

1992

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Recommended Citation

Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 *Cardozo Law Review* 1891 (1992).

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THE ASBESTOS CLAIMS MANAGEMENT ACT OF 1991: A PROPOSAL TO THE UNITED STATES CONGRESS*

*Lester Brickman***

I. INTRODUCTION: THE GENESIS AND CONTENT OF THIS PROPOSAL

In preparing this proposal for the Administrative Conference of the United States, I consulted and, in some cases, adapted (i) parts of bills previously introduced to Congress,¹ (ii) other proposals relating to compensation of asbestos victims,² and (iii) proposed legislation to better equip the courts to deal with mass torts.³

This proposal envisions the creation of an industry-financed trust fund, possibly augmented by government payments, which would be used to pay monthly benefits to those injured and disabled by occupational exposure to asbestos-containing materials. Payments would also be made for medical expenses, death benefits and survivor benefits. Any government benefits or insurance payments received by claimants because of asbestos-related injuries would offset any payments due under this program.

Asbestos defendants covered by the proposal would have their asbestos-related liability to occupationally exposed workers exclu-

* This proposal was originally delivered at the Administrative Conference of the United States, October 31, 1991 Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims.

** Professor of Law, Benjamin N. Cardozo School of Law (Yeshiva University). I would like to acknowledge my research assistant, Doreen E. Ferrera who has made significant contributions to this Article.

¹ Occupational Disease Compensation Act of 1985, H.R. 3090, 99th Cong., 1st Sess. (1985); Asbestos Workers' Recovery Act, S. 1265, 99th Cong., 1st Sess. (1985); Asbestos Workers' Recovery Act, S. 2708, 98th Cong., 2d Sess. (1984); H.R. 5735, 97th Cong., 2d Sess. (1982); Asbestos Health Hazards Compensation Act, H.R. 5224, 97th Cong., 1st Sess. (1981).

² *Asbestos Claims Facility Alternative Dispute Resolution Procedure*, 1987 ASBESTOS LITIGATION REPORTER, 14, 329-69; AD HOC COMMITTEE ON ASBESTOS LITIGATION, THE ASBESTOS CLAIMS PROCEDURE ACT OF 1991 (1991); COALITION FOR EQUITABLE COMPENSATION, OUTLINE OF BILL TO ESTABLISH AN ASBESTOS LITIGATION PROGRAM (1990).

³ Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 2d Sess. (1990) (a bill providing federal district courts with original jurisdiction in mass tort cases where at least 25 persons sustained injuries resulting in damages exceeding \$50,000 per person). Although the Act was passed by the House of Representatives, it was not adopted by the Senate. See 136 CONG. REC. H3119 (daily ed. June 6, 1990).

sively determined under the administrative proceedings set forth in the proposed act. The payments to be assessed against the covered defendants would principally be determined by the defendants' proportionate market share in the various asbestos-containing materials markets (insulation, spray-on products, cements) in the period between 1940-1970. The payment calculation process would be supplemented by some consideration of the tort system's determination of the percentage that each defendant bears to the total defendants' liability to all eligible claimants. Also, funds of defendants in chapter 11 proceedings, which have been set aside for asbestos-related injury compensation, would be transferred into the trust fund.

Unimpaired pleural plaque claimants, as well as other unimpaired claimants, would not be eligible for compensation under this program; however, these unimpaired claimants would not be subject to a statute of limitations in the event that they later developed asbestos-caused impairments.

Punitive damages would be precluded.⁴

Attorney fees would be awarded to representatives of successful claimants; however, those payments would not reduce the amounts awarded to claimants. In some limited circumstances, attorneys for unsuccessful claimants would also be compensated. Payment calculations would be based on hourly rates, taking risk factors into account.

A board would be created in the Department of Labor to administer the program, promulgate rules and make medical determinations.

Several provisions of the proposal are still incomplete; for example, in Section 102 which addresses Eligibility for Benefits, the terms *medical definition*, *disease latency period* and *length of occupational exposure* are listed but the empty brackets ("[]") indicate that they are as of yet undefined or unstated. In addition to provisions requiring technical expertise beyond my competence, other provisions in the proposal have been left blank pending further investigation. Among the most important of these is the formula for calculating monthly benefits.⁵ Traditionally, income-replacement formulas provide for sixty-seven to seventy-five percent of workers' average monthly incomes.⁶ However, because I have been unable to calculate the financial ramifications of the use of such percentages, I have chosen to omit

⁴ See Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1862-68 (1992) (discussing the role of punitive damages in asbestos litigation).

⁵ See *infra* § 103.

⁶ E.g., Representative Pat William's bill proposing a workers' compensation program for

actual percentages. My intention, though elliptical, is that the percentages used will in some measure reflect the level of payments into the trust fund while, at the same time, the total amount to be paid into the trust fund by defendants will reflect the benefit payment amounts plus the costs of administering the program. A rough and highly tentative estimate of the pay-in/pay-out number is \$250 million to \$300 million per year over a period of twenty years, for a total of five to six billion dollars.⁷ Pay-out levels plus administrative costs in the early years may be expected to exceed the average; thus, the payments diminish over time. Hence, pay-in levels will have to be structured accordingly. The possibility of a government loan to the trust fund to allow the higher pay-out in the early years of the program is addressed in the proposal. Finally, some provisions are enclosed in empty brackets (“[]”) indicating that the values assigned are regarded as tentative.

The proposal also provides for government payments into the trust fund to cover government responsibility for injuries to shipyard workers during World War II and thereafter.⁸ It is intended, however, that the program not be conditioned upon such government participation.

A. *The Problem of Equity*

In setting forth an administrative alternative to tort litigation, the choice of a compensation scheme is one of the most significant issues posed. In general, the choices are either (1) a tort equivalent,⁹ or (2) an income replacement.¹⁰ In this proposal, I have opted for the

federal employees provides a wage replacement equal to three-quarters of a worker's former wage. H.R. 3090, 99th Cong., 1st Sess. § 5 (1985).

⁷ The \$250 million to \$300 million figure represents only a crude estimate from which to begin discussion. Many observers of the asbestos litigation scheme would peg this number at a higher level. While at other points in this proposal I have declined to estimate the necessary figures, I feel compelled to provide a specific range in this instance to force discussion and begin a base inquiry into the total costs of this or any competing proposal. At the colloquy, Judge Jack Weinstein of the Eastern District of New York estimated the tort value of the current asbestos caseload to be \$30 billion. *See* Transcript of the Administrative Conference of the United States, Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims 30 (October 31, 1991) [hereinafter Colloquy Transcript].

⁸ *See generally* Brickman, *supra* note 4, at 1884-87.

⁹ Tort equivalent seeks to provide claimants with lump-sum payments (possibly payable in installments) which seek to replicate the value of the injury as determined by the tort system. In calculating such amounts, the whole range of verdicts would be relevant, including defense verdicts, as well as the time value of money since the awards would be available sooner than through the tort system; saved defense costs would also be relevant.

¹⁰ Income replacement seeks to replace income lost as a consequence of disability. For example, workers' compensation programs are income-replacement schemes. *See supra* note 6.

latter,¹¹ fearing that a scheme seeking to replicate values assigned by the tort system would create financial burdens¹² that would lead to more defendant bankruptcies, thereby reducing the level of payments into the fund. Moreover, calculating the tort value of various asbestos-related injuries is an immensely complicated task, and one which would be hotly contested by the various parties.¹³

Although an income-replacement scheme avoids some of these problems, it imports others, particularly the problem of equity. Income replacement schemes usually yield the most benefits to those who are the least sick. Since those most injured will die sooner, they will have received benefits for a significantly shorter period of time even though their benefits would be at a higher monthly level. Hence,

¹¹ Although I have opted for an income-replacement scheme, a tort-equivalent scheme has some significant advantages. A tort-equivalent scheme may be an easier "sell" to plaintiffs since it attempts to replicate the values being assigned by the tort system. Moreover, there would be significant administration-cost savings over an income-replacement scheme, since income replacement involves payouts over a much longer period of time as well as changes in the amounts of the payments to reflect changes in medical condition.

¹² Of course, this would depend on the values assigned in replication of tort values, the discount for present value, and the rate at which the payments would be made. Paying equivalent tort values over a period of three to five years would significantly ameliorate the cash flow aspect of the problem.

¹³ Determining the tort value of claims for defendants in the asbestos context is further complicated by the bankruptcies to date of twelve defendants, most importantly, the Manville Corporation. Before bankruptcy, Manville bore the brunt of asbestos litigation; it had the largest market share of asbestos-product sales and was assessed the highest percentage of liability by the tort system.

The Manville bankruptcy essentially removed it from the tort system as a payor but not as a player. Generally, the greater the percentage of product exposure ascribed to Manville, the greater the share of a verdict that Manville bore and therefore, the less the share that the other defendants had to pick up. However, postbankruptcy, plaintiffs could not collect the Manville allocation of the verdict from Manville directly; rather they had to go through the bankruptcy-court process and seek recovery from the Manville Personal Injury Settlement Trust Fund which was paying out only a fraction of Manville's share of the verdicts. See *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 120 B.R. 648, 670 (E.D.N.Y. & S.D.N.Y. 1990) (reporting that claimants would receive 45% of the liquidated values of their claims). Hence, postbankruptcy, the plaintiffs' interests were served by minimizing their claimed exposure to Manville asbestos products; the defendants' by maximizing it. Consequently, after the Manville bankruptcy, plaintiffs' testimony (and that of their witnesses) abruptly shifted from a predominantly Manville exposure frame to a predominantly "other defendants" exposure; whereas prebankruptcy testimony in Philadelphia Naval Yard Cases put Manville's share of product use as high as 80%, postbankruptcy testimony had Manville exposure accounting for a quarter or less of the volume of asbestos-containing materials encountered by plaintiffs. "In the Brooklyn Navy Yard Cases the jury apportioned between 9-11% of the overall liability to the Johns-Manville Corporation." *In re Eastern & S. Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1398 (E.D.N.Y. & S.D.N.Y. 1991). Accordingly, determining the tort value of a claim against any of the other nonbankrupt defendants—e.g., Owens Illinois, Owens-Corning Fiberglass, W.R. Grace, Allied Signal, Pittsburgh Corning, GAF, Union Carbide—is vitally affected by whether pre- or post-Manville-bankruptcy tort results are used.

for the most sick, the overall amount of benefits are likely to be less, thereby creating a problem of equity.

Two basic measures have been included in this proposal to combat the equity problem. First, the amount of the payments is graduated with the severity of the disability. Second, the proposal provides a death benefit to the survivors of the most seriously impaired who may be expected to die soonest (i.e., those afflicted with mesothelioma, severe asbestosis, and lung cancer); the survivors will receive a lump-sum payment equal to twelve to twenty-four times the decedent's monthly benefits. While it does not completely solve the equity problem, the survivorship benefit ameliorates the problem considerably.

B. *The Problem of Cost Control*

Virtually all government entitlement programs and, indeed, all government benefit programs, end up costing far more than anticipated. Often persons not initially foreseen as being eligible for benefits will become covered by the program—with commensurate increases in cost.¹⁴ A justifiable fear exists that the costs of any industry-funded administrative proposal would begin to exceed the revenues and the government would then be compelled to make up the shortfall.

Several aspects of the proposal have been designed to deal directly with the cost issue. For instance:

1. a claimant must be both "impaired"¹⁵ and "disabled"¹⁶ in order to receive compensation, thereby, preventing the nonsick who currently account for a large percentage of claimants¹⁷ from receiving compensation;
2. any government benefits and/or insurance payments will offset payments due under the program;
3. funds set aside in chapter 11 proceedings for asbestos-related injury compensation are to be transferred into the program;
4. punitive damages are precluded; and
5. fee agreements between attorney and claimant are set aside;

¹⁴ Medicaid and the Black Lung Program are examples where costs have far exceeded projections. See John S. Lopatto III, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 678 (1983) (reporting that the Black Lung Trust Fund was \$1.4 billion in the red by the time it was amended in 1981 to prevent the huge \$19.2 billion deficit projected by 1995).

¹⁵ See *infra* tit. 1, § 102(b)(2)(D).

¹⁶ See *infra* tit. 2, § 103(b)-(e).

¹⁷ See Brickman, *supra* note 4, at 1827.

therefore, awards to claimants (or their beneficiaries) are not reduced, allowing for lower payments to claimants while limiting fee payments to lawyers to hourly rates which, while generous, would be far less than effective hourly rates of return generated by contingent fees.¹⁸

C. *Assessments Against the Asbestos Industry: Constitutional Considerations*

Any plan that would replace litigation with a statutorily devised administrative-claim procedure must commence with the sine qua non of funding. To make the program partially or wholly dependent upon federal funding would likely render the undertaking a sterile exercise, given the current political climate. Moreover, it is entirely proper—as a matter of fairness and culpability—that the former asbestos industry be obliged to fund at least a substantial portion of the program. Indeed, previously crafted proposals for an administrative claim procedure¹⁹ have saddled industry with much of the financial burden. However, none of the proposals suggested to date appear to have contemplated the possibility that compelling the asbestos industry to fund the program would raise issues of constitutional dimension. Nonetheless, several constitutional concerns are implicated by the proposal.²⁰

While assessing an administratively established percentage of liability for past actions would not be characterized as a constitutionally invalid *ex post facto* law,²¹ it may possibly be construed as a bill of attainder.²² The Bill of Attainder Clause has been construed to prohibit the legislative branch of government from assuming a judicial function and/or conducting trials.²³ The Clause prohibits any legislative act from inflicting punishment on an individual or easily identifiable group without a judicial trial.²⁴

¹⁸ See generally Brickman, *supra* note 4, at 1834-40.

¹⁹ See *supra* notes 1-3.

²⁰ This article is not meant to provide a comprehensive treatment of constitutional law issues but rather to point out some of the constitutional considerations implicated by the proposal that require additional analysis.

²¹ See U.S. CONST. art. I, § 9, cl. 3. The *ex post facto* law prohibitions relate exclusively to the imposition of criminal liability for past actions that were not illegal when performed, *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377-78 (1866), and do not invalidate civil legislation, *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834).

²² U.S. CONST. art. I, § 9, cl. 3. Historically, the Bill of Attainder Clause was narrowly construed so as to apply only to legislative acts that imposed the death penalty on those allegedly guilty of serious crimes without the usual judicial proceedings. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 11.9(c), at 420 (4th ed. 1991).

²³ See, e.g., *United States v. Brown*, 381 U.S. 437 (1965).

²⁴ *United States v. Lovett*, 328 U.S. 303, 315 (1946).

Since many legislative acts could be interpreted to single out certain classes or persons and punish them, the Supreme Court has refined the requirements for Bill of Attainder Clause violations. Specifically, to be deemed a violation, a statute must (i) impose a traditionally prohibited punishment,²⁵ (ii) be designed to further punitive goals,²⁶ (iii) demonstrate congressional intent to punish,²⁷ and (iv) not be the least burdensome among existing alternatives.²⁸ Accordingly, care must be exercised to ensure that the proposed program is not described as, or considered to be, a legislative punishment, but rather the creation of an alternative means of resolving claims of injury that arose from occupational exposure to asbestos—claims that have inundated many federal and state courts to the detriment of the general welfare. In addition, since the proposal would be adopted in lieu of tort liability, it is not a punishment but simply the creation of an alternative forum—one better suited according to the Congress—for resolving the claims.

Besides the express restrictions on ex post facto laws and bills of attainder, the Due Process Clause has been used to invalidate legislation with retrospective aspects.²⁹ There are four distinct categories of cases where retroactive legislation has been considered an issue.³⁰ Most applicable to the proposal would be the curative-statute provisions. Curative statutes have been defined as measures which either ratify prior official conduct or make remedial adjustments to an administrative scheme.³¹ The court has consistently sustained the constitutionality of retroactive aspects of curative statutes.³² However, a

²⁵ These punishments include "imprisonment, banishment, and the *punitive confiscation of property by the sovereign . . .*" *Nixon v. Adm'r of Gen. Servs.* 433 U.S. 425, 474 (1977) (emphasis added).

²⁶ *Id.* at 474-75. For an example of a statute that was struck down as violative of the Bill of Attainder Clause for this reason, see *Brown*, 381 U.S. at 460 (law whose purpose is to "purge . . . those whom Congress regards as guilty of subversive acts" is invalid).

²⁷ *Nixon*, 433 U.S. at 478.

²⁸ *Id.* at 482.

²⁹ Retroactive legislation has been defined as a statute or law that attempts to establish the legal significance of transactions that have occurred before the law's enactment. See generally Ray H. Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U. L. REV. 540 (1956).

³⁰ These include (1) cases involving emergency retroactive legislation; (2) cases challenging the constitutionality of curative statutes; (3) cases that contest the constitutionality of general retroactive legislation; and (4) cases involving retroactive taxation. See Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697-710 (1960); W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Law Making*, 48 CAL. L. REV. 216, 238-44 (1960).

³¹ Slawson, *supra* note 30, at 238-39.

³² NOWAK & ROTUNDA, *supra* note 22, § 11.9, at 410; see also *FHA v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946).

general bias against retroactive legislation must be noted.³³

Another constitutional issue is whether the assessment or tax on the defendants covered by the proposal is a taking³⁴ of property without just compensation.³⁵ The Fifth Amendment requires that the government not take property without just compensation and due process.³⁶ To determine whether a taking has occurred one must examine three factors: "(1) the economic impact of the regulation on the claimant [i.e., the person or entity who must pay money, or whose property was taken]; (2) the extent to which the regulation has interfered with [the claimant's] distinct investment backed expectations; and (3) the character of the governmental action."³⁷ An additional requirement exists in that the government may not confiscate private property at whim, but only for a legitimate "public use."³⁸ These rules are not without exceptions.³⁹ The court-established general guidelines do not provide a bright-line test for determining whether a governmental regulatory action is a taking.⁴⁰ Nonetheless, the guidelines do provide some insight into the factors a court would consider should a constitutional challenge be raised.

A takings challenge to the proposed act could be countered by the argument that just compensation is provided under the administrative program because the assessments are a quid pro quo for the

³³ NOWAK & ROTUNDA, *supra* note 22, § 11.9, at 416.

³⁴ Current thinking on takings is likely to change based on the outcome of a case currently on the United States Supreme Court docket, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, 112 S. Ct. 436 (1991). For a brief account of that case, see Paul M. Barrett, *Supreme Court Signals Willingness to Draw Line Between Government Power and Property Rights*, WALL ST. J., Dec. 9, 1991, at A16.

³⁵ U.S. CONST. amend. V.

³⁶ NOWAK & ROTUNDA, *supra* note 22, § 11.12, at 426.

³⁷ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986) (quoting *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978)). Professor Michelman has described four factors, any one of which is generally determinative in deciding whether compensation is constitutionally due: (1) whether the claimant's interest was physically occupied; (2) the size of the harm or degree of devaluation of the interest involved; (3) whether the public gain outweighs the claimant's loss; and (4) whether the claimant has suffered any loss apart from the restriction of his liberty to conduct an activity considered harmful to others. See Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1621-29 (1988).

³⁸ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). The modern test of what constitutes a public use has been construed broadly to be a public benefit. *Id.*

³⁹ It has often been held that in time of emergency the government may take and/or destroy property without compensation. While, certainly, military measures have been considered to be emergencies, (See *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *United States v. Caltex, Inc.*, 344 U.S. 149 (1952)), situations of far less drastic import have been construed as emergencies as well. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (destroying red cedar trees to save an apple orchard).

⁴⁰ NOWAK & ROTUNDA, *supra* note 22, § 11.12, at 429 n.9.

elimination of judicially imposed liability. Additionally, procedural due process is not violated under such a plan because the findings of the administrative panel cannot be considered deprivations of procedural due process *per se*.⁴¹

Another potential issue is whether the congressional establishment of an administrative procedure to handle asbestos claims would unconstitutionally abrogate the right to bring a state court action. Congressional authority to enact the program, and in particular the essential assessment feature, may be found in the grant of power to regulate interstate commerce.⁴² The consequent elimination of a state-court action is remedied by the due-process procedures provided under the administrative regime. If this is still perceived as a problem, it can be remedied by adding a provision to the proposal abrogating the tort of asbestos-related injury⁴³—much as states have abrogated the common-law tort of breach of promise to marry.⁴⁴

Another constitutional issue is whether the parties are being deprived of their constitutional right to a trial by jury.⁴⁵ While civil claimants have the right to a jury trial in federal courts,⁴⁶ the Seventh Amendment is only applicable to “suits at common law.”⁴⁷ Since an administrative proceeding is not a trial, no such right to a trial by jury exists in the administrative setting. And assuming the administrative procedure is not inherently unfair, no claim for lack of procedural due process could be sustained.⁴⁸

⁴¹ Absent clear constitutional violations, the Administrative Procedure Act, 5 U.S.C. § 551 (1988), establishes the procedural requirements for federal agencies. Generally, when a law affecting a group of persons is passed, those persons affected have been deemed to have received procedural due process *vis-à-vis* the legislative process. Similarly, when an administrative agency exercises its rule-making powers, there is no constitutional right to a hearing for any individual or entity. NOWAK & ROTUNDA, *supra* note 22, § 13.8, at 526. However, when the agency makes decisions affecting limited interests which might be considered adjudicative, some fair procedures must be granted. *Id.* Certainly the procedural provisions delineated in Sections 201 and 301 of the proposal guaranty the affected parties' due process rights.

⁴² U.S. CONST. art. I, § 8.

⁴³ A similar limitation on state court actions was initiated in the Federal Vaccine Program, which prohibits punitive awards in state cases. *See* 42 U.S.C. § 300aa-22 (1988). Further, no constitutional right is abrogated by interdicting actions brought in state or federal courts or actions which have proceeded to trial but not reached judgment. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 259 (2d Cir. 1948).

⁴⁴ “The action for breach of promise to marry has become an anachronism in American Law.” HOMER H. CLARK, JR., *CASES & PROBLEMS ON DOMESTIC RELATIONS* 13 (2d ed. 1974); *see also* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS* § 1.5 (1968) (discussing the abolition of breach-of-promise-to-marry statutes). Breach-of-promise-to-marry statutes have been termed “Heart-Balm Acts.” *Id.* § 1.5, at 15.

⁴⁵ U.S. CONST. amend. VII.

⁴⁶ NOWAK & ROTUNDA, *supra* note 22, § 13.8, at 527.

⁴⁷ U.S. CONST. amend. VII.

⁴⁸ *See supra* note 38.

An alternative method of creating the necessary funding—one with less constitutional baggage—is to permit eligible defendants to opt into the program and pay assessed amounts in exchange for insulation from judicially imposed liability. This opt-in feature—and its concomitant in-lieu-of-judicially-imposed-liability feature—would be authorized not only by the Commerce Clause but also by the authority of congress to establish uniform bankruptcy laws.⁴⁹ That is, the program could be categorized as a quasi-bankruptcy proceeding in which reorganization is limited to establishing liability for asbestos-related injury. Moreover, congressional authority to enact uniform bankruptcy laws would permit staying both state and federal tort claims,⁵⁰ and might also be responsive to the issue of the right of trial by jury.⁵¹

The opt-in method poses its own complications which, are however, surmountable. The most obvious complication is that if several of the major asbestos defendants do not opt in, the program's utility is vitiated. But, even if only a few of the major defendants participate, the remaining defendants would be virtually compelled to do the same, lest they inherit much or all of the percentage liability share of the opt ins as a consequence of the operation of joint-and-several-liability laws.⁵² Hence, the opt-in procedure has the elegance of de jure volition and de facto compulsion. An opt-in program must also provide for a calculation of the percent of the total liability of all eligible

⁴⁹ U.S. CONST. art. I, § 8.

⁵⁰ 11 U.S.C. § 362(a)(1) (1988); see also *In re Joint E. & S. Dists. Asbestos Litig.* (Findley v. Blinken), 120 B.R. 648, 654-58 (invoking § 105 of the Bankruptcy Code (11 U.S.C. § 105(a) (1988)) and FED. R. CIV. P. 23(b)(1)(B) to stay all pending federal and state actions against the Manville Personal Injury Trust).

⁵¹ Although a split among the circuits exists on the issue, the Supreme Court has expressly declined to determine whether statutory authority exists for bankruptcy courts to conduct jury trials. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63-64 (1989). See generally Larry E. Jones, Case Note, *In re Ben Cooper, Inc.: Time to Build Jury Boxes in Bankruptcy Court Rooms?*, 44 ARK. L. REV. 697 (1991).

⁵² At least 30 states have repealed or restricted joint and several liability. The doctrine, however, still has sufficient application to compel the remaining defendants to opt in. Diane K. Wohlfarth, Note, *Joint Tortfeasors in Toxic Substance Litigation: Paying Your Fair Share*, 29 DUQ. L. REV. 325 (1991). Notably the new provisions limiting joint and several liability do not apply retroactively to claims accruing or filed prior to their date of enactment or effectiveness. Thus, a substantial number of asbestos claims are governed by joint and several liability even in states which have recently abolished the doctrine. See e.g., ARIZ. REV. STAT. ANN. § 12-2506 (1982) (effective date of abolishment, Jan. 1, 1988); OHIO REV. CODE ANN. § 2315.19(D) (Page 1991) (abolishment applicable only for noneconomic damages in negligence cases in which there is either contributory negligence or implied assumption of risk). See generally Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evolution of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 636 (1988).

asbestos defendants represented by those opting in, in order to tailor benefit payments to the percent represented in the program.

D. *A Tort Alternative to the Administrative Alternative*

Whether because of political reasons,⁵³ or constitutional constraints,⁵⁴ it may be necessary to retain a tort alternative to the proposed administrative solution. If it were deemed necessary to provide for such an alternative, it would have to be formulated so as to avoid the excesses of current asbestos litigation.⁵⁵ Both the Dalkon Shield bankruptcy⁵⁶ and the Manville bankruptcy,⁵⁷ which set up administratively operated trust funds to compensate claimants,⁵⁸ provided for a tort alternative. The common design of both trust funds permits entry into the tort system only after going through the administrative-claims process.⁵⁹ Both funds provide for the following steps: 1) claim submission; 2) information review; 3) offer; 4) negotiation;

⁵³ See, e.g., Remarks of Howard D. Samuel, Colloquy Transcript, *supra* note 7, at 48 ("Although I believe that organized labor would be unanimous in favoring establishment of a Federal compensation program, there would also be considerable support, probably unanimous, also, for retaining some avenue for workers to go to court if they wish.").

⁵⁴ See *supra* text accompanying notes 21-52.

⁵⁵ See generally Brickman, *supra* note 4.

⁵⁶ *In re A.H. Robins Co.*, 88 B.R. 742 (Bankr. E.D. Va. 1988), *aff'd*, 880 F.2d 694 (4th Cir. 1989), *cert. denied*, 110 U.S. 331 (1989); see also A.H. Robins Company Inc.'s Sixth Amended and Restated Disclosure Statement pursuant to Section 1125 of the Bankruptcy Code at 46-48, *In re A.H. Robins Co.*, Ch. 11 Case No. 85-01307-R (Bankr. E.D. Va. March 28, 1988) (containing Dalkon Shield Claimants Trust) [hereinafter Sixth Amended Disclosure Plan].

⁵⁷ *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); see also Johns-Manville Corporation Second Amended and Restated Plan of Reorganization and Related Documents as Executed and Consummated at Plan Consummation, at C-80 to C-135, *In re Johns-Manville Corp.*, Ch. 11 Case No. 88-5773A (Bankr. S.D.N.Y. Nov. 28, 1988) (containing the Manville Personal Injury Trust Settlement Agreement) [hereinafter Second Amended Plan].

⁵⁸ Another scheme of some, but limited, relevance is the vaccine program—a federal no-fault system of providing compensation to persons with serious adverse reactions to vaccines intended to prevent serious childhood illnesses. Public Health Service Act, 42 U.S.C. § 300aa-1 (1988). The compensation program is codified, *id.* § 300aa-10 to -34. See Wendy K. Mariner, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program* (May 1991) (a report for the Administrative Conference of the United States, on file with the author). The vaccine program is not analogous to asbestos litigation since the former is funded by a tax on the sale of vaccines; because the asbestos defendants no longer sell asbestos products, there is no opportunity for a similar tax.

⁵⁹ Second Amended Plan, *supra* note 57, at C100-105; Sixth Amended Disclosure Statement, *supra* note 56, at CRF-1-4 (Plan Exhibit C); see also Kenneth J. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 107-09 (1990) (evaluating methods of distributing funds in mass tort claims).

and, 5) alternative dispute resolution.⁶⁰ Following the alternative dispute resolution, a claimant may opt to seek a tort system resolution.

Under the Dalkon Shield trust, if the parties do not agree to the settlement offer, the claimant has a choice of binding arbitration or a right to a jury trial.⁶¹ Under the Manville trust, the claimant may elect either binding or nonbinding proceedings or trial by court or jury.⁶² If the claim is tried, both plans prohibit the award of punitive damages and preserve the full panoply of defenses for the defendants.⁶³ Under the Dalkon Shield trust, regardless of the verdict, no amount greater than the trust's best offer can be levied or executed until all other claimants have been paid.⁶⁴ Under the reorganized Manville trust-distribution plan,⁶⁵ the claimant's trial judgment is placed in a status inferior to both medically serious and less-serious administrative claims, effectively deferring actual receipt of compensation to many years later than had a settlement been accepted.⁶⁶

A PROPOSAL TO THE UNITED STATES CONGRESS
THE ASBESTOS CLAIMS MANAGEMENT ACT OF 1991

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

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⁶⁰ See generally Sixth Amended Disclosure Statement, *supra* note 56; Second Amended Plan, *supra* note 57.

⁶¹ Sixth Amended Disclosure Statement, *supra* note 56, at CRF-3 (Plan Exhibit C); Feinberg, *supra* note 59, at 108-09.

⁶² Second Amended Plan, *supra* note 57, at C-103.

⁶³ Second Amended Plan, *supra* note 57, at C-324; Sixth Amended Disclosure Statement, *supra* note 56, at CRF-4, 6 (Plan Exhibit C).

⁶⁴ Mark A. Peterson, *Giving Away Money: Comparative Comments on Claims Resolution Facilities*, 53 LAW & CONTEMP. PROBS. 113, 118 (1990) (citing *In re A.H. Robins, Inc.*, 880 F.2d 694 (4th Cir.), *cert. denied*, 110 U.S. 331 (1989)).

⁶⁵ See *In re Joint E. & S. Dists. Asbestos Litig. (Findley v. Blinken)*, 120 B.R. 648, 670-74 (E.D.N.Y. & S.D.N.Y. 1991).

⁶⁶ *Id.* at 673. A judgment creditor is eligible for payment only after all appeals have been exhausted. It is likely that Godot would arrive before such a jury verdict is paid out by the Manville Trust.

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Sec. 1. SHORT TITLE.

This Act may be cited as the "Asbestos Claims Management Act of 1991."

Sec. 2. FINDINGS AND PURPOSE.

a. Congressional Findings. WHEREAS Congress has determined that—

(1) occupational exposure to asbestos-containing materials has resulted in the death of several thousand workers and serious injury to and the disability of many more thousands;

(2) the tort system has not provided prompt, fair and rational compensation to those injured;

(3) ongoing litigation in state and federal courts for resolving claims for injury caused by exposure to asbestos-containing materials has resulted in:

(A) a substantial burden on some federal and state courts consequently impairing their function because of the large number of pending claims (exceeding 100,000) unevenly distributed throughout the courts;

(B) great delay in adjudicating asbestos claims because of the enormous volume of claims, thereby depriving impaired claimants of their right to reasonably prompt compensation;

(C) long, complicated and costly trials because of the difficulty of establishing asbestos-product identification; disputed medical claims; and the uncertainties inherent in a claim process where latency periods are of unusual if not unique length—as much as 40 years;

(D) very high transaction costs: sixty percent or more of the monies expended by defendants in defense of asbestos-related injury claims are consumed by defense costs, plaintiffs' attorney fees

and other litigation costs, with only forty percent being received by the claimants;

(E) a substantial burden on interstate commerce as a consequence of the bankruptcy of more than a dozen defendants whose insurance coverages and cash flows have been consumed with attendant negative consequences for job creation and the international competitiveness of United States industry;

(F) a substantial burden on interstate commerce as a consequence of the potential bankruptcy of many more defendants as each additional bankruptcy tends to spread the remaining liability over a smaller capital base;

(G) increasing caseloads in federal and state courts as new claims being asserted outnumber settlements and judgments by as much as 2:1, with a consequent tripling of pending cases in the past decade and the virtual certainty of additional increases in asbestos case backlogs in the foreseeable future;

(4) those corporations which are currently defendants in claims for occupational exposure to asbestos-containing material and which manufactured the asbestos-containing materials which the claimants were occupationally exposed to should be required to fund any administrative program for the resolution of the claims crisis;

THEREFORE, Congress hereby creates an administrative program for resolution of asbestos tort claims resulting from occupational exposure to asbestos-containing materials without the need to establish culpability on the part of specific defendants.

b. Purpose of the Act.

The purpose of this Act is—

(1) to create an administrative structure to fairly, rationally and promptly compensate those impaired by occupational exposure to asbestos-containing materials;

(2) to enable eligible defendants who are required to pay into the Asbestos Claims Compensation Trust Fund ("Trust Fund") amounts determined under operation of this Act, and to have their liability for asbestos-related injury exclusively determined by operation of this Act; and

(3) to reduce litigation in federal and state courts dealing with asbestos-related injury and to provide an alternative method of resolution less costly than litigation, such that a much higher percentage of funds expended by defendants and their insurers is actually paid to claimants.

TITLE I. DETERMINATION OF BENEFITS

Sec. 101. ASBESTOS CLAIMS MANAGEMENT BOARD.

(a) The Asbestos Claims Management Board (the "Board") is hereby established within the Office of Workers Compensation of the Department of Labor.

(b) The Board is authorized to—

(1) establish medical criteria for eligibility for compensation to supplement those criteria set forth in the Act;

(2) create and administer a claims procedure in accordance with this Act;

(3) create panels of physicians who will examine the medical evidence introduced by claimants and determine for each claimant the nature of the injury and impairment that resulted from occupational exposure to asbestos according to the criteria set forth in this Act and those established by the Board;

(4) create and appoint advisory boards as it shall deem necessary to carry out the provisions of this Act; and

(5) promulgate rules and regulations necessary to carry out the provisions of the Act.

Sec. 102. ELIGIBILITY FOR BENEFITS.

(a) Claimants, whether surviving or deceased, who have been or are—

(1) injured and impaired as a result of occupational exposure to asbestos-containing materials;

(2) diagnosed under the criteria set forth in this Act as having one or more of the listed asbestos-caused diseases and impairments; and

(3) disabled by that injury and impairment; shall be eligible for compensation.

(b) Eligibility for compensation shall be determined on the basis of the nature of the disease and impairment as follows—⁶⁷

(1) Mesothelioma.⁶⁸

(A) Requisite occupational exposure [].

(B) Latency period [].

⁶⁷ An alternative to categorizing the asbestos-related diseases would be to create a medical panel that would consider the medical evidence and determine which diseases should be considered as eligible for compensation. *See, e.g.*, S. 1265, 99th Cong., 1st Sess., § 104(b) (1985), discussed *supra* note 1.

⁶⁸ For each of the diseases listed, it is intended that there be a medical definition ("medical definition"), a stated minimum amount of time between the first exposure and the onset of disease ("latency period") and a stated minimum number of months or years of occupational exposure to asbestos containing materials ("requisite occupational exposure").

(C) Medical definition [].

(D) Impairment [].

(2) Asbestosis.

(A) Requisite occupational exposure [].

(B) Latency period [].

(C) Medical Definition. For purposes of this Act, asbestosis is defined to be evidence of diffuse interstitial parenchymal fibrosis as shown by appropriate autopsy evidence or an x-ray showing diffuse irregular opacities of I.L.O. 1/0 or greater, together with other signs and symptoms as are consistent with a diagnosis of asbestosis.

(D) Impairment. For purposes of this provision, impairment shall be considered to be present when:

(i) an individual's lung function measurements for vital capacity, forced vital capacity or total lung capacity are (1) below 80% of predicted normal capacity for an individual of the same age, sex, height, and race as the claimant; or (2) the claimant shows a measured decline of at least twenty percent of predicted normal capacity (adjusted for increasing age) when compared to the baseline lung function test for such claimant;

(ii) the pattern of impairment is restrictive in nature; and

(iii) all pulmonary function tests⁶⁹ are administered in accordance with provisions of 20 U.S.C. Sec. 718.1103 and Appendix B, thereto, by NIOSH certified technicians.

(3) Diffuse pleural thickening.

(A) Requisite occupational exposure [].

(B) Latency period [].

(C) Medical Definition []. For purposes of this Act, diffuse pleural thickening is defined to be extensive thickening of the visceral pleural surface.

(D) Impairment. For purposes of this provision, impairment is defined as it defined in § 102(b)(2)(D) of the Act.

(4) Lung Cancer.

(A) Lung cancer without asbestosis—

(i) Requisite occupational exposure [].

(ii) Latency period [].

(iii) Medical definition [].

(iv) Impairment [].

(B) Lung cancer with asbestosis. Claimants with lung cancer who also meet the criteria for asbestosis compensation shall not be

⁶⁹ Pulmonary function tests have been criticized for the crudeness of their measurement.

subject to any additional occupational exposure or latency period requirements.

(5) Cancer of the Larynx, Esophagus, Stomach, Small Intestine or Colon.

(C) Any claimant who has cancer of the larynx, esophagus, stomach, small intestine or colon, who also meets the criteria for asbestosis compensation shall be eligible for compensation at the one hundred percent impairment level.

(c) Any family member of a household in which another of the members was occupationally exposed to asbestos may bring a claim for compensation based upon a disease and impairment as defined in this Act. The family member claimant will have to show a duration of exposure by living in the same household with the occupationally exposed member equal to the period of exposure required of the worker as set forth above. No family member shall be eligible for compensation for lung cancer without asbestosis.

Sec. 103. DETERMINATION OF BENEFITS.

(a) Compensation shall be available under this Act for disability, medical expenses and death.

(b) Total disability.

(1) A claimant who has contracted an asbestos-caused disease and impairment as set forth in this Act and who is, as a consequence, completely and totally disabled, according to section 223 of the Social Security Act (42 U.S.C. 423) shall be awarded the greater of—

(A) []% of the claimant's average weekly wage for the month in which the onset of disability occurred (subject to a maximum of 200% of the national average weekly wage); or

(B) []% of the national manufacturing average weekly wage for the month in which the onset of the disability occurred.

(2) Claimants determined to have—

(A) mesothelioma are considered totally disabled.

(B) asbestosis or diffuse pleural thickening are considered totally disabled only if they also have been determined to have lung cancer, laryngeal cancer, or gastrointestinal cancer.

(c) Partial Disability. A claimant who has contracted an asbestos-caused disease and impairment as set forth in this Act and who is, as a consequence, partially disabled,⁷⁰ shall receive a percentage of the

⁷⁰ It will be necessary to define "partial disability"—a task of some considerable complexity.

amount due a totally disabled claimant commensurate with the degree of disability [].

(d) Lung Cancer without Asbestosis. Claimants who have lung cancer but not asbestosis shall first have a determination made by the Board of the degree of responsibility that occupational exposure to asbestos bore in the development of the lung cancer. To make this determination, the Board will compare the nature and duration of the occupational exposure to asbestos to the degree of risk posed by other causes of lung cancer, e.g., cigarette smoking. The Board shall then reduce the benefit calculated for partial and total disability to reflect the degree to which the lung cancer was attributable to other causes.

(e) Death Benefits.

(1) For those receiving, or eligible to receive, benefits under this Act upon death due to the condition which gave or would have given rise to benefits, a death benefit shall be payable consisting of the monthly disability benefit being paid under this Act or available to have been paid multiplied by [twenty-four].

(2) If death results from injury or impairment covered by this Act yet, because of the absence of disability there was no eligibility for a monthly benefit, then a death benefit shall be payable consisting of the monthly disability benefit for an individual 50% disabled multiplied by [twelve].

(f) Survivor Benefits.⁷¹ Survivors of deceased claimants or of those eligible to have filed claims, shall receive benefits calculated as follows—[]

(g) Medical Benefits. Medical expenses, incurred by a claimant or on behalf of a claimant as a consequence of injury and impairment as defined in this Act, shall be reimbursed or provided for all reasonable and necessary medical, hospital, surgical, diagnostic, therapeutic and associated expenses including drugs and nursing care subject to coordination with other benefits under subsection (1) of this section.

(h) Payment Method. Payment to claimants and survivors will be made monthly.

(i) Retroactivity. Benefits under this Act are payable retroactively to the date of death or the onset of disability.

(j) Adjustments in Cases of Multiple Causation. In any case in which disability or death resulted only in part from asbestos-related injury and impairment as defined in this Act, the monthly benefit shall be reduced to reflect the multiple causation.

(k) Taxation of Benefits. No payments made under this Act

⁷¹ It will be necessary to integrate death benefits with monthly survivor benefits.

shall be taxable by the United States or any State and shall not be subject to any attachment, execution, levy, garnishment, or other legal process, except to satisfy a child support obligation.

(l) Offsets.

(1) Payments to claimants and their survivors under this Act shall be reduced by any monetary benefits received by the claimant or by a survivor for any injury, impairment or disability covered under this Act from a State workers' compensation program, federal Longshore and Harbor Workers' Compensation Act, FELA, Black Lung program, and by any amount received as settlement or judgment in any claim or civil action based upon occupational exposure to asbestos.

(2) Medical payments under this Act shall be reduced by any payments received as reimbursement for medical costs under any state or federal workers' compensation program and by any medical insurance payments.

(m) Procedure in the Event of Insufficient Funds. In the event the Board determines that the Trust Fund established under this Act has insufficient funds to allow the full payment of the benefits due a claimant under this Act, the Board is empowered to reduce the benefits payable by a percentage commensurate with the amounts of money in the Trust Fund and anticipated to be paid into the Trust Fund.

Any such reduction in benefits will be paid to claimants at such future time as the Board determines that there are adequate funds in or anticipated to be paid into the Trust Fund, to so allow.

TITLE II - ESTABLISHMENT AND OPERATION OF THE PROGRAM

Sec. 201. OPERATION OF THE PROGRAM.

(a) A claimant seeking benefits under this Act shall initiate a claim by following the procedures established herein and promulgated by the Asbestos Claims Management Board.

(b) A claim shall include the following information: medical data, work history, and notice of any prior recovery for occupational exposure to asbestos.

(c) The initial eligibility decision will be made by a claims specialist in the Office of Workers Compensation based upon the information contained in the claim and the medical determination by the medical panel.

(d) A three-physician medical panel will review the evidence in the claimant's file and make a determination of the nature and exist-

ence of any asbestos-related disease and impairment. The panel will evaluate x-ray readings, tissue samples, and other medical evidence.

(e) Administrative Appeals Process.

(1) A claimant may seek reconsideration by the claims specialist of the determination.

(2) A claimant may then appeal the specialist's decision to an administrative law judge who will have the power to approve or deny the claim or remand it to the claim specialist for reconsideration.

(3) A claimant may then appeal the administrative law judge's decision to the Benefits Review Board of the Department of Labor.

(4) All agency reviewers shall be bound by the diagnostic determination of the medical panel.

(f) A claimant receiving benefits under this Act may seek to have the benefits level recalculated when the claimant's disability has increased by at least 20%.

(g) Any claimant who is denied benefits under this Act will be able to reapply at anytime and will not be subject to any statute of limitation as to such reapplication.

(h) The Board shall establish claim procedures designed to allow claimants or survivors to present claims under this Act unhindered by unnecessary complexity and shall make program personnel available to claimants to assist them in perfecting their claim.

(i) Statute of Limitations. Claimants or their survivors must file a claim under this Act within two years of the passage of this Act or two years from the time they know or should have known of an asbestos-related disability, whichever is longer.

Sec. 202. ASBESTOS CLAIMS COMPENSATION TRUST FUND.

(a) There is established in the Treasury of the United States a trust fund to be known as the Asbestos Claims Compensation Trust Fund ("Trust Fund").

(b) The Secretary of the Treasury shall deposit into the Trust Fund the following amounts—

(1) All amounts paid by eligible defendants.

(2) Interest accrued on the amounts on deposit.

(3) Amounts appropriated by Congress.

(4) Amounts recovered on behalf of the Trust Fund.

(c) There is hereby authorized to be appropriated to the Trust

Fund the amount of \$[].⁷²

(d) The Secretary of the Treasury shall cause to be lent to the Trust Fund the amount of \$[], as an advance against collection from eligible defendants. Any advance of funds to the Trust Fund by the United States shall be repaid to the United States with interest based upon the average cost of funds to the United States during the period the loan is outstanding, as determined by the Secretary of the Treasury.

(e) The Secretary of the Treasury or his or her designee shall be the Managing Trustee of the Trust Fund, and shall administer it under the terms of this Act and the laws of the United States and shall have the usual powers of a trustee.

(f) The Secretary of the Treasury is authorized to pay from monies on deposit in the Trust Fund such amounts to claimants as are determined by operation of this Act and the costs incurred by the Departments of Labor and the Treasury in administering this Act.

(g) The Managing Trustee shall invest such portion of the Trust Fund as is not required to meet current expenditures under this Act in obligations of the United States of such maturities as are suitable to the needs of the Trust Fund.

(h) The Managing Trustee shall report to the Congress annually on the financial condition and results of the operation of the Trust Fund and on its future expected condition and operations.

(i) The Trust Fund shall be subrogated to the rights that any claimants receiving payments under this Act may have to recover in respect of asbestos.

Sec. 203. DETERMINATION OF PAYMENTS BY ASBESTOS DEFENDANTS IN LIEU OF JUDICIALLY IMPOSED LIABILITY.

(a) Any manufacturer, distributor, supplier or user of asbestos-containing materials who has been sued in federal and state courts by at least 1500 plaintiffs alleging injury from occupational exposure to asbestos-containing products manufactured, distributed, supplied or used by that defendant shall be deemed an eligible defendant for purposes of this Act.

(b) The Board shall compile a list of all eligible defendants and shall notify the said defendants of their coverage under this Act.

(c) Eligible defendants shall pay into the Trust Fund, amounts

⁷² This proposal is not conditional upon an appropriation by the United States.

to be set by the Board, which amounts will be in lieu of judicially imposed liability.

(d) The Board shall determine for all eligible defendants, the percentage that each defendant bears to all defendants' liability to all eligible claimants, that is, claimants who are eligible to receive compensation under this Act. The sum of the percentages determined for eligible defendants will therefore total 100%.⁷³

(1) In determining the respective percentages, the Board shall principally take into account for each defendant—

(A) the amount of its asbestos-containing material product sales as a percentage of all asbestos-containing material products sales during the period 1940-1970;

(B) the amount of its asbestos-containing material product sales as a percentage of all asbestos-containing material product sales in the relevant market in which that defendant's products were sold, e.g., insulation material, cements, spray-on products, cloth, during the period 1940-1970;

(2) In addition to the conventional market share determinations, the Board shall also take into account for each defendant—

(A) the results of prior litigation;

(i) In taking into account the results of prior litigation and settlements, the Board shall adjust those results to offset changes in the results, over time, as a consequence of various eligible defendants entering into chapter 11 bankruptcy reorganization proceedings.

(B) settlements; and

(C) the total amounts previously paid out for judgments and settlements.

(3) In addition to conventional market share and litigational market share as set forth in (d)(2), the Board shall also take into account the relative risk which the asbestos contained in the defendants' products posed to workers.

(4) The Board shall have the power to subpoena such records as are relevant to such determinations from whomever has possession or control of such records.

(e) The Board shall determine, and redetermine once per year, the semi-annual amount that each eligible defendant shall pay into the

⁷³ As an alternative to the "percentage method" assessment, see S. 1265, *supra* note 1, which provides for a lump sum assessment, payable in annual installments, and provides that the lump sum is to be determined on the basis of annual payments over 45 years. *Id.* at 61-62. The principal purpose of this determination is to enable an acceleration of payments in the event of the sale of the assessed corporation.

Trust Fund. In determining this payment, the Board shall principally rely upon—

(1) the percentage allocation of the defendant as determined under subsection (d) of this section;

(2) the amount of insurance coverage available to that defendant for liability for occupational exposure to asbestos-containing materials.

(A) In the event that the insurance coverage available to that defendant as per subsection (d) above is insufficient to fund the semi-annual payment set by the Board, then the Board shall inquire further into the defendant's cash flow projections for the forthcoming year.

(B) In determining the amount to be assessed against such a defendant beyond the amount provided by its insurance coverage, the Board shall determine the amount of the cash flow projected for each defendant that ought to be available to that defendant for ordinary and necessary corporate purposes and to allow it to invest in research and development, enlarged capacity, and other endeavors designed to protect and increase the future cash flow of the defendant.

(f) During the first two years of operation of the program, the Board will project a rate of annual payout to claimants of \$275,000,000 and will set the amounts to be paid by eligible defendants based upon that annual payout.

(g) After two years from the effective date of this Act, the Board shall determine the total annual payments by eligible defendants based upon its own calculations.

(h) Amounts paid by eligible defendants into the Trust Fund shall be regarded as payments for liability to claimants occupationally exposed to asbestos manufactured, distributed or supplied by that defendant. Insurers will be obligated to pay to eligible defendants, up to policy limits, amounts that they would have had to pay, had the amounts paid unto the Trust Fund been instead paid to claimants in satisfaction of judgments and by way of settlements.

(i) Insurance companies that have provided coverage to eligible defendants that obligates the insurer to pay for defense costs in addition to the full value of the policy shall be required to pay over to such an insured as reimbursement for the latter's payments into the Trust Fund, an amount approximating what defense costs would have been had it not been for the enactment of this Act, to the limit of the defense-cost provision; if there is no limit, then the maximum amount, including amounts previously paid out by the insurance company for defense costs, will be [250] percent of the face value of the policy.

(j) The liability assigned to an eligible defendant shall not be dischargeable in bankruptcy.⁷⁴

(k) If any part of the payment obligation assigned to an eligible defendant has not been fully paid, then any transferee of assets of the defendant shall be liable for the obligation as the successor to the defendant corporation if the transferee expressly or impliedly agreed to assume the defendant's liabilities or the transaction amounted to a consolidation or merger between the defendant company and the transferee.

(l) Payments made by an eligible defendant into the Trust Fund shall be deemed ordinary and necessary expenses under the Internal Revenue Code incurred by the defendant in carrying out its trade or business and amounts paid by an insurance company directly to the Trust Fund in payment of the liability of the insured or to an eligible defendant in reimbursement of monies paid to the Trust Fund shall constitute losses incurred by the insurer on insurance contracts for all purposes under the Internal Revenue Code.

(m) Trust Funds and other funds of eligible defendants set aside under chapter 11 reorganization proceedings for asbestos-related compensation payments shall be paid into the trust fund set up under section 202 of this Act.⁷⁵

TITLE III - PROCEDURAL ASPECTS OF THE PROGRAM

Sec. 301. JUDICIAL REVIEW.

(a) A petition for judicial review of any assessment arising under section 203 of this Act or any matter related to such determination or a petition for judicial review raising the constitutionality of this Act shall only be brought in a single, three-judge district court of the United States that shall be established in the District Court for the District of Columbia (the "Court"). The Court created herewith is authorized to exercise the powers of a United States District Court Judge in any judicial district with respect to such proceedings. The Court—

(1) may issue rules for the conduct of any proceedings under subsection (a);

⁷⁴ It will be necessary to provide not only for nondischargeability under chapter 11, but in the event of a chapter 7 proceeding, or a liquidation under chapter 11, for an acceleration of the future amount due and for assignment of a priority status to that debt, perhaps by treating the obligation as an administrative expense.

⁷⁵ It will be necessary to coordinate the ongoing claims processing of those defendants in chapter 11 proceedings with the workings of this Act. In this regard, see *In re Asbestos Prods. Liab. Litig.* (No. VI), Order of the Judicial Panel on Multidistrict Litigation, 771 F. Supp. 415, 422 n.9 (J.P.M.L. 1991).

(2) notwithstanding any other provision of law, has original and exclusive jurisdiction over any civil action arising under the operation of section 203 of this Act or any action to construe the constitutionality of any provision or action under this Act;

(3) may stay or enjoin any proceeding in any state court or court of the United States other than the Supreme Court if such action (i) impairs the effective implementation of section 203 of this Act, (ii) is contrary to any provision of section 301(a) of this Act, or (iii) interferes with the execution of any order of the Court;

(4) may appoint and fix the compensation and assign the duties of such special masters and other persons as it considers necessary and proper to conduct hearings, receive evidence and report thereon to the Court, and perform such other acts as the Court may require.

(A) The Secretary of the Treasury is authorized to pay to the special masters and others hired by the Court, the compensation set by the Court, from the Trust Fund established under section 202 of this Act.

(B) The special masters and any others so employed, shall not be deemed to be employees of the United States or any department, agency, or instrumentality thereof.

(b) A petition for judicial review of any other rule-making or regulation-promulgating act under this Act may be filed only in the United States Court of Appeals for the District of Columbia. Any such petition must be brought within sixty days from the date that notice of the final action appears in the Federal Register.

(c) A petition for judicial review of any eligibility or compensation determination may only be brought upon exhaustion of the administrative review remedies specified by this Act and upon such exhaustion may only be brought in a United State District Court in the district where the claimant resides.

(1) Any petition for such review may only be brought within sixty days of final Board action.

(2) In reviewing an appeal, the court shall apply the ordinary standards of review for adjudicatory decisions of administrative agencies. The court shall accept as true an agency's findings of fact if they are supported by substantial evidence in the record and will only independently reconsider the agency's interpretation of law.

Sec. 302. AWARDING OF ATTORNEY FEES.

(a) Attorney fees shall not be payable from amounts awarded to claimants.

(b) Upon determination that a claimant who is represented by

counsel is eligible to receive benefits under this Act, the Board shall award to the claimant's attorney a fee for the attorney's services based upon the amount of time that the attorney reasonable devoted to prepare and present the claim multiplied by a reasonable hourly rate. In determining an hourly rate, the Board shall take into account the nature of the risk, if any, borne by the attorney; the prevailing hourly rate charged by attorneys representing clients before similar administrative agencies; the need for claimants who so desire to have access to attorneys and therefore the requisite financial incentives to attorneys necessary to provide that access; and any exceptional level of competence demonstrated by the attorney.⁷⁶

(c) An attorney for an unsuccessful claimant may petition the Board for a payment for services, and in exceptional circumstances, such as when injury is found but no disability and the bringing of the claim has insulated the claimant from the tolling of the statute of limitation, the Board may approve such a payment.

(d) Attorneys successfully appealing Board determinations administratively or judicially shall be awarded fees by the Board as determined under section 302(b).

(e) Agreements between claimants under this Act and their counsel for the payment of fees are superseded by the determination that the claimant is eligible to receive benefits.

Sec. 303. EXCLUSIVE REMEDY.

(a) Sixty days after the effective date of this Act, all claims against an eligible defendant for injury alleged to have been caused by occupational exposure to asbestos-containing materials shall be determined exclusively under this Act. Thereafter no state or federal court or administrative agency shall have jurisdiction over such a defendant to adjudicate, or to continue to adjudicate against such a defendant,

⁷⁶ A developed body of statutory and case law that could be usefully resorted to as a model for attorney-fee setting is the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1988). Section 928 of the Act provides for the recovery of attorney's fees following the successful prosecution of a claim. *Id.* § 928; *see also* 20 C.F.R. § 702.131 (1991). The method for recovery of attorney's fees and costs for services before a Benefits Review Board is outlined *id.* § 802.202. Under the operation of the Act, each deliberative body before which an attorney provides services on behalf of a claimant, e.g., Department of Labor, Administrative Law Judge or Benefits Review Board, independently determines the worth of the representation provided before it and determines the appropriate fee. *See Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. Unit A Aug. 1981); *Ayers Steamship Co. v. Bryant*, 544 F.2d 812, 814 (5th Cir. 1977); *Kirk v. Newport News Shipbuilding and Dry Dock Co.*, 23 Black Lung Rep. 346 (Benefits Review Bd. 1990). This supplantation of contingent fees with administratively determined hourly rate fees demonstrates the lack of novelty of the attorney fee provision in this proposal.

any claim of liability for injury resulting from occupational exposure to asbestos-containing materials.

(b) The provisions of this section shall apply in any judicial or administrative proceedings notwithstanding any contrary provision of state or federal law.

