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The Manville Corporation Bankruptcy: An Abuse of the Judicial Process?

Federal bankruptcy law offers a refuge to the honest debtor who is unable to pay his creditors when his debts are due. Here, the twin aims of bankruptcy law, to give the debtor a fresh start and to provide roughly equal treatment for his creditors, are laudably accomplished. But what policies support the use of federal bankruptcy law when the "debtor" is in fact solvent and apparently seeks refuge only to escape liability for the products it manufactures? This comment examines the recent filing of the Manville Corporation for Chapter 11 protection under bankruptcy law with this question in mind.

I. INTRODUCTION

The manufacturer of a widely marketed product often faces risks which are inherent in a free market economic system. Competition in the marketplace ideally leads to the advancement and prosperity of the manufacturer who markets the better product; less successful manufacturers, those who supply a product of lesser quality or usefulness, suffer the loss of profits and prestige. The benefits of such a competitive economy ultimately accrue to the public in the form of lower prices for goods and services, diverse employment opportunities, and a variety of products available for consumption.

On the other hand, competition in the marketplace, however beneficial in the larger picture, often induces a manufacturer in search of profits to take risks that may ultimately harm society and lead to the manufacturer's own economic collapse. This may occur when the manufacturer markets a defective product knowingly or in reckless disregard of the rights of others. While a manufacturer of a defective product may be strictly liable without regard to intent, he may be subject to punitive damages if it is determined that his conduct warrants punishment.

It is at this point that society and the courts face a dilemma: If the purposes of punitive damages are to punish the offender and to deter similar conduct by him and other offenders in the future, how are punitive damages to be administered so as to accomplish these purposes while avoiding the bankruptcy of an entity that may have provided much societal good in the past? This question

was raised initially in *Roginsky v. Richardson-Merrell, Inc.*,¹ which involved an award of punitive damages against the manufacturer of a widely marketed drug. Several hundred suits had been filed against Richardson-Merrell, Inc. throughout the United States. The court expressed its concern that punitive awards combined with large compensatory awards could "end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin."²

The primary issue when imposing punitive damages in mass litigation is how much punishment and deterrence is enough? Recognizing that it is nearly impossible to judicially limit the number of plaintiffs that would be permitted to seek punitive damages, the court in *Roginsky* stated: "[w]e have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."³

The assessment of punitive damages in a products liability suit, and the subsequent threat of bankruptcy as a result, have been given only cursory treatment by the courts.⁴ Where it has been considered, courts and commentators have generally disparaged any danger of bankruptcy flowing from an award of punitive damages. Such fears were generally dismissed as "more theoretical than real."⁵

1. 378 F.2d 832 (2d Cir. 1967).

2. *Id.* at 841.

3. *Id.* at 839. The court concluded that it was nearly impossible to judicially limit the number of plaintiffs that could seek punitive damages and cut off such recovery by subsequent plaintiffs. *Id.* at 839-40 n.11. "Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry 'Hold, enough,' in the hope that others would follow." *Id.* at 839-40.

4. See *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 961 (N.D. Tex. 1978); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1271 (1980); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 715, 60 Cal. Rptr. 398 (1967); *Owen, Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1260-61 (1960) [hereinafter cited as *Owen*]. For a discussion of the MER/29 litigation in particular, see *Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968).

5. *Owen, supra* note 4, at 1324-25. See, e.g., *Neal v. Carey Can. Mines*, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 715 n.3, 60 Cal. Rptr. 398 (1967) (The court, faced with facts and issues substantially similar to those facing the Second Circuit in *Roginsky*, "respectfully" differed from the court's holding, and awarded punitive damages. The court in *Toole* found that the "intentional, wilful and reckless conduct" of Richardson-Merrell justified sending the issue of punitive damages to the jury. The *Toole*

The theory became reality on August 26, 1982, when the Manville Corporation filed for reorganization under the Bankruptcy Reform Act of 1978. The filing followed a case which awarded, for the first time, punitive damages against the Manville Corporation. Almost immediately, the legal profession and members of Congress decried the filing as an unwarranted escape from liability for the corporation's "outrageous conduct" and an abuse by Manville of the judicial process.

Admittedly, the Manville Corporation's filing for reorganization and relief under federal bankruptcy law raises serious questions: Can punitive damages in mass products liability litigation be administered so as to avoid "overkill"? Is the filing of a solvent debtor an abuse of judicial process? Should the Manville Corporation rightly escape punishment in the form of punitive damages by filing for Chapter 11 reorganization? Absent a national compensation scheme for asbestos victims, should Congress, the courts or industry provide relief to injured workers? These questions deserve exploration. This comment seeks to explore these issues and answer them where possible.

II. ASBESTOS AND A PUBLIC HEALTH DISASTER

A. *Exposure to Asbestos*

Asbestos is a fibrous mineral which possesses attributes that are readily adaptable to modern technological needs. The fibers are strong, flexible, heat resistant, and chemical resistant.⁶ These characteristics render asbestos ideal for use as insulation. Of the one million tons of asbestos products consumed annually in the United States,⁷ approximately 77 percent is used in construction.⁸ The remainder is consumed by non-construction industries in such products as textiles, brake linings, clutch facings, papers,

court thus implicitly rejected the *Roginsky* court's fears of resulting bankruptcy. *Toole*, 251 Cal. App. 2d at 715 n.3, 60 Cal. Rptr. at 416-17 n.3.; *State ex rel. Younger v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1270-72 (1980).

6. "Asbestos" is a generic term for a number of mineral silicates. The major minerals are chrysotile (mined predominantly in Canada, the Soviet Union and Zimbabwe), amosite (mined only in South Africa), anthophyllite (found principally in Finland and Kenya), tremolite (mined in the United States) and actinolite (rare). 40 Fed. Reg. 47,652 (1975).

7. *Id.* at 47,653 (citing BUREAU OF MINES, MINERALS YEARBOOK, 1973).

8. *Id.* Of the tonnage used in construction, 92 percent was "bonded," i.e., "locked" in such products as asbestos cements, floor tiles, and roofing felts and shingles. *Id.*

paints, plastics, roof coatings, floor tiles, and miscellaneous other products.

The use of asbestos has been widespread; approximately 30 million tons are presently in place in the United States.⁹ During World War II and thereafter, the government required the use of asbestos insulation on navy ships. Asbestos has been sprayed into walls and ceilings, and applied to structural components such as steel beams, furnaces and pipes. From World War II until 1973, asbestos-containing materials were used extensively in the construction of both public and private schools.¹⁰ According to Don Clay, the director of the Office of Toxic Substances of the Environmental Protection Agency (EPA):

Based on data submitted voluntarily by school districts, EPA has estimated that friable^[11] asbestos-containing materials are present in approximately 8,600 public schools. An estimated 3 million students and 250,000 teachers and staff regularly use these schools; over the lifetime of the buildings, some 15 million students and employees will use them.¹²

Between 1940 and 1980, more than thirteen million men and women were exposed to asbestos in their work environment.¹³ Presently, there are approximately nine million men and women who work with asbestos and are likely to suffer serious asbestos-induced diseases in the future.¹⁴ Exposure to asbestos has recently been shown to cause asbestosis,¹⁵ lung cancer,¹⁶ malignancy of

9. *Hearings on the Hazards of Asbestos Exposure before the Subcomm. of Commerce, Transportation and Tourism of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 43 (1982) (statement of Irving J. Selikoff, M.D.) [hereinafter cited as *Asbestos Hearings*.]

10. *Asbestos Hearings*, *supra* note 9, at 106. (statement of Don Clay, Director of the Office of Toxic Substances of the Environmental Protection Agency (EPA)).

11. A substance is "friable" if it can be crumbled in the hand and reduced to a powder, thereby releasing the asbestos fibers. "Asbestos fibers are extremely durable, and their size and shape permit them to remain airborne for [a] long period of time. When these fibers do settle, any number of activities, including dusting, sweeping, vacuuming, repair activities, and every ordinary movement, cause resuspension." *Id.* at 107.

12. *Id.* Mr. Clay also reported that 1,800 nonpublic schools were also faced with friable asbestos hazards. *Id.*

13. *Asbestos Hearings*, *supra* note 9, at 6 (statement of Irving J. Selikoff, M.D.).

14. *Id.*

15. Asbestosis (pulmonary fibrosis) is a nonmalignant scarring of the lungs and is evidenced by shortness of breath, restrictive pulmonary function, clubbing of the fingers, or "rales" (dry, crackling sounds in the lungs). Goodman, *Radiology of Asbestos Disease*, 249 J. AM. MED. ASS'N 644 (1983) [hereinafter cited as Goodman]. 40 Fed. Reg. 47,652, 47,653 (1975) (to be codified at 29 C.F.R. pt. 1910 (proposed Oct. 9, 1975)). The disease is progressive; the asbestos particles trapped in the lung continue their biological action. "In its severe forms, death results from the inability of the body to obtain requisite oxygen or from the heart's failure to pump blood through the scarred lungs." 40 Fed. Reg. at 47,653. See also 4 A. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶¶ 205C.50, 205C.60 (3d ed. 1981) (hereinafter cited as GRAY).

16. Lung cancer is 70 times more likely to develop in a smoking asbestos worker than a nonsmoking asbestos worker. Goodman, *supra* note 15, at 645. This

the interior of the lung,¹⁷ mesothelioma—a rapidly spreading tumor of the lining of the chest cavity or the lining of the abdomen,¹⁸ and cancer of the stomach, colon and rectum.¹⁹

Currently, it is estimated that 8,500 asbestos-related cancer deaths are occurring each year.²⁰ This number is expected to rise to 10,000 annual deaths by the year 1990.²¹ Altogether, more than 1.6 million workers are expected to die of an asbestos-related disease.²²

While continuous, heavy exposure to asbestos is necessary to induce asbestosis,²³ a single or mild exposure may be sufficient to cause mesothelioma.²⁴ There are many reported cases of family members of asbestos workers developing asbestos-related diseases even though they were not directly exposed to asbestos processing. It is no exaggeration to call the present asbestos crisis a "public health disaster."²⁵

is because asbestos and cigarette smoke are "cocarcinogens." See GRAY, *supra* note 15, at ¶ 205C.71.

17. This is bronchogenic carcinoma. 40 Fed. Reg. at 47,653.

18. Mesothelioma is "three to five times more frequent in asbestos workers than in nonasbestos workers." Goodman, *supra* note 15, at 645. The tumor is incurable by modern methods, and death usually occurs within one year of diagnosis. 40 Fed. Reg. at 47,653. See GRAY, *supra* note 15, at ¶ 205C.72.

19. 40 Fed. Reg. at 47,653. There is a latency period between initial exposure and development of asbestos-related diseases. This period may range from twenty to forty years. *Asbestos Hearings*, *supra* note 9, at 7 (statement of Irving J. Selikoff, M.D.). "Disease being seen now can be traced back to inhalation of dust in the 1940's, 1950's and 1960's. The exposures of the '70's will not bear their bitter fruit until 1990, the year 2000 or well into the twenty-first century." *Id.* See Selikoff & Hammond, *Asbestos-Associated Disease in the United States Shipyards*, 28 CA—A CANCER J. FOR CLIN. 37 (1978); See also Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 63 (1978).

20. *Asbestos Hearings*, *supra* note 9, at 26 (statement by William J. Nicholson, M.D., Mt. Sinai School of Medicine, N.Y.). This estimate was conceded to be on the low side in that no account was taken of asbestos-related diseases contracted outside the workplace. *Id.* Note that the Secretary of Health, Education, and Welfare, Joseph A. Califano, stated in 1978 that 67,000 people will die from asbestos-induced cancer in the next thirty to thirty-five years. Comment, *supra* note 19, at 56 (citing the Hartford Courant, Sept. 12, 1978, at 1, cols. 7-8).

21. *Asbestos Hearings*, *supra* note 9, at 26 (statement of William J. Nicholson, M.D.).

22. See 127 CONG. REC. § 10033 (daily ed. Sept. 18, 1981) (statement of Sen. Hart).

23. *Asbestos Hearings*, *supra* note 9, at 7 (statement of Irving J. Selikoff, M.D.).

24. Goodman, *supra* note 15, at 645. See Selikoff & Hammond, *supra* note 19, at 87. See also *Asbestos Hearings*, *supra* note 9, at 4, 7 (statement of Irving J. Selikoff, M.D.).

25. *Asbestos Hearings*, *supra* note 9, at 6 (statement of Irving J. Selikoff, M.D.). Dr. Selikoff borrowed the term from a British colleague, Dr. Doll of Oxford. *Id.*

B. Health Hazard

The detrimental effects of asbestos have been observed since ancient times.²⁶ However, it was not until the early 1900's that the scientific and medical professions began to take serious note of health hazards associated with asbestos.²⁷ Much of the early research was done in Great Britain;²⁸ as a result, in the 1930's, Great Britain established regulations concerning the use of asbestos.²⁹

Research in the United States began in the late 1920's. In 1929, the asbestos industry, concerned with rising workman's compensation claims attributed to asbestos,³⁰ hired the Metropolitan Life Insurance Company to conduct a study on the effects of asbestos on the health of asbestos workers.³¹ The study was completed in 1931, but was not published until 1935.³² The results showed that prolonged exposure to asbestos dust caused asbestosis.³³ As a result of these early British and American studies, the serious hazards of asbestos inhalation became universally recognized.³⁴

In 1965, a report by Dr. Selikoff of the Mt. Sinai School of Medicine was published showing examination results in a study of 1,522 insulation workers.³⁵ The results showed that 48.5% of all the workers had pulmonary asbestosis, and of those exposed to

26. D. BERMAN, *DEATH ON THE JOB* 84 (1978). Pliny the Elder, of first-century Rome, observed that slaves who used to mine asbestos, suffered from lung disease and had fashioned a "make shift respirator" to protect themselves as they worked. See also *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1083 n.3 (5th Cir. 1973).

27. BERMAN, *supra* note 26, at 84-85. The first medical report of a workman's death caused by asbestos was issued in 1906 by Montague Murray, a British physician. *Id.* at n.29.

28. See Cooke, *Fibrosis of the Lungs Due to the Inhalation of Asbestos Dust*, 2 BRIT. MED. J., 147 (1924); Cooke, *Pulmonary Asbestosis*, 2 BRIT. MED. J., 1024 (1927).

29. Sweeney, *The Asbestos Time Bomb*, 14 TRIAL 17 (Oct. 1978).

30. The first claim for an asbestos related disability was filed in 1927. Lanza, *Asbestosis*, 106 J. AM. MED. ASS'N 369 (1936).

31. BERMAN, *supra* note 26, at 85. The employees studied were mainly employees of the Johns-Manville Company. *Id.* The study involved employees at five plants and mines in the United States and Canada, and was conducted by Dr. Anthony J. Lanza. Sweeney, *supra* note 29, at 17.

32. BERMAN, *supra* note 26, at 85.

33. Sweeney, *supra* note 29, at 17. The study showed that 67 of the 126 people examined had pulmonary fibrosis; i.e., asbestosis. BERMAN, *supra* note 26, at 85. See generally, Kotelchuk, *Your Job or Your Life*, HEALTH-PAC. BULL. (March 1973). See also Dreesen, *A Study of Asbestosis in the Asbestos Textile Industry*, PUB. HEALTH BULL. No. 241 (1938).

34. *Borel*, 493 F.2d at 1083 and accompanying footnote. Dr. Selikoff recently told a congressional subcommittee: "Following the first report of death due to asbestos inhalation in 1924, a series of surveys in this country and Great Britain from 1929 to 1931 showed that lung scarring—asbestosis—could be a common outcome of working with the mineral." *Asbestos Hearings*, *supra* note 9, at 6 (statement of Irving J. Selikoff, M.D.).

35. Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Industrial Insulation Workers*, 132 ANN. OF N.Y. ACAD. SCI. 139 (1965).

asbestos for forty years or more, 94.2% had asbestosis.³⁶

Dr. Selikoff's findings were instrumental in the passage of the Occupational Safety and Health Act of 1970.³⁷ The Act empowered the Secretary of Labor to establish standards of permissible exposure to airborne asbestos. Currently, the standard provides that no employee may be exposed to more than two fibers longer than 5 micrometers per cubic centimeter of air.³⁸ Compliance with this standard is to be met by "engineering controls;" i.e., ventilation, isolation, dust collection, and by "work practices" such as "wet" handling of asbestos, use of respirators, and laundering.³⁹

Despite a growing body of evidence showing the detrimental effects of asbestos on the health of the public,⁴⁰ the industry continued to challenge the scientific findings.⁴¹ The scientific community, the government, and the courts have not given great weight to the industry's protestations. The evidence shows that the industry "continually failed to warn users of hazards associated with the inhalation of asbestos fibers, despite overwhelming knowledge of those hazards by high ranking corporate officials. . . ."⁴² This failure to warn has been held to be in reckless

36. *Id.* at 147. This evidence is reprinted in *Borel*, 493 F.2d 1076, 1085 n.15 (5th Cir. 1973). See generally SELIKOFF & LEE, *ASBESTOS AND DISEASE* (1978).

37. 29 U.S.C. §§ 651-655 (1970), 84 Stat. 1590 [hereinafter cited as "OSHA"]. See BERMAN, *supra* note 26, at 86.

38. 29 C.F.R. § 1910.1001(b)(2) (1982). The original OSHA standard was included in the initial promulgation of regulations published on May 29, 1971 (36 Fed. Reg. 10,466 (1971)) pursuant to 29 U.S.C. § 655(a) (1976). That standard limited exposure to 2 million particles per cubic foot of air. See Comment, *supra* note 19, at 66.

39. 29 C.F.R. § 1910.1001(c) (1982). Growing awareness of the health hazards of asbestos is reflected in the regulation of asbestos exposure by other administrative agencies. These include: The EPA, 40 C.F.R. § 61.20 (1982); Consumer Prod. Safety Comm'n, 16 C.F.R. § 1500.17(7) (1982) (banning general-use garments containing asbestos); and The Mining Enforcement & Safety Admin., 29 C.F.R. §§ 55.5-1(b) (1981).

40. "By 1960, sixty-three scientific papers on the problem of asbestos exposure and health had been published in the United States, Great Britain, and Canada." BERMAN, *supra* note 26, at 85. Fifty-two papers were independently sponsored; the remaining eleven were sponsored by the asbestos industry. The eleven papers sponsored by the industry, interestingly enough, rejected the connection between asbestos and lung cancer. *Id.*

41. The challenges from the industry came as late as 1978. See AMERICAN INDUSTRIAL HEALTH COUNCIL, A REPLY TO: "ESTIMATES OF THE FRACTION OF CANCER IN THE UNITED STATES ATTRIBUTABLE TO OCCUPATIONAL FACTORS" (1978); Comment, *supra* note 19, at 64.

42. *Neal v. Carey Can. Mines*, 548 F. Supp. at 375. But see *In re Related Asbestos Cases*, 543 F. Supp. 1142 (N.D. Cal. 1982). Illustrative of the personal tragedy suffered by asbestos workers is the story of Ted Kowalski:

disregard of the rights of others, and has been held to be conduct sufficiently "outrageous" so as to warrant punitive damages.

III. BACKGROUND: PUNITIVE DAMAGES IN MASS LITIGATION INVOLVING PRODUCTS MANUFACTURERS: DETERRENT OR DESTROYER?

A. In General

The primary purposes of punitive damages are to punish the offending party and to deter such acts by him and other offenders in the future. To warrant punitive damages, the defendant's conduct must be "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."⁴³ The trier of

I went to work in a department adjacent to the shipping department, which was the finishing department. The rest of my days at Johns-Manville were in the finishing department. I worked on the machines cutting asbestos, bagging asbestos, crushing asbestos, eating with asbestos, speaking to my friends with asbestos, and everything we did in our life in that plant was asbestos. As the sun would shine through the skylight, all you could see was millions of particles that would glitter. It would just glitter in the skylight...We would pick out asbestos from our coffee, the larger pieces that fell in; pieces that fell in our sandwiches that we did not know or whatever fell into the coffee we drank.

Not only did they make us ill. According to the testimony, public records, that industry knew of the ills caused by asbestos. They used us as carriers. You could say we were their prostitutes. We took their ills home to our families.

My wife is 54 years old. Never worked a day in the plant, who looked to some day in the near future after raising her children that she too could enjoy life, is also a victim of asbestosis. My son at the age of 31 is also a victim...I know the hardship and ills caused by asbestosis. I lived with it. We paid our own medical bills because of someone else's greed that placed profit over human life. There was no excuse.

Asbestos Hearings, *supra* note 9, at 58 (statement of Ted Kowalski).

43. RESTATEMENT (SECOND) OF TORTS § 908 (1979). This section provides:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Id. The doctrine of punitive damages has been widely accepted in the United States. All but five states allow some measure of recovery for punitive damages. The states not allowing such recovery are Indiana, Louisiana, Massachusetts, Nebraska and Washington. GHIARDI AND KIRCHER, PUNITIVE DAMAGES, LAW AND PRACTICE §§ 4.07-4.12 (1981). In addition to these five states, four others, Connecticut, Georgia, Michigan and New Hampshire, apply "punitive damages" in the nature of compensatory damages. *Id.* at §§ 4.02-4.06. The majority of the states that allow punitive damages cite both punishment and deterrence as justification; in Alaska, Georgia (which has a "compensatory" scheme), Idaho, Maine, Oregon, Rhode Island and Utah, "deterrence" is the only supporting basis for a punitive

fact, whether judge or jury, in its discretion, may consider the act itself, the motives of the defendant, the relations between the parties, the harm done, and the wealth of the defendant⁴⁴ when assessing the amount of punitive damages.

While the doctrine of punitive damages has been widely accepted, it is still a subject of controversy. In 1851, the Supreme Court in *Day v. Woodworth*,⁴⁵ admitted that the doctrine was subject to question but ruled that "if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."⁴⁶ In the years since *Day*, the controversy has not abated.⁴⁷ The doctrine has suffered repeated attacks on constitutional grounds including challenges based upon double jeopardy,⁴⁸ due process,⁴⁹

award, and in one state, Delaware, "punishment" is the sole basis. *Id.* at §§ 4.14-4.16.

44. RESTATEMENT (SECOND) OF TORTS § 908 comment e (1979). The wealth of the defendant is relevant in assessing an amount that will actually "punish" the defendant for his conduct.

45. 54 U.S. (13 How.) 363 (1851).

46. *Id.* at 371.

47. See *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891); Carsey, *The Case Against Punitive Damages: An Annotated Argumentative Outline*, 11 FORUM 57 (1975); DUFFY, PUNITIVE DAMAGES: A DOCTRINE WHICH SHOULD BE ABOLISHED, in DEFENSE RESEARCH INSTITUTE: THE CASE AGAINST PUNITIVE DAMAGES 4 (D. Hirsch & J. Poulos eds. 1969); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158 (1966).

48. The fifth amendment of the U.S. Constitution provides in pertinent part: "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb..." Punitive damages, it is contended, subjects a person to double jeopardy because he is punished for a civil offense when he may also be subject to criminal sanctions for the same offense. This argument has been rejected by many courts in the United States. See, e.g., *E.F. Hutton & Co., Inc. v. Anderson*, 42 Colo. App. 497, 596 P.2d 413 (1979). Some jurisdictions which reject the argument read the constitutional prohibition of double jeopardy to apply solely to criminal actions. *E.F. Hutton & Co.*, 42 Colo. App. 497, 596 P.2d at 415; *Svejcar v. Whitman*, 82 N.M. 739, 487 P.2d 167, 169 (1971); *Brown v. Swineford*, 44 Wis. 282 (1878); See also *Ashe v. Swenson*, 397 U.S. 436 (1970); *Waller v. Florida*, 397 U.S. 387 (1970); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (double jeopardy in a criminal case).

However, jurisdictions which prohibit punitive damages do so on the basis of double jeopardy. Here, it is argued that the "punitive" element of the award is within the scope of criminal law, not civil. Thus, the defendant who may have already been convicted of a criminal offense, such as assault or battery, may be subject to another "penalty" in a civil action. See *Huber v. Teuber*, 10 D.C. (3 MacArth.) 484 (1897); *Cherry v. McCall*, 23 Ga. 193 (1857); *Austin and Wife v. Wilson and Wife*, 58 Mass. (4 Cush.) 273 (1849); *Boyer v. Barr*, 8 Neb. 68 (1878); *Fay & Ux v. Parker*, 53 N.H. 342 (1872).

49. The due process challenge is akin to the double jeopardy attack. It is claimed that because punitive damages protect societal interests (punishment, deterrence), the doctrine constitutes a criminal remedy; thus, the defendant is enti-

freedom of speech and press,⁵⁰ and equal protection.⁵¹

To date, none of these general attacks have been particularly convincing to the courts which have allowed punitive damages. It is felt that the usefulness of the doctrine, in punishing and deterring harmful conduct, sufficiently outweighs the interests propounded by opponents to the doctrine.⁵²

However, one area which warrants special attention is the due process challenge with regard to multiple awards of punitive damages in products liability actions involving mass production of a defective product. In *Wangen v. Ford Motor Co.*,⁵³ the defendant argued that the court should adopt a rule that where punitive damages are awarded in a products liability suit, the court should limit the punitive damages recovery to the first plaintiff and deny them to all subsequent plaintiffs in cases arising out of the same

tled to the due process safeguards afforded defendants in a criminal action. *GHIARDI & KIRCHER*, *supra* note 43, at § 3.03. This argument has been widely rejected. The courts have held that the protections afforded a criminal defendant are not afforded a defendant in a civil action with respect to punitive damages. *Gibson v. Gibson*, 15 Cal. App. 3d 943, 93 Cal. Rptr. 617 (1971); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *See United States v. Zucker*, 161 U.S. 475 (1896) (civil defendant has no sixth amendment right to be confronted with witnesses in a civil case). *See also United States v. Regan*, 232 U.S. 37 (1914) (burden of proof in a civil proceeding to recover a monetary penalty is a "reasonable preponderance" of the evidence rather than "proof beyond a reasonable doubt").

50. *See generally GHIARDI & KIRCHER*, *supra* note 43, at § 3.04. The issue here has generally involved the conflicting policies of punishment and deterrence of libel and prevention of a "chilling effect" on the press. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court held that the first amendment precluded punitive damages when there was not a complete showing of "actual malice" under the *Sullivan* test. *Id.* at 349. On the whole, the lower federal courts have allowed punitive damages when "actual malice" has been found. *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976). *See generally Comment, Constitutionality of Punitive Damages in Libel Action*, 45 *FORDHAM L. REV.* 1382 (1977).

51. The attacks under the equal protection clause of the fourteenth amendment have been brought by plaintiffs who have been denied recovery of punitive damages under state wrongful death statutes. As most jurisdictions have not allowed punitive damages under these statutes, the plaintiffs contend that the state discriminates when it allows recovery of punitive damages for other causes of action but denies recovery of such damages under the wrongful death statute. *See generally GHIARDI & KIRCHER*, *supra* note 43, at § 3.05.

Attacks on the wrongful death statutes have had little or no success to date. *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979); *Vollert v. Summa Corp.*, 389 F. Supp. 1348 (D. Hawaii 1975); *Georgie Boy Mfg., Inc. v. Superior Court of Los Angeles County*, 115 Cal. App. 3d 217, 171 Cal. Rptr. 382 (1981); *Robert v. Ford Motor Co.*, 73 A.D.2d 1024, 424 N.Y.S.2d 747 (1980).

52. *See supra* note 25. *See also Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 461 (1980). *See generally Owen*, *supra* note 4.

53. 97 Wis. 2d 260, 294 N.W.2d 437 (1980).

wrongful act.⁵⁴ While the court saw no reason to limit punitive damages in this way,⁵⁵ it may be argued that individual punitive damage awards in several separate cases may, when weighed cumulatively, deprive the defendant of his due process rights. This argument finds its genesis in *Palko v. Connecticut*⁵⁶ and is developed in *Hoag v. New Jersey*.⁵⁷

In *Palko*, the Supreme Court suggested that a defendant's rights to due process might be denied if the state, by its multiple prosecutions, was seeking "to wear the accused out."⁵⁸ The Supreme Court in *Hoag* further held that while the fourteenth amendment did not *per se* prohibit a state from bringing consecutive actions to prosecute separate offenses, "[t]he question in any given case is whether such a course has led to fundamental unfairness."⁵⁹

The "fundamental fairness" of leveling consecutive punitive damage awards against a manufacturer is questionable. However, "fundamental fairness" also dictates that an injured party be fully compensated. Just as it is important to protect a going business concern, it is also important to protect the health and safety of the public.

54. 294 N.W.2d at 466.

55. *Id.* The court held:

The gravamen of Ford's alleged offense is not only the manufacture and distribution of the car but the injury caused thereby. We are not persuaded that the federal and state constitutions require us to limit punitive damages arising from a single incident to a single award for punitive damages, and we do not adopt such a rule. We believe that a wrongdoer is protected against oppressive multiple awards by the judicial controls we have set herein.

Id. The "judicial controls" utilized by the *Wangen* court included (1) initial determination by the trial judge concerning the propriety of punitive damages in a particular case; (2) determination of the amount of punitive damages, by the jury, which considers the nature of the defendant's acts, the degree of malicious intent, the potential damage, the actual damage, and the defendant's ability to pay (taking into account previous compensatory and punitive damages imposed); (3) control by the judge over an "excessive" award by the jury. *Id.* at 457-61. The use of these judicial controls was felt sufficient to counter the threat of a punitive damage award bankrupting a manufacturer. *Id.* at 461. See generally Mallor and Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Owen, *supra* note 4, at 1314-25.

56. 302 U.S. 319 (1937).

57. 356 U.S. 464 (1958).

58. *Palko*, 302 U.S. at 328.

59. *Hoag*, 356 U.S. at 467.

B. Punitive Damages and the Threat of "Overkill"

It has been argued, with some force, that the purposes of punishment and deterrence are substantially furthered by allowing punitive damages in mass products liability litigation.⁶⁰ The difficulty arises when considering how much punishment is adequate. To allow every plaintiff a "full measure" of punitive damages would most certainly result in "overkill."⁶¹ Additionally, the primary policies served by punitive damages would be subverted. The goal of such damages is punishment of the offender and deterrence of further action of the same type by the offending party and others. These policies are chiefly designed to protect the public. To afford each plaintiff a right to punitive damages is to blur the distinction between private compensation and public protection⁶² thereby granting a windfall to later plaintiffs and creat-

60. Owen, *supra* note 4, at 1278-99. Professor Owen delineates four major functions of punitive damages: punishment, deterrence, law enforcement, and compensation. With regard to law enforcement, Professor Owen speaks of inducing "private persons to enforce the rules of law by rewarding them for bringing malefactors to justice." *Id.* at 1278. He states further:

Detractors of the punitive damages doctrine, minimizing its role in punishing wrongdoers and deterring misconduct, frequently criticize the doctrine for allowing the plaintiff a "windfall" in addition to any compensation for losses he may actually have sustained. But this criticism of the doctrine invariably overlooks the important fact that this prospective windfall motivates many reluctant plaintiffs to press their claims. And as the litigation of such claims increases, misconduct is increasingly punished and deterred.

Id. at 1287 (footnote omitted).

In rebuttal, it must be noted that the doctrine of punitive damages is supported by the public policy considerations of punishment and deterrence. When these policies clash with another public policy, that of protecting a going business concern from possible bankruptcy flowing from excessive punitive damages awards, the value of motivating "reluctant plaintiffs" with hopes of a windfall must be balanced against the substantial threat of inducing a corporate bankruptcy. If bankruptcy becomes more than a "theoretical threat" in any one case, then the policies of punishment and deterrence are more than fully served, and there is no more need to award punitive damages, much less allow the plaintiff a windfall. Conversely, the balance has swung in favor of the policies protecting a going business concern. At the very least, such an imminent threat of inducing a corporate bankruptcy should counsel judicial restraint in the award of any further punitive damages.

61. See *supra* notes 14-15 and accompanying text. Given the difficulty of consolidating claims for hearing before one court (See Comment, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1803-04 (1979)), claims will be heard by several courts. Even if one court reasonably limits the amount awarded as punitive damages by exercise of "judicial control," there is no guarantee that another court will consider past or even contemporaneous punitive awards when making its own assessment. Indeed, it would be nearly impossible to keep up to date on all punitive awards given in products liability litigation. Thus, ten or one hundred "reasonable" awards, as judged in each case, may quickly add up to a crippling amount imposed on a manufacturer.

62. This blurring of private compensation and public protection is seen in *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. at 376-77: "Punitive damages are a recover-

ing "overkill." The emphasis in such a case has impermissibly shifted from public protection to excessive private gain.

The threat of overkill becomes most pressing if no provision is made limiting full recovery of punitive damages to those plaintiffs first in line. This proposal, however, has engendered controversy⁶³ and appears almost unmanageable.⁶⁴ Despite these drawbacks, and the possibility of "unlimited punishment,"⁶⁵ this proposal demands the least restructuring of the present system.⁶⁶ Professor Owen, a leading authority, has stated:

Thus, while courts must be especially vigilant to control the very real, but by no means certain, risk of excessive punishment in mass disaster cases, the initial plaintiffs in appropriate cases should receive punitive damages awards that reward their efforts. Plaintiffs following soon thereafter whose successful prosecutions of punitive damages claims confirm the first award, should be permitted to recover enhanced punitive damages awards for similar reasons. Thereafter, however, punitive damages

able item of relief so long as the conduct exhibited by the defendant with respect to that individual plaintiff can be termed as 'outrageous' and a reckless indifference to the rights of that plaintiff." *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 908(2) (1979)).

The "punishment" aspect of punitive damages has two applications. First, to allow the injured party "revenge" on the defendant who injured him. Second, to "express the public's condemnation of the misconduct and remind manufacturers of their responsibilities for consumer safety." Owen, *supra* note 4, at 1282 (footnote omitted). Though the element of personal revenge may have some importance in a modern legal system, the overriding purpose of the doctrine of punitive damages is the protection of society. This is further evidenced by the "deterrence" aspect of punitive damages. "In its retributive role, punishment satisfies the individual's and society's need for vengeance, and thus serves to rectify some of the negative effects of prior misconduct. But perhaps the predominant purpose of most punishment, including punitive damages, is the deterrence of similar misconduct in the future." *Id.* at 1282-83 (footnote omitted).

63. See *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. at 376-77; *Wangen v. Ford Motor Co.*, 97 Wis. 2d at 304-08, 294 N.W.2d at 454-55.

64. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) ("[W]e think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because...Roginsky...in New York had stripped the cupboard bare. . . .")

65. Opponents of the doctrine of punitive damages contend that the doctrine is "fundamentally unfair" aside from any function of punishment or deterrence. The contention is that, in the practical application of the doctrine, the civil defendant may be subject to harsher penalties than a criminal defendant for the same or a similar offense. It is argued that none of the procedural safeguards in a criminal action are available to a civil defendant, and that the jury is not hindered by any limit, save the judge's discretion that the award is excessive, when awarding punitive damages. GHIARDI & KIRCHER, *supra* note 43, at § 2.12.

66. Other proposals run the gamut from outright abolition of punitive damages (see Carsey, *supra* note 47) to keeping a running total of past awards and submitting this figure to the judge, who compares it with what the jury in the case at hand has awarded. Comment, *supra* note 61, at 1797.

recoveries should probably be limited to reasonable costs of litigation. And once the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should no longer be available at all.⁶⁷

If punitive damages are to be an effective means of punishing and deterring outrageous conduct on the part of manufacturers, to protect the public, the court must carefully consider past awards and the extent to which the policies of punishment and deterrence have already been fulfilled. Additionally, the court must also consider that the primary purpose of the plaintiff in bringing suit is to obtain compensation for personal injuries proximately caused by the defendant.

The protection of public interests, while admittedly of value, must not be allowed to "consume" the personal compensation rightfully due to an injured plaintiff. If excessive awards of punitive damages pose a "very real" risk to the continued existence of a business, they also pose a serious threat to the recovery of compensatory damages by future plaintiffs. If the courts fail to limit excessive punitive awards, either by judicial self-control or by some other procedural means, the defendant manufacturer who chooses Chapter 11 reorganization may jeopardize a plaintiff's legitimate claim for compensation.

IV. MANVILLE CORPORATION ASBESTOS LITIGATION

A. *The Manville Corporation*

After World War I, the asbestos industry burgeoned as new uses were discovered for the product. Between 1925 and 1974, Johns-Manville emerged as a leader in the field; the corporation's annual sales increased from \$40 million to over \$1 billion.⁶⁸ By December 31, 1981, the Manville Corporation was one of the nation's largest companies and the world's largest single producer of asbestos.⁶⁹ The corporation's reported sales for 1981 totalled nearly \$2.2 billion, and the corporation employed nearly 30,500 people.⁷⁰

B. *Products Liability*

The available evidence shows that Manville knew of the hazards of asbestos and withheld that knowledge from its employees.⁷¹ Whatever the corporation's motive for this nondisclo-

67. Owen, *supra* note 4, at 1325.

68. BERMAN, *supra* note 26, at 84.

69. N.Y. Times, Aug. 27, 1982, at A1, col. 6.

70. *Id.*

71. Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076, 1106 (5th Cir. 1973).

sure, it is apparent that the Manville Corporation did not foresee the multitude of lawsuits that would result.

The seminal case in asbestos litigation was *Borel v. Fibreboard Paper Products Corporation*,⁷² which was brought by an insulation worker who had been disabled by asbestosis and mesothelioma.⁷³ The plaintiff alleged that Johns-Manville and other manufacturers of asbestos-containing materials⁷⁴ had breached their duty of due care for the failure to warn of the dangers inherent in handling asbestos. The trial court presented the case to the jury on counts of negligence, gross negligence, breach of warranty, and strict liability. While the jury found that no defendant was grossly negligent, it did find all defendants strictly liable on the basis of section 402A of the Restatement (Second) of Torts.⁷⁵

On appeal, the Fifth Circuit affirmed, holding that asbestos was a product rendered "unreasonably dangerous" for failure of the defendants to give "adequate warnings of the known or knowable dangers involved."⁷⁶ Stating the rule that a manufacturer in cases similar to this is held to the "knowledge and skill of an expert," the court stressed that, given this status, the manufacturer has a duty to "keep abreast of scientific knowledge, discoveries, and ad-

72. *Id.* at 1076.

73. *Id.* at 1081. Borel testified that during his usual workday his clothes would become so dusty that he was engulfed in a cloud of dust. "I blowed this dust out of my nostrils by handfuls at the end of the day. . . ." *Id.* at 1082.

74. Borel named eleven defendants. He settled out of court with four, and the fifth received an instructed verdict. The six remaining defendants were: Fibreboard Paper Products Corp., Johns-Manville Prod. Corp., Pittsburgh Corning Corp., Philip Carey Corp., Armstrong Cork Corp., and Ruberoid Corp., a division of GAF Corp. *Id.* at 1086. Borel died before trial and his wife was substituted as plaintiff. *Id.*

75. Applying § 402A to "occupational diseases" was here a matter of first impression. *Borel*, 493 F.2d at 1103. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

76. *Borel*, 493 F.2d at 1088.

vances and is presumed to know what is imparted thereby.”⁷⁷
The court held further:

[A] seller is under a duty to warn of only those dangers that are reasonably foreseeable. The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product *and to warn users and consumers of that danger.*⁷⁸

On rehearing, Johns-Manville and two other defendants argued that strict liability was improperly imposed because they had in fact placed a “warning label” on their products. Justice Wisdom, writing for the Fifth Circuit, retorted that “none of these ‘cautions’ intimated the gravity of the risks;” they were therefore inadequate warnings.⁷⁹ He summed up the case as follows:

The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risks in asbestos textile factories in 1938; . . . that in 1961 Dr. Irving Selikoff [sic] and his colleagues confirmed the deadly relationship between insulation work and asbestosis. . . . On the evidence before it, the jury could properly have decided that Borel received no warnings at all from any defendant at a time when the defendants were under a duty to warn him.⁸⁰

Borel was decided in 1973. Once it had been demonstrated that manufacturers of asbestos-containing materials were susceptible to liability, workers suffering from asbestos-related diseases, who had often been frustrated in attempts to obtain a remedy through state workman’s compensation plans, saw their chance. By 1980, more than two thousand asbestos cases had been filed in the United States.⁸¹

The number of asbestos cases swelled further when the courts began to give collateral estoppel effect to certain aspects of *Borel*. In *Mooney v. Fibreboard Corp.*,⁸² another case brought upon the

77. *Id.* at 1089. Justice Wisdom also stated that the “manufacturer has a duty to test and inspect his product.” *Id.* at 1089-90.

78. *Id.* at 1088.

79. *Id.* at 1104. The three labels were substantially the same. Johns-Manville’s read as follows:

This product contains asbestos fiber. Inhalation of asbestos in excessive quantities over long periods of time may be harmful.

If dust is created when this product is handled, avoid breathing the dust.

If adequate ventilation control is not possible wear respirators approved by the U.S. Bureau of Mines for pneumoconiosis producing dusts.

Id. at 1106.

80. *Id.*

81. *Mooney v. Fibreboard Corp.*, 485 F. Supp. 242, 247 (E.D. Tex. 1980). The asbestos defendants had won only a dozen or so.

82. *Id.* at 244-45 (E.D. Tex. 1980). Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning With The Unreasonable*, 14 ST. MARY’S L.J. 19, 38 (1982).

Collateral estoppel prevents relitigation of a fact or issue when a court of competent jurisdiction has rendered a final adjudication of the issue on the merits. Both parties in the subsequent suit are bound by the original

theory of strict liability, the court held that in order for the plaintiff to prove his case he must establish: (1) that the defendants manufactured, marketed, sold, or distributed insulation products; (2) that the asbestos products as manufactured, marketed, sold, or distributed were defective and unreasonably dangerous; (3) that the plaintiff was exposed to any of the defendants' asbestos products; (4) that his exposure to any of the defendants' asbestos products was sufficient to be a producing cause of certain lung diseases, including asbestosis and mesothelioma; (5) he has, or had, asbestosis or mesothelioma; and (6) he suffered damages.⁸³ The court then held that the defendants were collaterally estopped to deny that asbestos products were "dangerous and unreasonably defective" as determined in *Borel*.⁸⁴ The court found further that asbestos-containing products are defective and unreasonably dangerous as a matter of law;⁸⁵ and, also as a matter of law, that asbestos is a "competent producing cause" of asbestosis, mesothelioma, and other lung diseases.⁸⁶

Collateral estoppel was applied in several subsequent cases, but this trend was recently reversed in *Hardy v. Johns-Manville Sales Corp.*⁸⁷ The Fifth Circuit reversed a district court and held that collateral estoppel could not be used to prevent defendants who were not parties in *Borel* from presenting evidence tending to show that their asbestos products were not unreasonably dan-

decision if the party claimed to be estopped had a full and fair opportunity to litigate the issue in the earlier action.

Erlenbach, *supra*, at 25 (footnotes omitted). See also *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id.* at 331.

83. *Mooney*, 485 F. Supp. at 244.

84. *Id.* at 248.

85. *Id.* at 250.

86. *Id.* *Mooney* was upheld in *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980), a case heard that same year. Asbestos was held to be defective as a matter of law despite Johns-Manville's assertion that the asbestos contained in its cement pipes was not defective as was the insulation in *Borel*. In *Migues v. Nicolet Indus., Inc.*, 493 F. Supp. 61 (E.D. Tex. 1980), *rev'd in part and remanded*, 662 F.2d 1182 (5th Cir. 1981), a case handed down one month after *Flatt*, the court held that Nicolet Industries was collaterally estopped for denying that asbestos was an unreasonably dangerous product. This was upheld even though Nicolet Industries had not been one of the defendants in *Borel*. See *supra* note 74.

87. 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982).

gerous for failure to warn.⁸⁸ Also, the court held that the present issue of whether the products were unreasonably dangerous must be judged according to current scientific knowledge giving rise to possibly different types of warnings. Therefore, because this was a different issue, factually, from that in *Borel*, collateral estoppel could not apply to even the "*Borel*-defendants".⁸⁹

The court also took notice of the fact that, in *Borel*, the defendants were liable for \$68,000 in damages. It was held to be unfair to give collateral estoppel effect to the *Borel* judgment because "it is very doubtful that these defendants could have foreseen that their \$68,000 liability to plaintiff Borel would foreshadow multimillion dollar asbestos liability."⁹⁰ The implication was that the defendants would fight multimillion dollar suits much more vigorously than mere \$68,000 suits, and preclusion of important issues denied the defendants a fair trial. The court concluded by recognizing that giving collateral estoppel effect to *Borel* had "opened the floodgates to an enormous, unprecedented volume of asbestos litigation."⁹¹

According to a recent estimate, there are over 3,000 asbestos plaintiffs in the Eastern District of Texas alone and between 7,500 and 10,000 asbestos cases pending in the United States District Courts around the country. The omnibus order here involves 58 pending cases, and the many plaintiffs involved in this case are *each* seeking \$2.5 million in damages. Such a staggering potential liability could not have been foreseen by the *Borel* defendants.⁹²

C. The Punitive Damages Dilemma

By August, 1982, the Manville Corporation was faced with over 16,000 asbestos-related lawsuits.⁹³ The corporation reported that defending the lawsuits had cost it \$8.6 million in the first half of 1982.⁹⁴

That same August, the District Court for the Eastern District of

88. 681 F.2d at 338-41.

89. *Id.* at 344-45. The court also stated a second reason to deny collateral estoppel effect to the *Borel* judgment—the fact that the asbestos defendants had won some recent cases.

90. 681 F.2d at 346.

91. *Id.* at 347.

92. *Id.* at 347. See generally Erlenbach, *supra* note 82.

93. N.Y. Times, Aug. 27, 1982, at A1, col. 6. More than 200 other companies were faced with asbestos claims. *Id.*, Aug. 10, 1982, at D2, col. 2.

94. N.Y. Times, Aug. 10, 1982, at D2, col. 1. The Asbestos Compensation Coalition told reporters that it costs the "defendant companies an average of \$150,000 to put \$28,000 into the hands of a successful claimant." *Id.* The difference went to legal fees and expenses. *Id.* UNR Industries, a Chicago-based asbestos firm had spent more than \$26 million on asbestos litigation since the beginning of 1980. *Id.* UNR Industries filed for a Chapter 11 reorganization on July 29, 1982. N.Y. Times, July 30, 1982, at D12, col. 6. At the time of filing, UNR was faced with some 12,000 lawsuits. *Id.* at D1, col. 2.

Pennsylvania handed down its decision in *Neal v. Carey Canadian Mines, Ltd.*⁹⁵ The court upheld an award of punitive damages against the Manville Corporation, noting that "[t]he punitive damages awarded in this case were the first punitive damages ever awarded against Johns-Manville in asbestos litigation."⁹⁶

On the issue of liability,⁹⁷ the jury found that all of the supplier defendants, including Johns-Manville, were liable under section 402A, and that the employer, Celotex, was liable for "the aggravation of each plaintiff's injuries because of its intentional failure to warn."⁹⁸

The jury found Celotex and Johns-Manville liable for punitive damages due to their "outrageous conduct."⁹⁹ Upon subsequent denial of the defendants' motion for judgment n.o.v., the court affirmed the punitive damages awards, holding: (1) that the evidence was sufficient to show that the defendants' conduct was "outrageous" so as to support an award of punitive damages;¹⁰⁰ (2) that Johns-Manville's apprehension that punitive damages imposed in mass tort litigation would "annihilate or bankrupt" a cor-

95. 548 F. Supp. 357 (E.D. Pa. 1982). The decision is dated Aug. 31, 1982.

96. 548 F. Supp. at 377. The case was brought by twenty-four former employees of Carey Canadian Mines, Ltd., a manufacturer of asbestos insulation, against Celotex Corporation, the successor in interest to Carey Canadian Mines, Ltd., and against suppliers of asbestos, including the Johns-Manville Corporation. Johns-Manville was the principal supplier. *Id.* at 365. Ultimately, fifteen of the twenty-four claims were consolidated for trial, and the case was heard before a jury in 1981. *Id.*

97. The issues of liability and damages were bifurcated by the court. *Id.*

98. 548 F. Supp. at 366. In Pennsylvania, an employee's remedy against his employer is limited to workmen's compensation (Pennsylvania Workmen's Compensation Act, PA. STAT. ANN. tit. 77, §§ 1201-1603 (Purdon 1952)) unless the employer intentionally acts to injure his employee. Allegations of "willful," "wanton," or "reckless" acts are not sufficient to state a cause of action outside of workmen's compensation. *Ulicny v. National Dust Collector Corp.*, 391 F. Supp. 1265, 1268 (E.D. Pa. 1975) (applying Pennsylvania law); *See also Keating v. Shell Chem. Co.*, 610 F.2d 328, 332 (5th Cir. 1980); *Austion v. Johns-Manville Sales Corp.*, 508 F. Supp. 313, 316 (D. Me. 1981).

99. *Neal*, 548 F. Supp. at 366. Total compensatory damages awarded were \$1,213,500; total punitive, \$438,000. Of the punitive award, \$343,000 was assessed against Johns-Manville; Celotex was found liable for \$95,000. *Id.* at 366-67 n.4. Punitive damages claims against all other supplier defendants were dismissed because "presence alone or knowledge alone or involvement on an association basis without more or even possession of the knowledge without some further evidence as to wantonness is insufficient to support the question of punitive damages being considered by the jury." *Id.* at 375 (quoting the record of the trial, N.T. 23.57).

100. 548 F. Supp. at 374-76. Pennsylvania has adopted the rule of punitive damages as set forth in RESTATEMENT (SECOND) OF TORTS § 908. *Id.* at 374. *See supra* note 43.

poration was exaggerated;¹⁰¹ (3) that the threat of “excessive” punitive damage awards was effectively met by judicial control;¹⁰² (4) that the defendants’ due process rights were not violated by punitive damage awards in this case;¹⁰³ (5) that the defendants were not subject to double jeopardy;¹⁰⁴ and (6) that Johns-Manville’s failure to affix an adequate warning on a known dangerous product constituted “reckless indifference of the health and safety of plaintiffs in light of the knowledge held by its corporate officials.”¹⁰⁵

The aspect of the judgment most devastating to the Manville Corporation was the holding that each plaintiff who could show that the corporation’s conduct as to him was “outrageous” was allowed to claim punitive damages.¹⁰⁶ It was against this holding that the corporation unsuccessfully advanced their argument expressing a fear of bankruptcy.

The Manville Corporation, if not the court, recognized the pre-

101. 548 F. Supp. at 376-77.

102. 548 F. Supp. at 377. Pennsylvania law requires the punitive damages award to bear a “reasonable relation[ship] to the amount of actual damages suffered by [each] plaintiff.” *Id.* at 377. See *Givens v. W.J. Gilmore Drug Co.*, 337 Pa. 278, 10 A.2d 12, 16 (1940).

103. 548 F. Supp. at 377. The essence of due process is “fundamental fairness.” See *Benton v. Maryland*, 395 U.S. 784 (1969). Johns-Manville argued that the standards for punitive damages were so vague that the company was denied adequate notice of which wrongful conduct was being punished. Also, the lack of any “legally fixed standard” left the judge and jury virtually unguided in determining what conduct was wrongful.

The court answered by citing *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), in which the Supreme Court held that the standard of “outrageous conduct”—wanton disregard of the rights of others—provided adequate notice to defendants that they may be subject to punitive damages for their conduct. 548 F. Supp. at 377.

104. 548 F. Supp. at 377-78. Johns-Manville contended that to allow each plaintiff to recover punitive damages would be to violate the company’s fifth amendment rights by exposing it to “successive punishment” for “the same act.” *Id.* at 377. The court countered by holding, as a matter of law, that because the company owed a duty to each plaintiff, punitive damages could be claimed by each plaintiff because the conduct of Johns-Manville was “outrageous” as to each. *Id.* at 377-78. See *supra* notes 48 & 62.

105. 548 F. Supp. at 378. The evidence introduced at trial showed that Johns-Manville had specifically been advised by Mr. Hugh M. Jackson, Director of Safety for Johns-Manville from 1947-1952 and manager of the industrial health program from 1952-1960, that inhalation of asbestos dust presented serious health hazards. Johns-Manville was advised in the 1950’s to affix a warning on its asbestos products, but such a warning was not affixed until 1969. *Id.* at 375.

Also, Dr. Kenneth Wallace Smith, medical officer for Canadian Johns-Manville from 1943 or 1944 to 1951, after which he served as medical officer for the entire Johns-Manville corporation until 1966, conducted his own study of asbestos inhalation in the late 1940’s. As a result of his research, in 1952 Dr. Smith recommended to the highest corporate officials of Johns-Manville that a warning should be attached to their asbestos products. His advice was ignored until 1969. *Id.* at 375-76.

106. 548 F. Supp. at 376-77.

cedent set by the decision. In every subsequent suit brought in the District Court for the Eastern District of Pennsylvania, each plaintiff could claim punitive damages; other courts might also follow the *Neal* court's lead. In the eyes of the Manville Corporation, at least, the "theoretical" threat of bankruptcy flowing from punitive damages "overkill" began to take on substance.

V. BANKRUPTCY

The threat of bankruptcy was realized on August 26, 1982. The Manville Corporation on that date filed for Chapter 11 reorganization under the Bankruptcy Reform Act of 1978 in the United States District Court for the Southern District of New York.¹⁰⁷

In an interview, John A. McKinney, president and chief executive officer of the corporation, reported that while the corporation was still in "good shape," the corporation was "completely overwhelmed" by the asbestos litigation.¹⁰⁸ A Massachusetts consulting firm had advised Manville that it could expect to be faced with up to 52,000 lawsuits with resulting potential liability of \$2 billion.¹⁰⁹ Manville's reported assets at the time of filing were valued at \$2.2 billion, but because generally accepted accounting principles require a company to set aside funds as a reserve against anticipated claims,¹¹⁰ the corporation felt it had "no choice" but to file under Chapter 11.¹¹¹

A. Chapter 11 Reorganization

Filing a Chapter 11 petition automatically stays the commencement, continuation or enforcement of a "judicial, administrative, or other proceeding against the debtor."¹¹² The primary purpose of Chapter 11 is the "rehabilitation" of the debtor, not the liquidation of his estate.¹¹³ Thus, the debtor usually retains possession of assets and makes payments to creditors pursuant to a court-ap-

107. N.Y. Times, Aug. 27, 1982, at A1, col. 6.

108. *Id.*

109. *Id.* See also Time Mag., Sept. 6, 1982, at 17.

110. See *Financial Accounting Standards Board Statement No. 5* as reported in MILLER, COMPREHENSIVE GAAP GUIDE § 6.01 (1981).

111. N.Y. Times, Aug. 27, 1982, at A1, col. 6. Time Mag., Sept. 6, 1982, at 17. James Beasley, treasurer at Manville, reported that the costs could be much more than those projected by the consulting firm. N.Y. Times, Aug. 27, 1982, at A1, col. 6.

112. 11 U.S.C. § 362(a)(1) (Supp. V 1981).

113. EPSTEIN & LANDERS, DEBTORS AND CREDITORS: CASES AND MATERIALS 372

proved plan.¹¹⁴

This plan must be filed with the court.¹¹⁵ After filing the plan, the debtor must obtain approval of the plan from its creditors and stockholders. The plan is deemed "accepted" when a majority of creditors, who hold two-thirds of the total claims against the debtor, approve the plan. Stockholders "accept" the plan when holders of two-thirds of the total voting interest approve the plan.¹¹⁶

After acceptance, the plan must be confirmed by the court.¹¹⁷ Confirmation may be denied if the judge determines that the plan is not in the best interests of those creditors or shareholders who did not accept the plan.¹¹⁸ The plan will not be in the best interest of those non-approving creditors or shareholders who would receive less under the plan than they would under Chapter 7 liquidation.¹¹⁹

If the judge determines that the plan is in the best interests of all parties, he may confirm the plan over the objections of the minority.¹²⁰ Upon confirmation, the debtor is discharged from all of its pre-petition debts except as provided in (1) the plan, (2) the order confirming the plan, and (3) section 1141(d) of the Bankruptcy Code.¹²¹

B. Bankruptcy and Asbestos Liability

The filing of the petition in bankruptcy virtually paralyzes the resolution of asbestos-related claims. Claimants may petition to

(2d ed. 1982). The two general forms of bankruptcy are: (1) liquidation and (2) rehabilitation.

By far, the greatest number of filings are for liquidation. *Id.* Chapter 7 of the BANKRUPTCY CODE, 11 U.S.C. § 701, is entitled "Liquidation." Basically, the trustee in bankruptcy under Chapter 7 is empowered to collect the non-exempt assets of the debtor, reduce them to cash, and distribute the proceeds to the creditors. The debtor then hopes for a discharge of his remaining debts.

A filing under Chapter 11 of the BANKRUPTCY CODE, 11 U.S.C. § 1101, or under Chapter 13 of the BANKRUPTCY CODE, 11 U.S.C. § 1301, initiates a process of "reorganization" of rehabilitation or the debtor's assets. Here, the debtor usually retains his assets, and most often retains management of them, and makes payments out of future earnings to his creditors pursuant to a "plan" of repayment.

114. The "plan" is the key element of a Chapter 11 reorganization. *See* 11 U.S.C. § 1121 (Supp. V 1981).

115. 11 U.S.C. § 1121 (Supp. V 1981).

116. 11 U.S.C. § 1126 (Supp. V 1981).

117. 11 U.S.C. § 1129 (Supp. V 1981).

118. 11 U.S.C. § 1129(a)(7)(A)(ii) (Supp. V 1981).

119. *Id.*

120. This is referred to as a "cram down." EPSTEIN AND LANDERS, *supra* note 113, at 380. *See* BANKRUPTCY CODE §§ 1129(a)(8), 1129(b)(1978).

121. 11 U.S.C. § 1141 (Supp. V 1981). Section 1142(d) excepts from discharge, among other debts, those debts excepted by § 523.

have the automatic stay modified so as to try cases up to the point of judgment to determine damages; the claims would then be treated like any other debt the asbestos manufacturer owes.¹²² However, a lifting of the stay for purposes of enforcing a judicial lien¹²³ is unlikely. Section 362(d) of the Bankruptcy Code provides that relief from a stay will be granted to enforce a judicial lien only if the party seeking relief can prove "lack of adequate protection of an interest in property of such party," or, with respect to a stay of an act against property, if the debtor does not have an equity interest in such property and "such property is not necessary to an effective reorganization."¹²⁴

Because the Manville Corporation is solvent under the Bankruptcy Code,¹²⁵ there is little danger of inadequate protection of the judicial lien-holder's interest in the debtor's property. Retention of corporate assets may readily be shown to be necessary to an effective reorganization. Furthermore, the purpose of the automatic stay is to give "the debtor a breathing spell from his creditors."¹²⁶

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. . . . It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.¹²⁷

The automatic stay, within the context of reorganization, "is designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts."¹²⁸ The creditors' final relief is generally to be obtained as a result of reorganization and payment received

122. See 11 U.S.C. § 362(d) (Supp. V 1981).

123. 11 U.S.C. § 101(27) (Supp. V 1981). A "judicial lien" is a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* Such a lien is a secured claim under the Bankruptcy Reform Act of 1978.

124. 11 U.S.C. § 362(d)(1, 2) (Supp. V 1981). See *In re Saint Peter's School*, 16 Bankr. 404, 408 (S.D.N.Y. 1982) ("The grounds for relief under subsections (d)(1) and (d)(2) are stated in the alternative.").

125. An entity other than a partnership is "insolvent" for purposes of the Bankruptcy Code if its "financial condition" is such that "the sum of such entity's debts is greater than all of such entity's property," exclusive of property fraudulently conveyed or exempt. 11 U.S.C. § 101(26)(A) (Supp. V 1981). As noted before, Manville Corporation's assets totaled \$2.2 billion; its "projected" liabilities, \$2 billion. See *infra* notes 167-68 and accompanying text.

126. S. REP. No. 95-989, 95th Cong., 1st Sess. 54 (1978).

127. *Id.* at 54-55.

128. *Fidelity Mortgage Inv. v. Camelia Bldrs., Inc.*, 550 F.2d 47, 55 (2d Cir. 1976).

according to the plan.¹²⁹ This in turn facilitates the twin policies of the Bankruptcy Reform Act: giving the honest debtor a "fresh start," and providing for the orderly distribution of the debtor's assets or earnings to his creditors.¹³⁰

C. *The Extent of the Bankruptcy Court's Jurisdiction*

The waters were further muddied when the Supreme Court ruled that the broad powers given to bankruptcy judges under the 1978 Bankruptcy Reform Act were unconstitutional.¹³¹ Before *Northern Pipeline Construction v. Marathon Pipeline Co.*,¹³² the broad grant of power given to bankruptcy courts¹³³ would have allowed the bankruptcy court to resolve all asbestos-related lawsuits pending against the Manville Corporation, and to determine independently whether discharge of a particular debt is warranted. It is presently unclear how far the jurisdiction of the bankruptcy court will extend in any one case.¹³⁴ In *Northern Pipeline*, the Supreme Court held that the broad grant of nationwide jurisdiction could not be exercised under the Constitution because the bankruptcy judges were not given the protections of tenure under Article III of the Constitution.¹³⁵ Tenure and guaranteed "compensation" under Article III serve to preserve the independence of the judiciary, which is necessary to the effective functioning of our system of government.¹³⁶

The Court noted that Congress may create courts that are not Article III courts (so-called "legislative courts"),¹³⁷ but these courts have only limited jurisdiction. Legislative courts may properly exercise jurisdiction over: (1) specialized geographic ar-

129. *In re Alyucan Interstate Corp.*, 12 Bankr. 803, 806 (D. Utah, 1981).

130. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

131. *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858 (1982).

132. *Id.*

133. 28 U.S.C. § 1471 (Supp. III 1981). The Act became effective October 1, 1979. Section 1471(c) provided that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts." The bankruptcy court was thus entitled by the Act to exercise broad jurisdiction. See 1 COLLIER'S ON BANKRUPTCY ¶ 3.01, at 3-37, 3-44 to 3-49 (15th ed. 1981).

134. See generally H.R. REP. NO. 807, 97th Cong., 2d Sess. 1 (1982).

135. 102 S. Ct. at 2865-66. Article III, § 1 of the United States Constitution provides:

The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Time, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. ART. III, § 1.

136. 102 S. Ct. at 2865. See *United States v. Will*, 449 U.S. 200, 217-18 (1980); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*).

137. 102 S. Ct. at 2867-71.

eas, such as territories or the District of Columbia; (2) military cases; and (3) cases involving "public rights."¹³⁸ Essentially, "public rights" are those properly belonging to the executive and legislative branches; "private rights" are "inherently. . . judicial" and involve application of private civil law. The broad grant of power under the Bankruptcy Reform Act of 1978 conferred jurisdiction over "private rights." The lack of tenure of the judges rendered the grant of broad jurisdiction under the Act unconstitutional.

The distinction between "public rights" and "private rights" raises special problems in bankruptcy proceedings. As one commentator has stated:

[I]n the context of a bankruptcy proceeding, it is not clear which rights are public and which are private. . . . The responsibilities of the bankruptcy court in conducting a bankruptcy proceeding include staying lawsuits against the bankrupt, collecting the bankrupt's assets, conducting "summary proceedings" concerning property of the bankrupt that is within the actual or constructive possession of the bankruptcy court, allowing or disallowing claims, and adjudicating fraudulent conveyances and preferences. In varying degrees, all of these functions require bankruptcy judges to adjudicate questions of private civil law; however, it is doubtful whether a bankruptcy court could efficiently adjudicate bankruptcy petitions unless it were permitted to exercise authority over these ancillary matters.¹³⁹

D. Discharge

With respect to the Manville Corporation, the question of the bankruptcy court's jurisdiction has particular application to the availability of a discharge of the corporation's debts. Bankruptcy Code section 1141(d)(1)(a) provides that court confirmation of the Chapter 11 plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation."¹⁴⁰ A "discharge" relieves the debtor from all pre-petition debts and some post-petition debts that are treated as pre-petition debts.¹⁴¹

138. *Id.* at 2870 (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). "Public rights" are rights which: (1) may have been exclusively determined by the executive or the Congress; (2) involve a claim between the government and others; and (3) involve the government as a proper party. 102 S. Ct. at 2870-71.

139. H.R. REP., *supra* note 134, (statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, Dep't of Justice before the House Judiciary Comm.).

140. 11 U.S.C. § 1141(d)(1)(A) (Supp. V 1981).

141. While "discharge" is not defined in the Bankruptcy Code, "[s]ection 727(b) specifies that a discharge, in essence, releases the debtor from all pre-petition debts, and some post-petition debts which are treated as if they were pre-pe-

Section 1141(d)(2) provides: "The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title." Section 523(a) provides:

"A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt —

* * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.¹⁴²

The requirement that the debtor's act be "willful and malicious" has been the subject of continuing debate. In *Tinker v. Colwell*,¹⁴³ the Supreme Court, interpreting the corresponding provision under the Bankruptcy Act of 1898¹⁴⁴ determined that the debtor's conversion of a creditor's property had been intentional and voluntary, and, therefore, "willful."¹⁴⁵ The Court stated further:

[W]e think a willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception.¹⁴⁶

Lower courts subsequently expanded this passage to include "reckless disregard" for the rights of others.¹⁴⁷ When the Bankruptcy Reform Act of 1978 was passed, Congress made it clear that such an expansion was not warranted:

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, "willful" means deliberate or intentional. To the extent that *Tinker v. Colwell*, 193 U.S. 473 (1902) [sic] held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a "reckless disregard" standard, they are overruled.¹⁴⁸

The legislative history does not define "malicious" and courts have held that the definition formulated when construing the phrase under the prior Act still stands.¹⁴⁹ That definition has been stated as follows:

An injury to person or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the

tion debts. It is this release from debts which is the essence of a discharge." EPSTEIN & LANDERS, DEBTORS AND CREDITORS, *supra* note 113, at 588.

The post-petition debts treated as pre-petition, for purposes of § 1141(d) are those specified in §§ 502(g), 502(h), or 502(i). Respectively, these provisions concern an unexpired lease or executory contract, set-offs, and nonrecourse loans.

Id.

142. 11 U.S.C. § 523(a)(6) (Supp. V 1981).

143. 193 U.S. 473 (1904).

144. Bankruptcy Act of 1898 § 17(a)(2), 30 Stat. 550, chap. 541, U.S. Comp. Stat. 1901, 3428.

145. 193 U.S. at 487.

146. *Id.*

147. See, e.g., *Haerynck v. Thompson*, 228 F.2d 72, 74 (10th Cir. 1955); *Harrison v. Donnelly*, 153 F.2d 588, 591 (8th Cir. 1946); see generally *United States v. Langer*, 12 Bankr. 957, 959 (D.N.D. 1981).

148. H.R. REP. NO. 595, 95th Cong., 1st Sess. at 365 (1977).

149. *Langer*, 12 Bankr. at 959.

absence of personal hatred, spite or ill will. The word "willful" means nothing more than intentionally doing an act which necessarily leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.¹⁵⁰

An "intentional disregard for the rights of another" may thus constitute a willful and malicious injury;¹⁵¹ but, there must be shown an intent to harm a creditor in order to show malice.¹⁵² In *Neal v. Carey Canadian Mines, Ltd.*,¹⁵³ the court held that the plaintiffs had stated a cause of action for an intentional tort against their employer, thus bringing the case out of the state workers' compensation act.¹⁵⁴ The trial court instructed the jury that they would have to find by a preponderance of the evidence "that [the employer] intended to do an act or intended to fail to do an act [the employer] knew or believed would be substantially certain to cause harm to the plaintiff" in order to find the employer liable for intentional "aggravation of a pre-existing work-connected asbestos-related disease."¹⁵⁵ The jury found that the employer, "through the knowledge and inaction of its highest officials, despite professional and scientific consultation and advice, deliberately intended to injure the plaintiffs by choosing to totally and blatantly disregard [their own company doctor's] warnings and recommendations that [the workers] be informed about" the health hazards associated with asbestos.¹⁵⁶

Asbestos-related lawsuits brought against suppliers, however,

150. COLLIER'S ON BANKRUPTCY § 17.17[1] (14th ed. 1978). See also COLLIER'S ON BANKRUPTCY § 523.16 (15th ed. 1980); *Petty v. Dardar*, 620 F.2d 39, 40 (5th Cir. 1980).

151. *Langer*, 12 Bankr. at 960. See also *Alabama Farm Bureau Mut. Ins. Co. v. Brown*, 18 Bankr. 591 (N.D. Ala. 1982); *Underwood v. Underwood*, 17 Bankr. 417 (W.D. Mo. 1981). Gross negligence, no matter how odious, is not a "willful tort" for purposes of determining discharge of debt. See *McElhanor v. Greer*, 21 Bankr. 763 (D. Ariz. 1982); *Edge v. Simmons*, 17 Bankr. 259 (N.D. Ga. 1982); *Dans v. White*, 18 Bankr. 246 (E.D. Va. 1982) ("reckless disregard" of the rights of others is not sufficient to render liability nondischargeable).

152. *Langer*, 12 Bankr. at 960. Some courts refuse to give effect to the committee's "overruling" of *Tinker v. Colwell*: "It is unclear how much of the definitions stated in *Tinker* the committee intended to overrule.... As has already been noted, the words actually enacted remain unchanged. This raised the question whether a sentence in a committee report, which is itself ambiguous, overrules 75 years of consistent judicial interpretation of the identical terms used in the identical context. I think not." *Borg Warner Acceptance Corp. v. Simmons*, 9 Bankr. 62, 65 (S.D. Fla. 1981).

153. 548 F. Supp. 357 (E.D. Pa. 1982).

154. *Id.* at 378-81. See *infra* note 204 and accompanying text.

155. 548 F. Supp. at 380.

156. *Id.*

have prevailed on the theories of strict liability and negligence.¹⁵⁷ Because intent is immaterial under a strict liability theory, and because the negligence theory involves at most "reckless disregard" for the rights of others, the plaintiffs' claims seem not to be excepted from discharge under section 1141(d).¹⁵⁸ This is not necessarily the case. The original grant of jurisdiction under the Bankruptcy Reform Act of 1978¹⁵⁹ empowered the bankruptcy courts to independently consider whether the acts of the debtor were "willful and malicious" so as to be excepted from discharge.¹⁶⁰ Thus, the bankruptcy court is not bound by the doctrine of res judicata to consider only those grounds of liability that supported a nonbankruptcy court's judgment. As the Supreme Court held in *Brown v. Felsen*:¹⁶¹

In sum, we reject [the] contention that res judicata applies here and we hold that the bankruptcy court is not confined to a review of the judgment and the record in the prior state-court proceedings when considering the dischargeability of the [debtor's] debts.¹⁶²

157. See, e.g., *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155 (8th Cir. 1975); *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd*, 681 F.2d 334 (5th Cir. 1982); *Money v. Fibreboard Corp.*, 485 F. Supp. 242 (E.D. Tex. 1980); *Flatt v. Johns-Manville Sales Corp.*, 488 F. Supp. 836 (E.D. Tex. 1980); *Migues v. Nicolet Indus.*, 493 F. Supp. 61 (E.D. Tex. 1980), *rev'd in part and remanded*, 622 F.2d 1182 (5th Cir. 1981).

158. 11 U.S.C. § 1141(d) (Supp. V 1981). See *infra* notes 221-30 and accompanying text. In *Neal v. Carey Can. Mines, Ltd.*, the award of punitive damages was based on the defendants' "outrageous conduct" as defined by Restatement (Second) of Torts § 908 (1965) which provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." 548 F. Supp. at 375 (quoting RESTATEMENT (SECOND) OF TORTS § 408 (1965)) (emphasis in original). The award of punitive damages was based on the evidence that "Johns-Manville engaged in outrageous conduct by exhibiting a reckless indifference to the health and wellbeing of plaintiffs." 548 F. Supp. at 376.

Evidence tending to dispel the "intentional" aspect of the company's "outrageous" conduct is seen in Johns-Manville's efforts to issue warnings of some kind and to distribute information concerning the dangers of exposure to asbestos. *Id.* No evidence of such efforts to warn are shown on the part of the employer who, it is noted, was held to be liable for an intentional tort. See *infra* notes 233-35.

159. 28 U.S.C. § 1471(a)-(c) (Supp. III 1981).

160. See *Brown v. Felsen*, 442 U.S. 127 (1979).

161. 442 U.S. 127 (1979). The Court was interpreting section 17 of the Bankruptcy Act of 1898, 30 Stat. 550, Chap. 541, U.S. Comp. Stat. 1901, 3428, which corresponds to the discharge provision of the BANKRUPTCY CODE, 11 U.S.C. § 1141 (Supp. V 1981). Under section 17 of the Bankruptcy Act of 1898, the bankruptcy court was given the power to make an independent assessment of the "willful and malicious" nature of the debtor's act. *Id.* Section 1141 of the Bankruptcy Code does not contain such a grant of jurisdiction; instead, this grant is found in 28 U.S.C. § 1471 (Supp. III 1981).

162. 442 U.S. at 138-39. The Court stated further that refusing to apply the doctrine of res judicata would permit the bankruptcy court to make an accurate determination of whether the debtor's acts constituted fraud so as to be nondischargeable in bankruptcy. *Id.* at 138. It was also held that Congress in-

The bankruptcy court may well find upon review of the entire record of the cases brought against the Manville Corporation that the acts of the corporation were willful and malicious. The bankruptcy court, however, derives its power to independently determine whether the debtor's acts are willful and malicious for the purposes of discharge from the same provision of the Bankruptcy Reform Act of 1978 that was held unconstitutional in *Northern Pipeline*. Because issues of whether the debtor's tortious acts are willful and malicious are drawn from the record of the case in a nonbankruptcy or state court,¹⁶³ such a determination necessarily involves matters of private civil law which are not within the bankruptcy court's jurisdiction after the holding in *Northern Pipeline*.

Even if the bankruptcy courts are allowed to continue to independently determine whether a debtor's acts were willful and malicious, it is by no means certain that the courts will so hold in the case of the Manville Corporation. The bankruptcy court may be hard-pressed to find the requisite intent to injure the individual plaintiffs.¹⁶⁴

Congress was given until October 4, 1982, to remedy the defects of the Bankruptcy Reform Act. The deadline has passed as of this writing, but a bill conferring Article III protection for bankruptcy judges was recently approved by the House Judiciary Committee and may reasonably be expected to become law.¹⁶⁵

During the interim, the bankruptcy courts have retained their broad grant of power.¹⁶⁶ As noted, one important aspect of this

tended the bankruptcy court to make such an independent inquiry into the nature of the debtor's acts despite the fact that liability had been premised on another basis in the lower court. *Id.*

163. *Peerson v. Mitchell*, 205 Okla. 530, 239 P.2d 1028 (1950), *cert. denied*, 342 U.S. 866 (1951).

164. *See, e.g., Laatsch v. Stanfield*, 14 Bankr. 180 (Bankr. N.D. Ohio 1981) (defendant was found guilty of vehicular homicide in state court, but the bankruptcy court held that absent evidence that defendant intended to injure anyone, her conduct was not "willful and malicious" so as to render the claim for wrongful death nondischargeable). *See supra* note 158.

165. *L.A. Times*, Feb. 16, 1983, at 5, col. 1. This is H.R. 6978, 97th Cong., 2d Sess. (1982). *See supra* notes 134, 139.

166. *See supra* note 134, at 18. Transition from the present system to the tenured system of H.R. 6978 was expected to be completed by March 31, 1983. Decisions of the bankruptcy courts in the meantime are to be afforded their intended weight; the Supreme Court held only that Bankruptcy Code § 241(a) precluded a permanent system of untenured judges. *See infra* note 167 and accompanying text.

grant of power is the ability to stay all pending litigation against the debtor. With respect to the Manville reorganization, this stay prevents any imposition of liability on the corporation during reorganization or until the stay is lifted. The stay, however, operates only against commencement or continuation of a suit against the filing debtor. Any named co-defendants remain subject to suit. The Supreme Court recently allowed suit against Manville's former co-defendants to proceed despite the "empty chair defense."¹⁶⁷

E. Federal Legislation

It is likely that the Manville Corporation will stay in reorganization until Congress provides legislation compensating asbestos victims. The industry in general, and the Manville Corporation in particular, has long contended that the United States government should contribute at least part of the expense of compensating asbestos workers.¹⁶⁸

This contention is based on the fact that during World War II and thereafter, the government required the use of asbestos insulation on Navy ships.¹⁶⁹ At the height of ship-building activity

167. 28 U.S.C. § 1471(e) (Supp. V 1981) provides: "The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case." On February 22, 1983, the Supreme Court affirmed the "interim" grant of plenary jurisdiction to the bankruptcy court over both public and private rights by denying the petition of the Keene Corporation, the GAF Corporation and Pacor, Inc., challenging the authority of the bankruptcy judge handling the Manville reorganization to issue a stay of proceedings against Manville. The judge had ordered all pending suits against the Manville Corporation stayed as of Manville's filing under Chapter 11. The three named petitioners were all co-defendants with the Manville Corporation, and were subject to suit despite the "empty chair defendant." The Supreme Court refused to hear the matter, thereby affirming the bankruptcy judge's order of stay. *In re Keene Corp.*, 103 S. Ct. 1237 (1983). At a hearing before a House subcommittee of the full Committee of Education and Labor, John Baldwin, president of Pittsburgh Corning Corporation, a co-defendant with the Manville Corporation, stated that "when one defendant drops out of a case, the others must pick up the slack. Not only must they bear the entire costs of defense, but, in many states, they may be required to pay the entire amount of any judgment." *L.A. Times*, Feb. 11, 1983, at 19, col. 1.

168. *N.Y. Times*, Aug. 27, 1982, at A1, col. 6; D4, col. 3. *N.Y. Times*, Sept. 5, 1982, at D1, col. 3.

169. See *Hearings before the Subcomm. on the Coast Guard and Navigation of the Full House Comm. of Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 456 (1980). Introduced at the hearing was the "Maritime Administration Standard Specifications for Merchant Ship Construction: Insulation Lagging for Piping and Machinery." Asbestos is termed "mineral fibers;" corresponding federal specification: "HH-1-558." Asbestos was widely used in naval vessels and merchant marine vessels. See generally *id.*

A defense was asserted by Johns-Manville in *In re Related Asbestos Cases*, 543 F. Supp. 1142 (N.D. Cal. 1982) that "as a matter of public policy, a manufacturer who supplies equipment to the United States [military]...in a time of war pursuant

during the war, there were 1,723,000 men and women employed in shipyards.¹⁷⁰ Many of these workers were exposed to asbestos dust that was as great, and perhaps greater than, that encountered by asbestos workers elsewhere.¹⁷¹ The government must also be charged with knowledge of the reported hazards of exposure to asbestos. Despite such knowledge, regulation of exposure to hazardous substances was not diligently pursued until the 1960's and 1970's.¹⁷²

The government to date has denied any liability to those suffering from asbestos-related diseases,¹⁷³ and has repeatedly contended that it is already paying its fair share through the Federal Employment Compensation Act,¹⁷⁴ Medicare, and Social Security.¹⁷⁵ Despite these protests, the filing of the Manville Corporation for reorganization underlines the need for some legislative action.¹⁷⁶

to government specifications may not be held liable for any inadequacy of the plans." *Id.* at 1152 (quoting *In re "Agent Orange Product" Liab. Litig.*, 506 F. Supp. 762, 794 (E.D.N.Y. 1980)). When a defendant raises this defense, he must show:

1. That the government established the specifications for [a product which allegedly caused an injury]. . . ;
2. That the [product]. . . manufactured by the defendant met the government's specifications in all material respects; and
3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of [the product]. . . .

543 F. Supp. at 1152.

170. BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, BULL. NO. 824, WAR-TIME EMPLOYMENT, PRODUCTION, AND CONDITIONS OF WORK IN SHIPYARDS, H.R. DOC. NO. 149, 79th Cong., 1st Sess. 1 (1945).

171. N.Y. Times, Sept. 18, 1982, at D1, col. 2; D36, col. 1, 2. "During the war I worked in the shipyards and it just blew like dust. You couldn't see each other for it because you thought it was harmless." *Hearings on Corporate Criminal Liability, Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 447 (statement by George Figua).

172. The U.S. Public Health Service attempted to determine dangerous levels of exposure to airborne contaminants during World War II. Their findings were not made available until 1946. BERMAN, *supra* note 26 at 86. See generally *supra* note 169.

173. The government is currently a defendant in almost 1,200 asbestos-related products liability suits brought by nearly 13,000 claimants. N.Y. Times, Sept. 10, 1982, at D1, col. 4.

174. 5 U.S.C. § 8101 (Supp. V 1981). As of December, 1981, the government had received almost 6,000 claims and had processed a small proportion, paying \$9 million. N.Y. Times, Sept. 18, 1982, at D36, col. 2.

175. N.Y. Times, Sept. 18, 1982, at D1, col. 2.

176. Two proposals are currently under consideration by Congress. The first, H.R. 5735, 97th Cong., 2d Sess. (1982), envisions a federal compensation system funded entirely by industry for victims of asbestos and radiation-related diseases; the second, S. 1643, 97th Cong., 1st Sess. (1981), calls for the creation of a special one-time commission of government, health, labor and industry representatives to

The primary obstacle to prompt passage of federal compensation legislation is the question of whether industry or the federal government should compensate asbestos victims. Given the current economic situation, it would be unrealistic to expect easy passage of any compensation bill which calls for taxpayer support. On the other hand, if such federal involvement in a compensation scheme is withheld, the industry must certainly pass the extra costs of compensating asbestos victims to the public.

The alternative to federal legislation is the "resolution" of asbestos compensation under the present system: state workers' compensation or the courts. Neither has proven satisfactory because most state workers' compensation schemes were intended to remedy traumatic injuries and are, therefore, ill-designed to cope with the latent, lingering diseases associated with asbestos.¹⁷⁷ Additionally, many asbestos claimants find that their claims are barred by strict statutes of limitations on occupational disease.¹⁷⁸

In an effort to obtain relief, workers bring suit against the manufacturers of asbestos products. This process, however, by no

establish guidelines which would enable state workers' compensation boards to efficiently and speedily compensate asbestos victims. In the second scheme, the government would foot some of the bill. Gary Hart, the sponsor of the senate bill has observed:

Clearly, although the asbestos companies themselves may bear the principal financial burden for the social tragedy now confronting us, the Federal Government, as a regulator, employer, importer, and user, must share some responsibility for compensating persons with asbestos-related disease.

N.Y. Times, Sept. 5, 1982, at D1, col. 5.

Just as clearly, the asbestos industry favors Senator Hart's bill. On September 9, 1982, the House Education and Labor Committee Subcommittee on Occupational Safety and Health, chaired by Representative George Miller, opened hearings on the Manville bankruptcy. Representative Miller stated that to allow the government to compensate victims "would establish a dangerous precedent which could open the doors of the Treasury to every manufacturer of a hazardous product or substance which finds itself confronted with admittedly large liabilities, but liabilities which are of its own making." N.Y. Times, Sept. 10, 1982, at D4, col. 5. G. Earl Parker, a senior vice president for Manville countered: "In every moral, social and legal sense, the Federal Government is responsible for a substantial number of the asbestos disease cases we see today." *Id.* at D4, col. 6.

177. See *supra* notes 154, 155 and accompanying text. The federal government has expressed concern over "the tendency for worker's compensation to be underutilized by workers or survivors in cases of occupational illness." *Hearings before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 64 (1981) (prepared statement of Peter S. Barth, Univ. of Conn.).

178. Workers have succeeded in bringing common law actions against employers outside of state workers' compensation acts for intentional "aggravation" of their injuries. *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357, 379-81 (E.D. Pa. 1982); *Johns-Manville Prod. Corp. v. Contra Costa Super. Ct.*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); *Blankenship v. Cincinnati Milicron Chem.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).

means assures recovery. Also, any recovery that is secured may be substantially reduced by attorneys' fees and legal costs. With an estimated 676,000 Americans who will develop lung cancer by the end of the century as a result of asbestos exposure,¹⁷⁹ there is a serious question as to whether the courts can adequately resolve such a number of claims.¹⁸⁰ Furthermore, if the courts continue to allow punitive damages to all plaintiffs, more asbestos manufacturers will find Chapter 11 reorganization an attractive alternative to litigation.

VI. A "FRESH START" FOR THE SOLVENT DEBTOR

The filing of the Manville Corporation for Chapter 11 reorganization raises several critical issues. It has been argued that the Manville filing was an abuse of the federal bankruptcy law. An attorney who represents 268 claimants in asbestos-related suits stated: "It's an outrageous abuse of the judicial process. Chapter 11 is not intended for corporations with \$2.2 billion in sales that are operating in the black."¹⁸¹ This sentiment is widely shared.¹⁸²

The bankruptcy courts are essentially courts of equity. In this context, the demands for "clean hands" are met by allowing only the "honest debtor" to escape the pressures that drove him into bankruptcy. It would appear, at first glance, that a corporation who knowingly failed to provide adequate warnings concerning a product it manufactured should be denied the haven of the bankruptcy laws and protection from creditors. The fact that the Manville Corporation was not solely at fault for the widespread

179. L.A. Times, Feb. 11, 1983, at 19, col. 2.

180. *Hearings on the Manville Bankruptcy and Amendments on the Bankruptcy Code Relating to the Northern Pipeline Decision*, Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. at 113-14 (1982) (statement of James Franklin Fite, Eastern Regional Director, White Lung Ass'n).

181. Statement by Robert Sweeney in Time Mag., Sept. 6, 1982, at 17. Both UNR Industries and the Manville Corporation stressed the fact that they were still viable corporations. The filings for Chapter 11 reorganization were made to protect themselves from pending litigation. N.Y. Times, Aug. 27, 1982, at D4, col. 1. Another lawyer, Ronald Motley of Barnwell, South Carolina, told reporters: "The bankruptcy laws weren't set up to allow bailouts for future problems." *Id.* at D4, col. 2.

182. Senator Robert Dole, a Republican from Kansas, has called Manville's filing "dubious." N.Y. Times, Sept. 1, 1982, at D12, col. 4. Senator Dole's opinions are worthy of note in that he chairs the Senate judiciary subcommittee studying the bankruptcy laws. *Id.*

public exposure to asbestos should not enable the corporation to wash its hands of the matter.

Considerations of "fairness" appear on both sides of the question. While an argument can be made to the effect that "fairness" demands compensation be paid to those injured as a result of the Manville Corporation's "outrageous conduct," an argument may also be advanced that "fairness" suggests the industry should *not* bear the full brunt of litigation; the United States government should also take its share of responsibility. What seems dubious is Manville's use of the bankruptcy laws both to seek relief from litigation and to force Congress to act. The fact that the Manville Corporation was solvent when it filed for Chapter 11 reorganization only serves to emphasize this point.

Nevertheless, the language of the Bankruptcy Code is drafted so as to allow the filing of a "solvent" debtor for Chapter 11 reorganization. Bankruptcy Code section 109(d) provides merely that a person who qualifies as a debtor under Chapter 7 may be a debtor under Chapter 11. Any person or entity may be a Chapter 7 debtor who is not a railroad, an insurance firm, or a banking firm.¹⁸³ There is no requirement, either in the Code or in the accompanying legislative history, that such a debtor be insolvent. This lenient standard also serves to protect creditors by encouraging debtors to file for reorganization at a time when more of the debtor's assets are still available to satisfy creditors' claims.

While only an "honest debtor" is to be given a wholly fresh start, the Supreme Court and the bankruptcy courts have been reluctant to deny the debtor relief absent express legislative direction. Only where Congress has expressed its intention to deny a wholly fresh start has the Court denied a debtor escape from his creditors. If solvent debtors are to be denied bankruptcy relief, it seems likely that such denial must come from Congress.

Furthermore, Congress has expressly provided that only "willful and malicious" torts are nondischargeable in bankruptcy. This suggests that the "honest debtor" may include debtors whose acts have been negligent or even in "reckless disregard of the rights of others." The Manville Corporation's debts have arisen as a result of its adjudicated negligent and reckless acts and will likely be discharged. Given this express provision of Congress, the filing by the Manville Corporation for reorganization was not an "abuse" of law as it now reads.

183. 11 U.S.C. § 109(b) (Supp. V 1981).

VII. CONCLUSION

Presently, it seems doubtful that bankruptcy courts will interpret "willful and malicious" injury to include "reckless disregard" in light of reasonably clear legislative intent. This being the case, the tangle created by the Manville bankruptcy will leave the larger issue of compensation for asbestos victims ultimately in the hands of Congress. The danger of "punitive damages overkill" suggests that the courts have not efficiently resolved this national health crisis. Indeed, there is serious question as to whether courts, which essentially remedy wrongs against individual asbestos victims, are equipped to fashion an efficient remedy for a nationwide ill. Given the extent of asbestos exposure and the present quagmire of punitive damages application, the Manville bankruptcy was foreseeable. Only Congress is equipped to fashion a nationwide remedy, and regardless of who ultimately pays, this crisis cries out for remedy.

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