

**THE ASBESTOS LITIGATION CRISIS:
WHO WILL CLEAN UP
THIS ELEPHANTINE MESS?**

by

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INTRODUCTION

The “elephantine mass” of asbestos personal injury litigation — as the Supreme Court recently characterized it¹ — is now more than three decades old. More than 600,000 claims have been filed against over 6,000 defendants in almost every segment in the American economy.² Claimants reportedly have been paid more in excess of \$20 billion.³ Currently hundreds of thousands of claims are pending nationwide — the vast majority filed by claimants whom have no functional impairment. Although the number of asbestos claims tried

¹*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

²See RAND Institute for Civil Practice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002) (“RAND 2002 Report”), at 40, 49, 50. A more recent estimate of the number of companies that have been named in asbestos claims is 8,400. See Statement of Senator Don Nickles, Feb. 14, 2003 (“Nickles Statement”), available at http://www.asbestosolution.org/nickles_statement.pdf.

³See RAND 2002 Report at 63; see also *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (RAND Institute August 2001) (“RAND 2001 Report”), at 8-9.

to verdict has decreased in recent years,⁴ the size of jury verdicts has escalated dramatically. The rate of asbestos-related bankruptcy filings continues unabated, exacting costs on American workers and the economy. Some state courts have resorted to docket-clearing schemes that deprive defendants of due process of law by extorting settlements with threats of mass trials. Some companies targeted by asbestos plaintiffs have followed “settle everything” policies, which has led many of them into bankruptcy; others have followed “settle nothing” policies, which, for some, has led to almost constant trial activity and a mix of verdicts.⁵

For more than a decade, Congress and the Supreme Court have been locked in a stalemate over which branch should solve the asbestos litigation crisis. In 1990, a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation recommended the enactment of federal legislation creating a national asbestos dispute-resolution scheme.⁶ Congress’ only meaningful response was the amendment of the U.S. Bankruptcy Code in 1994 to provide

⁴See RAND 2002 Report at 56.

⁵See T. Voorhees, Jr. and E. Hellerman, *Peripheral Defendants in Asbestos Litigation: An Updated Strategy Review* (American Conference Institute, Sept. 2002) (“Voorhees and Hellerman”), available at <http://www.cov.com/publications/278.PDF>.

⁶See *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation*, 3/1991, at 2-3.

for so-called “524(g)” settlement trusts by bankrupt asbestos defendants.⁷ Since then, the Supreme Court has twice invalidated massive global settlements on the ground that they violated existing procedural rules.⁸ In so doing, the Court noted that “this litigation defies customary judicial administration and calls for national legislation.”⁹ Yet in its current term the Supreme Court has twice declined to review cases addressing significant aspects of the problem — one case challenging the constitutionality of mass “common issue” trials used by some state courts as settlement-extorting, docket-clearing devices,¹⁰ and another involving the scope of federal subject matter jurisdiction and the common issue of the use of questionable expert evidence as to whether low release asbestos-containing products cause disease at all.¹¹

⁷Section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g), provides for the creation of a “qualified settlement fund” for present and future asbestos claimants. See *Qeena Sook Kim, Firms Hit By Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2001, at B4; 11 U.S.C. § 524(g)(2)(B) (2001). The fund assumes all future liabilities of the debtor and sets a cap on each settlement. See 11 U.S.C. § 524(g)(3)(A). Section 524(g) empowers federal district courts to issue an injunction that channels all future claims into the trust and bars the filing of claims against the reorganized company. See 11 U.S.C. § 524(g)(1)(B). As a general rule, the fund must be vested with at least 51% of a company’s worth, but historically such trusts have held much higher percentages of bankrupt companies’ assets. See *Kim, supra*; see also 11 U.S.C. § 524(g)(2)(B)(i)(III).

⁸See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

⁹*Ortiz*, 527 U.S. at 821. Chief Justice Rehnquist’s concurring opinion stated that asbestos litigation “cries out for a legislative solution” *Id.* at 865.

¹⁰*Mobil v. Adkins*, 123 S. Ct. 346 (2002), *denying cert. to State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002).

¹¹*DaimlerChrysler Corp. v. Official Committee of Asbestos Claimants*, 123 S. Ct. 884 (U.S. Jan 13, 2003), *denying cert. to In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002).

In September 2002, and again earlier this month, Congress finally held hearings about the asbestos litigation crisis. To date, however, no bill has been reported out of a committee in either house of Congress.

In the face of the Supreme Court's refusal to act and Congress' failure to act, some lower state and federal courts have attempted to resolve at least some aspects of the crisis in their jurisdictions, and some major defendants have entered into creative proposed global settlements designed to solve the problem as far as they are concerned. For example, U.S. District Judge Charles R. Weiner of the Eastern District of Pennsylvania, to whom all asbestos cases in the federal courts are transferred for pretrial proceedings, and New York Supreme Court Justice Helen E. Freedman, to whom all such cases in New York City are assigned before trial, have issued laudable rulings designed to prevent unimpaired claimants from expending scarce judicial resources of their courts and threatening dwindling financial resources of the remaining defendants. Three remaining defendants with large numbers of claims pending against them, Halliburton, Honeywell, and ABB, have announced proposed global settlement agreements contemplating the filing of prepackaged bankruptcies by subsidiaries and the use of 524(g) trusts and channeling injunctions.

These and similar developments have received widespread publicity and interest. However, although positive and creative, they are local and individual

solutions to a national problem, unlikely to have national impact. The likely effect of these lower court orders is that plaintiffs will file fewer claims in those jurisdictions in which they apply and more in others. The proposed global settlements by Halliburton and others are acts of individual companies that face hundreds of thousands of claims arising mostly from operations of distinct subsidiaries and that are willing and assertedly financially able to put those subsidiaries into bankruptcy. The vast majority of remaining defendants, however, face far fewer claims, and many have neither the corporate structure nor financial wherewithal to put subsidiaries into bankruptcy. Moreover, part of Honeywell's proposed solution is to sell one of the sources of its asbestos problem (its brake business) to a company already in bankruptcy (Federal-Mogul). It does not appear likely that that is an option available to many asbestos defendants. Therefore it appears that a likely effect of these settlements and individual solutions (assuming they are approved and implemented) will be to immunize three more big defendants and cause the plaintiffs' bar to focus even more attention on the remaining defendants.

Part I of this WORKING PAPER describes certain recent developments in the constantly changing landscape of asbestos litigation, including recent large verdicts, new bankruptcy filings, and the Supreme Court's refusal and Congress' failure to act, and presents a snapshot of the current state of the crisis. Part II

focuses on the recent lower court attempts to resolve the unimpaired claimant problem in their jurisdictions and the proposals by Halliburton, Honeywell, and ABB to resolve the problem insofar as they are concerned, and addresses whether and to what extent these developments offer promise of relief to the thousands of remaining defendants, in the absence of national legislation.

I. RECENT DEVELOPMENTS AND THE CURRENT STATE OF THE ASBESTOS CRISIS

The following outlines some of the most important recent developments in asbestos litigation.

A. Mega-Verdicts

In the past eighteen months juries have rendered some astonishingly large verdicts for plaintiffs, dwarfing anything previously seen. These mega-verdicts, which involved various asbestos-related diseases,¹² included:

- a combined \$150 million verdict against three defendants — including the maker of a non-asbestos-containing face mask — in favor of six plaintiffs who had no malignant disease or

¹²There are four generally recognized (though in some respects disputed) categories of health effects of asbestos exposure: (1) pleural plaque (which alone causes no functional impairment); (2) asbestosis, a non-malignant form of pneumoconiosis caused by exposure to high levels of airborne asbestos fibers; (3) lung cancer and other cancer; and (4) malignant diffuse mesothelioma, a painful, fast-growing and usually fatal tumor of the lining of the lung or of the peritoneum. *See generally* R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* (1985). Although historically only about 3 or 4% of all asbestos claims have been for mesothelioma, *see* RAND 2002 Report at 46, mesothelioma claims are the most likely to prevail at trial, *id.* at 56 and are the most costly for defendants. *Id.* at 44.

impairment¹³;

- a combined \$111 million verdict against multiple defendants in various industries in favor of nine plaintiffs with mesothelioma¹⁴;
- a \$55.5 million verdict to a single plaintiff against the manufacturer of an asbestos-containing joint compound¹⁵;
- \$53 million to a brake mechanic (who also had worked in shipyards) for mesothelioma, against 36 defendants including a brake manufacturer found 45.75% culpable¹⁶;
- \$33.7 million to a former U.S. Navy electrician found to have developed mesothelioma from asbestos-containing boiler insulation¹⁷;
- \$20 million to a housewife who claimed she developed that disease from childhood exposure to asbestos-containing flooring in her home¹⁸;
- a \$13 million verdict against the maker of shipboard asbestos-insulated cable¹⁹; and

¹³*Curry v. ACandS* (Miss. Cir. Ct., Holmes County, Oct. 26, 2001), reported in 16 No. 19 MEALEY'S LITIG. REP.: ASBESTOS, 11/9/01, at 4; *Miss. Jury Awards \$150M to Workers Exposed to Asbestos*, 24 No. 1 ANDREWS ASBESTOS LITIG. REP. 12/13/01, at 6; R. Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE (Mar. 4, 2002) ("Parloff").

¹⁴*See New York Judge Unseals \$111 Million Phase I Verdict from 2001 Asbestos Trial*, 17 No. 19 MEALEY'S LITIG. REP.: ASBESTOS, 11/1/02, at 4. This verdict was rendered in Phase I of a reverse bifurcated trial in June 2001, but was sealed until October 29, 2002. *See id.*

¹⁵*Hernandez v. Kelly-Moore Paint Co.* (Tex. Dist. Ct., El Paso County, 8/29/01), reported in 16 No. 15 MEALEY'S LITIG. REP.: ASBESTOS, 9/07/01, at 3.

¹⁶*Brown v. ACandS* (N.Y. Sup. Ct., New York County), reported in 17 No. 2 MEALEY'S LITIG. REP.: ASBESTOS, 2/15/02, at 3.

¹⁷*Todak v. Asbestos Defendants* (Cal. Super. Ct., San Francisco County, 3/27/02), reported in 17 No. 5 MEALEY'S LITIG. REP.: ASBESTOS, 4/5/02.

¹⁸*Peterson v. Hill Brothers Chemical Co.* (Cal. Super. Ct., Alameda County, 6/4/02), reported in 17 No. 11 MEALEY'S LITIG. REP.: ASBESTOS, 7/8/02, at 4.

¹⁹*Matteson v. Various Defendants* (N.Y. Sup. Ct., New York County, 5/30/02), reported in 17 No. 9 MEALEY'S LITIG. REP.: ASBESTOS, 6/7/02, at 5, E1.

- \$11.5 million to a woman who claimed she developed mesothelioma from fibers brought home on her husband's clothes from his job as a pipe fitter.²⁰

Defendants can and do prevail at trial, and have prevailed in some recent trials.²¹ However, the risk that in certain types of cases a jury will return a multi-million dollar plaintiffs' verdict clearly has increased.

B. Bankruptcies

In 2002 at least a dozen companies in various industries filed for bankruptcy as a result of asbestos-related liabilities or costs.²² That brings to

²⁰*Genevieve J. Gunderson v. A.W. Chesterton Co.*, (Cal Super. Ct. San Francisco County, Dec. 12, 2002), reported in 17 No. 22 MEALEY'S LITIG. REP.: ASBESTOS, 12/20/02, at 10.

²¹For example, Chrysler prevailed in a mesothelioma case in Shelby County, Texas, apparently on the strength of its defense that asbestos from the plaintiffs' shipyard work, rather than from his having worked in the parts department and as service manager of a Chrysler dealership, caused his disease. See *Texas Jury Finds Meso Victim Was Exposed from Shipyard Exposure*, 17 No. 19 MEALEY'S LITIG. REP.: ASBESTOS, 11/1/02, at 6.

Bechtel recently received a defense verdict in Madison County, Illinois in a mesothelioma death case brought with respect to a former Texaco worker who alleged that Bechtel was liable as a contractor that supplied insulation to the plant where the decedent worked. Bechtel apparently prevailed on the defense that the decedent's employer's conduct was the sole proximate cause of this exposure to asbestos. See *Illinois Jury Renders Defense Verdict in Favor of Bechtel, Finds Contractor Not Liable*, 17 No. 21 MEALEY'S LITIG. REP.: ASBESTOS, 12/6/02, at 8.

Mobil recently prevailed at trial in a mesothelioma case in which it was alleged that the decedent was exposed in 1941 through 1949 and in 1954 on Mobil-owned vessels. Mobil's defense was that it had no duty to warn in those years and that exposure levels then were below current OSHA standards. The jury found that Mobil was negligent in exposing the decedent to asbestos but that its negligence was not a cause of the his injuries. The plaintiff is appealing. See *Louisiana Jury Returns Defense Verdict in Favor of Mobil; Appeal Filed by Plaintiff*, 17 No. 22 MEALEY'S LITIG. REP.: ASBESTOS, 12/20/02, at 11.

²²North American Refractories (NARCO), Harbison-Walker Refractories, A.P. Green Industries, Kaiser Aluminum, Plibrico, Porter-Hayden, Shook & Fletcher, Artra Group, Asbestos Claims Management Corp. (formerly National Gypsum Co., which had filed for bankruptcy in 1990), ACandS, A-Best, and JT Thorpe.

nearly 70 the total number of asbestos-related bankruptcy filings since the start of the asbestos litigation crisis. A study recently published by three economists, one a Nobel Prize winner, has concluded that asbestos litigation and bankruptcies have cost more than 50,000 jobs, lost earnings from those job eliminations of between \$175 and \$200 million, between \$375 billion and \$650 billion as a result of declining stock prices, and \$8,300 per worker in lost value of 401(k) plans.²³

C. New Theories of Recovery

In response to the bankruptcy filings by almost all of the asbestos insulation makers and, recently, some manufacturers of other asbestos-containing products, plaintiffs' lawyers have been pursuing creative new theories of recovery against the remaining defendants such as premises liability claims, and expanding their practices to include silica litigation as well.

The filing of premises liability claims — which allege liability based on the presence of asbestos-containing materials in defendants' premises rather than in the products they sold — has increased in recent years. Because the use of asbestos-containing construction materials was so widespread for so many years and the latency periods for asbestos-related diseases can be as long as

²³J. Steiglitz, J. Orszag and P. Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, available at www.asbestossolution.org.stiglitz_summary_presentation.pdf.

forty or even fifty years or more, thousands of companies are now in or subject to asbestos lawsuits simply by reason of having owned or operated industrial facilities in the latter part of the twentieth century.

Silica litigation is on the rise, as well. Although deaths from silicosis²⁴ have declined from approximately 1,200 to 200-300 a year in the past three decades²⁵ and the existence of a causal link between silica and cancer is disputed,²⁶ asbestos plaintiffs' lawyers expanded their practices by filing more silica-based personal injury claims in 2002.

D. Supreme Court Refusal to Act

In its 1997 decision in *Amchem v. Windsor*, the Supreme Court considered a global settlement, entered into in 1993, between what it estimated to be 200,000 to 265,000 current and an unknown number of future asbestos claimants, and more than twenty asbestos defendants who were members of the now-defunct Center for Claims Resolution. The Court invalidated the

²⁴Silicosis is a form of pneumoconiosis caused by exposure to respirable crystalline silica.

²⁵See National Institute for Occupational Safety and Health, Work-Related Lung Surveillance Report 1999 (Dec. 1999) (hereinafter, "Lung Surveillance Report"), tbls. 3-1, 3-2.

²⁶Compare World Health Organization, International Agency for Research on Cancer, *IARC Monographs on the evaluation of carcinogenic risk to humans: Silica, some silicas, coal dust and pararamid fibils*, vol. 68, (1997) at 211, quoted in National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services, *NIOSH Hazard Review: Health Effects and Occupational Exposure to Respirable Crystalline Silica* (Apr. 2002) (hereinafter, "NIOSH 2002 Hazard Review"), at 37 and American Thoracic Society, *Adverse Effects of Crystalline Silica Exposure*, 155 Am. J. Respiratory Critical Care Medicine at 761-68 (1997), with P. Hessel, et al., *Silica, Silicosis, and Lung Cancer: A Response to a Recent Worker Group Report*, 42 J. OCC. ENVIRON. MED. 704, 717 (July 2000).

settlement on the ground that it failed to satisfy several of the requirements of Rule 23 of the Federal Rules of Civil Procedure (governing class actions).²⁷ The Court noted that the 1990 Judicial Conference had urged Congress to enact a comprehensive solution to the asbestos litigation crisis but that “no Congressional response has emerged,”²⁸ and it called upon Congress to solve the asbestos litigation crisis with a “secure, fair, and efficient means of compensating victims of asbestos exposure.”²⁹ Two years later, in its 1999 *Ortiz* decision invalidating a global settlement between current and future asbestos claimants and defendant Fibreboard on the ground that it did not satisfy Rule 23, the Supreme Court added a memorable phrase to describe the asbestos litigation crisis — the “elephantine mass”³⁰ — but contributed no solution, instead once again calling on Congress to solve the problem with national legislation.

In recent months the Supreme Court has had two more opportunities to contribute solutions, and declined both. In one case, defendants asked it to review the constitutionality of the State of West Virginia’s use of “common issues” to resolve unknown thousands of disparate claims in a mass bifurcated

²⁷*See* 521 U.S. at 597-98.

²⁸*Id.* at 598.

²⁹*Id.* at 628-29.

³⁰527 U.S. at 821.

trial. In the other case, the Court was asked to review the rejection of defendants' attempt to use a single common causation issue to resolve tens of thousands of similar claims in connection with the bankruptcy of a co-defendant. In both cases, the Court denied certiorari.

1. The West Virginia Mass Trial Litigation

In *Mobil Corp. v. Adkins*, the Supreme Court was asked to review the constitutionality of state court docket-clearing schemes that extort settlements by denying defendants due process. The West Virginia courts had adopted rules and procedures requiring approximately 240 asbestos defendants in various industries to face bifurcated mass trials of the claims of unknown thousands of plaintiffs. In the first phases, three juries would be charged with determining those defendants' liability on the basis of several "common issues" but in the absence of any plaintiffs, and to determine punitive damage multipliers. In the second phase, subsequent juries would be asked to make findings of causation and damages with respect to actual plaintiffs' claims in "mini trials."

In August 2002, two defendants, Mobil Corporation and Honeywell International, Inc., sought Supreme Court review.³¹ They and sixteen other defendants filing supporting briefs argued that those West Virginia orders

³¹See Brief of Petitioner, *Mobil Corp. v. Adkins*, at ii.

denied their rights to due process under the Fourteenth Amendment in several respects by lumping hundreds of defendants with disparate products in a single trial without any judicial finding of commonality, and by applying West Virginia law to claims that arose outside that State.³² In September 2002, Chief Justice Rehnquist denied the defendants' emergency motion to stay commencement of the mass trial.³³ In October the Court decline to review those state court orders by denying the defendants' petition for certiorari.³⁴

The expressed purpose of the West Virginia trial court orders was to clear that State's court dockets of the tens of thousands of asbestos claims that had been attracted to it by its liberal filing rules and pro-plaintiff procedures.³⁵ It worked: by the start of the trial, all but eight of the 240 defendants had settled,

³²*Id.* at 12; Brief of Respondents Union Carbide Corp. and Amchem Products., Inc. in Support of Petitioners, *Mobil Corp. v. Adkins*; Brief of Respondent Premises Owner and Employer Defendants in Support of the Petition for a Writ of Certiorari, *Mobil Corp. v. Adkins*; Memorandum of DaimlerChrysler Corp., Ford Motor Co., and General Motors Corp., in Support of Petition for a Writ of Certiorari, *Mobil Corp. v. Adkins*.

³²Some defendants also noted the "hydraulic pressure to settle before participating in any such 'trial,' especially since the jury will be asked to determine not only defendants' 'fault,' but also a punitive damages 'multiplier' before even considering any issues of causation or compensatory damages." *Id.* at 2.

³³*Mobil Corp. v. Adkins*, No. 02-132 (U.S. Sept. 16, 2002), reported in Christopher Bowe, *Supreme Court Declines Asbestos Case*, FIN. TIMES, Oct. 8, 2002. The Chief Justice issued no opinion in denying this stay.

³⁴*Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002).

³⁵See W. VA. TRIAL CT. Rule 26.01; *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 793, 794-95 (W. Va. 2002) (Maynard, J., concurring).

and seven of those eight settled before the jury found the last one liable.³⁶

2. The Friction Product Defendants' Consolidation Attempt

In the *Federal-Mogul* case, the Supreme Court declined an opportunity to apply to the asbestos litigation crises a solution that had been used to resolve a similar, albeit smaller scale, problem posed by silicone breast implant litigation. In 1986, the U.S. Court of Appeals for the Sixth Circuit, in *In re Dow Corning*, held that the statute providing for federal subject matter jurisdiction over claims “related to” claims against a bankrupt³⁷ covered claims against the shareholders and silicone supplier of Dow-Corning, the bankrupt manufacturer of such implants.³⁸ In the fall of 2001 Federal-Mogul, alleged to be the successor-in-interest to two companies (Wagner and Abex) that had made asbestos-containing brakes, filed for bankruptcy. Shortly thereafter, Ford, General Motors and DaimlerChrysler, citing the *Dow Corning* case, removed from state to federal courts thousands of asbestos brake claims against them on

³⁶On October 24, 2002, the jury found that Union Carbide’s product was defective and that its premises were unsafe, and imposed a punitive damage multiplier of three times compensatory damages. Causation and compensatory damages were to be determined in subsequent minitrials of 400 remaining claimants. See *West Virginia Jury Find Union Carbide Product Defective, Premises Unsafe*, 17 No. 19 MEALEY’S LITIG. REP.: ASBESTOS, 11/1/02, at 3.

³⁷28 U.S.C. § 1134(b).

³⁸*In re Dow Corning Corp.*, 86 F.3d 482 (1996), cert. denied, *Official Committee of Tort Claimants v. Dow Corning Corp.*, 519 U.S. 1071 (1997) and *Breast Implant Tort Claimants Represented by O’Quinn, Kerensky, McAninch & Laminack v. Dow Corning Corp.*, 519 U.S. 1071 (1997).

the ground that they had bought brakes from Wagner and Abex and therefore Federal-Mogul would be liable to them for contribution or indemnity. The “Big 3” automakers, now joined by several other automakers and other friction product defendants (collectively, the “Friction Product Defendants”), then moved to consolidate those claims with the Federal-Mogul bankruptcy for the purpose of an omnibus *Daubert* motion to determine whether asbestos-containing brakes or other friction products can cause disease.³⁹

In February 2002, the bankruptcy court held that under the 1984 case law of the federal appellate circuit in which it sat — the Third Circuit — the statute in question did not confer federal “related to” subject matter jurisdiction over the claims against the Friction Product Defendants. Accordingly the court denied their transfer motion and granted the asbestos claimants’ motions to remand those claims back to the state courts.⁴⁰ In July, the U.S. Court of

³⁹In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Supreme Court held that under the Federal Rules of Evidence, “the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Accordingly, if the trial court concludes that the plaintiffs’ evidence of a causal relationship between his disease and exposure to defendant’s product was not based on reliable scientific methodology, it must exclude it (possibly thereby precluding the plaintiff from proving an essential element of the his claim).

³⁹In *Federal-Mogul*, the Friction Product Defendants argued that recent advances in epidemiology demonstrated that there is no scientific basis for concluding that chrysotile -- the only type of asbestos used in friction products (and the typed used in about 95% of all asbestos that was commercially applications in North America), does not cause mesothelioma or that such products can release sufficient quantities of asbestos fibers to cause any other disease.

⁴⁰*In re Federal-Mogul Global, Inc.*, 282 B.R. 301 (Bankr. D. Del. Feb. 15, 2002) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984)), *aff’d*, 300 F.3d 368 (3d Cir. 2002), *cert. denied*, *DaimlerChrysler Corp. v. Official Committee of Asbestos Claimants*, 123 S.Ct. 884 (Jan 13, 2003).

Appeals for the Third Circuit affirmed, noting that it lacked the power to overturn or refuse to apply its own 1984 precedent unless it sat en banc.⁴¹

In a “Coda” to its opinion, the Third Circuit stated:

We are neither unaware of nor unsympathetic to the argument of the Friction Product Defendants that the crisis created by the current asbestos litigation would be ameliorated were there a single proceeding that determined whether “the subset of asbestos claims based on alleged exposure to automotive friction products satisfies the threshold standard of scientific validity established in *Daubert v. Merrell Down Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).” Reply Br. of Big Three Automakers at 2. The arguments of appellants are based on their optimistic view that a *Daubert* hearing would lead to the rejection of the causation claims of all Plaintiffs. However, the evidence creates an issue that could well go either way as to whether Plaintiffs satisfy the *Daubert* gatekeeping standard. But this case is not in a posture to face the *Daubert* issue, as we are halted at the pass by our conclusion that we have no jurisdiction over the decision of the District Court denying the transfer and remanding the cases to the state courts from which they came.⁴²

The automakers filed a petition for certiorari to the U.S. Supreme Court.

On January 13, 2003 the Court denied certiorari.⁴³

The Third Circuit decision in *Federal-Mogul* noted that “against the

⁴¹*In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), cert. denied, *DaimlerChrysler Corp. v. Official Committee of Asbestos Claimants*, 123 S. Ct. 884 (Jan 13, 2003).

⁴²*Id.* at 390.

⁴³*Daimler-Chrysler Corp. v. Official Committee of Asbestos Claimants*, 2003 WL 102539 (Jan. 13, 2003).

need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system.”⁴⁴ *Mobil v. Adkins* presented the Supreme Court with the opportunity to uphold the integrity of the judicial system. The *Federal-Mogul* case presented it with the opportunity to give a potentially effective resolution of the asbestos crisis a chance to work. The Supreme Court declined both opportunities, and did neither.⁴⁵

E. Congressional Inaction

On September 25, 2002, the Senate Judiciary Committee held hearings

⁴⁴*Federal-Mogul*, 300 F.3d at 390 (quoting *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 617 (3d Cir.1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

⁴⁵The Court did grant certiorari in one asbestos case recently, *Norfolk & Western Ry. Co. v. Ayers*, to review whether fear of cancer arising from asbestosis is compensable as infliction of emotional distress under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51 et seq., the statute governing claims for injuries sustained by railroad employees on the job. Also at issue was whether FELA authorizes apportionment of damages among potentially liable defendants. On March 10, 2003, the Court held (1) that mental anguish damages resulting from fear of developing cancer may be recovered under FELA by a railroad worker suffering from asbestosis caused by a work-related exposure to asbestos; and (2) that under FELA, railroad defendants may be held jointly and severally liable for injuries caused in part by the negligence of third parties. The Court split 5-4 on the first issue; it was unanimous on the second.

The Court's opinion ended with another plea for Congressional intervention in the asbestos litigation crisis:

'The elephantine mass of asbestos cases '... ' defies customary judicial administration and calls for national legislation. ' Courts, however, must resist pleas of the kind [the railroad] has made, essentially to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis.

Norfolk & Western Ry. Co. v. Ayers, 538 U.S. ___, slip op. at 29 (Mar. 10, 2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)) (other citations omitted).

regarding the asbestos litigation crisis.⁴⁶ These hearings revealed sharp disagreement between defendants' and plaintiffs' interests, and between those plaintiffs' lawyers who represent mostly mesothelioma claimants, on the one hand, and those whose "inventories" of claims include large numbers of claimants who have no functional impairment, on the other.

At those hearings, David T. Austern, who serves as General Counsel for the Manville Trust, presented figures showing that less than half of the claims that will be asserted have yet been filed, and called for the development of a new compensation system.⁴⁷ Manville Trust data presented to the Committee indicates that at least 50 % of claimants are unimpaired.⁴⁸ Frederick M. Baron of Baron & Budd, the preeminent Texas plaintiffs' firm, argued that the system works and needs no fixing. He asserted that a claimant with nothing worse than pleural scarring is no less deserving of compensation than a victim of a knifing left with nothing worse than a scar.⁴⁹ Steven Kazan, the California plaintiffs' lawyer specializing in mesothelioma cases, was critical of some

⁴⁶*Asbestos Litigation: Hearing Before Sen. Comm. on the Judiciary* (Sept. 25, 2002), available at <http://www.senate.gov/~judiciary/hearing.cfm?id=472>.

⁴⁷*Id.* (statement of David T. Austern, General Counsel, Manville Personal Injury Settlement Trust).

⁴⁸*See Asbestos Litigation: Hearing Before Sen. Comm. on the Judiciary* (Sept. 25, 2002) (statement of Steven Kazan, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise), available at <http://www.senate.gov/~judiciary/hearing.cfm?id=472>.

⁴⁹*Id.* (statement of Frederick M. Baron, Baron & Budd, P.C.).

defendants and counsel for unimpaired plaintiffs, although he expressed support for legislation dealing with claims of the unimpaired.⁵⁰

Subsequently, the National Association of Manufacturers (“NAM”) presented testimony to the Senate Budget Committee about the depressive effect of asbestos litigation on the solvent companies and the economy, in support of its Asbestos Alliance’s efforts to enact national asbestos reform in the form of medical criteria precluding claims by the unimpaired. This testimony “characterize[d] out-of-control asbestos litigation as an anchor weighing down the business community, particularly the manufacturing sector, and slowing down our overall economic recovery.”⁵¹ NAM cited a U.S. Chamber of Commerce-sponsored study by National Economic Research Associates finding that nationwide, up to \$2 billion in additional costs will be borne by workers, communities and taxpayers due to indirect and induced impacts of asbestos-related company closings.⁵²

Another proponent of Congressional asbestos litigation reform, the Asbestos Study Group, had been working for comprehensive asbestos legislation. A leading member of that group had been Halliburton, which, as

⁵⁰*Id.* (statement of Steven Kazan, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farris).

⁵¹*Hearing Before the Sen. Comm. on the Budget* (Jan. 29, 2003) (statement of Michael E. Barody, (Executive Vice President, National Association of Manufacturers, and Chairman, Asbestos Alliance), available at <http://www.nam.org/tertiary.asp?TrackID=&DocumentID=25816>).

⁵²*Id.*

discussed below, hopes it has found its own solution in its recently announced proposed global settlement.

On February 11, 2003, the American Bar Association passed a resolution stating that it supports the enactment of federal legislation addressing the unimpaired claimant problem.⁵³

As of this date no bill has been reported out of committee in either House of Congress that addresses any aspect of the asbestos litigation crisis. While the Senate Judiciary Committee at least has held hearings, House Judiciary Committee Chairman F. James Sensenbrenner Jr. (R. Wis.) was quoted recently as saying that he will give priority to medical malpractice and class action reform, rather than asbestos. "I don't think the stars are yet in the proper alignment on asbestos," Representative Sensenbrenner said.⁵⁴

As plaintiffs bicker amongst themselves as to what sort of legislation they could accept, the problem continues to change, and continues to grow, and

⁵³See News Release, *ABA Supports Access to Counsel for Alleged Enemy Combatants, Federal Legislation on Class Actions, Asbestos; Urges Congress To Increase Federal Judicial Salaries* (American Bar Association, Feb. 11, 2003) (ABA supported "establishing medical criteria for claims for non-malignant asbestos-related disease in either state or federal courts, while exempting potential claimants from statutory deadlines for filing such claims until their condition meets the criteria."); *American Bar Association Backs Limits For Asbestos Litigation, Sets Medical Criteria*, 31 No. 7, *BNA Product and Safety Liability* (2/17/03) (ABA asked Congress to "allow those alleging non-malignant asbestos-related disease claims to file a cause of action in state or federal court only if they meet the medical criteria in the ABA Standards for Non-Malignant Asbestos-Related Disease Claims," dated February 2003, or "an appropriate similar medical standard" and to "toll all applicable statutes of limitations until such time as the medical criteria in such a standard are met...")

⁵⁴See *Commentary: Will a Chance for Asbestos Reform Be Missed?*, BUSINESS WEEK ON LINE, Jan. 13, 2003, available at http://www.businessweek.com/magazine/content/03_02/b3815036.htm (last visited Feb. 7, 2003).

continues to cry out for national legislative solution.

There is some ray of hope that Congress may act this session on some asbestos legislation. On February 13, 2003, Senator Don Nickles, who is Chairman of the Senate Budget Committee but not on the Judiciary Committee, introduced S. 413, which would establish medical criteria a claimant must meet before filing a claim, tolling the statute of limitations for unimpaired claimants and limit venue shopping.⁵⁵ Further hearings before the Senate Judiciary Committee were scheduled for March 5, 2003. Chairman Hatch's leadership in trying to forge legislation might well encourage the House to also become active since the House's reluctance in part springs from past experience when the House Judiciary Committee took difficult votes on asbestos legislation only to have effort dashed by Senate inaction.

II. RESPONSES BY LOWER COURTS AND LITIGANTS TO WASHINGTON'S FAILURE TO ACT

Some lower courts, and some of the major defendants, recently have attempted to cure some of the many aspects of the asbestos litigation crisis, in their respective jurisdictions and situations. This section of the WORKING PAPER focuses on two such attempts: (1) lower court orders dismissing or relegating to inactive dockets the claims of those plaintiffs who cannot

⁵⁵See S. 413; Nickles Statement.

demonstrate actual impairment; and (2) proposed global settlements involving, respectively, Halliburton, Honeywell, and ABB, that would utilize the 524(g) trust mechanism in bankruptcies of subsidiaries or other companies to enjoin claims against them.

As shown below, the lower court rulings regarding bankrupt companies' shares and unimpaired claimants, while laudable, are likely to have no nationwide impact but rather will merely deflect new claims away from the jurisdictions whose courts enacted them. As also shown below, the proposed global settlements by major defendants, even if approved and successful, do not appear to be useful models for most of the many thousands of companies ensnared in asbestos litigation and may ultimately increase litigation pressure on them as more deep pocket defendants are immunized from claims.⁵⁶

⁵⁶This paper does not address tort reform on the state level, except to note that the recent asbestos-related state legislation that has received substantial attention appears to have limited applicability, at best:

Pennsylvania's 'Limitations on Asbestos-Related Liabilities Relating to Certain Mergers or Consolidations' law, limiting liability for asbestos liabilities attributable to an acquired subsidiary to "the fair market value of the total assets of the transferor determined at the time of the merger or consolidation," 15 PA. CONS. STAT. ANN. § 1929.1 (2002), applies only to companies that were Pennsylvania corporations prior to May 1, 2001.

The tort reform recently enacted by the Mississippi legislature caps punitive damages at \$20 million for the largest corporations and on a sliding scale for smaller ones; caps punitive damages for companies with net worth of under \$50 million at 4% of their net worth; modifies joint and several liability by limiting to culpable share the liability for non-economic damages of defendants found less than 30% at fault and to 50% the liability of defendants found to be 30% or more at fault; and divests state courts of jurisdiction of actions over defendants who neither reside in the county nor committed acts in the county where the act or omission that caused the injury occurred. *See* H.B. No. 19, *reprinted in* 17 No. 23 MEALEY'S LITIG. REP.: ASBESTOS, 1/10/03, at E-1. None of those features appears likely to curb the practice, permitted under Mississippi's joinder law, MISS. R. CIV. P. 20 and comment thereto, of joining hundreds or even thousands of plaintiffs in a single complaint.

A. Unimpaired Claimants

Many commentators have pointed to the unimpaired claimant phenomenon as being among the most serious problems contributing to the asbestos litigation crisis.⁵⁷

Many plaintiffs' firms have sponsored mass lung screenings for union members and other workers, and then have filed thousands of claims based on the opinion of a non-treating physician retained by the plaintiffs' firm that the resulting x-rays evidence a condition "consistent with" asbestos exposure. The vast majority of these claimants have no functional impairment. Plaintiffs' lawyers contend that such claims must be filed because the statute of limitations begins to run upon the occurrence of such a diagnosis. In part as a result of this practice, the RAND Institute, in its 2002 "Interim Report" on Asbestos Litigation Costs and Compensation, concluded that "it appears that a large and growing proportion of the claims entering the [tort] system in recent years were submitted by individuals who have not incurred an injury that affects their ability to perform activities of daily living."⁵⁸

The precise extent of the problem is a matter of some dispute. As long ago as 1997, Justice Breyer, in his partially concurring opinion in *Amchem v.*

⁵⁷See, e.g. Parloff; A. Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

⁵⁸RAND 2002 Report at 21.

Windsor, stated that as many as 50% of asbestos claimants are unimpaired.⁵⁹ The Senate Judiciary Committee was recently told that half the claims filed against the Manville Trust were filed by claimants with no functional impairment.⁶⁰ Recent studies have found that unimpaired claimants made up between two-thirds and 90 percent of all current claimants.⁶¹ Whatever the actual percentage of unimpaired claimants is, their presence in the court system is an intolerable strain on limited judicial resources to resolve — and on defendants' dwindling financial resources to pay — claims of the relatively few seriously ill claimants who can prove that their disease was caused by asbestos in a defendant's product or premises.

As noted above, a substantial portion of the September 2002 congressional asbestos hearings was devoted to this issue, and defendants, a portion of the plaintiffs' bar that represents only claimants with malignant

⁵⁹See *Amchem v. Windsor*, 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. LEGIS. 383, 384, 393 (1993)).

⁶⁰*Asbestos Litigation: Hearing Before Sen. Comm. on the Judiciary* (Sept. 25, 2002) (statement of Steven Kazan, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise), available at <http://www.senate.gov/~judiciary/hearing.cfm?id=472>.

⁶¹See RAND 2002 Report at 20 (citing Debtors' Consolidated Reply in Support of Their Motion for Entry of Case Management Order, Establishment of a Bar Date, Approval of the Claim Forms and Approval of the Notice Program (Bankr. D. Del. Nov. 9, 2001); Daniel L. Rourke, *1997 and 2000 Grace Asbestos PI Claims Sample Design, Methodology and Results*, reprinted in Debtors' Consolidated.

Reply in Support of Their Motion for Entry of Case Management Order, Establishment of a Bar Date, Approval of the Claim Forms and Approval of the Notice Program (Bankr. D. Del. Nov. 9, 2001) (App. K); Letitia Chambers, *Where Is the Asbestos Litigation Going?*, THE WALL STREET FORUM (Mealey's Asbestos July 18, 2002).

disease, and the ABA all have called for a national remedy. In the absence of congressional action, some lower courts have enacted rules limiting unimpaired claimants' access to court's judicial resources and defendants' financial resources.

In January 2002, Judge Weiner of the U.S. District Court for the Eastern District of Pennsylvania, to whom all asbestos personal injury cases in the federal courts (other than bankruptcy) are assigned for pretrial purposes,⁶² issued an order providing for the administrative dismissal of all non-malignant claims initiated through mass screenings.⁶³ Judge Weiner's order provides for a tolling of the statute of limitations applicable to each such dismissed claim until the claimant proves "some evidence of asbestos exposure and evidence of an asbestos-related disease."⁶⁴

This order is a laudable effort, but it has limited practical effect. Prior to 1988, 41 percent of asbestos claims were filed in federal courts; by 1998, less than 20 percent were being filed in federal courts.⁶⁵ In the face of Judge Weiner's unimpaired claimant order, plaintiffs' lawyers continue to avoid

⁶²This assignment was made pursuant to a 1991 order of the Multidistrict Panel. *See In re Asbestos Prods. Liability Litig. (No. VI)*, 771 F. Supp. 415 (Jud. Panel MultiDistrict Litig. 1991).

⁶³*See* Administrative Order No. 8, *In re Asbestos Products Liability Litigation (No. VI)*, No. MDL 875, 2002 U.S. Dist. LEXIS 16590, at *1 (E.D. Pa. Jan. 14, 2002).

⁶⁴*Id.*

⁶⁵RAND 2002 Report at 29.

federal courts when they can, and aggressively seek to remand back to state courts any claims that defendants remove to federal courts.

In December 2002, Justice Freedman, to whom all asbestos cases in New York City are initially assigned, issued an order designed to solve the unimpaired claimant problem in her jurisdiction. She articulated the problem thusly:

More than 21,000 asbestos-related personal injury actions for personal injury or wrongful death are now pending in New York County [Manhattan]. Of that number, fewer than 2,000, or 10%, of the claimants or decedents suffer or suffered from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis. For the large majority of plaintiffs and decedents, however, the only clinical markers of asbestos exposure are pleural thickening or plaques that cause no discernible physical impairment.

The large number of claims made by or on behalf of the unimpaired or minimally impaired impedes the ability of the much smaller group of seriously ill plaintiffs and decedents to recover for their injuries. Recoveries by unimpaired or minimally impaired plaintiffs deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are dwindling as the 'elephantine mass of asbestos cases' nationwide drives large numbers of potentially culpable parties into bankruptcy.⁶⁶

Justice Freedman's solution was to establish a "deferred docket" for

⁶⁶*In re New York City Asbestos Litigation*, No. 40000/88 (N.Y. Sup. Ct. New York County, Dec. 19, 2002), *reprinted in* 17 No. 23 MEALEY'S LITIG. REP.: ASBESTOS, 01/10/03, at D1.

claimants with minimal or no impairment, an “active docket” for consolidating malignant claims for accelerated trial clusters, medical criteria for assignment of claims to each docket, and procedures for transferring claims from the deferred docket to the active docket.⁶⁷

Justice Freedman’s response to the unimpaired claimant problem will undoubtedly increase the efficiency of claim resolution in her court, and may have the effect of attracting more mesothelioma claims to New York. However, while it is in many respects a model for a national solution to that particular aspect of the asbestos litigation crisis, it is not a global solution. According to the latest RAND study, New York County has been one of the five favorite venues for the plaintiffs’ bar in recent years.⁶⁸ Except with respect to mesothelioma claims, as a result of Justice Freedman’s unimpaired claimant order most plaintiffs’ lawyers may simply take their business elsewhere.

There are other localities that have addressed the unimpaired claimant problem. In 1991, the circuit court of Cook County, Illinois created “a pleural

⁶⁷To be placed on the active docket, an asbestosis claimant must produce x-rays, which, in the opinion of a certified B-reader, show irregular opacities or pleural thickening, and produce a report by a board-certified pulmonary specialist or internist concluding that he has suffered impaired pulmonary function. To place a cancer or mesothelioma claim on the active docket, a claimant must produce a pathologist report concluding that the decedent suffered asbestos-induced lung fibrosis or a report by a board-certified internist, pulmonary specialist, oncologist, or pathologist concluding that he suffers from a primary cancer caused by asbestos exposure. *Id.* at D2.

⁶⁸*See* RAND 2002 Report at 36. Cuyahoga County, Ohio; Baltimore County, Maryland; and Mississippi’s Jefferson and Claiborne Counties round out the rest of the top five favorite plaintiff venues. *See id.*

registry, *i.e.*, an inactive docket system for those plaintiffs diagnosed as having only slight evidence of an asbestos-related disease” but “exhibit[ing] no disability and suffer[ing] no measurable impairment.”⁶⁹ Similar pleural registries have been established by the circuit court of Baltimore, Maryland; the circuit court of Milwaukee, Wisconsin; the superior court of Atlanta, Georgia; the superior court of Los Angeles, California; and the federal district courts in Hawaii, Connecticut, Northern Oklahoma, and Western New York. Courts in Arizona, New Jersey, Maryland and Hawaii have held that claimants with nothing worse than asymptomatic pleural thickening cannot state a claim for relief because they have no compensable injury.⁷⁰ However, until and unless all or substantially all localities in the nation enact rules to prevent unimpaired claimants from prosecuting their claims — or, to put it another way, so long as there is a Mississippi or a West Virginia for unimpaired claimants to file claims in — local initiatives such as these will only move the problem, not solve it.

B. Global Settlements

With the Supreme Court refusing to act and Congress failing to act, some companies that have been particularly hard hit by asbestos litigation have

⁶⁹*In re Asbestos Cases*, 586 N.E.2d 521, 522, 523 n.3 (Ill. Ct. App. 1991).

⁷⁰*See Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987); *Caterinicchio v. Pittsburgh Corning Corp.*, 605 A.2d 1092, 1096 (N.J. 1992); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. App. 1991), *aff'd in part and rev'd on other grounds*, 604 A.2d 47 (Md. 1992); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Hawai'i 1990) (applying Hawaii law).

recently attempted to fashion global settlements contemplating proposed prepackaged bankruptcies and 524(g) trusts involving present or former subsidiaries. This part of this WORKING PAPER focuses on three of the largest such proposals, those recently announced by Halliburton, Honeywell, and ABB.

1. Halliburton

Halliburton has two major sources of potential asbestos liability: (1) refractory products made by its subsidiary Dresser Industries and by Harbison-Walker, which Dresser previously owned and had indemnified; and, (2) asbestos in materials used in construction or maintenance projects by its Kellogg Brown & Root subsidiary. In October 2001, Dresser was one of three defendants found liable in the *Curry* case in Mississippi for a total of \$150 million in compensatory damages to six plaintiffs who had no malignancy or even impairment; Dresser, sued by only two of those plaintiffs, was assessed with \$21.25 million in damages.⁷¹ Halliburton subsequently stated in an SEC filing that concern about future asbestos verdicts caused volatility in its stock price and downgradings in credit ratings of its bonds.⁷²

In February 2002, Harbison-Walker filed for bankruptcy. Approximately 250,000 asbestos claims were pending against it at the time. Its former parent

⁷¹*Miss. Jury Awards \$150M to Workers Exposed to Asbestos*, 24 No. 1 ANDREWS ASBESTOS LITIG. REP. 12/13/01, at 6; Parloff,

⁷²*See* Halliburton Co. 10-K filed Mar. 12, 2002, at 21-22.

and indemnitor, Dresser, obtained from the bankruptcy court a temporary restraining order against prosecution of asbestos claims against it, on the ground that insurance coverage it shared with Harbison-Walker would be dissipated to the detriment of Harbison-Walker's estate and asbestos claimants. That stay has been extended several times.⁷³

As of September 30, 2002, the number of asbestos claims pending against Halliburton or its subsidiaries had risen to 328,000.⁷⁴ On December 18, 2002, Halliburton announced an agreement in principle with counsel for most of those claimants for global settlement of all asbestos claims against it and its subsidiaries. Under the proposed agreement, which requires the formal approval of 75% of the known present asbestos claimants, successors to Dresser and Kellogg Brown & Root would file prepackaged bankruptcy plans, and Halliburton would fund a 524(g) trust with up to \$2.775 billion in cash, 59.5 million shares of Halliburton stock, and notes in an amount to be determined. The bankrupt subsidiaries would retain the right to the first \$2.3 billion in insurance proceeds, and the trust would get the next \$700 million.⁷⁵

⁷³See *In re Harbison-Walker Refractories Co.*, No. 02-21627 (Bankr. W.D. Pa.), *Harbison-Walker Refractories Co. v. Indresco Inc.*, Adv. No. 02-2080 (Bankr. W.D. Pa.), reported in 17 No. 3 MEALEY'S LITIG. REP.: ASBESTOS, 3/1/02, at 3, 17 No. 6 MEALEY'S LITIG. REP.: ASBESTOS, 4/19/02, at 10, 17 No. 10 MEALEY'S LITIG. REP.: ASBESTOS, 6/21/02, at 21, 17 No. 13 MEALEY'S LITIG. REP.: ASBESTOS, 8/2/02, at 21, and 17 No. 24 MEALEY'S LITIG. REP.: ASBESTOS, 1/24/03, at 9.

⁷⁴Halliburton Co. Form 8-K, filed Jan. 13, 2003, at 14.

⁷⁵Halliburton Co. Form 8-K dated Dec. 18, 2002, filed Dec. 20, 2002.

2. Honeywell

According to its SEC filings and other public sources, Honeywell International has two sources of asbestos liability: refractory products formerly made by a company it divested (NARCO), and brakes formerly made by a company with which it merged (the Bendix Friction Materials business of AlliedSignal).⁷⁶

Until 1986, North American Refractories Company (“NARCO”), a maker of asbestos-containing refractory products, was a Honeywell subsidiary. In connection with this divestiture, Honeywell agreed to indemnify NARCO for subsequently filed asbestos claims arising from discontinued products.⁷⁷ When NARCO filed for bankruptcy in January 2002, Honeywell obtained from the bankruptcy court a temporary restraining order staying asbestos claims against Honeywell involving products manufactured by NARCO.⁷⁸ Honeywell argued that its indemnity to NARCO is part of the NARCO bankruptcy estate, and the continued prosecution of asbestos claims against Honeywell threatened to lessen its ability to indemnify NARCO.⁷⁹ The court has extended this stay

⁷⁶See Honeywell International Inc. Form 10-K, filed Mar. 20, 2002, at 51-52.

⁷⁷See *In re North Am. Refractories Co.*, No. 02-2019 (W.D. Pa. Bkcy. Jan. 4, 2002), reported in 17 No. 1 MEALEY’S LITIG. REP.: Asbestos, 02/01/02, at 18.

⁷⁸See *Pennsylvania Judge Issues Temporary Restraining Order, Stays Honeywell/NARCO Cases*, 17 No. 1 MEALEY’S LITIG. REP.: Asbestos, 2/1/02, at 18-21.

⁷⁹See *id.*

several times.⁸⁰

On January 17, 2003, Honeywell announced that it reached a tentative agreement with approximately 90% of the plaintiffs who have claims against NARCO.⁸¹ The proposed settlement, which would encompass approximately 236,000 current claims, contemplates a 524(g) trust and a channeling injunction applying to all future NARCO-related claims against NARCO or Honeywell.⁸² Final agreement will be subject to acceptance by 75% of the claimants and approval of the bankruptcy court.⁸³

With respect to its potential liabilities arising from brakes, Honeywell recently entered into another agreement. The bankruptcies of the insulation defendants resulted in brake and other friction product defendants becoming a central target of the plaintiffs' bar. As of the third quarter of 2002 there were approximately 50,000 asbestos claims pending against Honeywell arising from the Bendix friction materials business,⁸⁴ and although it or its predecessor

⁸⁰See *Stay on Asbestos Claims in Penn. Court Extended for Halliburton*, 17 No. 17 MEALEY'S LITIG. REP.: ASBESTOS, 10/4/02, at 8.

⁸¹See *Honeywell Reports Settlement with NARCO Plaintiffs*, 17 No. 24 MEALEY'S LITIG. REP.: ASBESTOS, 1/24/03, at 4.

⁸²See *id.*

⁸³See *id.*

⁸⁴Honeywell International Inc. Form 10-Q filed Nov. 13, 2002, at 31.

Allied Signal prevailed in some trials,⁸⁵ at the end of that year it was found liable for 45.75% of a \$53 million verdict in New York City.⁸⁶ In the fourth quarter of 2002 Honeywell took an after-tax charge of \$1.9 billion, part of which was to cover costs associated with the potential resolution of asbestos-related claims.⁸⁷

Honeywell attempted to obtain relief from the Supreme Court. It joined Mobil's certiorari petition in *Mobil v. Adkins*, seeking to stay the West Virginia mass trial as violative of its due process rights. It also pursued the strategy of the automakers in removing claims from state court and moving to transfer those claims to and consolidate them with the Federal-Mogul bankruptcy. Honeywell was no more successful than its co-defendants in either effort.

Now Honeywell is looking again to the Federal-Mogul bankruptcy court. On January 30, 2003, Honeywell announced that it had entered into a letter of intent to convey its Bendix business (other than certain U.S.-based assets) to Federal-Mogul, in exchange for bankruptcy court protection against Bendix-based asbestos liabilities. The deal would be subject to inclusion of those liabilities in a 524(g) trust and court issuance of a channeling injunction against

⁸⁵*See, e.g., King v. AlliedSignal and DaimlerChrysler*, reported in 16 No. 2 MEALEY'S LITIG. REP.: ASBESTOS, 2/23/01, at 15.

⁸⁶*Brown v. ACandS* (N.Y. Sup. Ct., New York County), reported in 17 No. 2 MEALEY'S LITIG. REP.: ASBESTOS, 2/15/02, at 3.

⁸⁷Honeywell International Inc. Form 8-K, filed Jan. 31, 2003, at 3.

the filing of asbestos claims against Honeywell arising from the Bendix friction business. The deal also is subject to the approval of the Federal-Mogul bankruptcy court and other governmental approvals.⁸⁸

3. ABB

ABB Ltd., a Swiss engineering company, is the parent of Combustion Engineering (“CE”), which made asbestos-containing boilers and insulation products. From 1990 to 2001, CE settled 204,326 claims for \$865 million; approximately 111,000 claims, with an estimated value of \$812 million, were still outstanding as of the end of the third quarter of 2002.⁸⁹ On January 17, 2003, ABB announced an agreement in principle with asbestos claimants and proposed futures representative David Austern (formerly the administrator of the Manville Trust), under which CE would file for Chapter 11 and seek to create a 524(g) trust funded by ABB with up to \$350 million in cash and \$50 million in ABB stock.⁹⁰

⁸⁸See Honeywell International Inc. Form 8-K, filed Jan. 30, 2003; *Federal-Mogul To Buy Honeywell’s Frictions Business*, 18 No. 1 MEALEY’S LITIG. REP.: ASBESTOS, 2/7/03, at 8. Covington & Burling, at which the author is of counsel, represents Federal-Mogul in connection with one aspect of its proposed acquisition of Honeywell’s Bendix assets. The author has not worked on that matter, and all statements in this article concerning that transaction are based entirely on public information.

⁸⁹See *ABB Announces \$1.2 Billion Agreement with Asbestos Plaintiffs*, 17 No. 24 MEALEY’S LITIG. REP.: ASBESTOS, 1/24/03, at 4.

⁹⁰See *id.*, ABB Ltd. Form 6-K filed Jan. 17, 2003. On February 18, 2003, CE filed for bankruptcy. See *ABB Files for Bankruptcy Early to Prevent Chapter 7 Filing*, 18 No. 1 MEALEY’S LITIG. REP.: ASBESTOS, 2/18/03, at 8.

4. Outlook for Remaining Defendants

Even assuming the proposed settlements recently announced by Halliburton, Honeywell, and ABB are approved by the requisite number of claimants and the courts, solutions such as those may not necessarily be the answer for most peripheral defendants.

Halliburton, Honeywell, and ABB, or their subsidiaries, are facing hundreds of thousands of asbestos claims and have suffered huge verdicts. By contrast, most defendants face, at most, thousands or tens of thousands of claims, and most of them have not yet been hit with a big verdict. Bankruptcy, with its attendant transaction costs and other expenses, would not be an appropriate solution for most remaining defendants, no matter what industry they are in.

Another distinguishing factor is that asbestos liabilities of companies entering into the new global settlements arise, in whole or in part, from operations of distinct subsidiaries that, according to those companies' public statements, could be put into bankruptcy without threatening the stability or continued viability of the parent company.⁹¹ Many companies' potential asbestos liabilities, however, arise from former operations of or premises owned

⁹¹See Halliburton Co. Press Release dated Dec. 18, 2002 and Form 8-K filed Dec. 20, 2002; *ABB Announces \$1.2 Billion Agreement with Asbestos Plaintiffs*, 17 No. 24 MEALEY'S LITIG. REP.: ASBESTOS, 1/24/03, at 4; ABB Ltd. Form 6-K filed Jan. 17, 2003.

by the parent company.

Moreover, Honeywell's proposed solution to its brake liability problem may be unique. Even if the proposed deal between Honeywell and Federal-Mogul does, ultimately, protect Honeywell from brake claims, it remains to be seen whether other companies in bankruptcy would be interested in acquiring asbestos-tainted assets of other solvent companies.

CONCLUSION

For most remaining defendants, therefore, the true course through the changing landscape of asbestos litigation continues to be a combination of well-advised strategic evaluation, support for scientific research, and a flexible, state-by-state and situational litigation approach.⁹² In addition, with the Supreme Court refusing to act, defendants still enmeshed in asbestos litigation should increase their support for meaningful and comprehensive national legislation, to resolve the problem fairly and efficiently.

There are numerous ways in which Congress could solve at least some aspects of the asbestos litigation crisis. It could amend Rule 23 to permit the use of class actions to effectuate global settlements of future claims. It could expand federal subject matter jurisdiction to encompass contribution and indemnity claims against bankrupts, or to eliminate the need for complete

⁹²See Voorhees and Hellerman at 28-36.

diversity in asbestos cases. It could enact a legislative version of Justice Freedman's solution to the unimpaired claimant problem in New York, with medical criteria and a tolling of the statute of limitations. It would appear, however, that until Congress adopts some or all of these solutions, local courts will have to find their own ways to prevent asbestos claims from clogging their dockets, and defendants throughout nearly every segment of American industry will have to rely on existing, inadequate laws and procedures to prevent those claims from depleting their financial resources.