

# THEORIES OF ASBESTOS LITIGATION COSTS – WHY TWO DECADES OF PROCEDURAL REFORM HAVE FAILED TO REDUCE CLAIMANTS’ EXPENSES

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*In twenty years of asbestos litigation, procedural reforms at all levels of the civil litigation system have failed to reduce plaintiffs’ attorneys’ fees. The result has been dramatic undercompensation of asbestos tort victims. This paper attempts to explain this remarkable fact using economic methodology. The paper offers three theories: First, that the continuing difficulty of assessing causation in asbestos and other mass tort cases predictably impedes the efforts of procedural reform to reduce costs; second, that changes in defendant and insurer risk attitudes have generated costly litigation; third, that collusion of plaintiffs’ attorneys to maintain prices cannot be ruled out. Each of these theories has some empirical support. Further, regardless of which turns out to be correct, the continuing high costs of civil litigation mean that resolution of asbestos claims through the bankruptcy system will predictably harm future claimants, an unfair outcome. In the final assessment, civil procedure reform, the favored mechanism for resolving the asbestos case backlog, cannot achieve its objectives. Rather, reform must take into account substantive law and the motives and incentives of actors in the legal system. Holistic analysis of this type lends support to a comprehensive administrative remedies scheme, which has the best chance of decreasing the costs of compensation.*

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## INTRODUCTION

In response to the asbestos crisis in America's civil litigation system,<sup>1</sup> courts at all levels have reinvented civil procedure and substantive tort doctrine. The goal was to reduce both private and public costs of resolving asbestos claims. By now, it is possible to collectively label these efforts failures. The civil justice system never did decrease the costs of resolving asbestos claims. Rather, the task was left to the bankruptcy system, which appears to have reduced costs substantially. Increasingly, pre-packaged bankruptcy petitions, submitted already approved by the asbestos defendants and their tort claimants, announce mass settlements of all claims, present and future.<sup>2</sup> What incapacitated the civil justice system from adapting to the crisis? Why are plaintiffs' costs of recovery for asbestos torts the same now as they were in 1985?<sup>3</sup>

Over the past two decades, courts have adopted inventive means to try to reduce claimants' expenses. Aggregation techniques – among them mass consolidation, class actions, multi-district litigation, pleural registries, standardized pretrial orders, and collateral estoppel – have all been attempted or applied to resolve the mass of asbestos claims. Despite all the judicial creativity, a thorough survey of litigation costs, using confidential information, finds that plaintiffs' fees have not declined at all since the onset of the asbestos litigation phenomenon.<sup>4</sup> This observation suggests that something is amiss in how we think about efficiency in litigation – I argue that the theory of the procedural reforms was misguided, and that practical barriers unique to the asbestos context thwarted what chance of success there was. By analyzing the asbestos procedural reforms, this Article attempts to clarify some of the tradeoffs and possibilities in civil justice reform.

This Article offers three possible answers to the mystery of static plaintiffs' costs. First, substantive tort doctrine created substantive bottlenecks that prevented efficient settlement of claims.<sup>5</sup> Because the procedural reforms could not, or at least did not, address the key substantive issues in asbestos lawsuits – causation and exposure – the reforms could not reduce claimants' expenses in any significant way. Second, risk-loving defendants and insurers generated far more litigation than they would have if they had been risk neutral.<sup>6</sup> Because a large percentage of asbestos defendants were insolvent and

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<sup>1</sup> The Supreme Court described colorfully modern asbestos litigation as an "elephantine mass." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). That description was charitable, for an elephantine mass can eventually diminish in size. An unending deluge, to me, seems more apt.

<sup>2</sup> Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1754 (2002) ("Bankruptcy is the only generally recognized legal vehicle that is currently available for imposing finality on a defendant's asbestos liability. Perhaps because of this, there have been more asbestos-related bankruptcy filings since 2000 than in either of the two prior decades.").

<sup>3</sup> STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 103 (RAND, Institute for Civil Justice 2005). See also *infra* Section I.

<sup>4</sup> CARROLL ET AL., *supra* note 3, at 103.

<sup>5</sup> See *infra* Section II.

<sup>6</sup> See *infra* Section III.

therefore willing to take excess risks,<sup>7</sup> and because their insurers, who normally would have checked them, were at their policy limits, and therefore were also willing to take excess risks, asbestos defendants extended litigation and drove up costs. The results of defense-side risk-seeking are more litigation, slower settlements, and higher costs for plaintiffs to recover. Third, plaintiffs' attorneys may have colluded to maintain high prices even in the face of falling costs.<sup>8</sup>

This Article proceeds as follows. Section I outlines the problem of stable plaintiffs' costs in the face of numerous procedural reforms designed to combat those costs. Sections II, III, and IV then discuss the three theories for why those costs have not fallen.

Section V closes, arguing that the persistent failure of procedural reform proves that prepackaged bankruptcies, sometimes seen as the solution to the asbestos problem, are certain to be highly inequitable. The inability of the civil justice system to solve the asbestos crisis inspired creative lawyers to use the bankruptcy system to resolve asbestos claims wholesale.<sup>9</sup> That the bankruptcy system has succeeded against the backdrop of high civil litigation costs reveals something about the bankruptcy system, with troubling implications. Specifically, the bankruptcy system must have offered plaintiffs' attorneys, the principals in asbestos litigation,<sup>10</sup> at least as much as they could have received from the civil justice system. Because the bankruptcy trusts cap attorneys' fees at a lower percentage than they could obtain in civil litigation,<sup>11</sup> the plaintiffs' attorneys could only have achieved the same wealth by transferring dollars from future claims to present ones. This reveals a tremendous inequity in the way pre-packaged bankruptcies treat the futures problem.

## I. THE PROBLEM

The RAND study of the asbestos problem examined confidential information in the hands of defendants to determine the amount of money allocated to plaintiffs' attorneys in an asbestos action.<sup>12</sup> In the twenty years from 1982 to 2002,

[n]one of the people we interviewed said they had seen any evidence that claimants' attorney contingent fee rates had been reduced to reflect changes in the litigation. Plaintiff attorneys may have recognized savings from routinization of the litigation (e.g., the widespread use of administrative payment schedules). However, none of

<sup>7</sup> CARROLL ET AL., *supra* note 3, at 109 (identifying seventy-three asbestos-related bankruptcies, with firms going bankrupt at an increasing rate).

<sup>8</sup> See *infra* Section IV.

<sup>9</sup> CARROLL ET AL., *supra* note 3, at 119-21.

<sup>10</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1373-78 (1995); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997) ("[A]lthough litigants, not lawyers, must ultimately decide whether to accept a settlement offer or to demand adjudication, our experiments provide some illustrative support for the belief that lawyers have the ability – at least under some circumstances – to persuade litigants to approach the settlement-versus-trial decision from the lawyer's preferred analytical perspective.").

<sup>11</sup> CARROLL ET AL., *supra* note 3, at 128.

<sup>12</sup> *Id.* at 4.

those we interviewed suggested that any of these savings have been passed on to claimants. Similarly, the people we interviewed generally said that they had not observed any reduction in claimants' other legal expenses.<sup>13</sup>

The number stayed constant at approximately 34% of gross compensation, defined as the amount paid out to the plaintiff net of defense costs.<sup>14</sup> The importance of this finding cannot be overstated. In a system designed over the course of decades to reduce transactions costs, plaintiffs' transactions costs remained exactly the same. Charles Silver has pointed out that the low net compensation for asbestos claims, relative to, say, auto injury claims, need not indicate anything wrong with the system.<sup>15</sup> Rather, asbestos cases could be more complex than other tort cases, or more effective at weeding out false claims (albeit at high cost).<sup>16</sup> But though these factors might explain an initially high level of plaintiffs' transactions costs, they do not explain the complete stasis of those costs over time. Procedural reform was supposed to reduce those costs, and certainly two decades should have been enough time for the positive effects of those reforms to be felt.

Defense transactions costs, by contrast, decreased dramatically, from a high of 59% of gross compensation in 1986 to 20% in 2001, the last year of the study.<sup>17</sup> Any explanation for the stable costs to plaintiffs must also account for the decrease in costs to defendants. RAND offers one explanation – a decrease in collateral litigation among defendants and insurers.<sup>18</sup> This is plausible, since defendants in the early days had to pursue multiple lawsuits to resolve one claim as a result of contribution actions against other defendants and coverage litigation against insurers.<sup>19</sup> However, once principles of allocation and indemnity were settled, the need for this litigation disappeared.<sup>20</sup> Manufacturing defendants and their insurers have now reached standard allocation agreements amongst themselves, where a given claim is allocated among liable parties on a percentage basis.<sup>21</sup> This obviates the need for costly collateral litigation. Plaintiffs do not need such agreements, because principles of joint and several liability decrease the need to recover from more than one defendant. Since it is difficult to determine whether the procedural reforms or the end of most collateral litigation was responsible for the decline in defense transactions costs, this Article analyzes the two independently.

The Manville Trust, the model on which most bankruptcy asbestos trusts are based, contrasts starkly with the failed civil litigation system.<sup>22</sup> The Manville Trust caps plaintiffs' lawyers' fees at 25% of the payout.<sup>23</sup> Other

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<sup>13</sup> *Id.* at 103.

<sup>14</sup> *Id.* at 102.

<sup>15</sup> Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2079 (2002).

<sup>16</sup> *Id.*

<sup>17</sup> CARROLL ET AL., *supra* note 3, at 96.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 110-11.

<sup>23</sup> Lester Brickman, *Ethical Issues in Mass Tort Litigation*, 33 HOFSTRA L. REV. 833, 842 n.28 (2005).

bankruptcy trusts appear to impose similar caps.<sup>24</sup> As a result, the costs to the plaintiff of pursuing a claim against a bankruptcy trust are much lower than the costs of pursuing the same claim through civil litigation.<sup>25</sup> Defense costs under this process drop precipitously, while plaintiffs' costs drop, though less.<sup>26</sup> The key feature of the Manville Trust is an accelerated claims-handling procedure. Plaintiffs are required to file sufficient information to place them in a metaphorical grid that contains seven categories, relating to the amount of provable exposure and the severity of their symptoms.<sup>27</sup> The system is not adversarial in the same fashion as the civil justice system, because elements such as causation that would be contested in court are not necessary to claim against the trust. As a result, defense costs declined even farther than plaintiffs' costs, to five percent of total payouts, according to RAND.<sup>28</sup> The Manville Trust provides a helpful data point. Something about the procedural reform implemented there proved superior (at least as to cost) to the civil litigation system. As I will explain, the Manville Trust mechanism succeeds because it dispenses with extensive proof of causation and exposure, two costs that the asbestos litigation system has so far failed to reduce.

As plaintiffs' costs remained the same, courts were showing unprecedented procedural dynamism in an attempt to rapidly move asbestos claims through the system. The innovations were both procedural and substantive.

The procedural reforms largely entail aggregation of asbestos claims by one method or another. Aggregation is one of the hallmarks of modern civil procedure,<sup>29</sup> and naturally these methods were applied to asbestos. Various forms of aggregation were attempted; though some were rejected as unfair on appeal,<sup>30</sup> some forms continue to be used. Aggregation works by compiling similar issues from different cases and deciding them at once. As Sherman pointed out, all of the various aggregation techniques share this feature. The impetus for aggregation is the savings from "eliminating duplication and providing economies of scale."<sup>31</sup>

The most popular aggregation technique for asbestos cases in the state courts is the consolidated trial.<sup>32</sup> Dozens to hundreds to thousands of plaintiffs, with claims of varying degrees of similarity, are joined into a mega-trial, which is usually divided into several phases dealing with issues such as general causa-

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<sup>24</sup> *Id.*

<sup>25</sup> CARROLL ET AL., *supra* note 3, at 97.

<sup>26</sup> *Id.*

<sup>27</sup> Manville Personal Injury Settlement Trust, Proof of Claim Form (2002), <http://www.mantrust.org/FTP/POC02.PDF> [hereinafter Manville Claim Form].

<sup>28</sup> CARROLL ET AL., *supra* note 3, at 97.

<sup>29</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1291 (1976).

<sup>30</sup> *E.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 864-65 (1999); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998).

<sup>31</sup> Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 237 (1991).

<sup>32</sup> Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1868-70 (1992).

tion, liability, and defenses. Settlement is the usual outcome in these cases, as in all large-scale aggregations of tort claims.<sup>33</sup>

In the federal system, the Judicial Panel on Multidistrict Litigation ordered federal asbestos cases to be consolidated for pretrial proceedings under the multi-district litigation system ("MDL").<sup>34</sup> Judge Weiner heard all pretrial motions in connection with the consolidated cases.<sup>35</sup> This task now resides with Judge Giles in the Eastern District of Pennsylvania.<sup>36</sup> In the MDL process, cases pending in district courts across the country are consolidated in front of a single transferee judge for pretrial proceedings, including discovery and motions for summary adjudication. No comparable device exists on the state level, though certain reformers have proposed that it should.<sup>37</sup>

Sampling for purposes of damages was attempted in *Cimino*.<sup>38</sup> This method attempted to avoid the need to individually determine each plaintiff's damages. Rather, a statistical sample was taken of the plaintiffs in the case; the damages suffered by the sample were extrapolated to estimate the damage for the whole class. Each plaintiff then received the damages predicted by the sampling technique, rather than her actual damages.

Litigants attempted class action settlements on two occasions; both attempts were rejected by the Supreme Court.<sup>39</sup> Both *Ortiz* and *Amchem* found that the class action mechanism did not adequately protect the rights of future claimants: in *Ortiz* because the "common pool" theory under which the case was brought allocated too small a pool to satisfy all the claimants; and in *Amchem* because the future claimants were inadequately represented, and the claims were too dissimilar. The rejection of the class action settlements in those cases illustrates a fundamental feature of aggregation techniques, which is that some amount of fairness, in all cases procedural fairness (as measured by the process traditionally available) and in some cases substantive fairness, is sacrificed in order to resolve the claims more economically.

Equally common are docketing reforms, such as the use of pleural registries or consolidated pretrials. Pleural registries in particular have gained steam as a way to prioritize the claims of the sickest plaintiffs.<sup>40</sup> A pleural registry is a docketing maneuver used to deal with claimants who claim asbestos expo-

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<sup>33</sup> George L. Priest, *Procedural Versus Substantive Controls of Mass Torts Class Actions*, 26 J. LEGAL STUD. 521, 522 (1997).

<sup>34</sup> 28 U.S.C. § 1407 (2006).

<sup>35</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 422-424 (J.P.M.L. 1991).

<sup>36</sup> Shannon P. Duffy, *Companies Seek Dismissal of Thousands of Asbestos Cases*, THE LEGAL INTELLIGENCER (2006), available at [www.law.com/jsp/law/LawArticleFriendly.jsp?id=1149843922549](http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1149843922549).

<sup>37</sup> See AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 4.01 (1994).

<sup>38</sup> *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 664 (E.D. Tex. 1990), *rev'd* 151 F.3d 297 (5th Cir. 1998).

<sup>39</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864-65 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>40</sup> See *In re All Asbestos Litig.* Filed in Madison County, Order Establishing Asbestos Deferred Registry (Madison County Cir. Ct., Ill. Jan. 23, 2004).

sure, but who have not yet developed significant symptoms.<sup>41</sup> Their claims are docketed so that their claims will not become time-barred. However, litigation does not advance until they develop actual symptoms.

Judges have attempted to use standardized procedures for handling individual asbestos cases, such as standard interrogatories, rules on service of process, and standing orders.<sup>42</sup> The goal behind these reforms is the same as other aggregation techniques: to create economies of scale by deciding issues once for a large group of cases, rather than deciding the same issues for each individual case.

Other procedural tools, interestingly, have not been used – collateral estoppel, even as to general defenses like the state-of-the-art defense, has been denied.<sup>43</sup> The state-of-the-art defense was one of the original eleven defenses in the seminal *Borel* case, the first case to find asbestos manufacturers strictly liable for failure to warn of the dangers of asbestos.<sup>44</sup> Manufacturers in that case advanced the state-of-the-art defense, arguing that at the time of *Borel*'s exposure, scientific research had not yet demonstrated that asbestos caused cancer.<sup>45</sup> Hence, the manufacturers argued against the imposition of strict liability for failure to warn. *Borel* was a landmark case because the defense was rejected, opening the floodgates to subsequent litigation. Despite the importance of *Borel*, the Fifth Circuit regarded the issues in asbestos cases, including the viability of the state-of-the-art defense, as too dissimilar to one another to constitute the "same issue" for the purposes of collateral estoppel.<sup>46</sup> This is part of a general trend that will become clear – despite the enormous number of asbestos cases, procedural expediency, not substantive clarity, is the order of the day. For instance, even though numerous cases have rejected manufacturers' state-of-the-art defense, it continues to be relitigated to this day.<sup>47</sup> The mechanisms for resolving asbestos cases en masse have not succeeded, precisely because they have not created sufficiently clear substantive guidelines for when a claimant can collect.

The goal of procedural reform is to achieve economies of scale. It is thought that by resolving common issues on a collective basis, litigants save time and money. Courts also preserve judicial resources by considering common issues only once. As commonsense as this theory is, it must reckon with the fact that plaintiffs' transaction costs declined not a whit in the wake of

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<sup>41</sup> The term "pleurel" refers to the pleurel lining of the lung, which is the target of most asbestos related cancers. A spot on a lung x-ray usually is the catalyst for a new asbestos claim, although such a spot does not necessarily predict future disease.

<sup>42</sup> See Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Mass Tort Litigation*, 33 TORT & INS. L.J. 127, 129 (1997).

<sup>43</sup> *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 345 (5th Cir. 1982) (finding that the variety in asbestos claimants' situations rendered the use of issue preclusion unfair).

<sup>44</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1081, 1091-1102 (5th Cir. 1973).

<sup>45</sup> For a detailed discussion of the state-of-the-art defense, see PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 42 (1985).

<sup>46</sup> *Hardy*, 681 F.2d at 345.

<sup>47</sup> Some manufacturers have offered to waive the state-of-the-art defense to avoid a punitive damages instruction. This suggests an awareness that the defense is likely futile, but a willingness in general to litigate the defense. See Rice & Davis, *supra* note 42, at 131.

wholesale procedural reform in the asbestos context.<sup>48</sup> Either unexpected *diseconomies* of scale canceled out the gains, or the projected economies did not materialize for the plaintiffs.

The next Sections will put forth and analyze three possible explanations for the static transactions costs for plaintiffs with asbestos claims. As will become clear, the theories often complement one another, and so should not be viewed as competitors, but as different angles on the same problem. One claim is that the courts' failure to clarify substantive law mooted procedural reforms.<sup>49</sup> A second claim is that the insolvency of defendants, combined with claims at the policy limits of their insurers, caused excessive risk taking, driving up costs of litigation.<sup>50</sup> Since litigation costs are the opportunity costs of settlement, high litigation costs increase attorneys' fees, even when cases are ultimately settled. A third claim is that asbestos plaintiffs' attorneys have successfully combined to maintain high prices, even in the face of hypothetical savings.<sup>51</sup>

Before proceeding, it is worth briefly considering several simple but ultimately unsatisfying explanations for stable plaintiffs' costs. One such possibility is that the price of resolving an asbestos claim has remained the same simply because nothing has happened to change the conditions that set that price. In microeconomic equilibrium under conditions of perfect competition and constant costs, prices remain the same.<sup>52</sup> If those conditions are met, then identical prices are to be expected, both among sellers and over time.<sup>53</sup> One difficult feature of antitrust enforcement is precisely this feature: benign forces and malignant forces will have the same effect – uniform prices – only at different price levels.<sup>54</sup> With no "true" price for comparison, the reality can be elusive. The question becomes even more difficult when market conditions are in flux, because combinations of shifts in supply and demand can produce stable price levels that are consistent with either cartel pricing or stable equilibrium.<sup>55</sup> The asbestos litigation situation is clearly a case of shifting market conditions. Equilibrium simply cannot be the answer here, for the civil justice system has been in unprecedented flux at all court levels since the onset of the asbestos phenomenon. If plaintiffs' lawyers face identical costs now as they did in 1985, it could only be because equal forces pull in opposite directions, and not because there are no forces at all. The only other alternative is a malicious attempt to maintain prices despite the changing market conditions.

Another simple answer would argue that defendants have achieved economies of scale over time, as they develop expertise dealing with asbestos claims.

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<sup>48</sup> CARROLL ET AL., *supra* note 3, at 103.

<sup>49</sup> See *infra* Section II.

<sup>50</sup> See *infra* Section III.

<sup>51</sup> See *infra* Section IV.

<sup>52</sup> JOHN B. TAYLOR, *ECONOMICS* 65-68 (2d ed. 1998).

<sup>53</sup> *Id.*

<sup>54</sup> See *infra* Section III.

<sup>55</sup> This is one of the fundamental theoretical difficulties in empirical economics. Models with enough moving parts to be good explanations of the phenomenon under study can be somewhat indeterminate when applied to a particular situation. The same problem applies when those economic models are then applied to legal matters. For this reason, I have had to content myself with three explanations of the stable costs phenomenon, instead of just one.



Plaintiffs, since each is involved in only one claim (or a few, in jurisdictions allowing later claims), do not have the chance to develop such expertise. They are not repeat players, and therefore cannot reap the benefits of returns to scale. This analysis would confirm the understanding underlying the procedural reforms that have been undertaken. That understanding was that by doing things once that would otherwise have to be done for each case, the system would save money and quickly resolve cases. The argument just presented extends the economies of scale argument from the judicial system as a whole and attributes economies of scale to the defense, but not the plaintiffs' side.

If true, differing litigant economies of scale would produce the result of declining defense costs and stable plaintiffs' costs. However, this argument misunderstands the nature of modern asbestos litigation. Asbestos plaintiffs' lawyers are repeat players on a massive scale.<sup>56</sup> The status of an asbestos plaintiffs' lawyer is judged by his "inventory," the number of claimants he has under contract.<sup>57</sup> Lawyers have created mechanisms for mass screenings of claims.<sup>58</sup> The same legal arguments are used again and again. Indeed, while the number of asbestos defendants has ballooned to some 8400 or more in recent years,<sup>59</sup> the size of the asbestos plaintiffs' bar remains startlingly small.<sup>60</sup> Whatever economies there might be should certainly appear as much on the plaintiff side as the defendant side. The equal sophistication of the parties to the average asbestos lawsuit forces us to look for different explanations for why plaintiffs, but not defendants, have such high costs.

#### A. *Method – the Importance of Settlement*

To understand the asbestos litigation phenomenon, one must understand settlement. It is surprising, then, that so many commentators have instead focused on the relatively tiny number of cases that go to trial. As has been pointed out before,<sup>61</sup> many procedural reforms have a nominal purpose of streamlining litigation, but have the latent purpose of encouraging settlement. A mass trial, for instance, should not be seen as a way to resolve the dispute (since an actual trial most likely will never happen), but as a feature of the landscape in which settlement talks occur.

Since the majority of asbestos cases settle,<sup>62</sup> and the costs of settlement should be comparable from one case to another, the decision to litigate rather than settle is a primary driver of the overall costs of the system.<sup>63</sup> That is, for purposes of analysis, the costs of settlement can be regarded as negligible.<sup>64</sup> In

<sup>56</sup> See CARROLL ET AL., *supra* note 3, at 23-24.

<sup>57</sup> See *id.* at 129.

<sup>58</sup> *Id.* at 47.

<sup>59</sup> *Id.* at xxv.

<sup>60</sup> See *infra* Section IV.

<sup>61</sup> See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

<sup>62</sup> See Korobkin & Guthrie, *supra* note 10, at 77, 83 (discussing high rate of settlement and possible difference between lawyer and litigant attitudes).

<sup>63</sup> See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 557-58 (1989).

<sup>64</sup> Small settlement transactions costs are a fair assumption with regard to asbestos cases, while they might not be in others. Partially because both the plaintiffs' attorneys and the

turn, the costs of litigation in a given area determine the likelihood of settlement and thus the net costs and compensation. Litigation constitutes the opportunity cost of both sides. Since the transaction costs of a settlement are low otherwise, the costs of litigation should be the primary determinant of cost levels and allocations in settlement. Settlement, then, is a crucial aspect of the asbestos phenomenon. Though much has been written on the attempted nationwide class settlements in *Ortiz*<sup>65</sup> and *Amchem*,<sup>66</sup> both of the class action settlements were rejected.<sup>67</sup> The majority of asbestos cases proceed individually or as smallish joined proceedings. Settlement, not trial, is the final stop for the huge majority of cases.<sup>68</sup> This is not to say that procedural reforms in the civil justice system are unimportant – they are. But they are important not necessarily on their own terms, but for the shadow they cast on settlement negotiations between the parties. The true measure of a litigation reform is how it alters settlement dynamics, and not how it affects the minute number of cases that are actually tried under its rules.

The link between settlement and the detailed dynamics of litigation suggests that the two cannot be understood in isolation. In this Article, I will attempt to induce from known facts about settlement to theories about the litigation process that generates those facts. Because litigation is the causal agent behind settlements, the maker can be known by its makings. The high price of attorney services in asbestos settlements is the fact – from that fact, plausible theories can be generated about the character asbestos litigation must possess in order for that fact to be true.

## II. THEORY 1: PROCEDURAL INNOVATION, SUBSTANTIVE UNCERTAINTY

This Section presents a first theory – that the uncertainty in application of the causation standards in asbestos litigation guts the effectiveness of procedural reform.

### A. *The Model, and the Pitfalls of Procedural Reform*

The standard law and economics model of settlement states that the likelihood of settlement is dictated by two factors – the joint costs of proceeding forward, and the spread in the parties' valuations of the likely judgment.<sup>69</sup> The parties settle when the sum of the plaintiff's costs,  $C_P$ , and defendant's costs,  $C_D$ , of proceeding are greater than the difference between the plaintiff's valuation,  $V_P$ , and defendant's valuation,  $V_D$ .

$$C_P + C_D > V_P - V_D$$

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defense attorneys have settled so many claims, the actual mechanics of settlement, once the parties' expectations on the value of the case have converged, should be relatively costless.

<sup>65</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

<sup>66</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>67</sup> *Ortiz*, 527 U.S. at 864-65; *Amchem*, 521 U.S. at 597.

<sup>68</sup> CARROLL ET AL., *supra* note 3, at 45.

<sup>69</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 609 (5th ed. 1998); Priest & Klein, *supra* note 61, at 4.

The spread in valuations is the potential prize of going forward,  $V_P - V_D$ . That prize is worth pursuing, however, only if it is greater than the joint costs of going forward,  $C_P + C_D$ . Parties will settle otherwise, in effect using the savings from settlement to fill in the gap of their valuations of the case.

This simple model provides a surprising amount of leverage in deciding the likely effect of procedural reforms on litigation. In general, procedural reforms that lower the cost of proceeding deeper into the litigation (for instance technological efficiencies in docket management) inhibit settlement because they lower the joint costs of proceeding,  $C_P + C_D$ . At the margin, then, disputes with smaller spreads in valuation become candidates for further litigation. After all, why not go forward when there is so much to gain, and the costs so low? Mathematically, when  $C_P + C_D$  decreases, while the valuation spread,  $V_P - V_D$ , remains the same, a smaller set of term values will satisfy the settlement condition. The surprising implication is that a set of procedural reforms may actually decrease total judicial efficiency, because more cases will be litigated deeper into the process. The increased number of cases brought (for bringing cases becomes economical when it previously would not have been) drives up costs, and the system re-equilibrates, under some conditions at the exact same level of delay and cost as before.<sup>70</sup> The effect on the overall costs of the system is ambiguous; it is possible that the per-case savings will outweigh the costs of administering the larger number of cases that are brought under the lower cost structure. It is equally possible that the overall costs of the system will increase. To see why, suppose that the plaintiff's valuation of a case is 4, and the defendant's is 3. Initially, the cost of going forward to determine the actual value of a case is 2. Under this set of circumstances, the case should settle. Neither the defendant nor the plaintiff will pay 2 in order to obtain information about the value of the claim. Thus, the 2 is never paid, and the case settles costlessly. Now suppose that judicial reform greatly accelerates the process, so that the cost of going forward is now .5. The settlement range has constricted, and now neither party will settle. Each is willing to pay the .5 in order to get extra information about the value of the claim. Since the .5 is now actually paid, rather than merely threatened, the cost of the system has increased.

This example is rigged, of course, but the principle should be clear. Procedural reforms not only might fail to bring costs down, but might increase them. These sorts of reforms predictably, then, tend not to achieve the desired effects.

In a different set of cases, real improvement is possible. Allowing parties to determine rapidly the true value of cases encourages settlement, because it decreases the spread in party valuations of the case. This increases the range of cases where the joint costs are greater than the spread in valuations, and so cases settle more frequently. Mathematically,  $V_P - V_D$  decreases, and so the set of term values that will satisfy the settlement condition increases. These reforms can be procedural or substantive. A substantive rule providing absolute liability, for instance, would result in a drastic decrease in judicial caseload, because parties would have no incentive to litigate a whole set of

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<sup>70</sup> See Priest, *supra* note 63, at 557.

issues; since valuation is easier, cases should settle more often. Procedural reforms that allow faster or earlier determination of key issues can increase settlement as well. Such reforms might also reduce litigation costs; to the extent they do, they provide an incentive to litigate further. However, to the extent they provide greater and earlier certainty in outcomes, such reforms lower the spread in valuation of the litigation looking forward, and therefore encourage settlement. Popular alternative dispute resolution techniques, such as early neutral evaluation, attempt to provide confidence as to the likely value of a case.<sup>71</sup> The idea is to promote settlement by lowering the valuation spread. If done according to theory, early neutral evaluation seems an unambiguously cost-reducing step. Summary judgment, on the other hand, can be seen as an ambiguous reform. Greater certainty is achieved earlier in the process as to the valuation of the claim, but the reduced probable cost of going to summary judgment rather than a whole trial might discourage settlement. The balance of these two effects determines the effect on the likelihood and timing of settlement and, therefore, the overall transactions costs of a system after summary judgment is introduced.

For a certain set of claims, the costs of litigation are greater than the anticipated verdict for either party to the litigation. However, those suits may still settle for a positive value, even when both parties have an expectation of a zero judgment for the plaintiff. In fact, these cases are overwhelmingly likely to settle, because the spread in valuation is minimal and the costs high. These "strike suits" may constitute a very large portion of the asbestos docket.<sup>72</sup> The RAND study came forward with the shocking finding that a huge proportion of the asbestos docket consists of plaintiffs who are not currently impaired.<sup>73</sup> These cases may well be affected by purely procedural efficiency, because the costs they are able to inflict are the source of their settlement value. However, the effectiveness of procedural reform, as will become clear, depends on the system reliably coming to the correct substantive conclusion: that these cases are in fact meritless. If, as I suggest below, these claims have a highly uncertain value, procedural reforms will not generally have the desired effect. The uncertainty makes the likelihood of settlement impervious to certain levels of procedural reform, because the litigation costs will outweigh the valuation spread even after the reforms have been undertaken.

The law and economics model also has certain normative implications. Settlement is applauded under the model, because by definition it entails lower costs than litigation. There are no tradeoffs, because there is no cost-justified procedure that will result in greater certainty on the underlying value of the claim. When the dispute has no externalities, settlement is therefore to be encouraged. Savings to the public, often a goal of procedural reform, is not within the model, but is certainly important. Again, when the dispute has no externalities, public expenditures are pure loss.

Another important feature of parties' litigation decision is that the parties decide whether to settle or go forward at every stage of the litigation, so it is

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<sup>71</sup> RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION* 944 (4th ed. 2004).

<sup>72</sup> CARROLL ET AL., *supra* note 3, at xxi.

<sup>73</sup> *Id.*

possible that reforms have cross-cutting effects on the likelihood of settlement. A reform of the early stages of litigation might decrease the rate of settlement by lowering costs, while a change in substantive law might decrease uncertainty, thus increasing the likelihood of settlement. The combination of these reforms is factored in at each stage, ignoring sunk costs. So, after summary judgment, for instance, the question is whether the *remaining* uncertainty in trial outcome justifies the joint cost of going to trial. If not, the parties will settle, irrespective of what they would have done if summary judgment were not an option.

If the spread increases, meaning that uncertainty rises, then litigation becomes more attractive, unless there is an even larger increase in the costs of going forward. If the spread declines, then participants' assessments of the trial outcome converge, and settlement becomes more likely. If costs of going forward rise, the impulse is to settle, because the difference in valuation is not worth the candle of going deeper into litigation. If costs decline, litigation increases. If both costs and valuation spread rise, the results are ambiguous, as if costs and spread both decrease.

With asbestos, the reforms have predominantly consisted of the purely procedural type, which decreases the joint costs of going forward in the litigation.<sup>74</sup> The goal has been to lower the cost of taking a claim to completion. The model is clear that when this happens, the result is more litigation, not less.<sup>75</sup> It is important to discuss the form that "more litigation" is likely to take, however. Commentators have claimed that this procedural efficiency is the direct cause of the enormous number of new asbestos claims.<sup>76</sup> This assessment cannot be correct without more, because the model does not say anything about the filing of claims, only their resolution. Because filing is so inexpensive and has the feature of preserving the claim against limitations periods, it is more likely that the filing of claims has to do with attorneys' beliefs that their claims are colorable under the operative *substantive law*. As a simple example, suppose that the district courts become tremendously speedy and efficient at resolving patent claims. That does not mean that I will bring a patent claim. What it might mean is that I will pursue deeper litigation of the claim should it be colorable to begin with.

Thus, certain kinds of procedural efficiency should not affect the bringing of claims. The *combination* of costs and substantive rules, however, can create the impetus for more claims. For instance, a judicial ruling abolishing the need for proof of causation would surely cause more claims to be brought. However, such a rule would not necessarily cause the judicial system to be overburdened; the burden would depend on the remaining uncertainty in litigation. An avalanche of newly-filed claims could be met with an avalanche of settlement of equal magnitude. The judicial system would suffer from some added paperwork, but no great amount of agony. The number of claims and the cost of resolving claims must be analyzed discreetly.

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<sup>74</sup> *Id.* at 28-30.

<sup>75</sup> See Priest & Klein, *supra* note 61, at 12-13.

<sup>76</sup> Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

As an example of how the model deals with procedural reforms, take consolidation of trials. Consolidation certainly does lower the per claim cost of proceeding deeper into the litigation and completing the trial. To that extent, consolidation should increase the prevalence of proceeding to trial. Additionally, the multiplication of the parties presumably multiplies the spread in expected values by the same amount. Because this multiplier is greater than the cost multiplier, the chances of proceeding increase. This observation could explain the RAND report's finding that most trials proceed on a consolidated basis.<sup>77</sup>

Alternatively, consolidation could decrease the gap in party valuation. Consolidation might result in more certain plaintiffs' verdicts because the trial will emphasize the claims of plaintiffs with the clearest entitlements to recovery, or because the fact of consolidation causes juries to assume wrongdoing. If consolidated trials result in more certain plaintiffs' verdicts, then consolidated cases will tend to settle, since there is nothing to be gained from proceeding forward. However, this quick settlement does not occur because of procedural reform, but rather the substantive skew that results from the change.

As this discussion has hopefully made clear, many procedural reforms have the perverse effect of lowering litigation costs and encouraging resort to litigation rather than settlement; the overall costs of the system might even increase as a result of the changes. It should not be surprising, then, that such procedural reforms have failed to produce the desired effects. Other procedural reforms are not really procedural at all, but are ways to change the substantive law by adjusting the nature of each party's proof. These reforms might increase the chance of settlement, but should not be read as purely procedural matters.

### *B. The Need for Substantive Clarity*

The structure of the settlement model suggests that bottlenecks can occur: that is, an issue that is an important but small component of the legal proof can prevent settlement, so long as that factor controls the parties' valuation spread. Procedural reforms that lower the cost of proceeding without addressing this substantive issue certainly will not decrease overall transaction costs, and may increase them. As this Subsection will argue, asbestos litigation contains just such a substantive bottleneck. As a result of the difficulty in proving legal causation of injury, the valuation of a claim is tremendously uncertain until fairly late in the proceedings.

The savings in transactions costs in the Manville Trust can be directly attributed to the Trust's elimination of the causation bottleneck. A simple regime of exposure and duration has replaced the open-ended standards favored by courts at all levels of the judiciary.<sup>78</sup> The Manville claim form is ten pages long, and the meat of the claim can be disposed of in a page or two.<sup>79</sup> Since the standards for recovery depend on heuristic rules as to exposure and disease category, rather than a case by case proof of medical and legal causation, valua-

<sup>77</sup> CARROLL ET AL., *supra* note 3, at 36.

<sup>78</sup> See Manville Claim Form, *supra* note 27, at 4.

<sup>79</sup> *Id.* at 4-5, 10.

tion of a claim is straightforward, and the transaction costs to all sides therefore decrease dramatically.

The most effective reforms to promote settlement and clear dockets are those that lower the likely spreads of the parties' expected values. This is accomplished by bringing parties' expectations into alignment at an early point in the proceedings, or, perhaps, before the proceedings have even begun. One way to do so is to provide clear substantive rules, which allow parties to predict liability at an early stage. If the rule is clear enough, the spread is zero, and the parties certainly settle. Another substantive reform is early identification of meritless claims. Quick identification of such claims reduces the nuisance value of the suits and transactions costs on both sides.

A fundamental failure of asbestos reform has been the courts' inability or unwillingness to clarify the issues of causation and exposure. This is the central issue in the majority of asbestos trials,<sup>80</sup> now that area-wide defenses, such as the state-of-the-art defense, have been rejected.<sup>81</sup> Because causation ultimately determines liability or non-liability, it is the bottleneck of asbestos litigation.<sup>82</sup> In cases where the claimant is presently unimpaired, causation is even more difficult, because the claimant lacks symptoms that give rise to an inference of asbestos exposure. These cases constitute the large majority of the asbestos docket.<sup>83</sup> In a given case, parties can come to very different conclusions on the value of a claim, and so there is benefit to parties to go relatively far into litigation prior to settling the claims.

Some commentators assume that because asbestos litigation is "mature,"<sup>84</sup> courts can easily apply the legal standards.<sup>85</sup> While this assumption is tempting, it is also untrue. The courts have provided only porous standards for evaluating the amount of exposure or the proof of causation.<sup>86</sup> Even the

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<sup>80</sup> "The element of legal causation in asbestos personal injury cases is the premier hurdle for asbestos victims." Brian M. DiMasi, Comment, *The Threshold Level of Proof of Asbestos Causation: The "Frequency, Regulatory and Proximity Test" and a Modified Summers v. Tice Theory of Burden-Shifting*, 24 CAP. U. L. REV. 735, 738 (1995).

<sup>81</sup> See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1092 (5th Cir. 1973).

<sup>82</sup> Steve Gold, Note, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence*, 96 YALE L.J. 376, 376-77 (1986) ("Proving the cause of injuries that remain latent for years, are associated with diverse risk factors, and occur at background levels even without any apparent cause, is the 'central problem' for toxic tort plaintiffs."); Simcha David Schonfeld, Note, *Establishing the Causal Link in Asbestos Litigation: An Alternative Approach*, 68 BROOK. L. REV. 379, 383 (2002) ("[I]t is often difficult to prove that exposure to any specific asbestos product was the cause of plaintiff's injuries. Most asbestos plaintiffs were exposed to numerous products and cannot conclusively prove that their injuries are the result of one specific product over another. To allow for recovery in virtually any asbestos case, therefore, courts would be required to relax the standard causation requirements. Noting this dilemma, many courts have done just that.").

<sup>83</sup> CARROLL ET AL., *supra* note 3, at 73-75.

<sup>84</sup> McGovern, *supra* note 76, at 607.

<sup>85</sup> "Asbestos mass tort litigation is somewhat anomalous because the trial of individual asbestos claims is fairly simple now that the law surrounding them is settled." Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 566 (1991).

<sup>86</sup> Jack B. Weinstein, *Foreword to* ERIC STALLARD ET AL., *FORECASTING PRODUCT LIABILITY CLAIMS: EPIDEMIOLOGY AND MODELING IN THE MANVILLE ASBESTOS CASE* xvi (2005) ("We need more objective tests.").

articulation of the standards is enough to demonstrate that they provide no real clarity without a detailed factual analysis in every case. In Ohio, a prime asbestos litigation jurisdiction, the *Lohrmann* test states “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.”<sup>87</sup> This test does not specify how much exposure, how regularly, for how long, or how close to where the plaintiff worked is necessary to prove causation. Further, proving each of those factors only gives rise to an *inference* of causation, which presumably may be rebutted, though the means for doing so are again unclear. In Washington, a plaintiff must establish a “reasonable connection between the injury, the product causing the injury, and the manufacturer of that product.”<sup>88</sup> Other jurisdictions have adopted variations on this theme, adopting standards like the

“substantial and direct causal link” test. . . . the “inference of exposure” test; the “substantial contributing cause” test; a standard “requir[ing] the plaintiff to show that he was exposed to a defendant’s asbestos-containing product by working with or in close proximity to the product”; and a standard that requires the asbestos product to play “a role in the occurrence of the plaintiff’s injuries.”<sup>89</sup>

In Texas, the state with the largest number of asbestos filings, juries are routinely given causation instructions like this: Were the defendants’ defective products “a producing cause of [plaintiff’s] mesothelioma? . . . ‘[p]roducing cause’ means an efficient, exciting, or contributing cause that, in a natural sequence, produced the injury.”<sup>90</sup> This requires more than showing an elevated epidemiological risk,<sup>91</sup> but beyond that, the Texas courts have provided no additional guidance on what is necessary or sufficient to prove causation.

The difficulty in proving asbestos disease causation is not held in common with other torts. The long latency of asbestos diseases means that the plaintiff often is held to proof of events that took place long in the past.<sup>92</sup> Moreover, some asbestos diseases are indistinguishable from diseases caused by other factors.<sup>93</sup> Asbestos causal uncertainty is thus in a distinctive category, even among toxic torts.

The uncertainty from the causation standards has come in two forms: first, there is very little information that a plaintiff can give to *prove* causation and exposure in a summary stage, and second, there is nothing a defendant can do to *disprove* causation at a summary stage. Though perhaps unenunciated rules of thumb<sup>94</sup> may have developed in the course of processing so much litigation, the rules themselves seem unusually flexible in their application. In evaluating an asbestos claim, the plaintiff and the defendant must, however,

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<sup>87</sup> *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986).

<sup>88</sup> *Lockwood v. AC & S, Inc.*, 744 P.2d 605, 612 (Wash. 1987).

<sup>89</sup> DiMasi, *supra* note 80, at 744.

<sup>90</sup> 2004 Tex. Dist. Ct. Jury Instr. 170415A.

<sup>91</sup> *Merrell Dow. Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997).

<sup>92</sup> DiMasi, *supra* note 80.

<sup>93</sup> See STALLARD ET AL., *supra* note 86.

<sup>94</sup> One can imagine, for instance, a kind of informal grid of settlement payouts, comparable to those used in the Manville Trust.



come to conclusions on causation to settle the case. Though some cases will be easy – certainly long-term asbestos workers with mesothelioma are such cases – a large heartland of cases is very difficult. As many efficiencies as the court system may have developed in response to the asbestos crisis, the cost of resolving the causation issue is simply insusceptible to much reduction. When the vast majority of asbestos claimants are exposure-only claimants, the question becomes even more difficult, because the treatment of damages can vary wildly. In the case of causation, it is not that the legal standard is unknown; the standard is known, but very difficult to work with. The legal standard does not provide heuristic rules like the Manville Trust, but rather imposes onerous requirements of proof and disproof on the parties. Reformers have been sensitive to the problem, but their proposed solutions such as “[t]he subjective definition of ‘substantial factor’ [causation] proposed here may be expressed as a connection between exposure and injury which is close enough to warrant liability,”<sup>95</sup> do not fare much better.

The dynamics of the causation rules mean that the parties have no way to avoid significant litigation if they wish to accurately value claims.<sup>96</sup> The costs that plaintiffs, even with no valid claim, can inflict on defendants are therefore significant. Because the opportunity cost is the amount plaintiffs’ lawyers would receive in litigation, preventing them from bringing the litigation requires compensation for roughly that amount. In a litigation environment where any case could go to trial, plaintiffs’ attorneys have significant settlement leverage.

It should be noted that the *difficulty* in valuation does not by itself inhibit settlement; the difficulty must manifest itself in the defendant and plaintiff *disagreeing* about the valuation. If valuation is difficult, but each side projects the claim as centered on the same value, and has the same risk attitude, the case will settle, despite its unpredictability. To explain why the porous causation standards result in greater costs, the theory must give an argument for why plaintiffs’ and defense attorneys routinely disagree about the values of their cases. One plausible assumption is that attorneys tend to be optimistic about their own abilities. Another possibility is based on the endowment effect, a phenomenon discovered by cognitive psychologists where people overvalue their current endowments relative to alternatives. Cognitive psychologists have illustrated that people tend to be happy with what they have, even when that assignment is essentially arbitrary.<sup>97</sup> Lawyers may well be subject to the endowment effect, resulting in an artificially rosy perception of the case they *have* relative to the settlement they *might* have. Indeed, such a cognitive defense mechanism may be essential in a profession of hired guns, whose assignment to one side or another is often arbitrary. Of course, since attorneys

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<sup>95</sup> Gold, *supra* note 82, at 395-96.

<sup>96</sup> See Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 102 (1990) (finding that proceeding to and past summary judgment is extremely expensive for plaintiffs and may diminish settlement).

<sup>97</sup> Jack L. Knetch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277 (1989) (citing a study finding preference for current property endowment, regardless of arbitrariness of initial assignment).

litigate only one side of the asbestos docket, such repeat play should cement attitudes even more.

Empirically, the theory that causation prevents procedural reforms from being effective has at least some support. Even to the extent that first-wave defendants (the manufacturers) came to concede causation or develop simple heuristics, second-wave (premises) defendants are less likely to have done so. Strict liability theories are less likely to apply to premises defendants, since they are not likely to have been under a duty to warn at the time of the exposure. Thus, the complexity of the causation question has not declined, even in the face of experience. As the causation issue becomes more difficult, the increased costs associated with that complexity outweigh whatever cost savings have emerged from procedural reform. Most importantly, because causation is usually a question for a jury, and not for a judge,<sup>98</sup> parties know that any heuristics that might have been used by judges if they decided the cases will not be used by juries. There is no opportunity, then, for the nebulous causation standards to change sub silentio into more concrete rules. The jury is a one-off player, which lacks the systemic wisdom of the other participants. Any folk wisdom in the asbestos bar and the judges who relate to it is unlikely to percolate to the jury.

Additionally, the RAND study observes that settlement is becoming less likely because defendants are settling less often.<sup>99</sup> The Center for Claims Resolution, a defendant created settlement facility, stopped agreeing to “inventory settlements”<sup>100</sup> when it became clear that the settlements had no effect on the number of remaining claims.<sup>101</sup> This suggests a tendency to go deep into litigation, a tendency consistent both with the substantive uncertainty discussed here, and with defendant risk-preference discussed in Section III.

The causation issue is a general symptom of “asbestos law,” where judges stretch and redefine traditional theories of liability to promote recovery.<sup>102</sup> The problem in formulating a special tort law for asbestos cases is not only that it penalizes companies for actions that were not illegal when taken. The problem is that “asbestos law” diminishes predictability; potential defendants may have an ominous sense about liability, but an ominous sense cannot be programmed in a meaningful way into the value calculation. A judge and jury facing the nebulous standards articulated above are capable of reaching any outcome – from a defense verdict to millions in punitive damages. This imprecision is reflected in the depth of litigation pursued; additional discovery and motion practice are undertaken to generate sufficient facts to lower the spread in valuations of claims.

Various theories of burden shifting, such as market-share liability, have been offered as solutions to the causation problem.<sup>103</sup> Courts have not

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<sup>98</sup> See, e.g., 2004 Tex. Dist. Ct. Jury Instr. 170415A.

<sup>99</sup> CARROLL ET AL., *supra* note 3, at 96-97.

<sup>100</sup> Settlements on standard terms offered to plaintiffs' attorneys for their entire inventories of cases. See *id.* at 129.

<sup>101</sup> *Id.* at xvii.

<sup>102</sup> Brickman, *supra* note 32, at 1887-88.

<sup>103</sup> See Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in ASBESTOS Litigation*, 70 IOWA L. REV. 141, 207 n. 374

accepted these theories.<sup>104</sup> There has thus been no substitute for an individual trial on the question of exposure and causation. Reforms in this area would be most welcome, but mere verbal reformulations of the current tests are unlikely to be helpful. Rather, heuristics involving certain provable levels of exposure and form of asbestos are more likely to lead to predictable and consistent results.

The causation problem is even more difficult in the second wave of asbestos litigation, the set of cases not involving asbestos workers. The workers had access to at least some business records involving the asbestos in their workplaces. Other plaintiffs are not likely to have this information. Particularly for exposure-only plaintiffs, the exposure can be so brief that documenting which product from which company caused the spot on the lung can be extremely difficult.

It is also worth considering that tenuous causation theories, if they make it through summary judgment, are likely to create extreme uncertainty in the trial verdict. Juries may push back against attenuated causation theories, or perhaps not – it is quite unclear what juries will do with these claims, which are in dispute even among experts.<sup>105</sup> The spread in valuation increases when the legal theory is novel, and the expense of resolving the issue is high – indeed, this is a consequence of the model, because parties will only pay for certainty when the value of resolving the uncertainty is worth the costs.<sup>106</sup> The uncertainty thus extends through the litigation process, and is likely to escalate as the asbestos bar confronts more and more novel theories of recovery. There is no reason to think, then, that procedural reform will have any more success than it has had in the last twenty years.

My argument depends not on the *ease* of recovery, but on the *uncertainty* of recovery. Previous explanations have chalked up the litigation boom to easier recoveries, brought about by changes in the substantive tort law.<sup>107</sup> McGovern argues that demand for plaintiffs' attorneys' services is driven by the expected payout for the plaintiff.<sup>108</sup> The payout, at least for the price-setting marginal litigants, is obviously set by substantive rules governing recovery. If the legal system makes it easier for marginal litigants to recover, as in the asbestos litigation context, demand goes up, in turn driving up the price of the attorney services required to get those payouts.<sup>109</sup> George Priest discussed a similar equilibrium process in his article on case management reform in Cook County, Illinois.<sup>110</sup> This argument is adequate in a static system, where the supply of plaintiffs' attorney services is at the long-run, cost-minimizing equilibrium. However, the litigation market, like any other market, should be dynamic. The fees to be earned by meeting the higher demand should, in the

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(1984) (noting, however, that presumptions adopted in *Borel* may have eased the proof as much as a theory of market share liability).

<sup>104</sup> *Id.*

<sup>105</sup> DiMasi, *supra* note 80, at 752-53.

<sup>106</sup> Priest, *supra* note 63, at 532-33.

<sup>107</sup> McGovern, *supra* note 76, at 605-06.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Priest, *supra* note 63, at 544-45.

long run, induce an expansion of supply as more producers/attorneys enter the market. When supply increases, the price of legal services should re-equilibrate. If the legal system has sufficiently lowered the costs associated with litigation, the price should re-equilibrate at a lower level than before the demand increase. Regardless of the trajectory of the long-run supply, price should adjust downward after the initial substance-driven increase. This indicates that even demand-driven explanations (easier payouts mean more lawsuits) require a supplementary supply-driven explanation for their results to stand over the long term (i.e., attorney supply is at long run cost-minimizing equilibrium). Why does supply not expand so as to permanently capture at least some of the marginal cost savings induced by procedural reform? The change in the substantive standard of recovery cannot produce the static costs result by itself. It requires a very specific, and in my view, improbable assumption about the supply of legal services.

Having concluded that the failure of courts to articulate clear rules on proof of causation is responsible for the high costs of recovery for asbestos claimants, I now attempt to justify the obvious alternative: clearer rules that provide greater predictability and therefore induce settlement and lower costs. In a thought-provoking piece, Donald Elliott has written that mass torts should not be viewed as dispensing purely individual justice.<sup>111</sup> Rather, toxic torts invoke a host of social values that should be invited into the system.<sup>112</sup> Some such values are efficiency and the society's views on risk and regulation. Elliott's perspective implies that the asbestos issue requires compromise of a variety of social values; for instance, perhaps, social savings via reduced transactions costs can justify a sleeker causation standard, even though that standard may not be best from a fairness or compensation perspective. The question here is a more general question about what to do when nebulous legal standards inflate the costs of litigation. It may be that some "accuracy" (which must mean optimality of deterrence, compensation, or justice) is compromised by replacing standards with rules.<sup>113</sup> However, whatever increase in accuracy there might be should be weighed against the additional costs that the system and the litigants sustain. Particularly since uncertainty makes settlement difficult and implies greater costs for society, claimants, and defendants alike, those costs are real losses, and must somehow be tested against the distributional goals of the tort system. People might differ on the merits of moving to a rule-

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<sup>111</sup> E. Donald Elliott, *The Future of Toxic Torts: Of Chemophobia, Risk as a Compensable Injury and Hybrid Compensation Systems*, 25 HOUS. L. REV. 781 (1988).

<sup>112</sup> *Id.* at 782.

<sup>113</sup> I am skeptical of this proposition, though a detailed discussion is beyond the scope of this paper. A credible argument could be made, however, that the causation standard represents an accommodation to the inherent uncertainty in the civil justice system. Standards make it difficult to point to an outcome as wrong – by making determinations fact-sensitive, the reallocation of resources by the civil justice system cannot be demonstrably unfair in any particular case. Setting a rule admits of the essential arbitrariness in parts of the civil litigation standard: by drawing a line, the law is forced to confront that the disparate treatment of those immediately on one side of the line from those on the other is imperfect justice. The reluctance is understandable, and is perhaps the reason why a regulatory venue is the most likely for declaring clear rules, where the decision can be cloaked in neutral expertise.

based system,<sup>114</sup> but it appears that the market eventually drives in that direction, as the repeated attempts at mass settlement of asbestos claims, via class action, claims resolution facilities, and, ultimately, bankruptcy demonstrate. The procedures by which litigants circumvented the usual civil litigation disposition of their claims can be questioned, but the fact remains that it was done; the cheaper payment of claims through the adoption of streamlined causation and exposure tests won the day.<sup>115</sup>

George Priest has written of the pitfalls in adopting a purely procedural outlook on aggregation techniques.<sup>116</sup> Often, the values that produce procedural innovation – fairness among claimants, adequacy of compensation, and transactions costs – relate to substantive compensation and deterrence values.<sup>117</sup> To treat these matters without taking substantive rules and outcomes into account is to season the soup by changing the pot. Because procedure is inseparably intertwined with the questions being adjudicated, the two must be considered together. The failure of asbestos procedural reform illustrates the pitfalls of trying to refine procedure in isolation.

In summary, pure aggregation techniques often have little effect on the costs of litigation. Dynamic effects from these techniques encourage the filing of more suits, and thus greater litigation. Procedural reform also is likely to fail in the face of bottlenecks. In the asbestos context, and perhaps in other mass torts, causation and exposure provide just such a bottleneck. The persistence of vague and unmanageable causation standards prevents litigation reform from substantially reducing costs. Only a shift to an administrative scheme, such as the Manville Trust, can significantly increase the clarity of the legal rule and enable fast, low-cost settlements of asbestos claims.

### III. THEORY 2: RISK-LOVING DEFENDANTS AND INSURERS

A second theory of the failure of procedural reform is that defendants and their insurers began taking greater risks, extending the length of litigation and driving up the costs of recovery for plaintiffs. I argue that defendants' insolvency and caps on insurance liability generated excess risk-taking, increasing the incentive to litigate. Once the diluvian number of asbestos claims became clear, a large set of defendants faced probable liabilities greater than their assets.<sup>118</sup> The litigation incentives of companies in the zone of insolvency are well known. Their risk attitudes change greatly, because the expected outcome threatens their existence.<sup>119</sup> Thus, they are willing to take a chancier lottery if

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<sup>114</sup> Compare *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 69-70 (1927) (Holmes, J.) (announcing clear if somewhat baffling rule for contributory negligence of drivers approaching grade crossings) with *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105-06 (1934) (Cardozo, J.) (abandoning rule in favor of standards-based approach).

<sup>115</sup> Yair Listokin & Kenneth Ayotte, *Protecting Claimants in Mass Tort Bankruptcies*, 98 Nw. U. L. Rev. 1435, 1480 (2004).

<sup>116</sup> See Priest, *supra* note 63.

<sup>117</sup> *Id.* at 544-47.

<sup>118</sup> McGovern, *supra* note 2, at 1726.

<sup>119</sup> When the corporation is insolvent or at the brink of insolvency, the difference in risk preference between shareholders and creditors is magnified with respect to corporate investment policies. During this period of financial stress, shareholders favor

there are some outcomes that enable them to survive, even if those outcomes are unlikely. In the extreme, they have incentives to gamble recklessly, because a more moderate strategy yields no chance of survival, while an extreme strategy, even though the expected return is lower, contains the possibility of survival. Debtholders suffer from these tactics because they receive no upside from the higher risk, but bear the brunt of the downside. For this reason, the law sometimes intervenes to prevent insolvent companies from acting on those incentives.<sup>120</sup> For instance, fiduciary duties normally owed to equityholders transfer to debtholders when the company is within the zone of insolvency.<sup>121</sup> Tort claimants, though they are formally creditors just as any contract claimant would be, must still prove their claims. Litigation to determine liability and amount is not a breach of duty.<sup>122</sup> Litigation strategy is therefore one area among many where companies in the zone of insolvency are likely to show excessive risk preference.

Insurance might be available to combat this excessive risk preference, but failed in the asbestos context because insurers were against their policy limits. Insurers often take the lead in defense of claims, because if they are paying, they need control over the litigation; the agency problems in allowing an insured to handle its own defense are too great, especially when the insured can count on insurance to cover most of the loss. An insured is usually indifferent as to where a claim settles, so long as the settlement is within policy limits. The insurer therefore must step in to protect its interests. Insurers are configured to be risk-neutral with regard to most claims.<sup>123</sup> This neutrality breaks down, however, as the expected value of the claim exceeds the policy limits.<sup>124</sup> Once that occurs, an insurer will be risk loving unless the law intervenes: if litigating the claim brings even a small probability of liability below the policy limits, the insurer has an incentive to take that risk. If the policy limit is a dollar, an insurer will choose litigation over a settlement for \$1.01, even if the litigation risks a judgment of two dollars, or a million, so long as there is some chance that the outcome will come under the policy limits.

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highly risky projects, even if these projects have only a slight chance of generating income large enough to cover the firm's debt and still provide some return to shareholders. In contrast, creditors want management to preserve the assets available to satisfy their claims by investing conservatively and taking minimal risk.

Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1489 (1993).

<sup>120</sup> *E.g.*, *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, 17 Del. J. Corp. L 1099, 1991 WL 277613 (Del. Ch. 1991) (holding that fiduciary duty shifts to creditors when corporation in the zone of insolvency).

<sup>121</sup> *See, e.g.*, *Clarkson Co. Ltd. v. Shaheen*, 660 F.2d 506 (2d Cir. 1981).

<sup>122</sup> *See Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198 (1988) (contesting tort liability while in bankruptcy).

<sup>123</sup> Indeed, the risk neutrality of insurers is what drives the insurance market. Risk averse companies are willing to pay higher than the expected value of their losses (through premiums) in order to eliminate the risk of a higher-than-expected loss. The insurer, by pooling risks together, reduces the chance of the catastrophic loss, since a higher than expected loss will usually be offset by other losses that do not materialize. The risk neutral insurer can then profit from the willingness of risk adverse parties to pay more to lower their risk profiles.

<sup>124</sup> *Crisci v. Security Ins. Co.*, 426 P.2d 173, 177 (Cal. 1967).

Of course, the insured detests this strategy, because when it fails, as it often does, resulting in an astronomical verdict or settlement, the insurer's liability is bounded by the policy limits, but the insured's is not. The insured remains on the hook for the remaining liability above the policy limits. This dynamic has caused the law to step in to protect the policyholder's interests in the context of settlement. Rules of good faith require the insurer to litigate the claim as if it bears the entire risk.<sup>125</sup> To operate in good faith is to extend risk-neutrality over the entire risk, not just the insured portion of the risk, where such neutrality comes naturally to the insurer.<sup>126</sup>

The insured is charged with policing the insurer's behavior in this regard; the insured brings the bad faith claim if the insurer has acted contrary to his interests. Though there may be problems with monitoring, the system on the whole seems well-designed. The insurer can prevent the insured from gambling with its money by taking control of the defense, and the insured likewise checks the insurer when the policy limits are likely to be exceeded. The insured has every incentive, usually, to try to monitor the insurer's behavior and make sure that the insurer, for instance, accepts reasonable settlement offers within the policy limits. The net effect of the system should generally be that insurance makes no difference in how claims are litigated; the insurer, when checked with an obligation of good faith, should litigate claims exactly as the insured would.

The system of checks breaks down, however, when the insured is in the zone of insolvency and the insurer is near the policy limits. When both of these conditions are met, both relevant actors have incentives to pursue risky litigation strategies. The insurer is inclined to gamble in the hopes of getting an improbably favorable outcome. The insured is also inclined to gamble, since to do so opens the possibility of survival as a company. In general, this means refusing a more certain sum in favor of a riskier lottery with both an upside and a downside. Specifically, the incentive is to refuse settlement in favor of more litigation. The insolvency of defendants and the policy limits of their insurers<sup>127</sup> combine to produce risky litigation strategy by asbestos defendants. Regardless of who ultimately bears operational responsibility for the litigation, the strategy pursued is likely to be the same. Indeed, the only difference between insurer and insured is a preference that the other bear the costs. Going deeper into litigation, which is the manifestation of the risky litigation strategy, takes time and consumes resources, driving up transaction costs for all involved. As the asbestos crisis has deepened, insurers and defendants have increasingly possessed these unusual incentives to litigate excessively,<sup>128</sup> and

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<sup>125</sup> *Id.* at 176.

<sup>126</sup> *Id.*

<sup>127</sup> Asbestos manufacturer insurers have progressively hit their aggregate coverage limits since 1985, though much coverage litigation still takes place. However, expansion of liability means that more insurance is being tapped (and exhausted), leading to a continuation of the dynamics described here.

<sup>128</sup> Seventy-three asbestos defendants have filed for bankruptcy, with bankruptcies occurring at an increasing rate. See CARROLL ET AL., *supra* note 3, at 109.

so even in the face of greater legal certainty,<sup>129</sup> defendants might be expected to act as though the law were unsettled.

It is now useful to apply the settlement model described above to the insolvency problem. Under the assumptions discussed above, defendants perceive a lower value of the case, for their insolvency means they may never need to pay it. For instance, if the true value of a case is a probability distribution from 0 to 10, with a mean of 5, then a rational defendant assesses the value of the case at 5, and makes its settlement determination from there. However, suppose the defendant goes bankrupt if it has to pay 5. That means that for any case value of 5 or greater, the actual payment is 5, and not the value of the judgment. Thus, the defendant's value is no longer 5, but is significantly less. For instance, if each value between 0 and 10 had equal probability, the old expected value was 5, but the new expected value is less than 4. This increases the average spread between defense valuation and plaintiff valuation, assuming the plaintiff keeps the same assessment of the likely payout. Thus,  $V_p - V_d$  has decreased, and the settlement condition, with costs held equal, is less likely to be fulfilled.

This model only explains reduced settlement likelihood if plaintiffs do not also discount their likely judgments by the chance of defendant insolvency, i.e.  $V_p$  remains constant. Certainly plaintiffs do not lack any of the cognitive powers of defendants, and so to sustain the theory, plaintiffs must have some other reason to maintain the same risk attitude even as defendants and their insurers become risk-preferring. If they properly adjust their expectations, then the insolvency of the defendants will decrease the value of settlements, but will otherwise have no effect on litigation dynamics.

I argue that plaintiffs make no mistake in assessing their claims at full value, even when most possible defendants are insolvent. Joint and several liability rules mean that a plaintiff can recover the full value of a judgment from any of the defendants.<sup>130</sup> If there are sufficient solvent defendants in the pool, then each defendant might discount his payout, without the plaintiff discounting his. So long as at least one defendant is solvent, then the defense strategy will be risky, and the plaintiff will still have incentive to litigate. The expansion of liability beyond the most likely liable parties has the effect of deepening the defendant pool.<sup>131</sup> With a sufficiently deep pool of solvent defendants, plaintiffs properly assess their claims at full value.<sup>132</sup> Greater litigation, of course, increases the net costs of the system.

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<sup>129</sup> Assuming such certainty really exists. *See supra* Section II.

<sup>130</sup> *See generally* RESTATEMENT (THIRD) OF TORTS, APPORTIONMENT OF LIABILITY § 10 (2000) ("When, under applicable law, some persons are jointly and severally liable to an injured person, the injured person may sue for and recover the full amount of recoverable damages from any jointly and severally liable person.").

<sup>131</sup> *See* Senator Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988).

<sup>132</sup> Rational plaintiffs might choose not to bother with (nearly) insolvent defendants. The rules of civil procedure allow the present defendants to bring in those other defendants, however. *See, e.g.*, FED. R. CIV. P. 14 (impleader). It remains an option for the plaintiffs to settle with the solvent parties. Various factors might conspire against this, including the solvent defendants free-riding on the litigation expenditures of the insolvent ones.



The next step in the analysis is to square my assertion of risk-preferring defendants with the fact of ubiquitous asbestos settlements.<sup>133</sup> The analysis presented does not mean that there will necessarily be fewer settlements, only that settlements come after a greater amount of litigation. Because the settle-or-litigate decision is made at every step of the litigation where money can be spent or information can be gained, a tendency toward risky litigation can cause the case to go as far as, say, the end of discovery, or summary judgment, but still result in settlement. Therefore, the characterization of defense risk attitudes here does not necessarily predict less total settlement activity, but it does predict more litigation activity leading up to the settlements that occur.

One way to model litigation is for the parties to purchase information about the value of the claim at each stage. Suppose that  $V_P - V_D > C_P + C_D$ , meaning that the settlement condition is unfulfilled. By investing the litigation costs needed to obtain information, for instance by engaging in discovery, filing motions to dismiss or for summary judgment, going to trial, and filing appeals, parties increase their information on the value of the claim. At each stage, the cost profile of going forward changes, because there is less information to be had and fewer litigation costs to be incurred. At the same time, when they obtain new information, parties' estimates of claim value converge; the initial spread in valuation is greater than the subsequent spread in valuation. For instance, a court's rejection of a motion to dismiss<sup>134</sup> signals to the defendant that the claim, perhaps, has more merit than initially thought. The defendant is therefore likely to increase its valuation of the case, bringing it in closer alignment with that of the plaintiff. The decrease in valuation spread increases the chance that the settlement condition will be met. When parties prefer higher levels of risk, they will increase the depth of the litigation, and will "purchase" more information, but only to a limited extent. No matter how risk-preferring the party, under some conditions settlement will look attractive.

Thus, the risk-preference model is perfectly consistent with widespread, even ubiquitous, settlements. The crucial piece of data is information about how deep into litigation parties tend to go. If the duration of the litigation is not justified by the information that is gained – that is, if claims could be estimated with sufficient accuracy at less cost – then risk preference is driving a greater amount of litigation. Unfortunately, there are no studies that have addressed this question directly. Anecdotally, some commentators have found that consolidated proceedings lead to exactly this kind of long proceeding: "[consolidation] has resulted in lengthy trials and delay in compensation for injured plaintiffs."<sup>135</sup>

One could also study the empirics of asbestos risk preference by looking at the evolution of litigation strategies over time. As it became clearer to more asbestos defendants that they would soon be bankrupt, they should have adopted riskier litigation tactics. Since many facts unique to particular litigated cases drive an assessment of how risky a strategy is, the question presents a challenge to outside observers. However, one possible indicator is defendants'

<sup>133</sup> See Korobkin & Guthrie, *supra* note 10.

<sup>134</sup> See FED. R. CIV. P. 12(b).

<sup>135</sup> Valle Simms Dutcher, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 PACE ENVTL. L. REV. 955, 957 (1993).

use of the same arguments even after it has become clear that those arguments are ineffective. Though the argument might be identical, the strategy is riskier, because its estimated payoff is lower, even though the high and low ends are the same. One clear example of this behavior seems to be the continued use of the state-of-the-art defense. Though widely rejected, the defense continues to appear in asbestos proceedings; after billions of dollars in claims have been paid out, it is remarkable that defendants continue to litigate the issue.<sup>136</sup> As each rejection comes in, asbestos defendants should adjust downward their estimates of its success.<sup>137</sup> At a certain point, the likelihood of success does not justify the costs of presentation. If my impression is correct, and the defense continues to be used despite its general ineffectiveness, then defendants and insurers are using a high-risk, low-expected value litigation tactic, which can only be explained if they are risk-preferring.

One further piece of evidence is the collapse of the Center for Claims Resolution (CCR) settlement body in 1991.<sup>138</sup> The CCR was designed to facilitate quick settlements on standard terms with large numbers of plaintiffs and potential plaintiffs. Defendants turned from a settlement-intensive strategy, where many claims not even filed were settled on standard terms with prominent plaintiffs' firms, to a strategy of litigation-driven settlement, where certain proofs needed to be made to a court.<sup>139</sup> Such a strategy entails greater risks, because settlement value can increase greatly once more information is uncovered, even if the case does not go to trial.<sup>140</sup> It is perhaps unknowable at what point defendants realized insolvency was inevitable, but the theory predicts a marked increase in risk-taking when that moment occurred. If 1991 was the moment of truth for most asbestos manufacturers, the collapse of the CCR would be strong corroboration that the risk-preference dynamic was taking place.

A final piece of empirical evidence supporting the idea that asbestos litigation takes longer, despite reform efforts, is the fact that the mean time from filing to disposition in federal courts is long – about twenty-nine months.<sup>141</sup> This is vastly greater than the mean for other federal cases, which have a mean time to disposition of 9.5 months over the relevant timeframe.<sup>142</sup> Of course, many inferences could be drawn from this fact, perhaps having to do with the MDL practice, judicial procrastination on asbestos claims, or collateral litigation. The most likely inference, based on the theory presented here, is that real litigation activity is taking place in those cases, and as a result disposition times are slower. This lapse in time supports my empirical claim that asbestos claims

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<sup>136</sup> See *supra* notes 43-47 and accompanying text.

<sup>137</sup> The adage is "fool me once, shame on you. Fool me twice, shame on me." The repeated application Bayes' theorem, which dictates the proper assessment of likelihood of success in light of new information, does not require such a quick learning curve. The message is the same, however: defendants should adjust their expectations after repeated failure.

<sup>138</sup> Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Prods., Inc., 80 CORNELL L. REV. 1045, 1052-53 (1995).

<sup>139</sup> *Id.*

<sup>140</sup> See Korobkin & Guthrie, *supra* note 10, at 122-24.

<sup>141</sup> Rice & Davis, *supra* note 42, at 127 n.4.

<sup>142</sup> Administrative Office of the United States Courts, *2005 Annual Report of the Director: Judicial Business of the United States Courts* tbl. C-5 (2006).

are prone to costly, lengthy litigation because of defendant risk attitude and the causation bottleneck.

A general challenge to the risk-preference model might arise because the claims asbestos companies face are not single, "bet-the-company" claims, but rather a constellation of thousands of small, individual tort claims.<sup>143</sup> One way to view the multiplicity of claims is as one giant claim, with a range of possible valuations, influenced by litigation strategy. This view makes sense if companies set litigation strategy once, with full knowledge of the range of possible outcomes.

If claims are viewed discretely, then no individual claim can really be said to implicate the bankruptcy dynamics illustrated here; no individual claim has the capacity to put a company into the zone of insolvency. Taken one by one, then, each claim should best be dealt with on a risk-neutral basis. But this view is hard to sustain; companies would be foolish not to have an aggregate strategy for dealing with an elephantine mass of claims. Similarly, insurers should also aggregate claims at least on a per-company basis to evaluate the potential exposure and appropriate litigation strategy. At that level, an insolvent actor is likely to take more risks, even at higher average costs. Those additional risks manifest themselves in the asbestos context in longer pushes through discovery and summary judgment, at high cost, prior to settlement.

The question arises whether anything positive can be said about risk-preference driven increase in litigation. In the first theory, involving the vague and subjective standards for assessing asbestos liability, at least some argument could be made that the causation bottleneck more effectively screened claims deserving of compensation.<sup>144</sup>

A riskier litigation strategy possesses some other attractive features for defendants. A litigation-heavy strategy, if credible, might deter negative value suits, suits in which the estimated cost of recovery does not justify the costs of bringing the claim.<sup>145</sup> Plaintiffs with low-value claims are unlikely to bring them if a defendant credibly commits to litigating claims in full; if the plaintiff believes that protracted litigation is needed to extract the value of the negative value claim, which by definition is less than the cost of procuring it, then the plaintiff should not rationally bring the claim. This benefit to defendants of deterring negative-value suits only accrues if the commitment to litigate is in fact widely believed. I am agnostic on this possibility; the strategy can work when a significant number of outcomes involve defense verdicts or small plaintiffs' verdicts. But a history of large plaintiffs' verdicts makes a take-no-prisoners approach unviable in the long run.<sup>146</sup> Deterring negative-value suits thus cannot provide a complete explanation for a high-cost, high-risk approach; on the other hand, the risk attitude considerations described above provide a credible rationale for such a strategy. In general, then, increased risk preference by defendants, and deeper litigation for that reason, is descriptively understandable but normatively hard to justify. The analysis suggests that to the extent that deeper litigation is taking place only because of defense risk attitudes, courts

<sup>143</sup> CARROLL ET AL., *supra* note 3, at 23.

<sup>144</sup> Or achieved other values, such as fairness. See Elliott, *supra* note 111, at 784-85.

<sup>145</sup> Robert G. Bone, *Modeling Frivolous Suits*, 145 U. P.A. L. REV. 519, 530 (1997).

<sup>146</sup> CARROLL ET AL., *supra* note 3, at 95-96.

should be on the watch for such risky behavior. As courts have a responsibility to protect debtholders to which an insolvent company has a fiduciary relationship, courts similarly have a duty to protect tort claimants who might be similarly vulnerable.<sup>147</sup>

The first and second theories connect nicely. The second theory – that defendants and insurers, because they are often in the zone of insolvency or at policy limits, are willing to take untoward risks – provides added incentive to litigate the substantive bottlenecks emphasized in the first theory. Similarly, the causation bottleneck in the first theory provides the uncertainty needed for risk preference to play a role. Without some level of uncertainty as to liability, no amount of desire for risk would trigger litigation, the same way that without a jackpot, no one would enter a lottery. The two theories are therefore complementary; as modeled using the economic model of settlement, both theories predict a higher spread in asbestos case valuations than in other sorts of cases. The natural result of the interaction of defendant risk-taking and unclear standards is a decrease in settlement pressure and an increase in overall litigation costs. Such a change is consistent with the failure of procedural reform to decrease plaintiffs' costs. Costs will not decline until early settlement substitutes for costly litigation.

#### IV. THEORY 3: PRICE COLLUSION

A third possible theory, independent of the first two, is that plaintiffs' lawyers have colluded to maintain high costs to their clients, even as their costs have gone down. Such a scheme certainly would increase the transaction costs of bringing asbestos claims, even if court-made procedural reforms would otherwise lower the costs. The effectiveness of procedural reform self-evidently depends on whether the system passes the cost savings on to clients. The following Section, without ultimately judging the merits of the position, assesses whether such a claim is credible and worthy of further investigation.

In general, it is unlikely that in a market with many suppliers, firms would be able to successfully collude and maintain high prices. The character of a cartel is that there are always incentives to defect, because a company can attract disproportionate market share by slightly undercutting the cartel price.<sup>148</sup> The monitoring and coordination costs of preventing this defection are high and grow higher the more actors there are in a cartel.<sup>149</sup> For good reason, cartels are of greatest concern in small markets, with barriers to prevent immediate entry by potential competitors.

Normally, the fact that everyone charges the same price is a sign of stability in a competitive market.<sup>150</sup> Competitors all charge the same price because the market is stable, and each competitor has the same cost structure, which is the minimum long term average cost.<sup>151</sup> "Problematically, parallel conduct is

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<sup>147</sup> See, e.g., FED. R. CIV. P. 11 (requiring sanctions for parties who put forth claims in bad faith).

<sup>148</sup> See TAYLOR, *supra* note 52, at 306.

<sup>149</sup> See *id.* at 308.

<sup>150</sup> *Id.* at 65-68.

<sup>151</sup> See *id.* at 222-24.

often forced by circumstance: under such circumstances, a 'rational' profit maximizing firm will always act similarly to its rivals."<sup>152</sup> Collusion is therefore impossible to read directly from the price term, because perfectly competitive markets and cartel markets each will have uniform equilibrium prices. Moreover, since price collusion is illegal,<sup>153</sup> those involved have every incentive to keep it secret from the general public. Inferential proof of collusion is often the best available.<sup>154</sup>

Price collusion cannot be proved from an armchair, but antitrust law has provided indicia in the absence of direct proof. The law seeks "plus factors" to diagnose when parallel behavior is more than the workings of a competitive market, and thus when agreement to fix prices can be implied.<sup>155</sup> A highly regarded opinion of Judge Posner specifies the general factors in a legal inquiry in the absence of solid evidence of agreement:

The economic evidence will in turn generally be of two types, and is in this case: evidence that the structure of the market was such as to make secret price fixing feasible (almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies); and evidence that the market behaved in a noncompetitive manner.<sup>156</sup>

Among these indicia of market structure and the capacity to cooperate are evidence of contact, market power, and barriers to entry.<sup>157</sup> Market power generally "exists in degrees. Power is small when more than a slight increase in price would lead to an unacceptable loss of sales. It is large when a firm can profit by raising prices substantially without losing too many sales."<sup>158</sup> The market power, in order to be persistent, requires "some protection against a rival's entry or expansion that would erode such supra-competitive prices and profits."<sup>159</sup> Without going into excessive detail on these theoretical questions, it is worth taking a quick glance at whether the asbestos plaintiffs' lawyer service market has features conducive to price fixing.

First, the market for asbestos claims, unlike the broader market for legal services, has a relatively small number of significant providers. Ten firms have filed an enormous percentage of the total asbestos claims.<sup>160</sup> Market share for the top ten firms has varied, but peaked in 1996 at 76% of all claims filed, and has subsequently declined.<sup>161</sup> The downward trajectory of market share from that point could be indicative of new entrants, which would be expected if

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<sup>152</sup> PHILIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 14.03, at 14-17 (3d ed. 2004).

<sup>153</sup> *See, e.g.*, *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 560-61 (1898).

<sup>154</sup> It must be said, however, that the threshold for an inferential proof of agreement is quite low. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

<sup>155</sup> *See* Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 24 (2004).

<sup>156</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

<sup>157</sup> *See id.*

<sup>158</sup> AREEDA & HOVENKAMP, *supra* note 152, § 5.01, at 5-5.

<sup>159</sup> *Id.* at 5-6.

<sup>160</sup> CARROLL ET AL., *supra* note 3, at 24.

<sup>161</sup> *Id.*; *see also* Silver, *supra* note 15, at 2102 ("On the plaintiffs' side, a small number of law firms control large blocks of claims, which they group for trial preparation and settlement.").

cartel rents were available. In fact, quick decline in market share is another indicator of the existence and use of market power.<sup>162</sup> The use of market power to secure supra-competitive returns induces investment in market entry; theory suggests that the aggregate rents correspond to the amount of investment outsiders will make to compete against the cartel. The size of barriers to such entry determines the ability of the cartel to survive over the long term. Since we do not have data as to what has occurred since the completion of the RAND study, it is unclear whether the decrease in market concentration resulted in a decrease in prices. If the answer is yes, that would be a powerful inferential argument that the market was cartelized during the period where prices remained stable. Furthermore, this theory does not require a perfect cartel to predict the astonishing price stability in the asbestos plaintiffs' market. An imperfect cartel could complement the theories described above, with each theory taking pressure off of the other. The cartel explanation could actually fill in for the other theories and help to predict a lag in price changes when effective procedural reforms were implemented.

The Department of Justice has published some rules of thumb about how to discover price collusion. One is that "[p]rice increases do not appear to be supported by increased costs."<sup>163</sup> Similarly, one might infer agreement from a failure to decrease prices when those costs appear to be falling; this is simply the logical converse. Depending on what one makes of the first theory, that costs are static because the procedural reforms have been ineffective, one is more or less likely to find that costs are declining. If costs are in fact declining, though, conspiracy becomes a tempting possibility.

Since one key to an inferential proof of price collusion is to demonstrate a barrier to entry in the relevant market; there are several candidates in the asbestos context. Barriers to entry need not be erected by the suspected parties; rather they can inhere in the nature of the market itself. High startup costs are one example – they form the backbone of a "natural monopoly."<sup>164</sup> Asbestos litigation arguably imposes such barriers. Asbestos practice is no place for amateurs. The incredible complexity of doctrine, and the custom-made procedure and substance bedevil the generalist trying to practice in the field. Relationships between plaintiffs' attorneys and defendants presumably take significant investment and cannot be instantly replicated. It is therefore plausible to think that barriers prevent ready entry into the asbestos field. One commentator, Susan Koniak, has pointed to the use of such relationships to keep up fees. In negotiating the *Georgine* settlement, later rejected by the Supreme Court, payouts were set in part on the basis of an "identity" factor. Payouts were higher to plaintiffs' whose attorneys had previously settled large number of cases with the CCR. That meant that going forward, plaintiffs would be disadvantaged if they hired lawyers without such experience. Thus, the preex-

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<sup>162</sup> *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660 (7th Cir. 2002) (suggesting that a decline in market share could indicate cheating by a member of the cartel).

<sup>163</sup> U.S. Dep't of Justice, Antitrust Div., *Price Fixing, Bid Rigging, and Market Allocation Schemes: What Are They and What to Look For* 4 (2005), available at <http://www.justice.gov/atr/public/guidelines/211578.pdf>.

<sup>164</sup> TAYLOR, *supra* note 52, at 445.

isting relationship between the largest plaintiffs' firms and defendants was leveraged into a competitive disadvantage for other firms.<sup>165</sup>

A price agreement is only credible if the hypothecated conspirators have contact with each other or have some other plausible coordination mechanism, that is, if the market structure is conducive to cooperation.<sup>166</sup> In a sufficiently small or close-knit market, "effective tacit price coordination might well be expected in a market with [few] firms selling a homogeneous product in repetitive transactions."<sup>167</sup> Given the secrecy of most lawyers' fees when cases are settled, there does not appear to be any method to use tacit coordination; an agreement seems necessary. However, in some cases, mere exchange of price information is enough. "[W]hen competitors exchange price information with each other, that alone is sufficient to establish the existence of an agreement."<sup>168</sup> Certainly at this mature point in the asbestos litigation lifespan, the asbestos plaintiffs' lawyer product is homogenous in the extreme, which means that a conspirator defecting by lowering prices could not hide the change behind additional product features. This feature of the market could assist potential conspirators in monitoring cooperation; the market would likely experience ripples if one of the large law firms changed its fee structure.

The antitrust cases impose a very low requirement to show the necessary agreement.<sup>169</sup> The most likely reason is that outsiders to the market cannot identify the agreement unless rather attenuated proofs are allowed. Whatever contact is visible to the outside is therefore held to suggest much broader contacts as part of the conspiracy. In the asbestos context, contact happens regularly and under conditions that are likely to facilitate the exchange of price information. Contact among plaintiffs' lawyers not only occurs, but is necessary to facilitate various cooperative functions required by the legal system, such as settlement negotiations. Another example is the plaintiffs' committees necessary for any large-scale aggregated tort claim. Repeated contacts, where conspirators can inflict punishment for defection or exchange information, are particularly valuable to pricing agreements.<sup>170</sup> Since any firm with a large enough block of plaintiffs can prevent joint action on consolidation, pretrial motions, settlement, and so on, each of the ten large asbestos firms has leverage on the others. A leading lawyer has written of cooperative behavior by the asbestos plaintiffs' bar in the context of bankruptcy settlement negotiations: "[i]nstead, plaintiffs' attorneys agreed among themselves to cease new case

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<sup>165</sup> "The 'identity factor' makes entry into the asbestos-lawyering market difficult and, thus, tends to keep fees up to the twenty-five percent ceiling the settlement sets." Koniak, *supra* note 138, at 1109.

<sup>166</sup> *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939).

<sup>167</sup> AREEDA & HOVENKAMP, *supra* note 152, § 14.08(b), at 14-28.

<sup>168</sup> *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1030 (5th Cir. 1983) (internal quotation marks omitted) (*overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986)).

<sup>169</sup> *Interstate Circuit, Inc.*, 306 U.S. at 225.

<sup>170</sup> George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 33, 45-46 (1964).

filings. This voluntary injunction against new cases did not prevent pending cases from proceeding to judgment and did not stay appeals.”<sup>171</sup>

Though the top ten law firms do not control anything like one hundred percent of the market,<sup>172</sup> they are in a uniquely powerful position to enforce cartel pricing. First, they are in many cases responsible for coordinated action, such as the settlement of large, mega-joinder cases or gathering votes for bankruptcy trusts. Second, the enormous cross-referral business generates repeated interactions. Repeated interactions are important to a conspiracy when it is not thought that the punishments available in a one-shot game are sufficient to enforce the cooperative outcome.

The structure of the market suggests the ability of the large firms to discipline those who deviate from cartel pricing. Control over the large settlements, leadership of plaintiffs’ committees, and so on, allows the biggest firms unusual control over allocations of fee dollars. As Stigler wrote in a keystone article, the ability to punish deviations is an essential component of collusive pricing.<sup>173</sup> In large settlements, the main firms, if they represent all claimants in the negotiations, must be on board. The possibility to exert leverage on other firms, then, is significant. The terms of settlements, as Koniak has pointed out, are decided in secret. In the case she documents, the main plaintiffs’ lawyers used the settlement of futures claims to get preferential treatment for their own inventories. Since they had the ability to get differential treatment of various claimants, they certainly had the power to punish firms not conforming with the agreement.<sup>174</sup>

Of course, to suggest that the *entire* plaintiffs’ bar engages in price collusion is “beyond the pale,”<sup>175</sup> but that is not to say that collusion in certain legal markets is impossible or even unlikely.<sup>176</sup> Rather, various legal markets should be treated the same as any other market with the same basic features. A mysterious stability in prices over a long period of time, when comparable prices (say, defense costs) are falling is reason for suspicion at the very least. Judge Posner used similar analysis in allowing a horizontal price-fixing case to go to summary judgment. In that case, involving the market for high-fructose corn syrup, there was a mysterious stability in the market share of the alleged conspirators, despite a significant increase in the demand for corn syrup, for sweetened soft drinks and the like. Mysterious stability in the composition of the market, given those changes, was circumstantial evidence of collusion.<sup>177</sup>

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<sup>171</sup> Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 449 (1999).

<sup>172</sup> CARROLL ET AL., *supra* note 3, at 24.

<sup>173</sup> Stigler, *supra* note 170, at 46.

<sup>174</sup> Koniak, *supra* note 138, at 1051-52.

<sup>175</sup> Silver, *supra* note 15, at 2091.

<sup>176</sup> Indeed, one author believes that there is just such a system of collusion in contingency-fee billing rates. See generally Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003).

<sup>177</sup> “Second and much more important, the output of HFCS grew during this period and one might expect that growth to have brought about changes in market shares; for it would be unlikely that all the sellers had the same ability to exploit the new sales opportunities opened



None of this is to say that wholesale price collusion *is* happening, only that the conditions for it to take place arguably exist. Good counterarguments also exist, of course. The primary is that the confidential nature of most agreements between clients and their attorneys makes cartel behavior difficult, because it is difficult to punish defection from the cartel policies. All the levers in the world are ineffective when it is unknown against whom to apply them. A deeper inquiry into the conditions of contact among the asbestos plaintiffs' bar is needed.

This analysis pushes toward a broader concern about competition among attorneys. The cooperation among litigants essential in the legal system may end up increasing prices and harming litigant welfare. Repeated interactions, in addition to their benign effects on reputation and expertise of the participants, can also permit broad sharing of information, and the repeated interactions needed to inflict punishment on cartel detractors. Not all areas of law create these worries; repetitious, aggregated tort claims raise eyebrows highest, since those provide the most occasions for competitors to cooperate. Despite concerns, a full evaluation of the third theory awaits further study. Because the terms of settlements are secret, it is very hard to get a bead on collusive behavior. The RAND study was unique in using confidential information to get a small snapshot of the litigation picture. Without that confidential information, we could not confidently say what the transactions costs of the asbestos morass are. Similarly intrepid work can produce the results needed to more fully evaluate the theoretical explanations here.

Are there benign explanations for fee stability, even when costs fall? One thought is that contingency fees are not actually related to the attorneys' costs, conventionally understood. Rather, they are a contractual mechanism to prevent attorneys from shirking in a market where effective performance is extremely difficult to monitor. Reducing the contingency fee below the market level would actually result in a worse product for plaintiffs because they would not be assured that their attorneys, who have full control over the litigation and private information about the likely results and their own efforts, would work as hard. By paying the attorney more, clients effectively create an efficiency wage for the attorney; knowing that she could not get the same deal elsewhere, the attorney must work especially hard to satisfy the client. Defense lawyers might not need this kind of arrangement because asbestos defendants are more sophisticated and thus better able to monitor their lawyers. Such a position argues plaintiffs' lawyers, though operating in a competitive market, do not and cannot compete on price, but rather compete along various other axes. Expertise, reputation, and communication with clients are viable possibilities.

I do not take such claims seriously, because in most markets with monitoring problems, sufficient mechanisms exist to police shirking without dissolving price competition. Reputation, licensing, codes of ethics, and judicial supervision should all act together to allow clients to trust their lawyers without having to pay an outlandish fee to appropriately align the lawyers and clients' incentives.

Contingency fees in general are often justified by the risk that a plaintiffs' lawyer undertakes in financing an action that may or may not succeed. However, the justification for *some* contingency fee does not argue against competition on the basis of fees *in general*. Some firms can generate economies of scale, or economies in labor and material inputs brought about by experience; over time, costs should be competed down to marginal cost. If the courts reduce the number of hours required to recover on a claim, the lawyer's risky outlay is reduced, and so compensation for risk should decrease as well.

In sum, no *prima facie* valid reason appears that would prevent plaintiffs' attorneys from competing on price. Stable prices in the face of radical change require explanation. Because of the structure of the market, collusion cannot be ruled out as a possibility. Antitrust law gives limited leverage on the question, but the factors identified by that body of law might pertain here.

The three theories described in this Article must be tested. The difficulty of doing so from an armchair illustrates the importance of empirical studies of the asbestos phenomenon. The crucial piece of information is whether litigation costs have been declining. If so, then the third theory becomes most plausible, because in a normal market, those declines in cost would, contrary to what RAND found, be passed on to plaintiffs. There are no nationwide studies of when asbestos cases get settled during the course of litigation. To say that causation standards require extensive factual proof is to say that settlement is unlikely until deep into discovery, the most expensive part of civil litigation. Do asbestos cases tend to settle at that point? The necessary empirics are unavailable. If the results ultimately prove that asbestos cases are litigated through discovery, the settlement models discussed above translate that fact into implications for settlement and plaintiffs fees. The models of defendant risk preference and the weakness of asbestos causation doctrine predict such late settlement, but must be proved empirically.

## V. IMPLICATIONS FOR BANKRUPTCY SETTLEMENT

Regardless of which explanation or combination is chosen, the failure of civil justice reform to decrease costs has powerful implications for prepackaged bankruptcies and channeling trusts. These trusts, established under Section 524(g) of the Bankruptcy Code,<sup>178</sup> permit the debtor/defendant to set aside certain assets, which go into a trust for distribution to current and future tort claimants. In a prepackaged bankruptcy, the claimants (through their attorneys) and the debtor in bankruptcy, agree to the terms of the bankruptcy prior to filing before the bankruptcy court. Plaintiffs' lawyers, the real agency behind the plaintiff side in negotiations, should agree to the bankruptcy only if it is preferable to their alternatives, in this case the civil justice system. As the RAND study revealed, the alternative to settlement through bankruptcy is pretty good – a continued flow of 35% of the proceeds of asbestos litigation.<sup>179</sup> Settling for fees of 25%, the Manville Trust figure,<sup>180</sup> only makes sense if it is 25% of a bigger pot, specifically about 40% bigger in present value terms. Anecdotal

<sup>178</sup> 11 U.S.C. § 524(g).

<sup>179</sup> CARROLL ET AL., *supra* note 3, at 105.

<sup>180</sup> *Id.* at 97.

evidence suggests that plaintiffs' attorneys think in precisely this fashion: "[s]ome defense counsel suggested that the plaintiffs' lawyers were just as anxious to settle before class certification because the judge would be able to adjust and monitor attorneys' fees once a class action was certified. The preservation of plaintiffs' attorneys' contingent fee contracts therefore became, sub rosa, a negotiating element."<sup>181</sup> This should not be surprising. Within ethical duties or other constraints, the plaintiffs' bar is a collection of profit-maximizing institution, and of course weighs opportunities against the status quo.

The plaintiffs' bar likely prefers aggregate settlement to litigation, but not at any price. The impetus for aggregate settlement is the same as regular settlement: the joint costs that would have been incurred otherwise can be divided up to settle the claims. As we have seen before, this model takes a bilateral perspective. In truth, asbestos litigation *is* bilateral, not between defendants and plaintiffs, but between defendants and plaintiffs' attorneys. The large number of cases means that plaintiffs do not and cannot exert real control over the course of their litigation. The very notion of an "inventory" is sufficient proof. Plaintiffs' lawyers own the litigation; they are the storekeepers. As a first cut, then, the agreement and cooperation of plaintiffs' attorneys is necessary to the creation of a bankruptcy trust. A feature of the system, however, is that some parties are not represented; future claimants, who may not have even developed symptoms, do not participate in the bankruptcy. When settlements are effected on a mass basis, the law's traditional aggregation of a lawyer and client into a "party" breaks down.<sup>182</sup> The unity of interest generally assumed cannot be enforced by client monitoring. Nor is the opposing party – the defendant – likely to do much monitoring on the plaintiff's behalf. Rather, the defendant is likely to exploit the disjuncture of client and attorney to get a better deal, taking from the client to give to the attorney. Thus, plaintiffs' lawyers are expected to pursue their own interests in these negotiations.

How can the bankruptcy system compensate plaintiffs' lawyers for their opportunity costs? Scholars have suggested that the bankruptcy process is inherently inhospitable to future claimants,<sup>183</sup> who must have their rights protected by a representative appointed by the settling parties. Because those parties are unrepresented, and must rely on the courts and other parties to represent them, conflicts arise, indeed the same conflicts that torpedoed the settlement in *Amchem Products v. Windsor*.<sup>184</sup> The bankruptcy settlement is attractive to the plaintiffs' lawyers involved, then, because it shifts to their clients payments that would have occurred in the future and to non-clients. Because their clients' recovery is augmented by improper takings from the futures claimants, the 25% fee becomes attractive to litigants. Though money from the futures is most likely to compensate plaintiffs' attorneys for their lost fees, side payments are

<sup>181</sup> Mullenix, *supra* note 85, at 555-56.

<sup>182</sup> See, e.g., FED. R. CIV. P. 7, 8 (specifying the requirements for pleadings in federal courts). The use of the term "party" in describing the character of filings clearly indicates that both the attorney and the client are unified for the purposes of litigation.

<sup>183</sup> See Listokin & Ayotte, *supra* note 115, at 1435; Richard C. Worf, *A Market-Based Approach to Protecting Future Claimants in Prepackaged Mass Tort Bankruptcies* 3 (Aug. 25, 2005) (unpublished manuscript, on file with author).

<sup>184</sup> 521 U.S. 591 (1997).

also possible. Joseph Rice, a prominent asbestos plaintiffs' attorney, received a \$20 million dollar "success" award after participating in one bankruptcy.<sup>185</sup> The ethics of such a payment may be disputed, but certainly a plausible inference is that such a payment was in part compensation for a reduced fee on his inventory of cases going forward.<sup>186</sup> Moreover, at least one inventory settlement was reached evidently in quid pro quo for a mass settlement of futures claims.<sup>187</sup> This might be regarded as a side payment to attorneys. Such payments are necessary to explain why lawyers would agree to lower fees in mass settlements, when the litigation system gives them the same fees for the foreseeable future.

The stability of fees induced by litigation drives the inference of ill-doing in the bankruptcy process. If fees were likely to decline in the future because of procedural reform, the reduced fees in the bankruptcy settlements would make sense. The fee is just the discounted value of the future (declining) fees. But since the fees are not likely to decline, the willingness of plaintiffs' attorneys to accept less in bankruptcy can only reflect an improperly enlarged pot from which those smaller percentages are taken. The theoretical explanations of the failure of asbestos reforms therefore create serious doubt as to whether the prepackaged bankruptcy fairly treats future claimants.

### CONCLUSION

Though mass bankruptcies may spell the end of judicial resolution of claims against manufacturers, the current approach to secondary or tertiary theories of liability predicts a continued flood of asbestos claims. The dynamics described in this Article will likely continue indefinitely until plaintiffs' increasingly attenuated substantive theories of liability fail. Whether the reason for the failure of procedural reform is cartel behavior by plaintiffs' attorneys, or substantive vagueness in the law of causation, or risky insolvency-driven behavior by defendants, the system seems structured to continue paying enormous fees to attorneys. To solve the problem is to make the litigation system resemble more closely the accelerated claims processes of the bankruptcy trusts and the administrative mechanisms suggested in congressional asbestos legislation.<sup>188</sup> Causation should be proved on the background of clear rules. Exposure, likewise.

What cannot be defended is procedural reform for its own sake. The economic model of settlement predicts that many procedural reforms will have unintended consequences, as they increase the amount of litigation and tend to re-equilibrate the system without significant cost savings. Reform of the asbestos mess requires reevaluating the expansion of liability and the nebulous stan-

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<sup>185</sup> See Jonathan D. Glater, *Asbestos Bankruptcies Face Setbacks on Two Fronts*, N.Y. TIMES, June 4, 2004, at C3.

<sup>186</sup> See Koniak, *supra* note 138, at 1054-55.

<sup>187</sup> See *id.* at 1052.

<sup>188</sup> See, e.g., Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (establishing trust fund for asbestos claimants, disbursed in relatively simple administrative scheme). See also Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150 (1972) (adopting evidence presumptions and capped liability for miners with black lung disease).

dards that have made asbestos claims so attractive to attorneys in the first place. Moreover, prepackaged bankruptcies should be carefully examined, for what appears to be saved in transaction costs might be repaid in a loss of fairness to future claimants and other outsiders to the negotiations that produce these mechanisms. If the bankruptcy system cannot yield the low-cost, equitable results promised, Congress must act to set up a system that is cheaper than the civil justice system, without giving the plaintiffs' bar power to manipulate the results.