Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation

Robin Jones*

I. INTRODUCTION

Asbestos litigation has been snowballing in this country over the past thirty years. There are currently more than 200,000 asbestos lawsuits pending in state and federal courts with thousands more expected to be filed each year.[1] Realizing the current and future effects this massive overload of cases is having on the judicial system, the United States Supreme Court has called for legislative action to help alleviate the problem by regulating asbestos litigation through the creation of a claims processing agency.[2] Congress has attempted to answer this judicial call in the form of the proposed Asbestos Compensation Act of 2000 (ACA).[3] The ACA is an attempt by Congress to reform the entire structure of asbestos litigation, effectively taking the process out of the hands of attorneys and transforming it into a legislatively-established Office of Asbestos Compensation.[4] However, it

* J.D. candidate 2002, Tulane University School of Law; B.A. 1998, University of the South.

1. *Legislative Controversy*, 12 ASBESTOS & LEAD ABATEMENT REPORT, Dec. 1, 2000.

2. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *see also* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 628-29 (1997) ("[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

3. H.R. 1283, 106th Cong. (2000).

4. *Id.*

is unlikely that the ACA will be passed in its current form due to the division it creates between republicans and asbestos company defendants on one side and democrats and allied trial lawyers on the other. Instead of attempting to reform the entire process, Congress should focus on regulating a particularly troublesome aspect of asbestos litigation: diagnosis of asbestos-related diseases.

Congress should establish an agency to regulate the diagnosis of asbestos-related diseases, thereby requiring potential claimants to receive an unbiased agency diagnosis of an asbestos-related disease before proceeding with a claim for monetary damages. Furthermore, in response to placing this high burden on plaintiffs just to get before a court, the legislation should mandate that federal and state courts employ the theory of alternative liability in asbestos cases.[5] This action would place the burden on named defendants to absolve themselves from all or part of the liability for a plaintiff's damages. If these proposals were implemented, the amount of money and time spent on asbestos litigation would decrease, along with the number of frivolous claims and damage payments to undeserving claimants.

This Comment outlines the progression of asbestos litigation up to the present situation of overburdened courts. In addition, it reviews attempts that have been made to regulate or reform asbestos litigation by parties to the litigation, the judicial system, and Congress. The Comment concludes by proposing possible solutions to the principal problems associated with asbestos litigation.

II. THE EVOLUTION OF ASBESTOS LITIGATION

Use of asbestos was popular in industry because of its fire-resistant properties, a trait that was well known even to the ancient Romans.[6] Before the discovery of its ill effects, its popularity as a fire-retardant insulator caused asbestos to be included in myriad products, including brake shoes, cement articles, thermal insulation, and floor tiles.[7] Due to its heavy use in the industrial setting, millions of workers were exposed to asbestos fibers.

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5. *See* BLACK'S LAW DICTIONARY 925 (7th ed. 1999). Alternative liability arises "from the tortious acts of two or more parties—when the plaintiff proves that one of the defendants has caused harm but cannot prove which one caused it—resulting in a shifting of the burden of proof to each defendant." *Id.*

6. DOUGLAS LIDDELL & KLARA MILLER, MINERAL FIBERS AND HEALTH 2 (Douglas Liddell et al. eds., 1991). Ancient Romans used asbestos to enshroud corpses before cremation to facilitate collection of ashes for burial. *Id.*

7. GEORGE A. PETERS & BARBARA J. PETERS, SOURCEBOOK ON ASBESTOS DISEASES: MEDICAL, LEGAL, AND ENGINEERING ASPECTS A4-A7 (1980).

The majority of inhaled asbestos fibers are caught by the body's natural defenses before reaching the lungs.[8] The uncaptured fibers become imbedded in the alveoli of the lung, where scar tissue covers the fibers.[9] The effects of this scarring can be seen anywhere from fifteen to forty years after exposure in the form of asbestos-related diseases, such as interstitial fibrosis (asbestosis), pleural plaques, lung cancer, and mesothelioma.[10] These types of asbestos-related diseases give rise to claims for compensation and the onslaught of asbestos litigation.

The dawn of asbestos litigation in this country occurred in the late 1940s and early 1950s.[11] Initially only insulation workers filed claims for non-malignant asbestos disease.[12] However, by 1982 asbestos cases were being filed at an alarming rate, primarily by individuals with alleged non-malignant asbestos disease.[13] Also in 1982, asbestos manufacturers got a view of what was to become of their industry when Johns-Manville, a Fortune 500 company, filed for bankruptcy as a result of its asbestos liabilities.[14] Since Johns-Manville, over twenty-six major companies have filed for bankruptcy as a result of paying out over $10 billion in settlements for asbestos liability.[15]

With the rapid onslaught of asbestos cases being filed, defendant companies and their insurers began to look for alternative ways to handle the litigation. In 1985, most of America's major asbestos producers got together and created the Asbestos Claims Facility (ACF).[16] In the ACF, all asbestos manufacturer members evenly split the costs of lawyers and settlement payments for all claims filed against any one of them.[17] However, the ACF was short-lived due to internal disputes between manufacturers who felt that they were paying more than their share.[18]

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8. NORWOOD S. WILNER & ALLAN FEINGOLD, ASBESTOS MEDICINE ON TRIAL—A MEDICAL/LEGAL OUTLINE, VOL. 1: NON-MALIGNANT DISEASE 11-14 (1995).

9. *Id.*

10. Lawrence Martin, *Asbestos Lung Disease—A Primer for Patients, Physicians and Lawyers*, *at* http://www.mtsinai.org/pulmonary/Asbestos/asbestos-questions.htm (revised Oct. 2000).

11. *See, e.g.*, Phelps Dodge Corp. v. Ford, 68 Ariz. 190, 190 (1949); Ernest D. Charron's Case, 331 Mass. 519, 519 (1954); M. H. Honeycutt v. Carolina Asbestos Co., 235 N.C. 471, 471 (1952).

12. *Asbestos Litigation 101*, *at* http://www.meso-law.com/Litigation/html (last visited Feb. 9, 2001).

13. *Id.*

14. *Id.*

15. Queena Sook Kim, *Did Broker Settlements Unwittingly Encourage More Plaintiffs' Suits?*, WALL ST. J., Feb. 7, 2001, at B1. Those filing for bankruptcy include, among others, Owens Corning, Armstrong World Industries, and G-I Holdings Inc. *See* Susan Warren, *Grace Considers Chapter 11 Filing amid Rising Asbestos Litigation*, WALL ST. J., Jan. 30, 2001, at A4.

16. Kim, *supra* note 15, at B1.

17. *Id.* at B6.

18. *Id.*

In 1988, several of the former members of the ACF joined forces again to create the Center for Claims Resolution (CCR), which operated in much the same fashion as the ACF.[19] The CCR settled claims in bulk before they went to court.[20] The problem with the CCR's methods was that they did not allow each claim to be scrutinized.[21] Therefore, individuals with minor or no asbestos injuries were collecting amounts similar to those who actually had mesothelioma.[22] The CCR's forays into court were mostly unsuccessful, leaving its members to focus more on settlements.[23] As with the ACF, members soon began dropping out to such an extent that today the CCR exists mainly as a clerical assistant to its remaining members.[24]

In 1990, the federal judiciary made an attempt to resolve the influx of asbestos litigation. Based on the recommendation of several federal judges, the Judicial Panel on Multidistrict Litigation imposed a stay on all asbestos cases pending in federal courts around the country.[25] Therefore, all asbestos cases were transferred to a single judge in Philadelphia for further non-trial proceedings.[26] This essentially brought all asbestos litigation in this country to a grinding halt and caused plaintiffs' attorneys to file suits in state courts.[27]

Meanwhile, in *Georgine v. Amchem Products, Inc.*, the CCR created a settlement agreement for an opt-out class action under Rule 23 of the Federal Rules of Civil Procedure that would settle the claims of between 250,000 and 2,000,000 individuals who had been exposed to asbestos products created by the members of the CCR.[28] This global settlement plan precluded exposed individuals without physical symptoms from bringing claims in the future when the effects of asbestos exposure are manifested.[29] The United States Supreme Court decertified

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19. *Id.*

20. *Id.* The CCR settled over 350,000 claims and paid out more than $5 million on behalf of its members. *Id.* at B1.

21. *Id.* at B6.

22. *See id.*

23. *See id.* In 1998, the CCR was hit with a $48.5 million court verdict, which created the group's fear of adjudication as well as a perception among plaintiffs' attorneys that the CCR was an easy source of money.

24. *Id.*

25. *Asbestos Litigation 101*, *supra* note 12.

26. *Id.*

27. *Id.* The state courts were ill-equipped to handle this new flood of asbestos cases. It took several years for cases to come to trial in state courts as a result of the courts' inability to organize and manage this deluge of cases.

28. 83 F.3d 610, 617 (3d Cir. 1996), *aff'd sub nom*. Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

29. *Id.*

the class under Rule 23(b)(3) due to a lack of adequate representation of unnamed class members.[30]

A few years later, the Supreme Court took up a similar case in *Ortiz v. Fibreboard Corp.*, dealing with a limited fund settlement for a Rule 23(b)(1)(B) mandatory class.[31] Just as before, however, the Court held that certification of the class was improper.[32] In his concurring opinion, Chief Justice Rehnquist made clear the judicial system's frustration with the growing number of asbestos cases filed when he stated that the "'elephantine mass of asbestos cases' . . . cries out for a legislative solution."[33] However, this was not the first judicial cry for legislative help in dealing with asbestos-related claims.

In 1991, the United States Judicial Conference's Ad Hoc Committee on Asbestos Litigation recognized the overwhelming burden created by asbestos litigation for both federal and state courts.[34] According to the committee, the only reprieve from the asbestos litigation problem would have to come from federal legislation.[35] The committee briefly summarized the major drawbacks of asbestos litigation in its report by stating that:

> dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[36]

The committee's report also stated that "[r]eal reform . . . require[s] federal legislation creating a national asbestos dispute-resolution scheme."[37] Based on this report, as well as the continuing flood of asbestos-related lawsuits[38] and the existing potential for a torrent of more

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30. *Amchem Prod.*, 521 U.S. at 591.

31. 527 U.S. 815 (1999).

32. *Id.* at 864-65. The Supreme Court denied class certification based on an insufficient showing that the fund was limited, as well as a failure to establish both the inclusiveness of the class and the equitable treatment of its members. *Id.* at 815.

33. *Id.* at 865.

34. Steven A. Fabbro, *Possible Implications of Georgine for Lindsay Class Action*, MEDICAL-LEGAL ASPECTS OF BREAST IMPLANTS, July 1997, at 3.

35. *Id.*

36. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)).

37. *Id.* (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 3, 27-28 (Mar. 1991)).

38. Approximately 250,000 asbestos lawsuits have been filed to date. Matthew C. Stiegler, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After* Ortiz v. Fibreboard Corp., 78 N.C. L. REV. 856, 857 (2000).

claims to be filed,[39] the Supreme Court made clear in *Ortiz* and *Amchem Products* that legislative action is the best solution to the problems caused by the asbestos litigation deluge.[40]

III. CONGRESS FINALLY TAKES ACTION

Following the Supreme Court's call for legislative reform in *Ortiz*, on March 25, 1999, Representative Henry Hyde introduced into the United States House of Representatives a bill "to establish legal standards and procedures for the fair, prompt, inexpensive, and efficient resolution of personal injury claims arising out of asbestos exposure, and for other purposes."[41] Originally titled Fairness in Asbestos Compensation Act, the Asbestos Compensation Act of 2000 (ACA) is intended to clear the tremendous backlog of asbestos litigation in both state and federal courts by taking the litigation out of the hands of defendant companies and plaintiffs' attorneys and placing it into the hands of the United States Department of Justice.[42]

The ACA proposes the creation of an Office of Asbestos Compensation (OAC) to be headed by an administrator who would appoint a medical director and a trustee to manage an Asbestos Compensation Fund.[43] In addition, the administrator would appoint a Medical Advisory Committee to evaluate medical eligibility criteria and review procedures.[44] Furthermore, an Office of Administrative Law Judges would be created to provide "expedited administrative adjudication of asbestos claims."[45]

To satisfy the medical eligibility requirements under the ACA, a claimant must submit a detailed medical history as well as a medical diagnosis that the claimant is suffering from either a non-malignant condition such as asbestosis or pleural thickening, mesothelioma, lung cancer, or some other form of cancer.[46] Upon being deemed medically eligible, the claimant's named defendants would be required to provide

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39. Thirteen to 21 million workers are estimated to have been exposed to asbestos. *Ortiz*, 527 U.S. at 867 (citing Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 6-7 (Mar. 1991)).

40. *See supra* text accompanying note 2.

41. H.R. 1283, 106th Cong. (1999), *amended by* H.R. 1283, 106th Cong. (2000). On the same day, Senator John Ashcroft introduced a nearly identical bill into the Senate. S. 758, 106th Cong. (1999).

42. *Republican Lawmakers, Trial Lawyers at Odds over Asbestos Tort Reform*, 12 ASBESTOS & LEAD ABATEMENT REP., Dec. 1, 2000. The Act was renamed "Asbestos Compensation Act of 2000" following amendment. H.R. 1283, 106th Cong. (2000).

43. H.R. 1283, 106th Cong. § 101(a), (c)-(d) (2000).

44. *Id.* § 101(f).

45. *Id.* § 101(e).

46. *Id.* §§ 102, 301-305.

both the claimant and the OAC's trustee with a written, good-faith settlement offer. [47] Within ten days of receipt of all the defendants' settlement offers, the trustee would then make an offer of compensation from the OAC to the claimant.[48] Should the claimant accept the trustee's offer, the trustee would assume the claim and have the option of either accepting the defendants' settlement offers, prosecuting the claim against any defendant before an administrative court, or prosecuting the claim in any federal or state court.[49] Should the claimant reject any of the defendants' settlement offers as well as the trustee's offer, he or she can appeal to an administrative court for action within ninety days or opt out of administrative proceedings and file suit in federal or state court.[50]

The ACA eliminates an asbestos personal injury claimant's right to assert a cause of action based on enhanced risk of a future condition.[51] In addition, the ACA limits punitive damages to three times the amount of compensation awarded in an administrative proceeding. It also requires the claimant to establish "clear and convincing evidence that the conduct carried out by the defendant was a conscious, flagrant indifference to the rights or safety of others [and] was the proximate cause of the harm that is the subject of the asbestos claim."[52] Conversely, the ACA abolishes defenses based on laches, statute of limitations, or any other defense based on the timeliness of a claim.[53]

Despite passing through the House Judiciary Committee, it is not likely that the ACA will ultimately succeed.[54] Not only has the Senate failed to accept the amendments of the House Judiciary Committee, but there is also a great deal of conflict between the majority of republicans and asbestos companies who favor the bill and democrats and trial

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47. Plaintiffs would identify potential defendants in the following manner:

> [A]fter receiving a certificate of medical eligibility . . . a claimant shall provide, with respect to each person that the claimant alleges is responsible for the injury claimed, a verified particularized statement of the basis for the allegation that the person is or may be responsible for the injury. The particularized statement shall include such information as the Administrator may require for the purpose of providing the defendant with a reasonable basis for making an offer of settlement.

Id. § 103(a)(2). Settlement offers must be made within twenty-one days following the naming of all defendants. *Id.* § 103(b)(1)-(2).

48. *Id.* § 103(b)(2).

49. *Id.* § 104.

50. *Id.* §§ 105-106.

51. *Id.* § 208(d).

52. *Id.*

53. *Id.* § 203.

54. H.R. REP. NO. 106-782 (2000) (recommending the amended version of H.R. 1283 be passed by the entire House).

lawyers, who adamantly oppose the bill.[55] The democrats and trial lawyers believe the bill will relieve culpable asbestos companies of much of the liability that should be assigned to them as well as prohibiting "60-80 percent of asbestos victims from seeking [the] compensation" they deserve.[56] However, supporters of the ACA say that it is necessary to ensure that the limited amount of available money goes to those who are truly sick and to restrict plaintiffs' attorneys from "trolling" for clients who may have a history of asbestos exposure, but show no sign of injury.[57]

Because of the stark differences of opinion occurring in relation to the proposed asbestos litigation reform legislation, chances appear bleak that the current bill will become law. The likely failure of this present piece of legislation, coupled with the recent disfavor placed on mass class action settlements by the Supreme Court,[58] leaves one to wonder just what can be done to corral the ever-expanding and controversial accumulation of asbestos litigation.[59]

IV. SEARCHING FOR SOLUTIONS TO THE PROBLEMS SURROUNDING ASBESTOS LITIGATION

The current proposed legislation is overly ambitious. It attempts to provide a grand solution to the problem of asbestos litigation, but this task is next to impossible because the politics of asbestos are stratified. Thus, it seems that incremental changes, as opposed to comprehensive legislation, are the most realistic means of regulating asbestos litigation. These changes can be achieved through both legislative and judicial action.

A great deal of the resources expended on asbestos litigation goes to determining whether a plaintiff does indeed have an asbestos-related disease.[60] Typically, a diagnosis determination creates a major controversy between the parties, with each side giving reasons as to why

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55. *See Senate Asbestos Bill Is Dead for the Year, Majority Leader Says*, 14 FED. & STATE INS. WEEK, Apr. 10, 2000.

56. *Legislative Controversy*, 12 ASBESTOS & LEAD ABATEMENT REP., Dec. 1, 2000; *see also* Michael Posner, *House Judiciary Tentatively OKs Major Asbestos Illness Payment Measure*, NAT'L J. NEWS SERV., Mar. 15, 2000.

57. *Senate Asbestos Bill*, *supra* note 55.

58. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

59. Asbestos litigation has become a gainful source of income for attorneys. Thus, plaintiffs' lawyers are now widening their hunt for possible defendants by pursuing companies with only a casual link to asbestos. Over 2000 companies, including IBM and Ford, face some type of asbestos lawsuit. *See A Trail of Toxic Torts: Fresh Asbestos Trouble for Insurers: A New Wave of Asbestos Claims Is Hitting Insurers*, ECONOMIST, Jan. 27, 2001, at 74.

60. *See* WILNER & FEINGOLD, *supra* note 8, at 1.

the plaintiff does or does not have an asbestos-related disease.[61] One incremental step toward pre-empting this kind of dispute would be for Congress to establish an agency assigned to determine medical eligibility to file a claim for personal injury damages resulting from asbestos exposure.[62] This would limit the number of claims filed to only those that are legitimate.

Further, legislative action should be taken to require judicial adoption in federal and state courts of the theory of alternative liability in asbestos cases.[63] Alternative liability can be used when two or more parties committed tortious acts resulting in harm to the plaintiff, the plaintiff is able to prove at least one of the defendants is responsible, but the plaintiff is unable to say exactly which one.[64] Once the plaintiff shows one of the defendants' acts is to blame for his damages, the burden shifts to the defendants to prove that they were not responsible.[65] Application of this theory in asbestos cases would place the burden on defendant asbestos companies and employers to prove that they were not responsible for a plaintiff's exposure to asbestos. This higher burden on defendants would compensate for the higher burden placed on plaintiffs through the creation of the medical eligibility process.

A. Regulating the Diagnosis of Asbestos-Related Diseases

Diagnosis of asbestos-related disease is a major problem in litigation because courts do not allow for plaintiffs to recover strictly based on exposure.[66] This is because if recovery were based on exposure alone, there would be an even greater flood of claims into the courts.[67] In addition, it would seem that under the exposure theory of damage recovery, smoking and non-smoking plaintiffs with similar exposure levels would receive the same amount despite the fact that the smoker has lung cancer and the non-smoker might show no signs of an asbestos-related disease. Therefore, proof of diagnosis of an asbestos-related

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61. *See* Lawrence Martin, *Pitfalls in Diagnosis of Occupational Lung Disease for Purposes of Compensation—One Physician's Perspective*, 13 J. L. & HEALTH 49, 51 (1998).

62. *See* H.R. 1283, 106th Cong. §§ 201, 301-305 (2000) (creating medical eligibility criteria within the ACA).

63. *See* Summers v. Tice, 33 Cal. 2d 80, 80 (Cal. 1948) (introducing the theory that allows for the burden to shift to defendants to prove themselves not liable when it appears that multiple defendants are culpable but it is difficult to determine which particular party caused injury to the specific plaintiff).

64. BLACK'S LAW DICTIONARY 925 (7th ed. 1999).

65. *Id.*

66. *See* Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 424 (1997) (denying plaintiff damages for emotional distress resulting from asbestos exposure because no physical damage had been shown).

67. *See supra* note 39.

disease is the key element in a plaintiff's case. Without proof of diagnosis, there is no opportunity for recovery.

The bulk of the current backlog of asbestos claims involves plaintiffs with a history of exposure to asbestos who have a chest x-ray that shows signs of a possible asbestos-related disease.[68] These claims are often filed by plaintiffs' attorneys who search for clients by holding mass screenings of asbestos-exposed workers.[69] The x-rays are then sent to a certified B-reader for review. A B-reader is a physician who has demonstrated "proficiency in the classification of chest x-rays for the pneumoconioses using the International Labour Office (ILO) Classification System."[70] B-readers are required to pass a difficult exam administered by the Appalachian Laboratory for Occupational Safety and Health before becoming certified.[71] There are currently 634 certified B-readers and each is required to recertify every four years after initial certification.[72]

The B-readers hired by plaintiffs' attorneys almost always review the x-rays without ever having seen the worker or having any knowledge of the worker's medical or exposure history.[73] Since the plaintiff's attorney is paying their bill, a bias is created, preventing the B-reader from objectively reading the x-ray, and instead reading it in search of an asbestos-related disease.[74] Once a possible asbestos-related disease is discovered, the attorney is alerted and quickly files a claim on behalf of the worker against any known asbestos supplier to the worker's plant.[75] These ill-informed, B-reader diagnoses become the main issue of contention throughout the litigation process, costing defendants considerable time and money to refute. In fact, a very small percentage of abnormal chest x-rays that do reflect remote asbestos inhalation are uncovered through this screening process.[76] Because these plaintiffs with false diagnoses are often lumped in with plaintiffs who are actually

68. WILNER & FEINGOLD, *supra* note 8, at 1.

69. *See* Raymark Indus. v. Stemple, 1990 U.S. Dist. LEXIS 6710 (D. Kan. 1990) (showing attorneys had used "examobiles" with x-ray equipment inside to conduct screenings of 100 to 150 tire workers per day for asbestos-related disease at the tire plant).

70. National Institute of Occupational Safety and Health, *The B Reader Examination*, *at* http://www.cdc.gov/niosh/pamphlet.html (last updated May 22, 2000) [hereinafter *B Reader Examination*]; *see also* 42 C.F.R. § 37.51(b) (2000) (setting forth B-reader requirements).

71. *B-Reader Examination*, *supra* note 70.

72. *Id.*

73. Martin, *supra* note 10.

74. *Id.*

75. *Id.*

76. *Id.*

suffering from an asbestos-related disease, their claims end up taking money away from claimants with a real disease.[77]

There are several problems that arise under the aforementioned plaintiff diagnosis method. The primary claim brought in asbestos cases is that the plaintiff is suffering from the non-malignant asbestos-related disease asbestosis.[78] In looking to establish uniformity in the diagnosis of asbestosis, the American Thoracic Society (ATS) published a statement in 1986 describing the diagnostic features of asbestosis.[79] For a diagnosis of asbestosis, the ATS standard requires an exposure to asbestos with a sufficient latency period, plus one or more of either a chest x-ray, pulmonary function testing, breath sounds, or diffusion capacity, as well as an exclusion of "competing or confounding causes of any abnormalities observed."[80] Many physicians feel that this ATS diagnosis standard is too limiting and often diagnose a plaintiff using a more liberal diagnosis method.[81] As a result of the application of these more liberal diagnosis standards, plaintiffs are over-diagnosed with asbestosis.[82] This means that their symptoms and abnormal chest x-ray could be and likely are attributable to some non-asbestos-related ailment, but because of the similarities to asbestosis and because the plaintiff's attorney is paying their bill, these B-readers or physicians use a "more probable than not" standard to diagnose the worker with asbestosis.[83]

The symptoms of asbestosis are not unique to the disease and are shared with several other ailments.[84] The primary symptom that manifests itself with asbestosis is dyspnea, or shortness of breath.[85] Dyspnea is a very nonspecific symptom and can be caused by various diseases of the heart, lungs and circulation as well as poor conditioning and cigarette smoking.[86] Furthermore, studies of asbestos claimants have shown that "dyspnea is most commonly associated with obstructive lung disease and coronary heart disease, not asbestosis."[87] In addition, every other clinical sign associated with asbestosis, including pulmonary function test restrictions, rales, and reduced diffusion capacity all have

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77. *Id.*
78. WILNER & FEINGOLD, *supra* note 8, at 1.
79. *See* American Thoracic Society, *The Diagnosis of Non-malignant Diseases Related to Asbestos*, 134 AM. REV. RESPIRATORY DISEASES 363, 363-68 (1986).
80. WILNER & FEINGOLD, *supra* note 8, at 24-25 (citing American Thoracic Society, *supra* note 79, at 363-68).
81. Martin, *supra* note 10.
82. *Id.*
83. *See* Martin, *supra* note 61, at 53.
84. WILNER & FEINGOLD, *supra* note 8, at 39-41.
85. *Id.* at 40-44.
86. *Id.* at 41-42.
87. *Id.*

alternate causes.[88] Even with the numerous symptomatic similarities between asbestosis and countless other conditions, the primary means for diagnosis is still the chest x-ray.[89]

Asbestosis produces a thickening or scarring of the lung tissue between the alveoli of the lung.[90] When a significant amount of lung tissue is damaged by the fibrosis or scarring, it will be indicated on a chest x-ray by abnormal shadows that occur as a result of the x-ray beam coming in contact with the fibrosis as it passes through the lung.[91] The difficulty is that there are several other things that can cause shadowing on a chest x-ray besides asbestosis.[92] Cigarette smoking, poor film quality, incomplete inspiration, and obesity are just some of the things that can produce shadows on an x-ray similar to those created by asbestosis. [93] Therefore, a physician looking to diagnose an individual with asbestosis can easily construe any of these causes for x-ray shadowing to be the result of asbestosis.[94] The alternative causes of shadowing on chest x-rays in connection with both the non-specific symptoms of asbestosis and the lack of adherence to a uniform standard of diagnosis by all physicians leads to significant problems in the diagnosis of asbestosis.[95] All of these factors contribute to the mass diagnosis of asbestosis that has occurred in this country and is the primary reason for the current "elephantine mass" of asbestos litigation currently flooding the courts.[96]

As a result of these one-sided diagnoses and countless other existing and arguable diagnostic variables, a majority of the time and money spent in asbestos litigation goes towards arguing over the

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88. *Id.* at 38-41. Total lung capacity decreases can be attributed to heart disease, chest wall disease or musculoskeletal diseases, among others. Rales, or crackling in the lungs, can also be caused by pneumonia, congestive heart disease, or chronic obstructive pulmonary disease, among others. A reduced diffusion capacity can be attributed to heart diseases, emphysema, chronic bronchitis, anemia, or tobacco use, among others. *Id.*

89. The ATS called the chest x-ray the "most valuable examination" in the diagnosis of asbestosis. *Id.* at 85 (quoting American Thoracic Society, *supra* note 79, at 363-68).

90. *Id.*

91. *Id.*

92. *Id.* at 114.

93. Cigarette smoking cannot only cause shadowing, but also a reduced diffusing capacity, rales or crackles, and lung cancer, all of which can be attributed to asbestos exposure. *Id.* at 300. Poor film quality can result from a technical error by the radiologist or movement of the subject during the taking of the x-ray among others. *Id.* at 115. Incomplete inspiration occurs as a result of the subject failing to take a full breath so that the lungs are expanded during the taking of the x-ray. Excess fat in the chest wall is not as radiolucent as lung tissue, so areas overlaid by fat appear to have shadowy markings. The same is true for large pectoral muscles. *Id.*

94. *See* Martin, *supra* note 10.

95. *See id.*

96. *See* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 591 (1997).

existence of an asbestos-related disease. Therefore, this is the area where Congress should focus its legislative regulation, as opposed to trying to rework the entire system.

Congress should establish a Medical Asbestos Commission (MAC), based on parts of the OAC and organized much like the Equal Employment Opportunity Commission (EEOC), that is designed to regulate the diagnosis of asbestos-related disease.[97] Using the $250 million start-up appropriation and subsequent $150 million yearly budget payment set aside for Congress's proposed Office of Asbestos Compensation, Congress should create a MAC consisting of physicians and administrators, devoted solely to the MAC, who would evaluate all asbestos claims on a medically diagnostic level to determine their legitimacy before they are filed.[98] The MAC would consist of an administrative wing and a medical department. The administration would be in charge of the processing and paper work surrounding each asbestos disease claim filed with the MAC. The medical department would consist of approximately 250 physicians, with about half being radiologists who are all National Institute for Occupation Safety and Health (NIOSH) certified B-readers, and the other half being physicians who have proven their knowledge of asbestos-related diseases. Each potential plaintiff who wants to file a claim would be required to submit a quality "1" chest x-ray along with detailed medical and exposure histories to the MAC for review.[99] In addition, similar to the ACA's proposal, all existing claims that have already been filed but are not within six months of trial would be required to submit a quality "1" x-ray to the MAC for a determination of the medical legitimacy of their claim.[100]

Once the chest x-ray is submitted, it would be reviewed separately and individually by three of the MAC's NIOSH B-readers using some diagnostic methods proposed by Dr. Lawrence Martin to help insure uniform and unbiased x-ray interpretations.[101] The B-readers would grade the x-rays using the NIOSH standard interpretation form without knowledge of whose x-ray it is or the individual's exposure or medical

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97. Title VII of the Civil Rights Act of 1964 created the EEOC. *See* 42 U.S.C. § 2000e-2000e(17) (1994); JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 25 (David L. Shapiro et al. eds., 1983).

98. *See* H.R. 1283, 106th Cong. § 403 (2000).

99. Quality "1" classification refers to the film quality of the x-ray, with "1" being a good quality x-ray which does not add any technical difficulties to the process of film interpretation. Quality "1" x-rays are easily obtained at hospitals or other permanent facilities. WILNER & FEINGOLD, *supra* note 8, at 87-88.

100. *See* H.R. 1283 § 501(b) (2000).

101. *See* Martin, *supra* note 10.

history.[102] Furthermore, at least 20% of the x-rays submitted to the B-readers for review would be of individuals who have never been exposed to asbestos.[103] These two steps, in addition to the fact that they would not be paid directly by either party would help ensure that the B-readers give a knowledgeable and unbiased interpretation.[104] If two of the three B-readers came to the conclusion that the chest x-ray did not exhibit signs of an asbestos-related disease, that individual would be barred from filing a personal injury claim for monetary damages based on asbestos exposure. Should at least two of three B-readers conclude that the chest x-ray does display signs of an asbestos-related disease, however, that individual's medical and exposure history would then be reviewed.[105] If this raised any doubt as to the existence of an asbestos-related disease in the individual, he or she would be required to submit to a physical exam by MAC physicians and, if necessary, a pulmonary function test or CT scan.[106] Should a reasonably certain diagnosis of an asbestos-related disease based upon the ATS standard occur upon completion of the MAC's review, the claimant could proceed in filing a claim for monetary damages stemming from his asbestos-related disease. With regard to deceased claimants, their medical records, past x-rays and autopsy report, if available, could be used to determine the eligibility of their claims.

In the event that two of three B-readers believed that no asbestos-related disease exists, that claimant would be unable to file a suit for monetary damages. The individual could file a medical monitoring claim in court, and with sufficient evidence of adequate asbestos exposure, recover the costs of future medical testing under that claim.[107] Furthermore, any claimant who is denied the right to file a claim for monetary damages because of no sign of an asbestos-related disease would be entitled to resubmit a new quality "1" x-ray one year after the date of the prior rejection of his medical eligibility, even if that claimant had recovered under a medical monitoring claim. Resubmissions to the MAC would be treated like first time submissions, in that they would be

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102. *See id.* The NIOSH standard interpretation form is available at http://www.cdc.gov/niosh.omb-0920.html (last visited May 11, 2001).

103. *Id.*

104. *See id.*

105. *See id.*

106. *See id.*

107. Medical monitoring recovery strictly provides for the cost of periodic future medical testing to detect latent diseases such as those diseases attributed to asbestos exposure. *See* Theresa A. DiPaola & Gary W. Roberts, *Back to the Future: Recognition of "Medical Monitoring" Claims in Florida*, 74 FLA. B.J. 28, 28 (Dec. 2000).

evaluated by the B-readers without any knowledge of the individual's prior medical, exposure, or MAC submission history.

Primarily, the government would fund all operations of the MAC. However, should a medically eligible claimant recover monetary damages in court, a portion of the plaintiff's attorney's fees would go to the MAC. Plaintiffs' attorneys would not be allowed to increase their contingency fee to compensate for payment to the MAC.

The creation of the MAC to evaluate the legitimacy of asbestos claims would help to solve a number of problems caused by asbestos litigation. It would save millions of dollars by eliminating the expert versus expert battle over the claimant's diagnosis because the diagnosis would come from one unbiased source, using a universally accepted standard for diagnosis of asbestos-related disease.[108] In addition, by requiring submission of all possible claims to the MAC, diagnosis would be taken out of the hands of the plaintiff's hired B-reader whose potentially biased diagnosis allows the plaintiff to get into court more easily.[109] Furthermore, no claimant would be denied the right of access to the courts if the MAC denied them medical eligibility to file a claim. These claimants would be entitled to file a medical monitoring claim to recover the costs of future medical testing, in addition to being able to resubmit to the MAC once a year. This system would help put an end to mass screenings that are inevitably followed by the mass claim filings that have lead to the current backlog in the court system. By requiring that a claimant be granted medical eligibility before filing a claim for monetary damage, the number of illegitimate claims in the court system would be drastically reduced. This would help ease the burden on the currently overburdened court system. Further, by taking out the expert versus expert battle, the length of the litigation process would be greatly reduced. Moreover, defendant asbestos companies would no longer have claims of fraud against plaintiff law firms.[110] Finally, by reducing the number of claims as well as litigation costs, more money would be

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108. American Thoracic Society, *supra* note 79, at 363-68.

109. *See* Martin, *supra* note 10; *see also* Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 362 (1998) (explaining that jurors often misunderstood the development of asbestosis, in that they believed that it was progressive and fatal in all cases).

110. *See* Raymark Indus. v. Stemple, 1990 U.S. Dist. LEXIS 6170, 6170 (D. Kan. 1990) (alleging that attorneys contrived and fraudulently processed over 6000 false claims of injury due to asbestos exposure); *see also Asbestos Attorneys' Alleged Litigation Tactics Form Basis for Extortion Claims*, 16 CIV. RICO. REP., Feb. 1, 2001 (stating that G-I Holdings, Inc. sued several prominent asbestos plaintiff attorneys and their firms for orchestrating a scheme to flood the judicial system with hundreds of thousands of asbestos cases without consideration for their legitimacy).

available for those plaintiffs who truly have been damaged by asbestos exposure.[111]

Congressional creation of a commission like the MAC is not the only thing that must occur. Since a higher burden would be placed on plaintiffs by requiring them to go through the MAC for determination of their medical eligibility, they should be entitled to some type of relief once they arrive in court. This relief should come in the form of the installation of alternative liability in asbestos cases in both state and federal claims.

B. Shifting the Burden

Currently, the generally-accepted burden of proof for plaintiffs in asbestos cases is evidence that exposure to a defendant's products was a "substantial factor" in contributing to the cause of plaintiffs' asbestos-related damages.[112] This burden should be shifted to defendants under the theory of alternative liability, requiring them to show that they did not cause or contribute to plaintiffs' injuries.

Originally, the theory of alternative liability was raised in *Summers v. Tice*.[113] In that case, the plaintiff filed suit against two defendants for an injury to his eye resulting from a shotgun blast.[114] The plaintiff was injured after both defendants simultaneously fired identical shells from like shotguns.[115] The plaintiff was unable to distinguish which defendant's gun fired the shell that injured him.[116] Thus, the court reasoned that because both defendants were negligent, the burden should be placed on each of them to absolve himself of liability if possible.[117] The theory of alternative liability, as it is understood by the courts, requires that "the burden shift[] to the defendants to prove themselves not liable when it appears that multiple defendants are culpable but it is difficult to determine which particular guilty party caused injury to a specific plaintiff."[118] Currently, courts are reluctant to apply this theory of liability to asbestos cases. Courts often state that the theory does not

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111. Only an estimated 39¢ of every dollar awarded goes to the injured plaintiff in the suit. The remaining 61¢ of each dollar goes to attorney fees and other transaction costs. Ortiz v. Fibreboard Corp., 527 U.S. 815, 867 (1999) (citing The Judicial Conference Ad Hoc Committee on Asbestos Litigation 13 (Mar. 1991)).

112. *See* Kennedy v. S. Cal. Edison Co., 219 F.3d 988, 996 (9th Cir. 2000); Sounder v. Owens-Corning Fiberglass Corp., 939 F.2d 647, 650-51 (8th Cir. 1991).

113. 199 P.2d 1, 1 (Cal. 1948).

114. *Id.* at 1-2.

115. *Id.* at 1-3.

116. *Id.*

117. *Id.* at 13-14.

118. Sounder v. Owens-Corning Fiberglass Corp., 939 F.2d 647, 650 (8th Cir. 1991).

apply because under the theory, all possible defendants must be before the court.[119] This problem can easily be resolved.

Shifting the burden from an injured plaintiff to defendants in an asbestos case would occur after the plaintiff established a prima facie case. This would be done by presenting the plaintiff's diagnosis from the MAC establishing the reasonably certain existence of an asbestos-related disease. Furthermore, the plaintiff would be required to show evidence of all defendants who were responsible for any asbestos in his workplace during the span of his employment. Following these showings, the burden would then shift to the defendants to exonerate themselves from liability completely or produce evidence that they are liable for some fraction of the damages. Until absolving itself from some or all of the liability, a defendant would be jointly and severally liable for the plaintiff's damages.[120] It would be possible for more defendants to arise through discovery, or be implicated by existing defendants. This would release the plaintiff from the difficult burden of demonstrating each defendant's contribution to his damages.[121] Furthermore, it is ordinarily the defendants who are in a better position to provide evidence of who in fact was responsible for the plaintiff's injuries.[122] The defendants are in possession of all the business records and other documentation, as well as the knowledge as to what was used, by whom, and its likely effects. Because defendants would no longer be able to dispute the diagnosis of the plaintiff, they could focus all of their legal resources on relieving themselves of liability.

V. CONCLUSION

Despite the Supreme Court's request, Congress's proposed legislation is not a realistic answer to the problems created by asbestos litigation.[123] The politics surrounding asbestos litigation are far too divided for this grand legislative resolution to be accepted by all. Therefore, Congress should act to create a commission to regulate the diagnosis of asbestos-related diseases. It is this area where a significant portion of the time and money devoted to asbestos litigation is spent. Requiring approval by the MAC before being allowed to file suit places a

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119. Kennedy v. S. Cal. Edison Co., 219 F.3d 988, 994 (9th Cir. 2000); Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203, 1216 (Cal. 1997).

120. *See* BLACK'S LAW DICTIONARY 926 (7th ed. 1999) (stating that under joint and several liability, "each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from nonpaying parties").

121. *See* Menne v. Celotex Corp., 861 F.2d 1453, 1466 n.19 (10th Cir. 1988).

122. *See* Summers v. Tice, 199 P.2d 1, 10 (Cal. 1948).

123. *See* H.R. 1283, 106th Cong. (2000); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 815 (1999); Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 591 (1997).

higher burden on plaintiffs. Upon a MAC diagnosis of an asbestos-related disease, however, the plaintiff's burden, after showing which defendants were possibly responsible for his exposure, should be met. Once the defendants have been named, the courts should be legislatively required to employ the theory of alternative liability, thereby placing the burden on the defendants to prove that they were not the cause, or only partly the cause, of the plaintiff's injury. These two actions (congressional creation of the MAC and the legislative implementation of alternative liability) would help to alleviate the problems relating to time and money spent, filing of frivolous claims, and unfair compensation for victims of asbestos exposure.