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Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability

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Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability

Richard L. Cupp, Jr.*

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Over a decade ago, the Federal Judicial Conference warned of an asbestos litigation "disaster of major proportions."[1] *The Supreme Court of the United States has described the litigation as a "crisis."*[2] *According to the RAND Institute for Civil Justice ("RAND"), by the end of 2000, more than 600,000 asbestos claims were filed.*[3] *RAND estimates that as many as three million more plaintiffs may eventually file claims. Most new claimants are not sick.*[4] *The flood of claims has forced almost sixty companies into bankruptcy;*[5] *many of these bankruptcies are very recent. As a result, defendants with only remote connections to asbestos–known as peripheral defendants–are being dragged into the litigation. Some of these companies have also begun to declare bankruptcy. Experts predict that, absent meaningful reform, asbestos cases may continue to be a major legal and public policy problem for decades to come. In this article, the author argues that courts and legislatures should impose ad hoc public policy limitations on joint liability in asbestos and other appropriate cases. The article analyzes holdings that support asbestos-specific limits on joint liability, and explains why unlimited and unrestrained joint liability represents unsound public policy in the current asbestos litigation environment. The article concludes that limits on joint liability in asbestos cases are supported by sound public policy and would help mitigate the litigation crisis.*

Aesop's fable about killing the goose that laid the golden eggs[6] does not quite fit the present state of asbestos litigation. If Aesop were alive today, he might write about lawyers killing the prized goose, and then searching out and killing ever more dissimilar birds who also lay golden eggs – perhaps a golden egg-laying duck, then a chicken, followed by a pigeon, a sparrow, and finally, perhaps, a golden egg-laying hummingbird. Eventually, a large number of egg-laying birds would be gone or facing the threat of extinction. That story would describe what is happening today in asbestos litigation.[7]

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1. *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciaryu.* 106th Cong. 5 (1999) [hereinafter Edley Testimony] (Statement of Christopher Edley, Jr., Professor, Harvard Law School).

2. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

3. STEPHEN CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT 49 (2002) [hereinafter RAND Rep.]

4. *Id.* at 77.

5. Mark D. Plevin et al., *Where Are They Now? Part Two: A Continuing History of the Companies that Have Sought Bankruptcy Protection Due to Asbestos Claims*, 17-20 MEALY'S LITIG. REP. ASBESTOS 1 (2002).

6. *See* AESOP, *The Goose that Laid the Golden Eggs*, *reprinted in* THE BOOK OF VIRTUES: A TREASURE OF GREAT MORAL STORIES 47 (William J. Bennett, ed. 1993) (A farmer had a goose that began laying one solid gold egg each day, which the farmer sold. The farmer decided he wanted to get all the gold the goose had inside it, so he killed the goose and opened it only to find nothing.).

7. *See generally* Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6-6 BRIEFLY 2 (2002) (Nat'l Legal Ctr. for the Pub. Interest Monograph), *available at* <http://www.nlcpi.org> (last visited June 3, 2003); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).

I. THE ASBESTOS CRISIS

Before the 1970s, large numbers of American workers were exposed to asbestos in industrial and other work settings, some for long periods of time and at high levels. With the passage of the Occupational Safety and Health Act in 1970, increasingly strict regulations governing workplace exposures to asbestos were put into place.[8] The Occupational Safety and Health Administration (OSHA) promulgated its first limitations on the use of asbestos in 1971,[9] and in short order further restricted the product until it was effectively precluded from use in most commercial applications.[10] By the early 1970s, "use of new asbestos essentially ceased in the United States."[11]

At about the same time, manufacturers and sellers of asbestos-containing products began to face large numbers of asbestos-related personal injury lawsuits for exposures that occurred in earlier decades.[12] Although several of these defendants were quite large and profitable corporations, plaintiffs began forcing them into bankruptcy in the late 1970s and early 1980s.[13] Few such companies remain solvent today.[14]

In part because use of new asbestos basically ceased, and in part because many asbestos producers and suppliers were bankrupted fairly quickly, most observers believed that the asbestos litigation eventually would fade.[15] That has not happened. In fact, quite the opposite has occurred.[16]

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8. 29 U.S.C. § 651 (2003).

9. *See* Safety and Health Regulations for Construction, 29 C.F.R. § 1518 (1972).

10. *See* Occupational Safety and Health Standards, 29 C.F.R. § 1910.1001 (1971).

11. *See In re* Joint E & S Dists. Asbestos Litig.,129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

12. Asbestos injuries usually take a long time to manifest themselves after exposure – generally 15 to 40 years. *See* JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (1984).

13. The "first wave" of asbestos bankruptcies occurred between 1978 and 1985 when seven major asbestos manufacturers and suppliers declared bankruptcy including North American Asbestos Corp. (1978), Johns-Manville (1982), Amatex Corp. (1982), UNR Industries (1982) (including Union Asbestos & Rubber), Waterman Steamship Corp. (1983), Wallace & Gale Co. (1984), and Forty-Eight Insulations (1985). The next wave occurred between 1986 and 1993, and involved companies with significant asbestos liability, such as Pacor, Inc. (1986), Prudential Lines, Inc. (1986), Standard Insulations, Inc. (1986), Gatke Corp. (1987), Nicolet (1987), Delaware Insulations (1989), Hillborough Holdings (1989), Raytech Corp. (1989) (including Raymark Industries and Raymark Corp.), Celotex Corp. (1990) (including Carey Canada, Panacon, Philip Carey Co., and Smith & Kanzler), National Gypsum (1990), Standard Asbestos Manufacturing & Insulation (1990), Eagle Pitcher Industries (1991), and H.K. Porter (1991) (including Southern Asbestos Co. and Southern Textile). *See* Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies that Have Sought Bankruptcy Protection Due to Asbestos Claims*, 17-20 MEALEY'S LITIG. REP.: ASBESTOS 18 (2002).

14. *See* RAND Rep., *supra* note 3, at 49; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1.

15. *See* Victor S. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus*

By 1991, trends in the litigation led the federal Judicial Conference to warn of an asbestos litigation "disaster of major proportions."[17] From 1993 to 1999, the number of asbestos cases pending nationwide doubled from 100,000 to 200,000.[18] As the decade closed, the Supreme Court of the United States described the "elephantine mass"[19] of asbestos cases in this country as a "crisis."[20] By the end of 2000, over 600,000 people had filed claims.[21]

More recently, the rate of claiming activity has accelerated, propelled in part by well-intentioned but ultimately misguided efforts by courts to relax procedural and substantive rules in asbestos cases to serve efficiency concerns.[22] In 2001 alone, plaintiffs filed at least 90,000 new cases.[23] RAND predicts that the litigation will worsen, and that up to three million total claims may be filed.[24]

Perhaps the most powerful impetus for the phenomenal increase in asbestos cases is the explosion in the number of claims filed by unimpaired or mildly impaired plaintiffs.[25] Early asbestos cases generally involved plaintiffs claiming serious and often fatal injuries caused by substantial

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on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 AM. J. TRIAL ADVOC. 247, 248 (2000).

16. *See* Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 95, *available at* 2002 WL 2214449; *Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, *at* <http://www.towers.com/towers/webcache/towers/United_Kingdom/press_releases/2001_06_13/2001_06_1.html> (June 13, 2001) ("Although most thought that the claims would have trailed off by now, the number of plaintiff filings has increased dramatically, with 50,000 to 60,000 claims filed against some defendants in the last year, compared to averages near 20,000 in the early to mid 1990s.").

17. JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 2 (1991) [hereinafter JUDICIAL CONFERENCE REPORT].

18. Edley testimony, *supra* note 1, at 5..

19. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). *See also* Norfolk & W. Ry. Co., v. Ayers, 123 S. Ct. 1210, 1228 (2003) (again referring to the "elephantine mass" of asbestos cases).

20. Amchem Prods. v. Windsor, 521 U.S. 591, 597 (1997).

21. *See* RAND Rep., *supra* note 3, at vi.

22. *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001). Professor Francis McGovern has explained this phenomenon:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

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

23. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1, *abstract available at* 2002 WL 18538000 (discussing the rise in asbestos-related claims despite the declining exposure to asbestos since the 1970s).

24. *See* RAND Rep., *supra* note 3, at 77.

25. *See* Mark Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1, 6 (2001).

exposure to asbestos.[26] By 1997, however, the U.S. Supreme Court observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment."[27] More recent reports estimate that up to ninety percent of new asbestos claims are filed by unimpaired or mildly impaired plaintiffs.[28] Many of these claims are generated by for-profit screening enterprises that work closely with plaintiffs' law firms.[29]

As the typical claimant has changed over the years—from a person suffering serious, actual injury due to substantial exposure to asbestos to a less-exposed plaintiff with no present physical injury—the targets of asbestos lawsuits have evolved as well. As a result of the bankruptcies of virtually all former producers and sellers of asbestos-containing products, plaintiffs lawyers began to search for new types of defendants.[30] If these golden egg-laying "geese" (asbestos producers and sellers) were not widely available, the lawyers reasoned, then maybe similar targets would do.

The first significant non-producer or supplier defendants appeared in the 1980s, when plaintiffs started suing companies that had purchased businesses which at one point had sold or produced asbestos-containing

26. *See* Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff—and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 158, *available at* 2002 WL 2190334.

27. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part).

28. *See* JENNIFER BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS 3 (Dec. 2001), *available at* <http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf> (last visited Aug. 20, 2003) [hereinafter Biggs]; RAND Rep., *supra* note 3, at 20. *See also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815 (2002).

29. *See* Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray [sic] screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); *In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 748 (working in conjunction with unions, plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque."); Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 244 (2001) ("Increased litigation activity is also facilitated by widespread solicitation of potential claimants by use of mass advertising, "800" phone numbers, and websites"); Parloff, *supra* note 26, at 154 ("Since asymptomatic cases had become valuable, plaintiffs lawyers began seeking them out. By the mid-1980s they were organizing mass screenings, often with the cooperation of labor unions."); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341 ("To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

30. *See* Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111; Eric Roston, *The Asbestos Pit*, TIME, Mar. 11, 2002, at Y9, *available at* 2002 WL 8385920.

products.[31] To return to the metaphor, perhaps these successor corporations could be viewed as something like golden egg-laying ducks. They were not as much at fault as the asbestos producers and sellers because the businesses these companies had purchased had stopped producing asbestos well before the purchases. Like ducks and geese, however, they were at least similar—similar enough for plaintiffs to try to attach liability to them.

Before long, the extension to corporate successors was not sufficient to permit recovery by the increasing volume of claimants. The resulting search for new "deep pockets" caused ever more peripheral defendants with little connection to asbestos or plaintiffs' injuries to be pulled into the litigation.[32] Plaintiffs' lawyers began suing defendants merely because they had used products that contained some form of asbestos or because they had asbestos on their premises.[33] Railroads, automobile manufacturers, soap manufacturers, wine producers, and even the Campbell Soup Co.–to name a few–have been named as defendants.[34] "To name a few" is all too accurate–by the early to mid-1980s, approximately 300 defendants had been named in asbestos lawsuits;[35] the number today exceeds 8,400.[36]

One prominent plaintiffs' lawyer candidly described the new focus on peripheral defendants as follows:

> The concept is picking low-hanging fruit. In the early days of the litigation, you had Mansville. Mansville goes away. Next in line are the regional distributors. If they go away, next in line are the contractors who bought from them. If those guys disappear, there are cases where we legitimately are suing the neighborhood hardware store, because that's where the guy bought asbestos joint compound, or the lumberyard where he bought asbestos shingles, or the floor company where he bought floor tiles. They say "All of a

31. *See* Edley Testimony, *supra* note 1, at 8.

32. *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 747–48 (Bankr. S.D.. N.Y. 1991) (stating that "[a] newer generation of peripheral defendants are becoming ensnarled in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries."); *see also 'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17-3 MEALEY'S LITIG. REP.: ASBESTOS 19 (Mar. 1, 2002) (quoting mass tort plaintiffs' lawyer Richard Scruggs as stating: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy.").

33. *See* Biggs, *supra* note 28, at 4 (recognizing the surge in lawsuits against peripheral defendants after the bankruptcy of the major manufacturers in the 1980's and observing that "the connection of some of the newer peripheral defendants to asbestos is not obvious"); Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1, *available at* 2003 WL-WSJ 3957497; Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, *available at* 2002 WL-WSJ 3383766.

34. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, *available at* 2000 WL-WSJ 3025073.

35. *See* RAND Rep., *supra* note 3, at 6.

36. *See The Fairness in Asbestos Injury Resolution Act of 2003: Hearing on S. 1125, Before the Senate Comm. on the Judiciary*, 107th Cong. at 3 (Jun. 4, 2003) (statement of Laurence H. Tribe, Professor, Harvard Law School).

> sudden, why me?" One answer is: "Consider yourself lucky that we left you alone for 20 years. Now we're higher in the tree."[37]

Plaintiffs have increasingly relied on the doctrine of joint liability to move "higher in the tree" and obtain recoveries from attenuated, peripheral defendants. The rule of joint and several liability, sometimes called joint liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages.[38] Although the doctrine has been judicially or legislatively abolished in many jurisdictions, in other states it either continues to exist in its "pure" form or in a modified form that still allows large recoveries against some peripheral asbestos defendants.[39]

For example, in an October 2001 verdict in Lexington, Mississippi, the jury apportioned eighty percent of a $25 million award between two defendants, after all other defendants settled and dozens of potential defendants had already declared bankruptcy.[40] In another case, a New York jury awarded $1.5 million to a man who claimed that exposure from asbestos-containing products that he purchased from Sears, Roebuck & Co. fifty years earlier caused him to develop cancer, even though the jury found Sears only two percent at fault and placed the remaining responsibility on the plaintiff's employer.[41] In one more New York case, Bendix Corp.'s successor-in-interest was held jointly liable for a $53.5 million judgment in 2002 involving a single plaintiff, even though the jury assessed Bendix's share of responsibility for the plaintiff's harm at only 2.35 percent.[42] Six other defendants in the case had already declared bankruptcy.[43]

These examples make it easy to comprehend the mathematics of chain-reaction bankruptcies caused by joint liability in asbestos litigation.[44] Each

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37. Parloff, *supra* note 26, at 164 (quoting Oakland, California plaintiffs' attorney Steve Kazan).

38. *See* Coney v. J.L.G. Indus., Inc., 454 N.E. 2d 197, 204 (Ill. 1983).

39. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17, reps. note, cmt. a, (2000) [hereinafter RESTATEMENT (THIRD)].

40. *See* Parloff, *supra* note 26, at 164.

41. *See N.Y. Jury Finds Sears/GE Liable for Exposure: Awards $1.5 Million to Meso Victim*, 15-17 MEALEY'S LITIG. REP.: ASBESTOS 13 (Oct. 6, 2000).

42. *See* Mem. of Law in Supp. of Def. Bendix's Mot. to Mold the Verdict, Brown v. A, C & S Inc., No. 120595/00 at 2 (N.Y. App. Div. Feb. 8, 2002).

43. *See id.*

44. Another interesting but troubling phenomenon is that plaintiffs' lawyers are often able to convince jurors that peripheral defendants who were not even considered worth naming as defendants in earlier cases were actually the guiltiest parties. For example, in one case a jury apportioned 60 percent of an arguably unimpaired plaintiff's $25 million award to a small insulation contractor with seemingly remote connections to the plaintiffs' claim. Scores of other perhaps more culpable defendants had settled before trial, and dozens of other potential defendants had already declared bankruptcy before the case went to trial. *See* Parloff, *supra* note 26, at 166.

new bankruptcy places "mounting and cumulative" financial weight on the remaining solvent defendants, speeding their path toward Chapter 11.[45] Furthermore, as potential plaintiffs become more aware of the likelihood of bankruptcies, more of them may feel motivated to sue prematurely – even if they are unimpaired – while there is still money to be had.[46] These factors have triggered a domino effect of asbestos-related bankruptcies that is unparalleled in tort law.

To date, at least sixty-seven companies have been driven into bankruptcy as a result of asbestos liability exposure.[47] Almost one-half of these bankruptcies occurred within the past two years.[48] As the dominoes of corporate bankruptcies continue to fall, the financial burden facing hundreds of thousands (and potentially millions) of asbestos plaintiffs will lead to financial ruin for other corporations, including those with increasingly remote connections to asbestos.[49] This destruction harms sick plaintiffs, defendants, the economy, and the judicial system as a whole.[50] Unfortunately, unless something is done to address the crisis, no end is in sight.

II. JOINT AND SEVERAL LIABILITY: A POLICY-DRIVEN CREATION OF THE COURTS

The doctrine of joint and several liability (also sometimes referred to as joint liability[51]) in more or less its modern form can be traced to the 1771 English case of *Hill v. Goodchild*,[52] or perhaps even earlier to *Sir John Heydon's Case* in England in 1613.[53] By the early part of the 20th century,

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45. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993); *see also* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, 16-6 MEALEY'S LITIG. REP.: ASBESTOS 20 (Apr. 20, 2001).

46. *See* Samuel Issacharoff, *Shocked: Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1932 (2002) (stating that "[t]he ongoing risks of insolvency, the search for new claimants against solvent defendants, and (paradoxically) the prospects for either bankruptcy or some global resolution have created great pressure to file cases as quickly as possible.").

47. *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, 18-3 MEALEY'S LITIG. REP.: ASBESTOS 21, (Mar. 7, 2003).

48. *See* STEPHEN CARROLL & DEBORAH HENSLER, RAND INSTITUTE FOR CIVIL JUSTICE, FACTS AND FIGURES ABOUT ASBESTOS LITIGATION: HIGHLIGHTS FROM THE NEW RAND STUDY (2003).

49. *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims*, 15-23 MEALEY'S LITIG. REP.: ASBESTOS 7 (Jan. 5, 2001).

50. See *Id.*

51. The doctrine may also be referred to as "joint liability." For different usages of the terms "joint tort" and "joint tortfeasors" see RESTATEMENT (THIRD), *supra* note 39, at § 10, cmt. a, rptrs. notes.

52. 98 Eng. Rep. 465 (K.B. 1771); *see also* RESTATEMENT (THIRD), *supra* note 39, at § A18, cmt. a, rptrs. notes (tracing joint liability to *Hill*); Paul Bargren, Comment, *Joint Liability: Protection for Plaintiffs*, 1994 WIS. L. REV. 453, 455-56 (1994) (providing a history of joint liability).

53. 77 Eng. Rep. 1150 (K.B. 1613); *see also* Frank Vandall, *A Critique of the Restatement (Third), Apportionment as it Affects Joint & Several Liability*, 49 EMORY L.J. 565, 565-66 (2000) ("Joint and several liability originated over 300 years ago in the English report of *Sir John Heydon's Case*").

American commentators were generally supportive of the doctrine,[54] and it became the majority rule.[55]

The courts fashioned joint and several liability to serve a public policy objective. Their original justification for the doctrine was that "as between a culpable defendant and an innocent plaintiff, the culpable defendant should bear the full burden of the plaintiff's injuries."[56] Since the defendant was at least somewhat at fault and the plaintiff was not at fault at all, if someone had to bear a loss it was thought to be fairer for the blameworthy party to do so.[57]

The all-or-nothing doctrine of contributory negligence was an important bulwark for this justification.[58] Contributory negligence's insistence that a plaintiff who was partially at fault should receive nothing ensured that joint and several liability would apply only when defendants faced blameless plaintiffs.[59] Thus, defendants facing joint and several liability were always more morally culpable than the plaintiff, and it therefore was arguably fair to make them bear all of the loss in that situation rather than to require a completely blameless plaintiff to suffer the burden.[60]

The rise of comparative fault placed a large stick in the spokes of the initial justification for joint and several liability.[61] Since under comparative fault a plaintiff could be partially to blame herself but still recover, courts no longer had the assurance that imposition of joint and several liability would pit a morally blameless plaintiff against a morally blameworthy defendant. A number of authorities, including the Prosser treatise, began noting this problem and criticizing the continued use of joint and several liability in comparative negligence jurisdictions.[62] The *Restatement (Third) of Torts:*

54. *See* RESTATEMENT (THIRD), *supra* note 39, at § A18, rptrs. note, cmt. a, (citing William L. Prosser, *Joint Torts and Several Liability*, 25 CAL. L. REV. 413, 432 (1937)); Roy D. Jackson, Jr., *Joint Torts and Several Liability*, 17 TEX. L. REV. 399, 403 (1939); J. H. Wigmore, *Joint-Tortfeasors and Serverance of Damages: Making the Innocent Party Suffer without Redress*, 17 ILL. L. REV. 458, 459 (1923).

55. *See* RESTATEMENT (THIRD), *supra* note 39, at § A18, cmt. a (noting that "only a few" American courts resisted adopting joint liability).

56. *Id.* at § C21, cmt. a.

57. *Id.*

58. *See* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 15.03 (4th ed. 2002).

59. *See id.* at § 1.02.

60. *Id.* at § 15.04.

61. *Id.*

62. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 475-76 (5th ed. 1984) ("[T]he failure to consider the negligence of all tortfeasors, whether parties or not, prejudices the joined defendants who are thus required to bear a greater proportion of the plaintiff's loss than is attributable to their fault."); RESTATEMENT (THIRD), *supra* note 39, at § B19, rptrs. note, cmt. c.; Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 903 (1984) ("To the extent that a given legal system ignores the fault of any tortfeasor, and shifts the financial burden from one culpable person to another, the fundamental principle of comparative fault

Apportionment of Liability ("*Restatement (Third)*"), completed in 1999, agrees with these criticisms.[63] It notes that the original justification for joint and several liability is "no longer compelling,"[64] and finds it "difficult to make a compelling argument" for pure joint and several liability since the rise of comparative fault.[65]

In response to these criticisms, some supporters of joint and several liability began emphasizing a second policy rationale for the doctrine. They argued that joint and several liability is justified because each liable defendant is a full legal cause of a plaintiff's harm.[66] If one is a full legal cause, according to the argument, then that defendant should be held fully responsible for all damages, regardless of whether the plaintiff was at fault.[67]

Professor Richard Wright sets up this argument with a hypothetical involving four tortfeasors who, acting independently of each other, each negligently place one drop of poison in a coffee cup.[68] In the hypothetical it is assumed that three drops of poison are sufficient to kill the plaintiff.[69] In such a situation, he posits, asserting that each defendant was only twenty-five percent negligent would be inaccurate – they all were, in the eyes of the law, complete and proximate causes of the harm.

Professor Wright's hypothetical is a bit confusing, because it asks us to take what would intuitively seem to be intentional misconduct–four

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is compromised.").

63. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (1999).

64. RESTATEMENT (THIRD), *supra* note 39, at § C21, cmt. a.

65. *Id.* at § 10, cmt. a ("It is difficult to make a compelling argument for either a pure rule of joint and several liability or a pure rule of several liability once comparative responsibility is in place.").

66. *See generally* Brief Amici Curiae of American Law Professors in Support of Respondents, Norfolk & Western Ry. Co. v. Ayers, 123 S. Ct. 1210 (2003) (No. 01-963) [hereinafter Norfolk Amici Brief].

67. *Id.* at 11-15.

> A defendant's individual full responsibility for an injury that was an actual and proximate result of her tortious behavior is not diminished if some other person's tortious behavior also was an actual and proximate cause of the injury. Rather each defendant whose tortious behavior was an actual and proximate cause of the injury is individually fully responsible for the entire injury. This is most obvious when a defendant's tortious behavior was either necessary or independently sufficient for the occurrence of the injury, but it remains true whenever a defendant's tortious behavior was an actual and proximate cause of the injury.

Id. at 12-13.

Richard Wright, *The Logic and Fairness of Joint Liability*, 23 MEMPHIS ST. L. REV. 45, 54 (1992).

68. *See* Norfolk Amici Brief, *supra* note 66, at 7. Professor Wright also presents a different version of the hypothetical (one in which any one of the defendants' independent drops of poison would have been enough to kill the plaintiff) in Wright, *Logic and Fairness*, *supra* note 67, at 59. Professor Wright's hypothetical is also discussed in an article by Professor Stuart M. Madden, *Selected Federal Tort Reform and Restatement Proposals Through The Lenses Of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1077 (1998), and is mentioned in a footnote in Richard Fumerton & Ken Kress, *Causation and The Law: Preemption, Lawful Sufficiency and Causal Sufficiency*, 64 LAW & CONTEMP. PROBS. 83, 90 n.28 (2001).

69. *See* Norfolk Amici Brief, *supra* note 66, at 7. This differs from Professor Wright's earlier version of the hypothetical, in which any one drop of the poison would be sufficient to cause death. *See supra* note 67.

tortfeasors each putting a drop of poison in someone's coffee–and to assume that each tortfeasors' conduct is negligent. If the conduct were intentional, as one would suppose under these facts, responsibility would be much easier to accept–intentional conduct has long been used in tort law as a basis to extend a defendant's liability. Also, the hypothetical does not address the moral dilemma raised when a plaintiff herself negligently contributes to her harm. Of course our desire to impose full liability on each defendant would be tempered if we learned that one of the people putting poison in the coffee was the plaintiff herself. Professor Wright accepts the notion that plaintiffs should be responsible for their own percentage of fault,[70] but the key point of plaintiff fault–which is the foundation of the post-comparative negligence decline of joint and several liability-does not make it into the hypothetical. Defending with precise logic the exact amount of twenty-five percent liability for each party might remain difficult in the context of a plaintiff adding one of the drops herself, but our rough sense of justice might lead us to adopt some basis for allocation–even if it is not perfect–to prevent the unfairness of a plaintiff adding to her harm and yet avoiding all responsibility. Since each party provided twenty-five percent of the poison, there is at least some intuitive basis for assigning that amount of responsibility to each party.

Further, once the door to assigning percentages of liability among the parties has been opened in response to accepting a general decision to consider plaintiff's own fault as a factor that may reduce recovery rather than necessarily eliminating it; on an intuitive level, that door is difficult to close again in situations such as asbestos where the plaintiff is typically not contributorily negligent. One could make a reasoned argument, as some scholars have, that comparative negligence primarily presents challenges to joint and several liability in cases where plaintiffs are partly to blame for their harm, but perhaps that is a little bit like the pleas of the Great and Powerful Oz not to pay any attention to the man behind the curtain. Now that courts and, perhaps more to the point, legislatures, have been allowed to see multiple party liability in terms of a percentage basis, it is asking a lot to implore them only to do so in some, but not all, of the situations in which multiple responsible parties are involved.

Perhaps in part because of these difficulties, this second effort at justifying joint and several liability in the era of comparative responsibility has not halted the courts' trend away from the traditional doctrine. Although the *Restatement (Third)* notes the development of the second proposed justification, the Reporters nevertheless conclude that, since the advent of comparative responsibility, pure joint and several liability is difficult to

70. *See* Wright, *supra* note 67, at 72-78.

defend.[71] Indeed, fifteen jurisdictions have abolished (or virtually abolished) joint and several liability altogether,[72] either judicially[73] or through legislation.[74] One of the courts that judicially abolished the doctrine explained:

> Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault.[75]

In addition to the jurisdictions that have abolished joint and several liability altogether, most other jurisdictions have in some significant way acted to limit the doctrine. Several jurisdictions only allow the doctrine to apply when defendants have some threshold level of liability (e.g., joint and several liability applies only to defendants who are at least fifty percent at fault);[76] several jurisdictions reallocate the share of an insolvent or immune

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71. *See* RESTATEMENT (THIRD), *supra* note 39, at § C20, cmt. a. The reporters seem to favor retaining a modified form of joint liability that would reallocate the share of an insolvent or immune party to the remaining responsible parties (including the plaintiff if the plaintiff is comparatively at fault) in proportion to their share of liability. *See id.*

72. *See id.* at § B18, rptrs. note, cmt. a, § 17, rptrs. note, cmt. a (table).

73. *See* Brown v. Keill, 580 P.2d 867 (Kan. 1978); Prudential Life Ins. Co. v. Moody, 696 S.W.2d 503 (Ky. 1985); Bartlett v. N.M. Welding Supply, Inc., 646 P.2d 579, 586 (N.M 1982); McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992); Volz v. Ledes, 895 S.W.2d 677 (Tenn. 1995); *cf.* Anderson v. O'Donoghue, 677 P.2d 648 (Okla. 1983) (abolishing joint liability where plaintiff was at fault); Washburn v. Beatt Equip. Co., 840 P.2d 860 (Wash. 1992) (abolishing joint liability where plaintiff was at fault). *But see* Boyles v. Okla. Natural Gas Co., 619 P.2d 613 (Okla. 1980) (retaining joint liability for innocent plaintiffs).

74. *See* ALASKA STAT. § 09.17.080 (Miche 2002); ARIZ. REV. STAT. § 12-2506 (West 2002); COLO. REV. STAT. § 13-21-111.5 (2002); IND. CODE ANN. § 34-51-2-8 (Michie 2002); LA. CIV. CODE arts. 1804, 2323, 2324 (West 2002); NEB. REV. STAT. § 25-21,185.10 (2002); N.D. CENT CODE § 32-03.2-02 (2002); OR. REV. STAT. § 18.485 (2002); UTAH CODE ANN. § 78-27-40 (2002); WYO. STAT. ANN. § 1-1-109(e) (Michie 2002); *see also* IDAHO CODE ANN. § 6-803 (Michie 2002) (abolishing joint liability with exception for violation of any state or federal law or regulation related to hazardous or toxic waste or substances or solid waste disposal sites, or any cause of action arising from the manufacture of any medical devices or pharmaceutical products); KY. REV. STAT. ANN. § 411.182 (Michie 2002) (codifying prior court decision eliminating joint liability); MICH. COMP. LAWS §§ 600.6304(4), 600.6312 (West 2002) (abolishing joint liability except in medical malpractice cases or criminal conduct involving gross negligence or the use of drugs or alcohol); N.M. STAT. ANN. § 41-3A-1 (Michie 2002) (abolishing joint liability except in strict liability cases, cases involving vicarious liability, or "situations not covered by any of the foregoing and having a sound basis in public policy."); NEV. REV. STAT. ANN. § 41.141 (Michie 2002) (abolishing joint liability except in strict liability or toxic or hazardous substance cases).

75. *McIntyre*, 833 S.W.2d at 58.

76. *See, e.g.*, FLA. STAT. ANN. § 768.81 (West 2002) (permitting various levels of recovery under joint liability depending on defendant's level of fault); IOWA CODE ANN. § 668.4 (West 2002) (abolishing joint liability for economic damages for defendants less than 50% at fault); MINN. S.F. 872 (2003) (abolishing joint liability for defendants that are 50% or less at fault); N.J. STAT. ANN. § 2A:15-5.3 (West 2002) (abolishing joint liability for defendants less than 60% at fault); N.H. REV.

party to the remaining responsible parties (including the plaintiff, if the plaintiff is comparatively responsible) in proportion to their share of liability;[77] several jurisdictions only apply joint and several liability to certain types of damages (e.g., allowing joint and several liability for economic damages but not for noneconomic damages);[78] and a few jurisdictions only apply joint and several liability where plaintiffs are not at fault.[79]

Only fifteen jurisdictions still apply full joint and several liability.[80] Some of these states, however, have particularly heavy asbestos caseloads, such as Maryland, Massachusetts and West Virginia. Thus, as peripheral asbestos litigation defendants have learned, joint and several liability remains a potent issue in asbestos litigation.

III. PUBLIC POLICY IMPLICATIONS OF ALLOWING JOINT AND SEVERAL LIABILITY TO APPLY TO ASBESTOS LITIGATION AND POTENTIAL SOLUTIONS

The common law rule courts developed to serve important policy concerns in the harsh era of contributory negligence has, in the present context of litigation, created a public policy disaster. Viewing the matter from a broader perspective, with the demise of contributory negligence, joint and several liability in all contexts is increasingly controversial and under assault. The many jurisdictions that have through legislation or judicial

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STAT. ANN. § 507:7-e (Michie 2002) (abolishing joint liability for defendants less than 50% at fault); S.D. CODIFIED LAWS ANN. § 15-8-15.1 (Michie 2002) (limiting joint liability to two times the percentage of fault of any defendant found to be less than 50% at fault); TEX. CIV. PRAC. & REM. CODE ANN. § 33.013 (2002) (abolishing joint liability except for defendants found to be more than 50% at fault, or 15% at fault in toxic tort cases); WASH. REV. CODE. ANN. § 4.22.070(1)(B) (West 2002); WIS. STAT. ANN. § 895.045(1) (West 2002) (abolishing joint liability for defendants found to be less than 51% at fault); *see also* W.V. CODE ANN. § 55-7B-9 (Michie 2002) (abolishing joint liability for defendants found to be less than 25% at fault in medical malpractice cases).

77. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-572h (West 2002).

78. *See, e.g.*, CAL. CIV. CODE § 1431.2; IOWA CODE ANN. § 668.4; NEB. REV. STAT. § 25-21, 185.10; N.Y. C.P.L.R. §§ 1601-1602 (West/Deering 2002) (abolishing joint liability for noneconomic damges for defendants less than 50% at fault in certain cases); OHIO REV. CODE ANN. § 2315.19 (West/Anderson 2002) (abolishing joint liability for noneconomic damages when the plaintiff was contributorily negligent or impliedly assumed the risk that caused the harm).

79. *See, e.g.*, GA. CODE ANN. § 51-12-33; MO. STAT. § 537.067; OKLA. STAT. TIT. 23, § 13/5; WASH. REV. CODE ANN. § 4.22.070(1)(B); *see also* RESTATEMENT (THIRD), *supra* note 39, at § 17, rptrs. note, cmt. a (table). Some of the jurisdictions have adopted combinations of the limitations cited above. *See, e.g.*, IOWA CODE ANN. § 668.4 (abolishing joint liability for noneconomic damages and abolishing joint liability for economic damages when the defendant is less than 50% at fault).

80. These jurisdictions are Alabama, Arkansas, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia (with exception for medical malpractice actions in which defendant is found to be less than 25% at fault, *see* W.V. CODE ANN. § 55-7B-9). *See* RESTATEMENT (THIRD), *supra* note 39, at § 17, rptrs. note, cmt. a (table).

decisions abolished or limited the doctrine provide ample evidence that the honeymoon with pure joint and several liability is waning.

In the most disruptive national arena of litigation during the transition to the twenty-first Century–asbestos lawsuits increasingly focusing on peripheral defendants–joint and several liability is uniquely destructive and thus merits greater scrutiny than when the doctrine is applied to other types of cases. Several factors combine to make the doctrine uniquely pernicious in peripheral defendant asbestos cases.

First, since the use of asbestos was essentially discontinued decades ago, asbestos litigation presents especially difficult challenges in determining fair risk distributions between potential defendants. In cases where the product was last sold decades ago, witnesses may be deceased, documents may no longer exist, and memories may be faded. Fairly apportioning liability among peripheral defendants whose businesses were not focused on asbestos products is a special challenge.[81]

Second, the extremely large numbers of plaintiffs and the size of the judgments involved make joint and several liability unique in peripheral defendant asbestos cases. The failed policies of courts trying to quickly resolve asbestos claims by easing procedural and substantive limitations opened the litigation floodgates for unimpaired and mildly impaired plaintiffs, creating enormous financial strains.[82] As asbestos producers and suppliers crumbled under the weight of the litigation, unimpaired and mildly impaired plaintiffs who might have otherwise held off on filing claims began to file rushed lawsuits before the available money had been exhausted.[83] The chain reaction of bankruptcies then began in earnest, with the horde of plaintiffs moving further and further away from the core of original defendants primarily responsible for asbestos with each new bankruptcy.[84]

A. Chapter 11 Bankruptcies Cause Particularly Significant Societal Harm in the Context of Asbestos Litigation

The domino-effect of corporation after corporation being forced into bankruptcy presents the most strikingly unique aspect of current asbestos litigation. This context makes joint and several liability a much more powerful doctrine than it is in typical tort cases. For example, a study of Wisconsin personal injury trials in 1985 and 1986 found joint and several liability applied in only 1.6 percent of the cases.[85] A national study performed in the early 1990s found joint and several liability applied in a

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81. *See, e.g.*, *N.Y. Jury Finds Sears/GE Liable for Exposure; Awards $1.5 Million to Meso Victim*, 15-17 MEALEY'S LITIG. REP.: ASBESTOS 13 (discussing case in which the jury awarded $1.5 million to an individual who claimed that exposure from asbestos-containing products that he purchased from Sears *fifty* years earlier caused him to develop cancer) (emphasis in original).

82. *See supra* notes 11 through 23 and accompanying text.

83. *See supra* notes 30 through 32 and accompanying text.

84. *See supra* notes 31 through 38 and accompanying text.

85. *See* JOINT LIABILITY: THE WISCONSIN EXPERIENCE, STATE BAR OF WIS. 2 (1989); Bargren, *supra* note 52, at 473-74.

similarly miniscule percentage of cases.[86] Thus, one could argue that in most categories of cases concerns about the effects of joint and several liability might be overstated.

This is not the case in the present state of asbestos litigation. In part because most asbestos claims now involve at least one and often several bankrupt potential defendants, reliance upon joint and several liability, where it is permitted, is the rule rather than the exception.[87] For example, RAND recently found that by the late 1990s, "nontraditional" defendants (i.e., defendants not involved in asbestos mining, manufacturing, or the distribution or installation of asbestos insulation) "accounted for about sixty percent of asbestos expenditures."[88] "In contrast, in the early 1980s 'traditional' defendants accounted for about three-quarters of expenditures."[89] Whatever flaws might exist in joint and several liability are thus magnified by the scope of its impact in current asbestos litigation. In this field the doctrine has particularly sharp teeth.

The individual and societal harm caused as the domino-effect bankruptcies in asbestos litigation extends more and more toward peripheral defendants is another factor that makes joint and several liability unique in the asbestos litigation context. Chapter 11 bankruptcies impose direct and indirect costs on at least three entities: (1) the firm declaring bankruptcy; (2) other firms in that industry that have not (yet) declared bankruptcy; and (3) society as a whole.

As the recent RAND study indicates, the "costs of bankruptcy reorganization [in the asbestos litigation context] can be substantial."[90] These direct costs may include expenses such as attorneys' fees, bankruptcy fees (i.e., accountants), and administrative costs.[91] According to most estimates, these direct costs total generally about one percent to three percent of a firm's value.[92] In asbestos-related bankruptcies, however, they may be higher because of the massive numbers of tort creditors.[93]

86. *See* Joan T. Schmit et al., *An Analysis of Litigation Claiming Joint and Several Liability*, 58 J. RISK & INS. 397 (1991); Bargren, *supra* note 52, at 474. The national study used the Lexis database to study 130,000 federal and state cases from 1963-88, and found only 0.13 percent discussing joint and several liability in a non-contract setting. *Id.*

87. *See supra* notes 31 through 37 and accompanying text.

88. RAND Rep., *supra* note 3, at 50.

89. *See id.*

90. *Id.* at 72.

91. *See* Leonard J. Long, *Bankruptcy Lessons of Future Mass Tort Claims: Potential Mass Tort Victims Should Have Catastrophic Injury Insurance*, 16 QUINNIPIAC L. REV. 357, 376-77 (1997) ("[Bankruptcy] is a battle over what the economists classify as 'transaction costs,' and is essentially a battle over attorneys fees. That is, it is a contest amongst lawyers (and their 'hanger-ons' [such as accountants]) over shares of other people's money.").

92. *See* Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 476 (1992) (citing Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of*

Furthermore, attorneys' fees are not only expended after bankruptcy has been declared. Firms attempting to stave off bankruptcy or other financial harm incur substantial expenses defending against bankruptcy claims. RAND has noted that recent asbestos litigation developments are likely to drive up transaction costs potentially for a long period of time; the study focuses on litigation expenses as an important element in the increase.[94] As plaintiffs' lawyers become more aggressive in relying on novel arguments for attaching liability to peripheral defendants, these defendants are responding with increasingly aggressive – and costly – defense strategies.[95]

The indirect costs of asbestos-related bankruptcies are more difficult to measure than direct costs, but they may be even higher. These costs may include loss of customers, interruption of supply, damage to reputation, managerial distraction, and employee turnover.[96] One significant indirect cost that may be particularly high in asbestos-related bankruptcies stems from the long wait typically required to pay claimants. The length of time a business stays in bankruptcy reorganization is "critically important" to whether the business will successfully re-emerge, because during that time "management incentives are inappropriate, professional fees accrue at a rapid rate, and business uncertainties increase."[97]

RAND found that among eleven major asbestos defendant bankruptcies it analyzed, the average length of time from petition to confirmation was six years.[98] One bankruptcy took ten years.[99] It takes even longer to actually pay claimants. For example, Johns-Manville filed its bankruptcy petition in 1982, and its petition was confirmed six years later, in 1988.[100] Payments were halted in 1990, and did not resume again until 1995 – thirteen years after the bankruptcy petition was filed.[101] According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."[102] The Trust is now paying out five cents on the dollar to asbestos claimants.[103]

Priority of Claims, 27 J. FIN. ECON. 285, 285-89 (1990)) (estimating direct costs for publicly held firms at three percent of assets); Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1087 (1984) (average of direct bankruptcy cost to value of the company ratio for publicly held companies was six percent)).

93. *See* RAND Rep., *supra* note 3, at 72.

94. *See id.* at 61.

95. *See id.* at 61, 68.

96. *See* JOSEPH E. STIGLITZ ET AL., THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT FIRMS 23 (Sebago Assoc., Dec. 2002) [hereinafter STIGLITZ STUDY] (observing that "bankruptcies can destroy the organizational capital associated with the firm").

97. Lynn M. LoPucki, *The Trouble With Chapter 11*, 1993 WIS. L. REV. 729, 729 (1993).

98. *See* RAND Rep., *supra* note 3, at 68.

99. *See id.*

100. *See id.*

101. *See id.*

102. Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

103. *See* Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, *available at* 2002 WL-WSJ 3392934.

An especially harmful consequence of long bankruptcies in the asbestos context is the additional pressure put on non-bankrupt defendants. This may contribute significantly to furthering the domino effect of more and more asbestos-related bankruptcies. The RAND study noted that because bankruptcy stays litigation against bankrupt defendants, "a considerable sum of money for paying asbestos claims has been 'taken off the table.'"[104] This has led plaintiffs' attorneys to demand more money from solvent defendants, and to develop new legal theories to bring additional solvent defendants into the litigation.[105]

Another indirect bankruptcy cost that is more significant in asbestos bankruptcies than in most other types of bankruptcies influences entire industries against whom asbestos claims are flourishing. The more businesses in a particular industry are forced to resort to bankruptcy, the more cautious lenders must be for other businesses in that industry.[106] Businesses thus find it harder to obtain necessary loans, and the loans they obtain may come with higher interest rates.

The human costs associated with Chapter 11 bankruptcies are also substantial. In publicly traded corporations, one study found that only eight percent of managers remained with the corporation one year after a confirmed reorganization plan was developed.[107] Most of the managers were able to find other jobs, but not nearly at the same salary: the average individual financial loss per manager over time was $1.3 million dollars.[108] Not surprisingly, the managers suffered psychological effects from the experience, including suicide.[109]

Employees, managers and other businesses all suffer ripple effect losses when a corporation declares bankruptcy. Examples abound, and highlighting the details of two may be illustrative. When Webvan Group, Inc. declared Chapter 11 bankruptcy in 2001, it terminated employees with no severance pay, its landlord lost $4.7 million, and some corporate

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104. RAND Rep., *supra* note 3, at 68.

105. *See id.* In response, defendants have reported facing higher costs to resolve asbestos claims than they anticipated, and they have reported resorting to more aggressive – and thus more expensive – defense strategies. *See id.*

106. *See Enron Headed Toward Bankruptcy Filing, Which May Leave Smaller Energy Companies With a Tough Time Getting* Loans (Nat'l Public Radio, Nov. 30, 2001).

107. *See* Warren, *supra* note 92, at 450 (citing Brian L. Betker, Management Changes, Equity's Bargaining Power and Deviations from Absolute Priority in Chapter 11 Bankruptcies 11 (Mar. 1992) (unpublished manuscript, on file with author)).

108. *See id.* (citing Stuart C. Gibson, *Management Turnover and Financial Distress*, 25 J. FIN. ECON. 241, 254 (1989)).

109. *See id.* (citing Gibson, *supra* note 108, at 252); *see also* SOL STEIN, BANKRUPTCY: A FEAST FOR LAWYERS (1989) (citing as one of the "ten lies about Chapter 11" that managers will not be attacked personally – in reality managers are vilified and humiliated).

investors lost over $1 million dollars.[110] Similarly, when the Fresno, California corporation UpRight, Inc. declared Chapter 11 bankruptcy in 2001, it layed off 800 employees without notice.[111] But the bankruptcy did not just harm managers and employees. Hydratech, Inc., a corporation that did substantial business with Upright, also suffered dramatic losses. A strong percentage of Hydratech's sales were to UpRight, and, not surprisingly given the bankruptcy, UpRight owed Hydratech a substantial sum of money.[112] Within two weeks of UpRight's filing of a bankruptcy petition, Hydratech was forced to lay off almost two-thirds of its employees, and imposed a ten percent pay cut on its remaining employees.[113]

The numbers of jobs lost due to asbestos-related bankruptcies dwarf these other illustrations. A study released in December 2002 by Columbia Professor and Nobel-prize winning economist Joseph Stiglitz and two colleagues found 60,000 lost jobs due to asbestos-related bankruptcies as of December 2002.[114] The study estimated the total economic cost associated with this displacement at between $1.4 billion and $3 billion.[115] To cite a few examples, Federal-Mongul and U.S. Gypsum, both of which filed for bankruptcy in 2001, announced layoffs of 1,100 and 500 workers, respectively, that year.[116] In the three years before filing for bankruptcy in 2000, Owens Corning let 1,500 workers go.[117] Absent a significant change in the litigation's direction, the overall dollar costs and human costs will, without doubt, become much higher over time.

Chapter 11 bankruptcies can also destroy or impair the retirement assets and life-savings of thousands of employees, such as union workers, who are even less able than corporate managers to make up for their losses. The Enron bankruptcy and its devastating effect on employee-shareholders' retirement funds drew national attention to this dilemma,[118] but of course the problem does not only plague notorious bankruptcies such as Enron's. Rather, the public only hears about it in such cases.[119] The Stiglitz study

110. *See* Carol Emert, *Eating Their Losses*, S.F. CHRON., July 10, 2001, at B1, *available at* 2001 WL 3408529.

111. *See* Ron Trujillo, *138 Valley Jobs Slashed – UpRight Closure Forces Hydratech to Cut Costs – and Jobs*, FRESNO BEE, June 15, 2001, at C1.

112. *Id.* UpRight accounted for almost 50 percent of Hydratech's overall sales, and owed Hydratech more than $1.4 million. *Id.*

113. *See id.*

114. *See* STIGLITZ STUDY, *supra* note 96, at 26.

115. *See id.* at 29.

116. *See id.* at 24-25.

117. *See id.*

118. *See* Albert B. Crenshaw, *Ruling Unravels Deal on Enron Pensions*, WASH. POST, Apr. 4, 2002, at E6, *available at* 2002 WL 17587646 (reporting that 20,000 Enron employees had invested $1.3 billion in the company's 401(k) plan, which became "essentially worthless" with the company's bankruptcy); Albert B. Crenshaw, *Retirees, Workers Assail Enron on 401(k) Freeze; Witnesses Challenge Firm on Length of Halt in Stock Trading*, WASH. POST, Dec. 19, 2001 at E12, *available at* 2001 WL 31543794 (reporting that Enron employees Janice Farmer and Charles Prestwood lost $700,000 and $1.3 million, respectively, in retirement savings).

119. *See, e.g.*, Diane Stafford, *Finding a Job is a Full-time Endeavor*, K.C. STAR, Jan. 9, 2003, *available at* 2003 WL 4021982 (reporting on the case of a 54-year-old executive secretary and other

found that asbestos bankruptcies had inflicted "substantial, albeit perhaps not devastating, costs on workers' [pension wealth]."[120] The study estimated that "the average worker at a bankrupted firm with a 401(k) plan suffered roughly $8,300 in losses."[121]

Finally, many of the difficulties and challenges presented by asbestos bankruptcies are even harder on small corporations, which are increasingly being named as asbestos defendants. As stated, the length of time a business stays in bankruptcy reorganization is "critically important" to whether the business will ultimately survive reorganization.[122] Unfortunately, smaller corporations usually stay in reorganization longer than larger corporations.[123] Further, small corporation bankruptcies are getting longer.[124] Thus, not surprisingly, the costs of bankruptcy tend to be much higher for smaller firms. One study indicated that costs of bankruptcy totaled twenty percent of the Chapter 11 distribution in small firms, compared with two to six percent of the distribution in larger firms.[125] In part because of these larger costs, surviving Chapter 11 bankruptcy is much more rare for small corporations than for large corporations.[126] Because asbestos lawsuits are now starting to involve smaller peripheral defendants, the harm will be even worse than it was when the litigation focused on large businesses with substantial responsibility for plaintiffs' harms.

B. *The Case for Treating Joint and Several Liability Uniquely in Peripheral Defendant Asbestos Litigation*

Joint and several liability was created by courts in response to public policy concerns. Accordingly, where the doctrine is no longer serving

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employees who lost their jobs and retirement savings upon the sale of the business during Chapter 11 bankruptcy proceedings).

120. STIGLITZ STUDY, *supra* note 96, at 43.

121. *Id.* at 43. According to the study, "[f]or a 45-year old worker with an average 401(k) balance, such a loss would mean his retirement income would fall by $1,250 per year." *Id.*

122. *See* LoPucki, *supra* note 97 and accompanying text.

123. *See* LoPucki, *supra* note 97, at 745 (finding that the time for reorganization for small companies more than doubled after the adoption of Chapter 11 in 1978).

124. *See id.*

125. *See* Robert M. Lawless et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. ILL. L. REV. 847, 876-78 (based on study of 57 small firm bankruptcies filed in Memphis that were completed in 1991 and 1992).

126. *See* Warren, *supra* note 92, at 444 (stating that "[o]nly about 17% of all Chapter 11 cases manage to confirm a plan of reorganization, while nearly 90% of publicly traded companies survive to confirm a plan.") (citing ED FLYNN, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL ANALYSIS OF CHAPTER 11, at 10-11 (1989) (estimating a 17% confirmation rate for all Chapter 11 filings)); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 411, 441 n.105 (finding confirmation rate of 89-96% among biggest cases filed during 1979-88)).

public policy in a particular context, courts and legislatures should change the law. Asbestos presents such a situation. Courts can change joint and several liability rules under the traditional common law process. Respected courts have already done so.[127] Legislatures also have the power to create and modify tort law doctrine. Regardless of the public policy debate as to whether joint and several liability should be abolished in general, asbestos liability is one situation where the arguments for limiting or abolishing the doctrine are especially strong.

Limitations developed by courts or legislatures for asbestos cases could take several approaches. For example, joint and several liability could be abolished for asbestos lawsuits. Another approach would be to establish a responsibility minimum (e.g., fifty percent) to allow the doctrine to operate against certain asbestos defendants – as stated, several states already have modified the doctrine in this fashion for all cases.[128] Or, joint and several liability could be prohibited in cases involving unimpaired asbestos plaintiffs. A final approach may be to decide on a case-by-case basis whether the application of joint and several liability is appropriate under the circumstances.[129]

Two brief examples help to illustrate why asbestos-specific limitations on joint and several liability may be desirable public policy. *In re Collins,*[130] decided in 2000 by the Third Circuit Court of Appeals, focused on punitive damages in asbestos litigation. Four asbestos plaintiffs' cases were transferred to the federal Judicial Panel on Multidistrict Litigation ("MDL Panel") which includes all asbestos personal injury litigation in the federal courts.[131] Eventually, at the suggestion of the transferee judge, the cases were remanded back to the transferor courts.[132] The MDL Panel withheld remand of the plaintiffs' claims for punitive damages, as it had done in asbestos cases throughout the 1990s.[133] The *Collins* court upheld the MDL Panel's practice, stating that, because assets are limited in the specific context of asbestos lawsuits, "the sick and dying, their widows and survivors should have their claims addressed first."[134] The court explained:

> Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a

127. *See, e.g.*, In Re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982) (refusing to allow plaintiffs to argue a market theory of liability in asbestos cases); Greenwood v. McDonough Power Equip., 437 F. Supp. 707 (D. Kan. 1977) (applying Kan. Law) (holding that joint and several liability has been replaced by several liability in Kansas, and finding that the defendant had a substantive right to have its liability gauged in proportion to its causal negligence.).

128. *See supra* notes 74 through 80 and accompanying text.

129. This potential approach would allow the least certainty and predictability of the approaches mentioned, but it would also allow the most precise tailoring of the doctrine to meet public policy needs.

130. *In re* Collins, 233 F.3d 809 (3d Cir. 2000).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 812 (quoting In re Petenauela, 210 F.3d 135, 139 (3d Cr. 2000)).

> finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants .... Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages.[135]

The appellate court went on to note that the resources available to asbestos plaintiffs are "steadily being depleted", and that the rising numbers of asbestos-related bankruptcies reveals that "the process is accelerating".[136] In this context, the court held, it is "responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls."[137] The court further found it "discouraging that while the [multidistrict litigation] Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation."[138]

The *Collins* holding does not apply to all multidistrict punitive damages cases; its limitation applies only to asbestos cases, where unique circumstances make punitive damages awards especially problematic.[139] Thus, *Collins* recognizes that adoption of an asbestos-specific rule to limit liability is entirely appropriate where it serves public policy interests. Like joint and several liability, punitive damages are a common law creation designed to serve public policy. The *Collins* court was correct in limiting a common law doctrine that now frustrates rather than furthers public policy in the specific context of asbestos, and other courts should consider similarly limiting joint and several liability in asbestos cases.

Another example is the 1984 New Jersey Supreme Court case of *Feldman v. Lederle Labs.*[140] For purposes of our focus, in relevant part *Feldman* interpreted *Beshada v. Johns-Manville Products Corp.*,[141] another New Jersey Supreme Court case that was decided two years earlier. *Beshada* was a closely watched asbestos lawsuit against Johns-Manville, and the court adopted the radical proposition that defendants should be held strictly liable for risks that were unknowable at the time of sale but

135. *Id.* (citation omitted).
136. *See id.*
137. *Id.*
138. *Id.*
139. *See* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Affect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 149 (2001).
140. 479 A.2d 374 (N.J. 1984).
141. 447 A.2d 539 (N.J. 1982).

discovered later. Thus, even if there was no way a seller could have known of later-discovered risks, it will be treated as if it knew of them. Particularly in failure to warn cases such as *Beshada*, this standard approaches absolute liability for sellers.[142]

Several prominent legal scholars soundly denounced *Beshada* in the two years between it and the *Feldman* decision.[143] The *Feldman* court noted this criticism, and declined to apply *Beshada*'s imputed knowledge of risks standard to the case before it (a case involving a prescription medical product rather than asbestos). But the court also declined to overrule *Beshada*. Instead, it restricted *Beshada* "to the circumstances giving rise to its holding."[144] A later New Jersey Supreme Court case confirmed that this limitation meant that *Beshada*'s extreme rule is to be applied "only in asbestos cases."[145]

Feldman and *Beshada* are examples of courts' early approaches to the onset of large-scale asbestos litigation. Unfortunately, their approach of making lawsuits easier to win against asbestos defendants was both short-sighted and misguided; it invited a litigation superhighway traffic jam involving a large number of asbestos claims. The cases, however, demonstrate that courts certainly have the power to make asbestos-specific rules if they believe that doing so furthers public policy.

Indeed, the *Feldman* and *Beshada* cases are particularly appropriate examples, because they make the point that since courts making asbestos-specific rules helped to create the current crisis in asbestos litigation, they should not shy away from trying to solve the problem through new asbestos-specific rules. If asbestos-specific judicial expansion of the law helped generate the crisis, asbestos-specific judicial contraction of the law may be appropriate to help end the crisis.

IV. CONCLUSION

Courts and legislatures should make special rules for specific categories of lawsuits only in rare circumstances. Any ad hoc or case-specific rule to some extent engenders uncertainty, and presents the risk of giving reign to activist judges who wish to shape the law to their individual tastes.

If there were ever a situation crying out for unique approaches to limiting further liability, however, asbestos litigation clearly is it. The combination of litigation on a massive scale, a history of courts treating asbestos litigation as unique (albeit in the past to make the litigation easier for plaintiffs), escalating bankruptcies, and the explosive increase in filings

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142. *See* Victor E. Schwartz, *The Death of "Super Strict Liability": Common Sense Returns To Tort Law*, 27 GONZ. L. REV. 179 (1991).

143. *See Feldman*, 479 A.2d at 388 (citing five law review articles, many written by prominent torts scholars, criticizing *Beshada*'s imputed risks standard).

144. *Id.* at 388.

145. Lewis v. Am. Cyanamid Co., 715 A.2d 967, 982 (N.J. 1998) ("Only in asbestos cases is a manufacturer precluded from asserting the state-of-the-art defense, despite the fact that the harms of asbestos were not known to the scientific community at the time of manufacture.").

by unimpaired plaintiffs is so compelling that even harsh critics of most judicial activism should feel comfortable considering it an appropriate option under the circumstances. In a sense this is a rare luxury for judges; the forbidden fruit of fashioning creative judge-made law to fit a specific situation is, in this unusual situation, healthy. Given the dismal current state of the litigation, there are great benefits and little risk in creating asbestos-specific limitations on joint and several liability.

One might raise the concern that adopting such limitations in some jurisdictions will contribute to forum-shopping—that the limitations will push plaintiffs to jurisdictions where neither courts nor legislatures have created asbestos-specific restrictions on joint and several liability. However, forum-shopping concerns usually focus on worries about inappropriately attracting litigants to one's jurisdiction, rather than repelling them. Courts and legislatures cannot control whether other jurisdictions will act appropriately to limit joint and several liability, and they should not allow other jurisdictions' failures to prevent them from taking appropriate action.

Judicially or legislatively limiting joint and several liability in asbestos cases is not the only solution to the asbestos crisis. For example, creating inactive dockets to defer claims for presently uninjured claimants is a measure that should be considered in addition to limitations on joint and several liability.[146] Federal legislation would avoid forum shopping and open the way for more far-reaching solutions. Given the dire circumstances, however, courts and state legislatures should not wait for a federal solution. As one court has stated:

> [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that, might perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional . . . action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not judicial activism, that is the problem in this area.[147]

Limiting joint and several liability in asbestos cases is something that courts and legislatures can and should consider undertaking immediately to

146. *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Orders That Defer Claims Filed by the Non-sick*, 31 PEPP. L. REV. (forthcoming Dec. 2003); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

147. Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting*), modif. in part*, 13 F.3d 58, *cert. denied sub nom.* Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993).

help stem the tide of unimpaired plaintiffs causing mass bankruptcies and significant societal harm.