman, *supra* note 1, at n.105 (contrasting diagnoses of attorney- and court-sponsored experts).

144. *See supra* text accompanying note 111.

145. The range of views is well represented by the briefs filed in response to Order to Show Cause, *In re* Asbestos Products Liability Litigation (No. VI MDL-875) (J.P.M.L. Jan. 17, 1991). *Compare, e.g.*, Response of Wilentz, Goldman & Spitzer, PC to Order to Show Cause (filed Mar. 15, 1991) (opposing registry; representing plaintiffs in 24 actions, 17 labor and public interest organizations, and joined by at least 6 other plaintiffs' firms) *with* Reponse of the Center for Claims Resolution Defendants to Order to Show Cause (filed Mar. 18, 1991) (advocating registry; representing 20 defendants).

146. Some defendants' lawyers advocate the use of a court-appointed medical expert under FED. R. EVID. 706 to screen cases, coupled with the use of FED. R. CIV. P. 11

Ironically, the limited funding available for asbestos compensation is actually the strongest possible argument in *favor* of a deferral registry. A registry is designed to ensure that those funds are allocated to the most serious claims first. To the extent that it avoids litigation of the many unimpaired cases that will never mature into impairments, it will increase the funds available to compensate genuine injuries. In any event, it will distribute the existing funds more fairly and efficiently.

Number of claims. Some defendants' lawyers note that a registry would increase the number of claims in several ways. They fear that a registry, by making it less risky for claimants to file prematurely, would stimulate plaintiffs' lawyers to engage in the mass solicitation of cases that would not otherwise have been filed. On the other hand, the incentives to file asbestos claims under the existing system are already so great that a registry seems unlikely to attract many additional ones. By ensuring that the unimpaired cases will be tried later, a registry may discourage the filing of claims, or at least significant litigation expenditures on them, until an actual impairment appears.

Carrying costs. Even claims deferred by a registry impose on the parties (and in the case of plaintiffs, on their lawyers) a variety of costs: filing; monitoring; periodic reporting to court; maintaining expert witnesses; the risk of stale evidence; establishing and maintaining financial reserves; increased liability insurance premiums; communication with clients, insurers, and perhaps stockholders; and the adverse effect on business and investor confidence generated by the extensive "contingent liabilities" carried in defendants' accounting records.[147]

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sanctions against plaintiffs' attorneys whose clients' injuries are not serious enough to meet the jurisdictional amount. It should be noted, however, that since a claimant with chest x-ray changes attributable to asbestos exposure generally states a claim under state law, summary judgment on that claim will not ordinarily be appropriate. *See, e.g.*, *Cathcart*, 471 A.2d at 506-08 (finding "medically identifiable effect linked to her exposure to asbestos particles").

147. Registries may be useful to bankruptcy courts in classifying (by diagnosis and severity) and estimating the number of contingent claims and unliquidated claims. *See* 11 U.S.C. § 502(c) (1988). Moreover, to the extent that registries encourage earlier filings, *see* text in preceding paragraph and *supra* text accompanying notes 89-91, they could increase the number of claims eligible for payment and discharge in bankruptcy. *See* 11 U.S.C. §§ 726(a); 1129(b); 727(b); 1141(d). Encouragement of earlier filings could also increase the number of cases stayed under § 362(a) (6) and reduce the number of future claims. The status in bankruptcy of such future claims remains controversial. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 50-64 (2d ed. 1990) (discussing status of unmanifested tort injuries and contingent tort claims).

Here again, however, a registry compares quite favorably with the existing system. Carrying costs are inescapable for cases that are tried later. A registry does not change this fact; it only alters the order in which cases are processed. Indeed, to the extent that it discourages the filing or processing of weak or premature claims, a registry will reduce carrying costs. Moreover, a registry should cause the most serious cases such as mesothelioma claims to be tried earlier, before the claimant dies and his heirs are deprived of whatever evidence the decedent might have presented himself.

IV. Legal Issues

If, as I have argued, deferral registries represent a sound, indeed essential reform in asbestos litigation, and if the parties cannot be expected to establish them in all circumstances where they are socially desirable, Congress should enact a statute requiring federal courts and encouraging[148] state courts to establish them by consent if possible, but by court rule or order if necessary. Failing Congressional action, the Judicial Conference of the United States should adopt a uniform rule governing registries (perhaps allowing some local variation) in the federal courts, while state legislatures should require registries for the state courts, perhaps using the offices of the National Commission on Uniform State Laws to minimize state-by-state variation.

In the remainder of this part, I analyze the legal arguments likely to be raised against legislatively-mandated or judicially-mandated registries implemented by courts, which challenge the court's authority on a variety of non-constitutional and constitutional grounds. I conclude that a well-designed registry should withstand these challenges.

A court that seeks to mandate a registry without benefit of a specific registry statute could invoke a number of sources of legal authority. These include: (1) existing general statutes; (2) some Federal Rules of Civil Procedure; (3) the court's general rule-making authority; (4) the court's inherent power to control its own docket; (5) the authority of the Judicial Panel on Multidistrict Litigation (JPML or MDL); and (6) analogous judicial

148. The constitutional impediments to congressionally-mandated registries in state courts are briefly discussed *infra* at note 187.

actions. Even assuming that the court-mandated registry were authorized by one or more of these sources or indeed by a registry statute, it could of course still be challenged on several constitutional grounds. In the last two sections of this paper, I discuss the sources of judicial authority and the question of constitutionality.

A. *Sources of Judicial Authority*

General statutes. In recent years, Congress has explicitly confirmed the district courts' authority to establish their own calendaring priorities. In a 1984 statute, for example, it directed each federal court to "determine the order in which civil actions are heard and determined."[149] This requirement that courts set their own priorities was recently applied to uphold the authority of a court rule that assigned the lowest priority to diversity cases.[150]

Even more recently, Congress provided further authority and encouragement for courts swamped with asbestos cases to take innovative steps to conserve scarce judicial resources. In 1990, the Civil Justice Reform Act required each district court to implement a "civil justice expense and delay reduction plan," to be developed after consultation with an advisory group or by the Judicial Conference.[151] The Act provides that each district court

> shall consider and may include . . . systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of

149. 28 U.S.C. § 1657 (a) (1988). The statute provides exceptions to court-established priorities for habeas corpus, recalcitrant grand jury witness, or injunctive relief actions, and for "good cause". " '[G]ood cause' is shown if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." Potential constitutional challenges to court-established priorities in the form of a deferral registry are discussed and rejected *infra* at note 187. Another provision of the same statute authorizes the Judicial Conference of the United States to modify these locally-established priorities in the interests of inter-circuit consistency. 28 U.S.C. § 1657(b) (1988). In Zukowski v. Howard, 115 F.R.D. 53, 55 (D. Colo. 1987), which denied a tort plaintiff's motion for an expedited trial date, the court noted that arguably *only* the Judicial Conference can review or modify the priorities established by local court rules.

150. *Zukowski*, 115 F.R.D. at 54.

151. Civil Justice Reform Act, 28 U.S.C.A. § 471 (West Supp. 1991).

the case . . .[152]

It also authorizes, *inter alia*, the use of court-designed "mediation, minitrial, and summary jury trial" techniques.[153] Registries, I shall argue, are considerably less problematic than these Congressionally-approved techniques.[154]

Federal Rules of Civil Procedure. Rule 1 of the Federal Rules of Civil Procedure provides that the Rules should "be construed to secure the just, speedy, and inexpensive determination of every action." This clause is to be applied in construing other rules,[155] including Rule 40, which requires further local rules for assigning cases for trial in "such . . . manner as the courts deem expedient . . . ." Registry filing would have to comply with state law tolling principles with respect to statutes of limitations; commencement of an action by filing a complaint under Federal Rule 3 is insufficient for this purpose if, for example, state law also requires service.[156] After tolling requirements are met, however, Rule 1 could be applied to alter the sequence of subsequent proceedings.[157] Cases could be deferred as a matter of trial scheduling.[158]

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152. *Id.* at § 473(a) (1).

153. *Id.* at § 473(a) (6) (B). Although the legislative history did not specifically mention registries, it emphasized the goal of making "an early assessment of each case" and endorsed "[s]ingling out different categories of cases for different procedural treatment." S. REP. No. 416, 101st Cong., 2nd Sess. 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6826.

154. *See infra* text accompanying notes 184-87.

155. *See* Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 104 (1990) (criticizing basis for court mandate of summary jury trial under Rules 1 and 16(a); employing arguments superseded by Civil Justice Reform Act of 1990).

156. Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980) (holding that in diversity cases, state statute of limitations governs absent conflicting federal rule; Rule 3 not such a rule); *cf.* West v. Conrail, 481 U.S. 35 (1987) (finding that Rule 3 can toll statute of limitations in federal question case); Stephen Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988) (discussing aptness of federal rules for limitations law in most federal question cases). It is also debatable whether Supreme Court Rules may alter statute of limitations law under the Rules of Decision Act and *Erie* jurisprudence. *See* Stephen Burbank, Comment, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1019-20 (1989) (arguing that under Rules Enabling Act, court rules may not make substantive policy choices such as tolling rules; disputing Carrington's view that federal rules authorize general if not claim-specific limitations law).

157. *See* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (upholding court-mandated summary jury trial as authorized under Rule 16 as glossed by Rule 1); *cf.* Bolton v. Travelers Ins. Co., 475 F.2d 176, 178 n.3 (5th Cir. 1973) ("time periods allowed for answer and appearance are . . . clearly procedural").

158. On the relationship between registry filing and tolling the statute of limitations, see *supra* paragraph accompanying notes 89-91, 113, and 117.

The reference in Rule 1 to "speedy" determinations should pose no problem for a registry that defers certain cases for the sake of hastening the trial of others.[159] A deferral registry is a form of schedule or calendar, of which Rule 79(c) requires courts to direct the preparation. Rules 16(b)(4) and (5), which govern scheduling and planning, require courts to enter a scheduling order, including trial dates and "any other matters appropriate in the circumstances of the case." The scheduling order is to be preceded by consultation with the parties, with or without a conference, except where exempted by local rules. The Advisory Committee notes that this requirement "permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained."[160] The Committee also expected that "district courts undoubtedly will develop several prototype scheduling orders for different types of cases."[161] A deferral registry tailored to the special features of asbestos cases would constitute such a prototype.[162]

General rule-making authority. The federal courts are empowered to "prescribe rules for the conduct of their business consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court [under section 2072] . . . ."[163] Although the issuance of new rules requires that

159. Narrow application of the "speedy" provision has been rejected in another context, involving the delayed assessment of litigation costs. *See* Northcross v. Board of Educ., 611 F.2d 624, 635 (6th Cir. 1979); United States v. Hoffa, 497 F.2d 294 (7th Cir. 1974). To remove doubt, however, the word "speedy" might be changed to "timely," especially since the speed desideratum is probably implicit in Rule 1's existing requirement to secure "inexpensive" determinations.

160. FED. R. CIV. P. 16(b) advisory committee's note.

161. *Id.*

162. Before the Civil Justice Reform Act of 1990, *supra* note 70, FED. R. CIV. P. 16(a) was invoked to support other mandatory pretrial proceedings, but with some controversy. *See Arabian American Oil Co.*, 119 F.R.D. at 448 (upholding summary jury trial); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46-48 (E.D. Ky. 1988) (discussing authorization for summary jury trial under FED. R. CIV. P. 16); *see also* Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 68 NOTRE DAME L. REV. 818 (1988); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Means of Dispute Resolution: Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 469 (1984) (grounding summary jury trial in Fed. R. Civ. P. 1 and Fed. R. Civ. P. 16). Although Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988) (holding mandatory participation in summary jury trial not authorized by FED. R. CIV. P. 16) and Wiegand, *supra* note 155, are to the contrary, they are superseded by the Civil Justice Reform Act of 1990, *supra* note 70.

163. 28 U.S.C. § 2071 (1988). Section 2072 authorizes the Supreme Court to issue rules of civil procedure.

courts comply with certain procedures,[164] some existing local court rules that govern calendaring priorities may well authorize court-mandated registries without the necessity for issuing new rules.[165]

Inherent judicial power to control docket. The Supreme Court has stated that a court possesses "the inherent power to control its own docket."[166] This power includes the incidental power to stay actions pending the outcome of relevant judicial or other proceedings.[167] Courts also have the power to dismiss cases pursuant to "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[168] In the context of a registry, however, this power to dismiss, as distinguished from merely deferring, may require the court to protect the plaintiff's right to refile without a statute of limitations bar.[169]

MDL and transferee court's authority. Congress established the Judicial Panel on Multidistrict Litigation[170] to "provide centralized management under court supervision of pretrial proceedings to assure the 'just and efficient conduct' of such

164. Such rules must meet certain notice-and-comment and publication requirements, 28 U.S.C. § 207(b) (1988), and are subject to review, modification, or abrogation by the Judicial Conference. 28 U.S.C. § 2071(c) (2) (a) (1988). However, there is no requirement for a formal public hearing before such rules are adopted. 12 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3151, Rule 83, App. C (1973 & Supp. 1991), at 166.

165. *See, e.g.*, Rule 50.6 in the Eastern District of New York, a district in which a large volume of asbestos cases are pending. Rule 50.6 authorizes district judges to calendar cases "in such order as seems just and appropriate," giving preference to certain categories of cases including "any other action if good cause is shown." Moreover, courts enjoy broad discretion in interpreting and applying their own rules adopted in the interest of efficiency. *See, e.g., In re* Adams, 734 F.2d 1094 (5th Cir. 1984) (upholding interpretation of local bankruptcy rule). A leading treatise, however, observes that "basic procedural innovations" may not be effected by local rule. 12 WRIGHT & MILLER, *supra* note 164, at § 3154, Rule 83, at 239 (citing Miner v. Atlass, 363 U.S. 641 (1960)).

166. American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); *see also* Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2134-35 (1991) (affirming and extending this inherent power to control proceedings, even in situation in which existing rule and statute applied to the conduct in question).

167. *American Life Ins. Co.*, 300 U.S. at 215; *see Mulligan*, slip op. at 2-5, 10 (Ill. App. Ct. Dec. 27, 1991) (holding registry order non-appealable, as ministerial prioritization based on internal court power).

168. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (upholding court's dismissal for attorney's failure to prosecute action); Mingo v. Sugar Cane Growers Coop., 864 F.2d 101, 102 (11th Cir. 1989) (holding same, but remanding for reconsideration).

169. *See* Burden v. Yates, 644 F.2d 503, 505 (5th Cir. 1981) (affirming power to dismiss for failure to prosecute action, but remanding since even dismissal without prejudice might bar plaintiff from refiling if statute of limitations has run). A dismissal designed merely to effect a deferral to a registry must be distinguished, of course, from a dismissal on a dispositive procedural ground or on the merits.

170. Multidistrict Litigation, 28 U.S.C. § 1407 (1988).

actions."[171] In July 1991, the MDL Panel ordered the transfer of all federal court asbestos cases to the Eastern District of Pennsylvania for coordinated pre-trial management.[172] While the MDL Panel did not establish a deferral registry itself, it left to the transferee court the decision about whether, and in what form, to create it. The analysis presented here demonstrates that the transferee court may indeed do so.

Analogous judicial actions. In other settings, some courts have in effect—and without benefit of specific statutory authority—rejected the conventional FIFO rule for claims processing in favor of a calendaring system based upon the relative severity of claimants' injuries. Although these precedents are not identical to the asbestos situation, the parallels are sufficiently close to provide some analogical support for mandating a non-FIFO priority rule in asbestos cases.

In the *Agent Orange* litigation, for example, the Second Circuit upheld in all relevant respects the District Court's order implementing a distribution plan that made payment only in the case of death and permanent, total disability claims, despite the existence of a large volume of other claims, many of which were filed earlier, involving less severe injuries.[173] More recently, in the order certifying a national class in the consolidated Manville bankruptcy proceeding, the courts (over the opposition of certain parties[174]) established a two-tier payment system, ordering that "[p]riority in terms of scheduling the timing of payment will be given to those most seriously injured."[175]

171. H.R. REP. No. 1130, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899.

172. *See In re* Asbestos Products Liability Litigation (No. VI, MDL-875), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

173. *In re* "Agent Orange" Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

174. *In re* Asbestos Litig., *supra* note 1, Bankr. 710, 777-92 (discussing position of minority claimants, largely in opposition).

175. 129 Bankr. at 769. If the plan is upheld on appeal, payments of 45% of the value of asbestos-related claims settled with the Trust will be prioritized according to illness severity and pro-rated for the remaining 55%. "First level" priorities will be, in descending order, "extreme hardship" (financial or imminence of death), mesothelioma and other cancers, and (in FIFO order) serious asbestosis and deaths. "Second level" priorities will be, in descending order, "hardship", certain pleural and interstitial fibrosis (radiographically and functionally defined), claimants over 70, and (in FIFO order) other claims. Within each of the two levels, groups of claims may be paid out of order. *In re* Asbestos Litig., 120 Bankr. 648, 670-71; *see also id.* at 672-80 (governing medical progression, classification and evidence, financial structure and disbursement, dispute resolution, attorneys' fees, and amendments). The courts noted that many claimants, including many of the presently unimpaired, favored this approach even though it meant deferral of their claims. 129 Bankr. at 776, 77; *see supra* note 99.

The courts were strongly influenced by the fact that the Manville Trust's mindless use of the FIFO rule had yielded disastrous results in terms both of equity and efficiency.[176]

Another analogy is to interpleader, a remedy that is now authorized by statute,[177] by rule,[178] and under the court's equitable power.[179] In certain circumstances, a party facing multiple but similar claims on a limited fund can place that fund in escrow in the court and move for simultaneous trials. In the asbestos litigation, defendants face multiple claims on a limited fund; the court should be able to calendar the trial of those claims in a way, such as a deferral registry, that preserves the fund while avoiding inconsistent, inequitable outcomes.

B. *Constitutional Issues*

A constitutional challenge to a court-mandated deferral registry could advance a number of different claims. These claims would be based upon: (1) the right to jury trial; (2) First Amendment protection of advocacy of legal rights; (3) Due Process and Takings Clause protection of access to courts and of property rights; (4) Equal Protection Clause limitations on classifying claims; and (5) federalism concerns, assuming that a registry mandated by Congress or a federal court applied to asbestos cases in state courts as well as federal courts. I shall argue, however, that a well-crafted registry could circumvent these challenges.

Jury trial. Opponents could argue that for a court to apply the criteria for registry deferral would require it to make findings of fact which, under the Seventh Amendment, are within the exclusive province of a jury. They would presumably cite cases such as *Armster v. United States District Court*,[180] which held unconstitutional a categorical suspension of civil jury trials following an Administrative Office of the United States Courts advisory that budget constraints prevented the empaneling of any civil juries until the new fiscal year began. The *Armster* court, however, emphasized that the case involved a "wholesale

176. *See* 129 Bankr. at 754-59.
177. 28 U.S.C. § 1335(a) (1988).
178. FED. R. CIV. P. 22(1).
179. *See* Geoffrey C. Hazard & Myron Moskovitz, *A Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 750-63 (1964).
180. 792 F.2d 1423 (9th Cir. 1986); *accord* Hobson v. Brennan, 637 F. Supp. 173 (D.D.C. 1986).

non-discretionary suspension of the civil jury trial system and a blanket moratorium on all civil jury trials for a three and one-half month period" for purely fiscal reasons.[181] The court carefully distinguished that situation from one of overloaded dockets. In the latter, it noted, individual district courts enjoy wide discretion to control their dockets through deferral of some trial dates without implicating Seventh Amendment rights.

The federal appeals courts have consistently upheld against Seventh Amendment, access to court, Due Process, and Equal Protection challenges, several other trial deferral and diversion techniques mandated by statute or by local court rule. They have done so even though these techniques would seem to be more constitutionally vulnerable than a registry, and even in diversity cases.[182]

Perhaps the closest analogy is the medical review panel established by a number of states to screen medical malpractice claims before they can be tried in court.[183] Like registries, these schemes defer trial; they do not deny it. Unlike registries, however, they generally defer *all* such claims, forcing claimants to incur additional expenditures before they can clear the screening process. Moreover, the schemes were not created for the efficiency and fairness reasons that justify registries.

Court-mandated compulsory arbitration rules for certain types of cases have similarly been upheld despite the fact that they delay access to a jury trial and entail costly proceedings at the arbitration level.[184] Schemes involving mandatory referral

181. *Armster*, 792 F.2d at 1428.

182. *See, e.g.*, Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1st Cir. 1981); DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980); Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979).

183. *See, e.g.*, Gronne v. Abrams, 793 F.2d 74, 77-78 (2d Cir. 1986) (upholding against Equal Protection challenge); *Feinstein*, 643 F.2d at 889-90 (upholding against Seventh Amendment and state bill of rights challenge); *DiAntonio*, 628 F.2d at 291 (upholding against Seventh Amendment and Equal Protection challenge); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 433-34 (N.D. Ind. 1979) (upholding against Seventh Amendment, Equal Protection, and Due Process challenges), *aff'd* 603 F.2d 646 (7th Cir. 1979); Davison v. Sinai Hosp., 462 F. Supp. 778, 781 (D. Md. 1978) (upholding against Seventh Amendment and state constitutional challenge), *aff'd* 617 F.2d 361, 362 (4th Cir. 1980). *See generally* PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL, 38-43, 183-87 & nn.94-129 (1991); Kristine C. Karnezis, Annotation, *Validity and Construction of Statutory Provisions Relating to Limitations on Amount of Recovery in Medical Malpractice Claim and Submission of Such Claim to Pretrial Panel*, 80 A.L.R. 3d. 583 (1977).

184. *See, e.g.*, New England Merchants Nat'l. Bank v. Hughes, 556 F. Supp. 712, 714 (E.D. Pa. 1983) (upholding arbitration rule against Seventh Amendment challenge); Kimbrough v. Holiday Inn, 478 F. Supp. 566, 567-72 (E.D. Pa. 1979) (same, discussing cases). *See generally* John F. Wagner, Annotation, *Validity and Effect of Local District Court*

to non-binding mediation,[185] and mandatory summary jury trials[186] have also been upheld.[187]

It is true that for a mandatory registry scheme to work, the court (or a court adjunct such as a master) must—absent agreement among the parties—make a finding that the claimant is presently unimpaired, a finding that relates to the merits of the claim and involves a factual determination of a kind that juries must ordinarily make.[188] It might be argued that this consideration triggers a Seventh Amendment or other constitutional violation.

Such an argument, however, proves too much. Courts must often make determinations at the threshold on factual issues

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Rules Providing For Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms, 86 A.L.R. FED. 211 (1988).

185. Rhea v. Massey-Ferguson, 767 F.2d 266, 268-69 (6th Cir. 1985) (upholding against Seventh Amendment challenge).

186. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46 (E.D. Ky. 1988) (upholding against Seventh Amendment challenge). Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987), which found such a scheme unauthorized by Rule 16, has surely been rendered anachronistic by the Civil Justice Reform Act of 1990, *supra* note 70.

187. Many state courts have upheld similar pretrial schemes. *See generally* R.D. Hursh, Annotation, *Constitutionality of Arbitration Statutes*, 55 A.L.R. 2d 432 (1957); Karnezis, *supra* note 183. Some state courts have held such diversion and deferral schemes unconstitutional but generally on grounds inapplicable to deferral registries. Furthermore, amendments to such legislative schemes can and have been designed in response to holdings of unconstitutionality. *See* Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 741 (Ill. 1976) (stating in *dictum* that although statute unconstitutionally vested attorney and physician members of medical malpractice review panel with power to determine and apply substantive law, this did "not imply that a valid pretrial panel procedure cannot be devised"); *see also* Mattos v. Thompson, 421 A.2d 190, 196 (Sup. Ct. Pa. 1980) (stating in *dictum* that compulsory arbitration statutes were generally constitutional, though statistics revealed unconscionable delays in particular arbitration system held unconstitutional).

The Seventh Amendment jury right does not apply to the states, so constitutional challenges to pretrial diversion or deferral schemes have relied on state constitutional jury rights, with the schemes sometimes held unconstitutional but generally on grounds inapplicable to deferral registries. Program-specific factors held to violate state constitutional jury rights have included oppressive delays, replacement of jury trial, and the probable biased effect of panel decision on jury. *See, e.g.*, Smith v. Barclay, 429 A.2d 438 (Pa. Super. 1981) (holding deferral program unconstitutional because of oppressive delay); Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903, 907-08 (Ohio Cir. Ct. 1976) (finding that admission of arbitration decision as evidence at subsequent trial limited right to jury); Grace v. Howlett, 283 N.E.2d 474, 481 (Ill. Sup. Ct. 1972) (finding deferral program unconstitutional for supplanting jury trial).

188. It should be noted that under the consent-based registry systems, the courts have devised ways to avoid making such factual determinations. The principal one, of course, is to press plaintiffs' attorneys to decide which claims to defer. On the other hand, courts may not compel parties to stipulate facts. *See* J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976); *see also* Cook County Order, *supra* note 4, at 5, 12 (restricting descriptions of claims to use for registry purposes); *cf. supra* Part III 1 and note 143.

that go directly to the merits.[189] Although determinations on standing or jurisdictional amount, for example,[190] may in the end be decisive, the courts nevertheless are required to make them at the threshold. It is enough that such findings are deemed preliminary and non-binding on the jury should the case go forward.[191] If courts may, without constitutional objection, dismiss claims on the basis of such threshold findings, they surely possess the power to make such findings for the far more limited purpose of establishing trial priorities.[192]

Access to courts. In a variation on the jury trial theme, opponents could argue that a registry violates their First Amendment right to "vigorous advocacy" of their legal claims, citing cases such as *NAACP v. Button.*[193] A registry, however, does not deny access, much less use the criminal law to discourage it, as in *Button.* It merely defers trial based upon a rational priority criterion; in that sense it is more nearly akin to a time, place, and manner restriction on protected speech.[194]

Property rights. Opponents might argue that causes of action for asbestos-related injury (and presumably defenses to such claims) are forms of property protected by the Due Process and Takings Clauses of the Fifth Amendment against procedurally unfair or uncompensated restrictions.[195] "[W]hatever the pre-

189. Perhaps the most important and commonplace example is a court's duty to make preliminary fact determinations so that it can then decide whether or not it possesses jurisdiction over a claim. 13A WRIGHT & MILLER, *supra* note 164, § 3536, at 535 (discussing jurisdiction to determine jurisdiction).

190. A defendants' lawyer in the Boston asbestos litigation has suggested this threshold determination as to jurisdictional amount ($50,000 in federal court diversity cases, 28 U.S.C. § 1332 (1988)) would be a way for federal judges to discriminate among claims according to severity. *See* 13A WRIGHT & MILLER, *supra* note 164, § 3707, at 1333-42 (discussing circumstances under which courts may determine amount in controversy in tort claims for jurisdictional purposes).

191. An even more striking example of threshold fact-finding is the preliminarily motion to suppress in which a judge must determine the voluntariness of a confession, an issue that will later go to the jury and may be central to its decision to convict or acquit.

192. Another analogy involves those threshold determinations that courts must make to apply a statute or court rule mandating docket priority for certain types of claims. *See, e.g.*, Speedy Trial Act of 1975, 18 U.S.C. § 3161 (1988); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(D) (1988).

193. 371 U.S. 415 (1963) (holding unconstitutional state regulations barring certain forms of solicitation by lawyers).

194. *See, e.g.*, Grayneal v. Rockford, 408 U.S. 104, 115 (1972) (stating that peaceful demonstrations are subject to reasonable time, place, and manner restrictions); Cox v. New Hampshire, 312 U.S. 569, 576 (1942) (holding that permit requirements for a parade were reasonable time, place, and manner restrictions).

195. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (finding access to administrative hearing is protected by Due Process clauses); Martinez v. State

cise nature of the right of access to the courts, it is clear that due process is established if the statutory procedures provide an opportunity to be heard in court at a meaningful time in a meaningful manner."[196] A properly-designed registry[197] would preserve this opportunity; indeed, it may be essential if this opportunity is actually to be "meaningful."

A registry trial calendar rule—or a rule that tolls the statute of limitations, where possible[198]—for presently unimpaired claimants whose claims are deferred, could do so retroactively, that is, for claims that were filed prior to the creation of the system. Even this feature, however, would probably survive challenges based on Due Process, Equal Protection, or Takings grounds.[199]

Equal protection. Opponents might contend that a registry, by treating asbestos claimants differently than other personal injury claimants, violates the Equal Protection principle. This kind of argument has often been rejected by courts in analogous situations.[200] Except where fundamental rights are concerned—not the case with priority-setting in asbestos litigation—the classification of cases need only be rational.[201] As noted earlier, a priority scheme based upon the seriousness of injury is manifestly rational. Moreover, the courts have upheld such schemes against constitutional challenges, including

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of California, 444 U.S. 277, 281-82 (1979) (stating that a state-created cause of action for wrongful death is a species of property protected by the Due Process clause).

196. State *ex rel.* Strykowski v. Wilkie, 261 N.W.2d 434, 444 (Wis. 1978) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)); *see also Logan*, 455 U.S. at 423, 430 n.5 (1982).

197. For example, the system should provide for at least administrative review of the determination of non-impairment. *See supra* note 114.

198. *See supra* notes 156-57 and accompanying text.

199. Legislation reforming statutes of limitation has been upheld against such challenges. *See* Douglas v. Hugh A. Stallings, M.D. Inc., 870 F.2d 1242, 1249-50 (7th Cir. 1989) (upholding as rational against Equal Protection and Due Process challenges the commencement of Indiana medical malpractice statute of limitations at injury occurrence, and the lowering of legal age of disability exemption from statute of limitations); Montagino v. Canale, 792 F.2d 554, 556 (5th Cir. 1986) (upholding against Due Process and Equal Protection challenges); Brubaker v. Cavanaugh, 741 F.2d 318, 321 (10th Cir. 1984) (upholding against Due Process and Equal Protection challenges); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982) (upholding against Due Process challenge). *But see* Waller v. Pittsburgh Corning Corp., 5 Toxics L. Rep. (BNA) 365, 365 (D. Kan. 1990) (holding that statute of limitations creates a vested right of defense and that subsequent legislative expansion of limitations period violates Due Process).

200. *See, e.g., supra* note 183.

201. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1440 and § 16-6, at 1451 (2d ed. 1988)

Equal Protection claims, in the context of statutorily-created medical malpractice screening panels[202] and court rules imposing compulsory arbitration, summary jury trial, and mediation requirements.[203] Similar challenges have also been rejected in state courts.[204] Indeed, the courts have viewed the purposes of preventing complex litigation from overwhelming the docket, and assuring swifter relief for the most serious claims—the central goals of registries—as essential to vindicating the horizontal equity values of Equal Protection.[205] Nowhere is this more apparent than in asbestos litigation, whose uniqueness the courts have often recognized.[206]

Federalism concerns. The foregoing analysis firmly establishes

202. *See supra* note 183.

203. *See supra* notes 185-87. Similar challenges to some other kinds of "tort reform" measures have also been rejected.

204. Program-specific factors that state courts have held to violate Equal Protection or Due Process, include the passing of the malpractice crisis that engendered the legislation, confinement of the sole benefit of a scheme to defendants, inflexible time limits, probable bias of medical arbitration panel, failure to advise patient of panel composition, and optional non-participation for one party only. *See, e.g.*, Hoem v. State, 756 P.2d 780, 784 (Wyo. 1988) (holding that medical review panel not rationally related to public health purpose and unequally benefitted medical profession while obstructing malpractice victims); Boucher v. Sayeed, 459 A.2d 87, 92-94 (R.I. 1983) (holding that non-binding medical review panel violated equal protection by irrationally conferring one-sided "salutary privileges" on medical profession and undermining deterrence); Jackson v. Detroit Memorial Hosp., 312 N.W.2d 212, 214 (Mich. App. 1981) (invalidating arbitration procedures with 60-day revocation period and mandating doctor or hospital administrator on panel); Aldana v. Holub, 381 So.2d 231, 236-38 (Fla. 1980) (invalidating statute mandating completion of medical malpractice mediation within 10 months without extension); Carter v. Sparkman, 335 So.2d 802, 805 (Fla. 1976) (upholding statutes pertaining to liability mediation panels).

Other program-specific factors that courts have held unconstitutional include delegation of judicial power to lay members of a medical review panel. *See, e.g.*, DeLuna v. St. Elizabeth's Hosp., 540 N.E.2d 847 (Ill. 1989) (holding unconstitutional required leave of physician to file claim); *Wright*, 347 N.E.2d at 741 (holding unconstitutional for delegation of judicial power to attorney and physician members of panel). Other explicit state constitutional provisions have been invoked. *See, e.g.*, Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (holding that limits on awards violated state constitutional right of access to courts); *Grace*, 283 N.E.2d at 481 (holding that compulsory arbitration provision for small claims violates state constitutional provisions for jury trial against the use of fee officers).

205. *See, e.g.*, *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1011 (5th Cir. 1977) (discussing calculation of attorneys' fees); Davidson v. Allis-Chalmers Corp., 567 F. Supp. 1532, 1542 (Mo. 1983) (awarding attorneys' fees against plaintiff for filing a frivilous suit); *cf.* Zukowski v. Howard, 115 F.R.D. 53, 57 (D. Colo. 1987) (denying plaintiff's motion for an expedited trial because plaintiff did not demonstrate extraordinary hardship in comparison with other claims awaiting trial).

206. *In re* Asbestos Litigation, 829 F.2d 1233, 1235 (3d Cir.), *cert. denied sub nom.* Owens-Illinois v. Danfield, 485 U.S. 1029 (1988); JUDICIAL CONFERENCE REPORT, *supra* note 1.

the validity under the United States Constitution[207] of a mandatory registry implemented either in federal courts pursuant to a federal statute or federal court rule or in state courts pursuant to a state statute or state court rule. In contrast, an attempt by Congress or the federal judiciary to impose a registry upon state courts would raise genuinely vexing federal constitutional questions.[208] If Congress also asserted a substantial federal interest in state court asbestos litigation, however, these questions would be less difficult. Congress might do so, for example, by legislating a federal statutory right to recover for asbestos-related injuries or by altering the substantive or remedial law of asbestos claiming.[209] A putative federal interest would of course have to be grounded in congressional authority under Article I,[210] but such an interest could likely be found in the massive effects of the asbestos litigation on the economy and courts, and the causal links between the litigation and the numerous bankruptcies in the industry, matters of constitutionally-mandated congressional competence.

V. Conclusion

The policy arguments in favor of using deferral registries to help regulate the flood of asbestos claims in the courts are overwhelming, while the legal impediments to mandating registries are insubstantial. At stake are important public interests in the fair and efficient management of asbestos litigation. Although some plaintiffs' and defendants' lawyers have agreed

207. Some of the issues arising under state constitutions are discussed *supra* at notes 187 and 205.

208. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them."(quoted in FERC v. Mississippi, 456 U.S. 742, 774 (Powell, J., dissenting)). *Cf.* Administrative Order No. 2, *In re* Asbestos Products Liability Litig. (No. VI, MDL-875) (E.D. Pa. filed Feb. 24, 1992) (ordering preparation of information on all federal and state cases for settlement conferences); 6 Mealey's Litig. Rep.–Asbestos, Mar. 6, 1992, at 3-4 (describing "ballistic reaction" of plaintiffs' counsel to Judge Weiner's assertion of jurisdiction over information regarding state cases).

209. *See, e.g.*, FERC v. Mississippi, 456 U.S. at 771 (1982) (rejecting Tenth Amendment challenge to statute imposing procedures on state regulatory agencies acting in a "pre-emptible field"); Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 363 (1952) (holding that a state may not dispense with jury determination of certain issues in Federal Employers' Liability Act cases in state courts); Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 Cardozo L. Rev. 1891 (1992).

210. The most likely sources of constitutional authority would appear to be Article I, Section 8. *See, e.g.*, *Zukowski*, 115 F.R.D. at 55-56 (finding Article I, Section 8 authority for 28 U.S.C. § 1657 (1988), which directs court prioritization).

to establish deferral registries in certain jurisdictions, counsel are unlikely to fully represent these interests. Legislators and judges therefore should act to protect them.

The asbestos litigation is of course unique in many respects. Among the factors that have caused this litigation to traumatize the civil justice system are the unprecedented number of claimants and defendants, the protracted time periods involved, the tragic toll of death and disability suffered, and the often ruinous liabilities entailed. Absent these factors, a procedural device like the deferral registry would not be so urgently needed.

Still, alternative trial-rationing devices such as deferral registries might well be justified in some contexts other than asbestos litigation. In a judicial system in which access to a proximate trial date is an increasingly scarce and valuable resource, the traditional FIFO rule for allocating this value seems less and less compelling. Even supposing that there are good reasons to retain FIFO as the norm for calendaring cases for trial, other social values may sometimes trump those reasons and demand exceptions to the FIFO rule. Where speedy trial dates cannot be given to all criminal cases, for example, no one would suggest that courts should be obliged to try misdemeanors before felonies just because the lawyers prefer it that way or because the indictments were filed in that order.

Similarly on the civil side, the conjunction of unusual factors—overwhelming caseload pressures, great heterogeneity among claims, a reliable methodology for distinguishing among them according to some generally accepted criterion of urgency, such as present impairment, and a conviction that privately-determined trial priorities are wasting scarce resources and violating norms of equal treatment—should lead to a search for different trial priorities in asbestos cases and in other kinds of mass tort litigation. Where lawyers' and parties' incentives to litigate cases in a particular order diverge sharply from society's interests in using different priorities to fulfill a broader conception of justice, legislatures and courts should insist that society's interests prevail.