



Asbestos Litigation: Malignancy in the Courts?

Lester Brickman

Professor Lester Brickman teaches at the Yeshiva University Benjamin N. Cardozo School of Law. His areas of expertise are lawyers' ethics with a focus on lawyers' fees; tort reform, including administrative alternatives to mass tort litigation; and contingency fee reform. He is widely quoted in the press, and his writings have been influential in changing policy with regard to non-refundable retainers and in setting the tone for national debate over tort reform. He has consulted for the US Office of Education, Ford Foundation, National Science Foundation, Council on Legal Education for Professional Responsibility, American Bar Association, and others.

Roger Parloff is a journalist who has been on the staff of The American Lawyer, Inside, and Brill's Content. His work has also appeared in The New York Times Magazine, Harper's, New York, the Wall Street Journal, The New York Times Sunday Book Review, and People, among others. He recently authored a thorough article on the asbestos issue that appeared in the March 4th issue of Fortune.

INTRODUCTION BY ROGER PARLOFF

While I was preparing for this introduction, I had a disconcerting experience. I learned that essentially every point that I tried to make in my Fortune article had already been made more convincingly, more comprehensively, and more powerfully ten years earlier in an article in the Cardozo Law Review by Professor Lester Brickman. So, although Professor Brickman is an expert in the law and jurisprudence, I am relieved that he does not seem to be personally litigious.

Please welcome Lester Brickman.

REMARKS OF PROFESSOR LESTER BRICKMAN

As many of you know from reading Roger Parloff's article,¹ about 90,000 new asbestos claims were filed last year. That's approximately triple the number of just two years ago.² If asbestos litigation filing rates were an accurate indication of asbestos-related injury, we could conclude that such injuries had reached epidemic proportions. In fact, they haven't. Far from it.

Most injurious exposure to asbestos-containing materials occurred during World War II when the United States undertook the most massive shipbuilding effort in history—an effort that was critical to our success in the war.³

The next wave of exposure came during the 1950s and the 1960s, when workers were exposed to asbestos-containing products during their installation at numerous construction sites. However, by 1970, or shortly thereafter, when knowledge of the hazards of the use of asbestos-containing

products became widespread, manufacture of such products pretty much ceased. Significant exposure—from the point of view of injury producing potential—diminished substantially thereafter.

For the principal asbestos-related diseases of asbestosis and mesothelioma⁴ to occur, there has to be substantial exposure over a period of time, followed by a ten to forty year latency period, before actual disease manifestation occurs. Given the current ages of the occupational groups that were subjected to high-exposure levels, and their dates of exposure, one would expect that the numbers of new asbestos claims would be declining to a comparative trickle today.

Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier.

What then accounts for the disconnect between the dates and rates of exposure and the huge increases in recent years in the numbers of claim filings? The answer is simply astounding. But, to understand it, I have to take you first on a whistle-stop tour through Asbestos Litigation Land.

The tour begins in the early 1970s when evidence was discovered that demonstrated that the Johns-Manville Corporation, Raybestos-Manhattan Corporation, and others had conspired decades earlier to suppress information on the hazards of inhaling asbestos in the course of mining and manufacturing asbestos-containing materials.⁵ This damning evidence led the judiciary to facilitate asbestos disease claiming, beginning in 1973.⁶

By 1982, when asbestos litigation against Johns-Manville, which mined virtually all of the asbestos used in the United States and was, by far, the leading manufacturer of asbestos-containing materials, had mushroomed to 16,000 claims, Manville, surprising everyone at the time, declared bankruptcy. After Manville entered bankruptcy, every dollar of injury that a jury would

attribute to Manville would be heavily discounted. This posed a severe problem for plaintiff attorneys, virtually all of whom, to that point, had concentrated on suing Manville. There then occurred one of the great sea changes in American legal history. Almost overnight, claimants and witnesses changed their testimony regarding Manville's share of the relevant market decades earlier. It plunged from as high as 80% to 25% or less and, by 1990, to 10%,⁷ and even less today when the Manville Trust is paying only five cents on the dollar.

It is reasonably clear that this altered testimony was procured by plaintiff lawyers as part of their re-tooling of asbestos litigation. Judges, who probably knew what was occurring, were perhaps tolerant because seriously injured workers deserved compensation. They may have reasoned, at least in these cases, that the end justified the means.

Even today, the process inures. As each asbestos defendant goes bankrupt, there is an immediate and even uncanny change in claimant and witness testimony as to the percentage of that company's products at particular work sites.

Another issue created by the Manville bankruptcy (the biggest player and payer in the industry) was a looming capital shortage. This was partially solved in 1981 when Judge Bazelon held that, for purposes of insurance coverage, every carrier that had ever insured an asbestos-producing company over previous decades during which asbestos-containing products were being made, and every carrier that had insured a company at any point since, up to the time of the litigation, had to kick in policy limits for each and every year in which such policies were in force.⁸ This holding was the equivalent of commandeering the government printing press into printing between 50 and 100 billion dollars in currency and putting the bill to the insurance companies. The creation of this enormous pool of insurance capital was seen by the former asbestos manufacturers as their salvation. In fact, it was their doom.

But for that decision, there would be no asbestos litigation today to speak of. It would have ended long ago when all the available corporate assets had been consumed. Instead, the decision was to have the same effect as the discovery of gold at Sutter's Creek. But, before the rush could be on, a few more steps were necessary.

Most of the post-Manville defendants had ended up in the asbestos products business by purchasing much smaller companies. Had these smaller companies remained independent, then asbestos litigation would have ended long ago, when their assets and insurance proceeds had been consumed. The fortuity of their being bought up by larger companies enabled the courts to apply the doctrine of "successor liability" to multiply the effects of the decision to rewrite insurance coverage.⁹ As applied, successor companies not only inherited the liabilities of the acquired companies to the extent of the assets of those acquired companies, but to the extent of the assets of the acquiring companies as well, including their newly-minted insurance coverage. Thus the successor companies were held liable, not only for the acts they did not commit but also for the consequences of the acts of their acquired companies that they were not aware of at the time of the acquisitions and, indeed, of which they could not have been aware.

Having created a pot of gold, the next step in the development of asbestos litigation was to provide a path to the pot that would circumvent a major obstacle—tort law. Tort law, reduced to its paradigm, provides that if A injures B, B can sue A for the extent of his injuries. But, to prevail, B has to prove that A proximately caused the injury. Most asbestos litigation involves claims of exposure to asbestos products 15, 20, 30 or more years earlier at multiple work sites where many different asbestos-containing products were being used. Thus, problems of proof abound in this litigation. Nonetheless, the proximate cause obstacle was swept aside by creative lawyering, resulting in the development of what I termed 10 years ago "spe-

cial asbestos law."¹⁰ Instead of having to directly prove both exposure to specific products and causation, all that was required was testimony from somebody that Company A's products were used at the work site, plus medical testimony that exposure could cause injury, plus a claim of significant injury,¹¹ and the case could go to the jury, and the jury could do what juries do. But in adjusting the rules of evidence to meet the exigencies of asbestos cases, that is, in creating a result-driven evidentiary regime for cases where the fullest compensation for serious injury seemed merited, the appellate courts failed to confine the circumstantial hearsay evidence rule that they had created to cases of serious injury. Almost immediately, special asbestos law was applied to cases of dubious injury and ultimately to cases, as we will see, with no injury.

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For some judges, "special asbestos law" needed to be augmented by numerous evidentiary rulings during the course of trials that would further weight the process in favor of the plaintiff. Thousands of such rulings were made which never saw the light of day outside of the courtroom. Let me give you one example. A plaintiff, claiming asbestosis testified, as is typical, that he was short of breath and could no longer work or engage in many of life's activities.¹² During the course of this trial, the judge became ill, and it was necessary to declare a mistrial and conduct a new trial with a different judge and a different jury. During the subsequent trial, a juror who had been seated at the first trial voluntarily came forth and offered to testify that he happened to observe that same plaintiff outside the courtroom and that he exhibited none of the symptoms that he had displayed in the courtroom (of shortness of breath, and so on). Despite the clear relevance and critical importance of this freely volunteered testimony, the judge disallowed it on procedural grounds.

Although there was overwhelming evidence that the plaintiff had suffered no injury, and that he continued to carry on his normal activities, *the jury awarded him a million dollars in compensatory damages and \$25 million in punitive damages*, remitted by the judge to \$500,000 and \$2 million respectively, and somewhat further remitted in an appellate proceeding.

Here was asbestos litigation writ large. A claimant who almost certainly had no asbestos-related disease, no injury, no symptomatology, invoked “special asbestos law” and with additional and critical help from the judge, had been awarded huge sums by a jury.

The circle was now squared. There was a pot of gold, special asbestos law, and the removal of the last impediment posed by tort law, the requirement of evidence of real injury.

There were still obstacles to overcome in the development of modern asbestos litigation. Huge assets had been sequestered, special law created, but, at the rate of 4,000 malignancy claims a year, it would take much too long to accommodate the pecuniary interests of tort lawyers. The universe of claimants had to be expanded.

Perhaps 50% of persons heavily exposed to asbestos over a period of years, develop “pleural plaques,” which are deposits of collagen fibers detectable only by x-rays, visible 20 or more years after initial exposures as thickenings of the lining of the lungs.¹³ The vast majority of individuals with plaques have no lung impairment and no symptomatology whatsoever. For most, is a totally benign condition. Furthermore, there is no scientific evidence to indicate that having pleural plaques results in any greater likelihood of contracting an asbestos-related disease than others similarly exposed that have not developed pleural plaques. Indeed, a leading pulmonologist that I consulted indicated that someone with pleural plaques has a much lower likelihood of thereafter

contracting asbestosis than a similarly exposed individual who does not have pleural plaques.

Despite the fact that there is no scientifically credible evidence that being diagnosed with pleural plaques is an indication, above and beyond the fact of exposure, of any greater likelihood of contracting an asbestos-related disease than if no pleural plaques existed,¹⁴ the condition has been labeled a “disease” in some states (though in other states, such a categorization is rejected.) In other states, pleural plaque claims are denominated as “fear of cancer” claims though, again, there is no credible evidence relating pleural plaques to malignancy. Not surprisingly, claims migrate to those states where compensation is available. However denominated, pleural plaque claims were brought by the thousands and soon billions of dollars in compensation were being paid out to these claimants.

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Tens of thousands of asbestos claims began to inundate the courts, clogging their dockets. To deal with the traffic crisis that they had created, courts decided to build the equivalent of superhighways to accommodate caseload congestion. By use of consolidations, class actions and other aggregative techniques, courts began to dispose of cases by the tens, and then hundreds, and then thousands, in single swoops. This had three effects. First, the defendants confronted “bet the company” scenarios. The possibility existed that a jury in a jurisdiction specially selected by plaintiff’s attorneys because of its propensity for awarding huge amounts to plaintiffs, could award millions in compensatory damages per claimant, and more importantly, tens or hundreds of millions in punitive damages collectively. And so, acting rationally, defendant’s counsel settled the aggregated claims even though many of them, and later most of them, had little or no merit.

Second, plaintiff lawyers had great incentives to include more and more unimpaired claims since defendants were compelled to settle the aggregated cases.

Third, plaintiff lawyers mobilized. They had learned that the greater the number of claims that they brought, the greater the pressure they put on courts to aggregate them,¹⁵ and the greater the pressure on defendants to settle the aggregated claims irrespective of their merits. In response, they used mobile x-ray vans to do mass screenings and engaged in other techniques to collect clients by the droves.

The strategies adopted by the courts to deal with the consequences of their own decisions were thus perverse.¹⁶ They had the exact opposite of the intended effect. The more the courts aggregated asbestos claims in order to clear their dockets, the more claimants the plaintiff lawyers searched out to refill the pipelines and create new pressures to aggregate more groups of claims.

In addition to understanding how pleural plaque claims have been used to perpetuate a fraud on the civil justice system, comprehending the answer to the question I posed at the outset also requires understanding of the role of asbestosis claims. When any of scores of different dust particles penetrate the lung's forward line of defenses, they can produce inflammation that can lead to a scarring of lung tissue.¹⁷ When it does, the condition is termed interstitial or parenchymal "fibrosis."¹⁸ If the fibrosis is the result of exposure to silica (sand), the condition is termed "silicosis;" if it is the result of exposure to asbestos, it is called "asbestosis." There is no difference in these conditions—only the name is different. Asbestosis in its mildest form causes no breathing impairment and, like pleural plaques, is detectable only by chest x-ray. In more severe cases, it is progressive and debilitating and can lead to death.

Frequently, in asbestos litigation, diagnoses of asbestosis are disputed. Some medical experts

hired by plaintiff lawyers virtually always find asbestosis and some hired by defendants rarely find asbestosis. Where does the truth lie? A Federal district court judge substituted court-appointed medical experts for the parties' experts, to examine 65 plaintiffs, each of whom would have been diagnosed by plaintiffs' experts as having asbestosis. The neutral experts found that only 15% had asbestosis and 20% were unimpaired but had pleural plaques. The remaining 65% had no identifiable condition.¹⁹ If this example is characteristic of asbestosis claiming, and there is good reason to believe that it is, then 70% or more of claims currently denominated as asbestosis are simply bogus.

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The role of asbestosis claims in asbestos litigation underwent dramatic changes in the mid-1990s. By then it had become clear that all of the so-called traditional defendants would soon go bankrupt. In a desperate attempt to survive, the CCR, an association of 20 of the leading asbestos defendants that had banded together to jointly defend asbestos litigation suits, sought out and entered into a \$1.2 billion settlement agreement with the nation's leading plaintiff asbestos law firms (save one). The agreement, known in the trade as *Georgine*, provided that, in exchange for setting up an administrative claiming process for adjudication of all future claims, there would be huge payouts for the lawyers' current inventory of 14,000 claims, including their pleural plaque claims, that would net the lawyers approximately \$300 million in fees. This settlement was closely associated with an immediately prior settlement of asbestos claims which netted the plaintiffs lawyers upwards of \$300 million in fees.

The critical feature of *Georgine*, indeed the core reason why the defendants sought out the lawyers and agreed to both settlements, was that there was

to be a zero valuation for future pleural plaque claims. While the settlement agreement was later struck down by the United States Supreme Court,²⁰ it had an almost immediate and immense effect on asbestos claiming.

Plaintiff lawyers began reclassifying their unimpaired pleural plaque claims as asbestosis to defeat the *Georgine* exclusion of pleural claims.²¹ For the Manville Trust, set up as part of the Manville bankruptcy, non-malignancy claims, consisting mostly of unimpaired claims, *have quintupled in the last four years*. In response to this cataclysmic increase in claiming, which forced the Manville Trust to decrease its payment rate from 10 cents on the dollar to 5 cents on the dollar (and a further reduction is clearly in line), the Trust began medical audits of the asbestosis claims being submitted by requiring x-rays, which they then sent out to experts for reading. The audit program demonstrated that several of the law firms were consistently using bogus medical evidence.²² When plaintiff lawyers complained about being required to have to submit x-rays along with their claims, the presiding judge, one of the most sought after federal district court judges in the country by plaintiff lawyers filing certain mass tort actions,²³ instructed the Trust to stop the auditing program and to pay claims as submitted and not subject them to any kind of an auditing procedure.²⁴

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The mass screenings of would-be clients was also facilitated by the establishment of entrepreneurial enterprises to administer pulmonary function tests.²⁵ Given the enormous financial incentives built into the medical evidence production process, it is not surprising that many of these enterprises systemically and deliberately deviate from testing standards in order to produce positive results.²⁶

Even when medical evidence is produced by specialized professionals (radiologists who are called

“B” Readers to recognize a higher level of skill), financial incentives have often overwhelmed professional standards. It is a fact that different asbestos law firms have different disease mixes that characterize their portfolio of claims. There is considerable evidence that some B-Readers conform their outcomes to the preferences of the lawyers that retain them. So, a B-Reader reading 100 x-rays for Law Firm A might find 95% to show evidence of asbestosis, whereas the same reader, reading the same 100 x-rays for Law Firm B and conforming to their disease mix, might only find a 50% rate of asbestosis.²⁷

The engine that drives asbestos litigation is, of course, the contingency fee.²⁸ *Effective hourly rates for plaintiff asbestos lawyers range from \$1,000 an hour to \$25,000 an hour*. In some aggregations, the effective hourly rates of return are much higher. Only contingency fees in tobacco exceed these hourly rates.

In theory, lawyers’ contingency fees ought to vary according to the degree of risk. At the very least, charging 40% contingency fees in cases utterly devoid of risk (as, for example, where by prior settlement, the lawyer automatically bills defendants for payment of new claims), would appear to clearly violate rules of ethics limiting lawyers’ fees to reasonable amounts. In fact, they do not. *This is so because the rules of ethics simply do not apply to fees generated by asbestos lawyers (and, I might add, also do not apply to fees generated for many of these same lawyers wearing their tobacco litigation hats).*

Another example of the exemption of asbestos lawyers from rules of ethics, if not from criminal laws, are the methods used by some lawyers to process the claims of the unimpaired. Once the claimants are recruited by mass screenings and the requisite medical evidence is produced by the B-Readers and other mass medical testing enterprises, the mass processing continues at the law firms where paralegals prepare the clients for deposition.²⁹ If these clients cannot remember

what products they came in contact with 20 and 30 years ago at multiple and various work sites, as many do not, the paralegal will show them pictures of product labels, instruct them as to which products they are to testify they came in contact with, and then give them written information about those products with instructions to memorize that information, because they are going to take a test—it’s called a “deposition”—and if you pass the test, you get money.³⁰

In addition, they are told which products they are to testify that they did *not* come in contact with. These, of course, are the products of companies in bankruptcy that are paying too few cents on the dollar.³¹ They are also instructed to say that they never saw warning labels on the bags containing the products and are reassured that they are not to worry about being challenged with regard to any feature of their testimony, because the lawyers for the defendants have no way of knowing which products they actually used and, therefore, cannot contest *anything* that they say.³² Finally, they are instructed what to say with regard to their adverse health condition. Pages and pages of sample symptoms are provided.³³

In my opinion, previously expressed in the form of an affidavit, this is subornation of perjury. It is also a principal, if not *the* principal, method of processing unimpaired asbestos claims today.

These exemptions, both from the rules of ethics and criminal law, are simply the tip of the iceberg in terms of delineating the influence that these lawyers have come to exert in American society. The final stop, then, in my whistle stop tour is to focus on the leading asbestos litigation lawyers. There is no better indication of their sheer, raw power than the account in the press and elsewhere of how some of these lawyers expressed their opposition to a bill introduced into Congress in late 1998 and re-introduced in early 1999, co-sponsored by more than a 102 Senators and Congressmen that would have set up an administrative process to defer resolution of the claims of “non-

sick” persons until and unless they actually developed an asbestos-related disease.³⁴ As all of us know, the First Amendment to the Constitution of the United States provides that “Congress shall make no law. . . abridging the right of the people peaceably to assemble, and to petition the government for redress of grievances. . .” Note carefully that the First Amendment’s prohibitions do not apply to asbestos lawyers, only to Congress (and the States.) When the proposed legislation to remove unimpaired claimants from the litigation process appeared to be generating a head of steam, the leading asbestos lawyers, representing 80% of pending cases, summoned the defendant companies supporting the bill to a series of meetings at which they informed the companies that unless they withdrew their support for the bill and instead, announced their opposition, they would be put out of business in short order. The threat was more than credible. All of the defendant companies, save one, capitulated.

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I have searched historical records in an attempt to identify groups in U.S. history who have amassed wealth and power comparable to that of the contingency fee lawyers involved in the asbestos and tobacco litigations. The closest approximation I have been able to come up with are the Robber Barons of the late Nineteenth Century. The powers and excesses of the Robber Barons were ultimately curbed by legislative and judicial action. Today’s version exercises far more power than the Goulds and Fisks, or even the Morgans and Rockefellers, ever did. The reality is that our modern-day robber barons, armed with their riches and shielding their naked power from public view with a little help from Hollywood, have come to exercise dominant control over both legislative and judicial processes.

Now that I have completed my whistle stop tour of Asbestos Litigation Land, I can answer the question that I posed at the outset: Why is asbestos litigation increasing at a time when medical science says it should be decreasing?

It is because asbestos litigation today has come to consist, mainly, of non-sick people, suing in jurisdictions where asbestos litigation is one of the main industries supporting the local economy,³⁵ claiming compensation for non-existent injuries, often testifying according to prepared scripts with perjurious contents,³⁶ and often supported by specious medical evidence.³⁷

On the basis of the empirical data and analysis set forth in the articles I have published as well as

other published and unpublished materials, it is my opinion that asbestos litigation today is, for the most part, a massively fraudulent enterprise that can rightfully take its place among the pantheon of such great American swindles as the Yazoo land frauds, Credit Mobilier, and Teapot Dome. The issues posed by asbestos litigation, as practiced today, in my judgment, should be seen less as matters of civil justice reform than as matters of law enforcement. Some years ago, a Federal judge, in addressing the S&L scandals and focusing on the role of professionals in the many fraudulent schemes that were uncovered, asked rhetorically, "Where were the lawyers?" Today, I answer, I think we know where the lawyers are. But where are the prosecutors?

AUTHOR'S NOTE

Empirical data, statements and conclusions set forth in this presentation are largely based upon three articles that I have written on asbestos litigation: *The Asbestos Litigation Crisis: Is There A Need For An Administrative Alternative?*, 13 *Cardozo L. Rev.* 1819 (1992) (hereinafter “*Asbestos Litigation Crisis*”); *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 *Cardozo L. Rev.* 1891 (1992) (hereinafter “*Asbestos Claims Management Proposal*”); and *Lawyers’ Ethics and Fiduciary Obligation In The Brave New World of Aggregative Litigation*, 26 *William & Mary Environmental Law & Policy Review* 243, 271-298 (2001) (hereinafter “*Aggregative Litigation*”). As noted in *Asbestos Litigation Crisis*, some of the data that I relied on for my initial article “was obtained during the course of consulting work on contingency fees and punitive damages that I did for an asbestos defendant; however most of the unpublished empirical data which I refer[ed] to was obtained as part of my research for the Article.... [B]ecause of this and other opportunities I... had to ‘extensively review empirical data, case files and other materials’ on asbestos litigation, the Administrative Conference of the United States [an executive branch agency of the U.S. government] asked me to ‘draft a proposed administrative solution to the asbestos litigation crisis which the panelists at [a] colloquy [that I organized for the Conference] were invited to criticize.” *Id.* at 1819, quoting from Introduction of Lester Brickman by the Chairmen of the Administrative Conference at the colloquy titled: *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States (Oct. 31, 1991).

In editing this presentation for publication, I have added citations to supporting materials where I thought that would be helpful to the reader. Those seeking a more detailed understanding of asbestos litigation, however, may wish to read the articles I have listed above.

END NOTES

1. Roger Parloff, “Asbestos lawyers are pitting plaintiffs who aren’t sick against companies that never made the stuff—and extracting billions for themselves,” *Fortune*, March 4, 2002 at 155.

2. Certain industries have reported huge increases in filing rates. In the past two years, for example, there were increases of 721% in the textile industry, 296% in the pulp and paper industry, and 284% in the food and beverage industry. *Id.*

3. Convincing evidence exists that both the Navy Department and the White House knew that many of the shipyard workers, who were practically bathed in the asbestos installation that they were installing inside the ships, would contract deadly diseases but *c’est la guerre*. In war time, there are casualties and the U.S. Government apparently considered shipyard workers to be on the front lines. *Asbestos Litigation Crisis* at 1884-86.

4. For a description of mesothelioma, see *Asbestos Litigation Crisis* at 1842-44. It is commonly thought that mesothelioma, a particularly virulent malignancy of the pleural, pericardial and peritoneal cavities, is caused exclusively by exposure to asbestos. See, e.g., *O’Brien v. National Gypsum*, 944 F. 2d. 69 (2d Cir. 1991). In fact, approximately 20% of malignant mesotheliomas are not caused by asbestos exposure. Michele Carbone, Robert A. Kratke & Joseph R. Testa, *The Pathogenesis of Mesothelioma*, 29 *Seminars in Oncology* 2 (Feb. 2002); Mark Britton, *The Epidemiology of Mesothelioma*, 29 *Seminars in Oncology* 18 (Feb. 2002).

5. See Paul Brodeur, *OUTRAGEOUS MISCONDUCT* (1985).

6. See *Borel v. Fiberboard Corp.*, 443 F. 2d. 1076 (5th Cir. 1973).

7. See *Asbestos Claims Management Proposal* at 1894 n. 13; *Aggregative Litigation* at 277 n. 105.

8. *Keene Corp. v. Ins. Co. of North America (INA)*, 667 F. 2d 1034 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 951 (1982). See *Asbestos Litigation Crisis* at 1832 n. 51.

9. *Asbestos Litigation Crisis* at 1881-84.

10. *Id.* at 1840-52.

11. *Aggregative Litigation* at 294-95.

12. See *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. 929 (D.V.I. 1991); see also *Asbestos Litigation Crisis* at 1844-47.

13. *Asbestos Litigation Crisis* at 1852; see also Paul Sterk, “Imaging of Pleural Plaque, Thickening and Tumors,” downloaded from UpToDate at www.uptodate.com, last visited April 30, 2002.

14. In a study of power plant workers, See Dr. Joseph M. Miller, *Benign Exposure to Asbestos Among Power Plant Workers* (1990) (unpublished), 172 workers were identified who had had significant exposure to asbestos, 19 of whom retired, 9 had died, 30 declined to enter the study and 114 were still alive, employed at the plant and were agreeable to participating in the study. Eighty percent had exceeded 30 years of latency and the mean latency of all participants was 32 years. The 114 workers were monitored annually from 1982 to 1990. Approximately 43 percent were found to have pleural plaques. Not one had asbestosis. Ninety five percent had no impaired lung function. Six of the seven individuals with slight to moderate reduction in lung function were heavy smokers, whose impairments were not characteristic of asbestosis, and the seventh was an ex-smoker. There was no significant difference in the mean values on lung performance tests between those with pleural plaques and those not found with pleural plaques. Of the 172 workers identified in 1982, 25 deaths had been recorded by

1990. None died of mesothelioma or asbestosis. Two who were heavy cigarette smokers died of lung cancer.

Included in the study was a review of other studies of power plant workers. These other studies showed an increased prevalence of pleural plaques but no significant difference in clinical symptoms or in lung function when compared to a control group. The study concluded: Despite the "... high prevalence of pleural plaques..., the absence of clinical asbestosis, the lack of excess lung cancer and no finding of mesothelioma provide reasonable evidence of low risk to those workers during a full occupational lifespan.... [T]he finding of no significant difference in mean [lung function] among those with and without plaques appear to absolve plaques as a cause of the minimal impairment of respiratory function noted in a few smokers." *Id.* at 7-9. "Only when asbestosis was also detected in association with plaques did the risk of cancer increase, thus signifying heavier asbestos exposure as the cause of increased risk, rather than the mere presence of pleural plaques." *Id.* at 10.

15. *Aggregative Litigation* at 257.

16. *Asbestos Litigation Crisis* at 1826-27.

17. See Ken Donaldson & C. Lang Tran, Inflammation Caused by Particles and Fibers, 14 *Inhalation Toxicology* 5 (2002).

18. *Asbestos Litigation Crisis* at 1846 n. 112.

19. *Id.* at 1847 n. 120.

20. *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'd* 83 F. 3d 610 (3rd Cir. 1996).

21. *Aggregative Litigation* at 284 n.112.

22. *Id.* at 286-92.

23. *Id.* at 264.

24. *Id.* at 290-91.

25. *Id.* at 273 n. 95, 282 n. 110.

26. *Id.* at 282 nn. 110-111.

27. *Id.* at 293 n. 141.

28. *Asbestos Litigation Crisis* at 1834.

29. *Aggregative Litigation* at 273-81.

30. *Id.*

31. *Id.* at 276-77.

32. *Id.*

33. *Id.* at 278-81.

34. *Id.* at 246 n. 13.

35. *Asbestos Litigation Crisis* at 1827; for a discussion of the role of forum shopping in mass tort litigation, see *Aggregative Litigation* at 258-65.

36. *Aggregative Litigation* at 275-81. For a description of the type of testimony that might emanate from the use of such scripts, see *Asbestos Litigation Crisis* at 1848 n. 125.

37. *Aggregative Litigation* at 281-293.

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