Asbestos Litigation:

The Problem of Forum Shopping and Procedural Innovations, and Potential Solutions

By Michelle J. White

Michelle J. White is a professor of economics at the University of California at San Diego and a research associate at the National Bureau of Economic Research. Her recent research has focused on the American bankruptcy system and, in particular, the causes and consequences of asbestos exposure and asbestos litigation in the United States. The following is an edited version of a transcript from Professor White's talk at the Manhattan Institute on September 14, 2005. For a fuller summary of Professor White's research, see her paper Asbestos Litigation: Procedural Innovations and Forum Shopping, *forthcoming in the* Journal of Legal Studies, *and available in working paper format at* http://econ.ucsd.edu/~miwhite/outcomes-jls-Nov2005.pdf. *See also her paper* Asbestos and the Future of Mass Torts, *published in the Spring 2004 issue of the* Journal of Economic Perspectives, *available at* http://econ.ucsd.edu/~miwhite/asbestos-jep.pdf.

Introduction

Asbestos was called the "miracle mineral" for its fire retardant capabilities, and it was widely used until the 1970s in thousands of products, including wallboard, roofing, flooring, clothing, paper, automobiles, drinking water pipes, children's toys, and hair dryers. An estimated 27 to 100 million in the United States were exposed to asbestos.

Unfortunately, asbestos exposure is very dangerous. When someone breathes microscopic asbestos fibers, they're more likely to fall prey to a number of diseases, the worst of which can be fatal. The best known illnesses linked to asbestos exposure are asbestosis, lung cancer, cancers of the digestive system, and mesothelioma, which is cancer of the lining around the lungs and the body cavity. Asbestos diseases have a long latency period – on average 30 years – from exposure to the time the disease is discovered.

Table 1 below shows some of the basic facts about asbestos litigation. Hundreds of thousands of plaintiffs have sued thousands of defendants. Millions of claims have been filed, because each plaintiff sues many different defendants.

Table 1. Asbestos Litigation Summary Statistics

Litigants	730,000 plaintiffs
	8,400 defendants
Claims filed	Millions: every plaintiff sues many defendants
	Claims filed per year have grown from 20,000 in early 1990s to 101,000 in 2003
Cost to date	$70 billion
	85 corporations filed for bankruptcy
Estimated total cost	$200 – 275 billion

Source: Stephen J. Carroll et al., RAND Institute for Civil Justice, *Asbestos Litigation* (2005), *available at* http://www.rand.org/pubs/monographs/MG162/index.html.

Asbestos litigation has been getting bigger and bigger. Over the 1990s, the number of plaintiffs filing claims quintupled from 20,000 to 100,000 per year. The total cost of the litigation as of 2003 was $70 billion. Various estimates of the final cost when all plaintiffs' claims have been resolved are all above $200 billion.

What complicates the story of asbestos litigation is the fact that 90 percent of plaintiffs have no impairment, meaning they have been exposed to asbestos, but they have no health problems that they wouldn't have had otherwise. That's a conservative estimate.

History of Asbestos Use and Litigation

Let me step back and talk about a little bit about the history of asbestos use. The question is why asbestos ever became so widespread in the first place. By the 1920's, the dangers of asbestos were known. Asbestosis had been named and there were medical journal articles that described it. For many asbestos uses, there were substitutes.

In the 1930s, a number of U.S. states started workers' compensation systems. One would think that such systems would have given producers of asbestos products an incentive to reduce exposure, because workers who were injured would file claims and get compensation. More compensation awards would drive up employers' costs. But these programs were very narrowly written, and they didn't cover diseases with long latency periods. Few victims received compensation, so there was no cost pressure.

There were also regulatory programs, but they were scattered and ineffective. Moreover one type of regulation--building codes—was counterproductive, since these codes often required the use of asbestos insulation in buildings. By the early 1970s, we had an alphabet soup of new regulatory agencies, but they really didn't do very much. OSHA adopted limits on workplace exposure to asbestos, but they weren't very strict.

The Consumer Product Safety Commission started a voluntary program to get manufacturers to remove asbestos from their products, but that program was dropped by the Reagan administration. The EPA proposed a ban on asbestos, but it was thrown out by the courts on a technicality and the agency didn't pursue it. There's still no ban on using asbestos in the U.S.

What about litigation? I have argued that litigation was really what drove asbestos out of the market. The first successful lawsuit against an asbestos product manufacturer was the *Borel* case in 1973.[1] It involved a worker who installed asbestos insulation and had developed a serious asbestos disease. His lawyer filed a workers' compensation claim on his behalf, but it was denied. So the lawyer had the idea of suing the manufacturers of the asbestos insulation that the worker installed. This lawsuit was successful.

Once one asbestos claim was successful, a lot more similar claims were filed: 25,000 asbestos claims were filed over the next decade, starting in Texas and then moving around the country. At the same time, product liability law changed from negligence to strict liability, which, of course, was good for plaintiffs. Asbestos use in the U.S. plummeted starting in 1974. By 1990, it was 6 percent of the 1975 level.

Getting asbestos out of the marketplace was a good thing, and it happened in the U.S. long before it happened in Europe. But while the danger of asbestos was receding, asbestos litigation kept on growing.

Plaintiffs' lawyers gradually developed evidence that defendants knew about the dangers of asbestos, but kept it secret. Manufacturers had a long history of conducting research on the effects of asbestos, but when they found out that it was dangerous, they kept the findings secret. Of course, this kind of evidence helps plaintiffs win cases. Soon, plaintiffs began to receive punitive damages. A large fraction of all the punitive damage awards were against five big asbestos insulation manufacturers.

But if defendants know they are going to lose at trial, what do they do? Well, they settle. And so they started settling. But when lawsuits settle, it becomes very profitable to file additional lawsuits. This is because plaintiffs' lawyers, who are working on contingency fees, hate to go to trial. Trials are very time-consuming and plaintiffs' lawyers may not receive enough in additional fees to pay for their time spent at trial. But filing cases that plaintiffs' lawyers know will settle is very profitable.

So the increasing tendency of asbestos defendants to settle gave plaintiffs' lawyers an incentive to seek out new plaintiffs. Nowadays if you Google "asbestos," you find lots of ads by plaintiff lawyers. If you open the newspaper, you are likely to find ads by plaintiffs' lawyers.

Asbestos is different from other mass torts because it just keeps on going. Many, many people were exposed, so the mass tort doesn't run out of plaintiffs. Also, many firms were involved with asbestos, so the mass tort doesn't run out of defendants. And because there are lots of defendants, they have lots of insurance policies, which in turn means there are lots of deep pockets to pay damages. So a major reason why the asbestos mass tort has continued to grow is that there is a virtually limitless supply of plaintiffs

and an almost equally large supply of deep pocket defendants, both manufacturers and insurance companies.

Problem One: Forum Shopping

Now let me turn to forum shopping and procedural innovations. Plaintiffs' lawyers have an incentive to pick the best jurisdiction in which to file their lawsuits. What makes a jurisdiction favorable?

One factor is whether the jurisdiction allows ***joinder***. These jurisdictions allow plaintiffs' lawyers to file one case by a resident of the state and then attach a lot of other asbestos cases to it from all over the country. In effect, easy joinder rules allow plaintiffs' lawyers to create an informal class action in which many cases are litigated together. Because the class is informal, it doesn't need to be certified. In these jurisdictions, plaintiffs' lawyers benefit from tremendous economies of scale in litigation.

Plaintiffs' lawyers also seek out jurisdictions that don't limit ***punitive damages*** and don't limit ***lawyer's fees***. They also seek out favorable ***judges***; in particular, they like judges who lean on the parties to settle large numbers of cases at once. And one of the things that encourages mass settlements is a set of legal procedural innovations.

Problem Two: Procedural Innovations

One such innovation is simply ***consolidation*** for trial, meaning that the judge consolidates a number of plaintiffs' claims and holds a single trial for all of them. Consolidation increases the correlation of the trial outcomes, which makes it much riskier for defendants to go to trial. Why? Because if the trial outcomes are correlated, then the chance of defendants losing all of the cases goes up, which of course would be very expensive for defendants. So consolidated trials increase the pressure on defendants to settle.

Another procedural innovation is ***bifurcated trials***, or trials held in two separate parts. In asbestos trials, the jury decides the amount of damages first. Then the judge stops the trial and instructs the parties to bargain to a settlement. The remaining portion of the trial, which involves deciding liability, is held only if the parties fail to settle. But in asbestos trials, the damage portion of the trial tends to favor plaintiffs; while the liability portion of the trial tends to favor defendants, because plaintiffs generally can't prove that particular defendants' asbestos products caused their harm. Deciding damages first resolves a lot of uncertainty and therefore makes settlement more likely to occur. It also tends to raise settlement amounts, because the pro-plaintiff part of the trial has been completed.

The third procedural innovation that I've looked at is ***bouquet trials***. In bouquet trials, a group of, say, 30 plaintiffs' cases are selected from a much larger group of joined cases and the 30 cases are tried together. The trial is referred to as a bouquet trial, because the 30 cases include at least one of each type of plaintiff, as in a bouquet. After the bouquet trial, the judge encourages the parties to settle all the rest of the claims in the larger group, using the formula for damages established by the bouquet trial. If they fail

to reach a settlement, then the same jury will decide additional claims in the large group. This means that, once the formula is established, there is tremendous positive correlation of outcomes among all the remaining cases, which makes going back to trial very risky for defendants. So after a bouquet trial, defendants tend to settle the entire large group on very favorable terms for plaintiffs.

Research Findings: The Impact of Forum Shopping and Procedural Innovations

Table 2 shows some of the results of my research. I analyzed data from all the asbestos cases that have gone to trial over the last 15 years. I ran a regression analysis that explains plaintiffs' expected return -- what the average plaintiff receives at trial – as a function of forum shopping and use of the procedural innovations. I also control for the plaintiff's disease. Each variable is measured against a baseline—the baseline jurisdiction is Pennsylvania, the baseline disease is pleural plaque, and the baseline for the procedural innovations is trials in which the innovation was not used. Pennsylvania is used as the baseline jurisdiction because it has lots of asbestos trials, but it is relatively favorable to defendants. Pleural plaque is used as the baseline disease because it is the least serious asbestos disease category.

Table 2. Impact of Forum and Procedural Innovations on Plaintiff's Expected Return in Asbestos Litigation (Baseline: Pennsylvania)

Missisippi	$3.8 million
West Virginia	$1.0 million
Houston	$1.4 million
Dallas	$ 800,000
Manhattan	$1.7 million
Consolidation of 2-5 plaintiffs	$ 45,000
Bifurcated trial	$ 650,000
Bouquet trial	$1.2 million
Mesothelioma (vs. pleural disease)	$1.8 million

Source: Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, *Journal of Legal Studies* (forthcoming), available at http://econ.ucsd.edu/~miwhite/outcomes-jls-Nov2005.pdf

As Table 2 shows, I found that Mississippi as a forum is a real outlier and is extremely favorable for plaintiffs. Mississippi doesn't have many asbestos trials, presumably because it has lots and lots of settlements. Relative to Pennsylvania, filing an asbestos case in Mississippi increases plaintiffs' expected return by nearly $4 million.

A number of other jurisdictions -- West Virginia, Dallas, Manhattan, and Houston -- have expected returns that are about one million dollars higher than in Pennsylvania.

I also looked at trials in Madison County, Illinois. Juries in Madison County are more likely to award punitive damages in asbestos trials than juries in other jurisdictions. But these awards aren't large or frequent enough to make plaintiffs' expected return significantly higher than in Pennsylvania.

Looking at Table 2, we can also see that the use of the procedural innovations also increases plaintiffs' expected returns. Small consolidations of 2 to 5 cases raise plaintiffs' expected return from trial by $45,000; bifurcated trials raise plaintiffs' expected return by over half a million dollars; and bouquet trial by over a million dollars. Since the procedural innovations are associated with higher expected returns at trial, they also are associated with higher settlement amounts. This is because if plaintiffs are predicted to do better at trial, then defendants will be willing to pay more to settle.

What is the effect of damage awards on settlement costs? The average asbestos settlement over the 15 year period is about $5,700 in 2003 dollars, which compares to an average return at trial of about a million dollars. What explains the huge difference? One reason is that 90 percent of plaintiffs don't have any injury from asbestos exposure, but their cases rarely go to trial. These cases pull the average settlement figure down, but have much less effect on the average trial outcome figure.

I also looked at the relationship between damage awards and settlement costs, and found that, when damage awards are higher, settlement levels are also higher. Also, when particular defendants go to trial more often, their settlement costs rise. And when damage awards against particular defendants are higher, more claims are filed against that defendant. This isn't very surprising, because damage awards are public information, and higher damage awards suggest that the defendant is a good litigation target. So plaintiffs' lawyers respond by filing more claims against the defendant.

What are the effects of forum shopping on total asbestos litigation costs? This is a hard question to answer, but here is a simple approach. On average, asbestos litigation costs are about 12 times damage awards. Since the average plaintiff gets about a million dollars more if his case goes to trial in a pro-plaintiff jurisdiction such as West Virginia, Houston or Dallas rather than Pennsylvania, total asbestos litigation costs will increase by about $12 million for each additional trial held in one of these jurisdictions rather than Pennsylvania. The additional litigation costs include the cost of the higher damage award, the cost of additional claims that will be filed due to the higher damage award, and the cost of the increase in settlement levels due to the higher damage award.

Why the Legal System Can't Work For Asbestos

Let me turn now to the question of how the legal system resolves mass torts -- and what went wrong with the asbestos mass tort. The legal system has developed two methods for resolving mass torts: ***bankruptcy*** and ***class actions***. Neither of these approaches has worked for asbestos. Let me just say a little bit about why, then I'll talk about the legislation that's pending in Congress.

Bankruptcies

What does bankruptcy do? When an asbestos defendant files for bankruptcy, the bankruptcy resolves all the claims against the bankrupt firm – including the tort claims against it. Claims are resolved regardless of whether they have already been filed or, in the case of asbestos claims, will be filed in the future by plaintiffs who have not yet discovered their asbestos disease. The bankrupt firm sets up a trust, which receives money both from the firm's future profit if it reorganizes, and from its insurance policies. The money in the trust is used to pay both current and future claims.

There's an inherent problem with this approach: when one asbestos defendant files for bankruptcy, the focus of litigation shifts to other defendants. This is because plaintiffs' lawyers know that it will take several years to set up the trust and the amount of money that the trust pays will be low relative to damage awards. So, in practice, asbestos bankruptcies have shifted the litigation focus from old to new defendants and caused the litigation to spread. Though bankruptcy helps firms that go bankrupt, it makes legal situation worse for other defendants.

Class Actions

What about class actions? A number of mass torts have been resolved with class-action settlements. Here, the judge certifies a class of all plaintiffs who were harmed by a particular product which was produced by one or a few defendants. A settlement is negotiated that includes all the plaintiffs and all the defendants.

The problem is that such settlements have to be voluntary and it's difficult for large numbers of defendants to agree on a settlement. The largest mass tort class-action settlement that I've been able to find is the Agent Orange settlement, which involved 12 defendants. Even to get 12 defendants to agree was very difficult – the judge literally locked all the parties up in a room and told them they couldn't come out until they had arrived at a settlement. It's hard to imagine doing that with 8,400 asbestos defendants and all their insurance companies. So the class action approach isn't going to work for asbestos. An additional problem is that the Supreme Court overturned two proposed class-action settlements of asbestos claims. Neither settlement covered all asbestos claims, but both covered many thousands of claims.

The Proposed Congressional Solution

Some form of legislative resolution of the asbestos problem has been pending in Congress for nearly five years. The newest version is the Fairness in Asbestos Injury Resolution Act of 2005. What the bill would do is to set up a government-run no-fault compensation fund to compensate all asbestos victims over the next 30 years. The amount that the fund would have to distribute to victims has been rising—last year it was $110 billion, but now it has grown to $140 billion.

The money would come from taxes on defendants and insurers -- roughly $90 billion from defendants and $46 billion from insurers. The payments would be based on

past asbestos liabilities, so firms that haven't been involved in asbestos litigation will not have to pay.

To collect from the fund, claimants would have to submit evidence of asbestos disease and exposure to asbestos for a minimum number of years. The idea is that the compensation process would separate out people who have been exposed but haven't developed any asbestos-related disease. These people would be monitored for the development of any asbestos diseases in the future, but they wouldn't get any compensation unless they developed an asbestos disease.

Table 3. Proposed Asbestos Injury Compensation Levels Under FAIR Act

Mesothelioma	$1.1million
Malignant conditions	$ 800,000
Non-malignant conditions	$ 26,000
No impairment (monitoring cost)	$ 1,000

Source: Congressional Budget Office

Table 3 shows the proposed compensation levels: $1.1 million for mesothelioma, on average; $800,000 for cancer; and $26,000 for nonmalignant conditions, namely asbestosis.

Is the proposed Congressional fix a good idea? Here are some of the arguments why it is. First, as I've been arguing, the legal system just hasn't been able to resolve the asbestos mass tort by itself.

Another good thing about the proposed trust fund is that it would compensate present and future claimants equally: one of the problems with the existing compensation trusts, and with the legal system generally, is that present victims get paid much more than future victims. For example, the Manville trust—the biggest of the asbestos compensation trusts-- is now paying only 5 percent of the compensation levels that it paid when it was set up. This means that people who develop mesothelioma at present receive only one-twentieth of the amount they would have received from the Manville trust if they had developed mesothelioma in the mid-1980s. The general point is that future claimants would be treated much more fairly under Congressional solution than under the current system.

The Congressional legislation would also resolve uncertainty -- which is good for both plaintiffs and defendants -- and it would also stop the spread of the litigation to new defendants that haven't had any involvement with asbestos litigation in the past.

So what is the major problem with the Congressional solution? The compensation levels are awfully high – as high as most compensatory damage awards. When the proposed fund was $110 billion, the Congressional Budget Office said it couldn't certify

that there would be enough money to compensate all the future victims. Since then, both the compensation levels and total payment to the fund have been raised. The critical factor as to whether the Congressional approach would be successful is whether the medical screening procedures would be sufficient to prevent unimpaired claimants from collecting.

Conclusion

In conclusion, asbestos litigation has a mixed record. It initially was very valuable because it drove asbestos out of the U.S. market, but then it spiraled out of control and the legal system just hasn't been able to resolve it. I don't think that there's ever going to be another mass tort like asbestos. But will asbestos litigation really change firms' attitudes towards the risk of producing dangerous products in the future? I really doubt it, because if the product causes a disease that has a latency period of 30 years, like asbestos, the disease is unlikely to affect the decisions of managers, who are typically focused on their next quarterly report.

---

[1] Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 869 (1974).