

PERSPECTIVES ON ASBESTOS LITIGATION: OVERVIEW AND PREVIEW

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I. INTRODUCTION¹

On January 18, 2008 Southwestern Law School hosted a live symposium entitled *Perspectives on Asbestos Litigation*. The symposium brought together a diverse array of nationally recognized experts, including judges, lawyers, law professors, and social scientists to discuss the many complex and important issues presented by asbestos litigation,² the “mega mass tort.”³ In this issue, we proudly present the articles and essays

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1. Professors Calnan and Stier, who served as co-chairs for the conference, would like to thank all of the participants in the symposium, *Perspectives on Asbestos Litigation*, including Judge Barbara Rothstein; Justice Helen Freedman; Dean Bryant Garth; Professors Ronald Aronovsky, Anita Bernstein, Howard Erichson, James Fischer, Mark Geistfeld, Michael Green, Deborah Hensler, Keith Hylton, Gregory Keating, Francis McGovern, Linda Mullenix, Richard Nagareda, David Owen, Myrna Raeder, Joseph Sanders, Judy Sloan and Neil Vidmar; and distinguished practitioners Mark Behrens and Philip Harley. In addition, we thank the editors of the Southwestern University Law Review, and in particular Editor-in-Chief Adrienne Salerno, for their exemplary efforts in coordinating the conference. We also thank the many administrators at Southwestern Law School who provided invaluable assistance and support for the conference, including Deans Doreen Heyer and Debra Leathers, Dr. Robert Mena, Elizabeth Reinhardt and Douglas Snyder, as well as the faculty advisors to the law review, Professors Michael Frost and Danielle Kie Hart. Finally, we thank Professor James Henderson, who submitted an article to the law review specifically for publication in connection with this symposium issue.

2. Some conference participants engaged in a question and answer session, others delivered oral presentations, still others offered verbal commentary on the presentations, and at the end of the program, all had the opportunity to participate in general discussion.

3. This term was coined by Professor Francis McGovern. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1836-38 (1995).

precipitated by the symposium's stimulating exchange of views.⁴

What follows is an overview and preview of the symposium. Part II describes the background of asbestos litigation, highlighting its particularities as a mass tort. Part III explains the purpose and structure of the conference. Part IV provides brief summaries of the materials included in this issue and the Conclusion appraises the symposium's significance.

II. SITUATING ASBESTOS LITIGATION

The plaintiffs in asbestos litigation allege injuries from exposure to asbestos, a naturally occurring but toxic mineral fiber that is 1,200 times more thin than a human hair.⁵ In the 1960s and 1970s, Dr. Irving Selikoff at Mount Sinai School of Medicine undertook scientific research that revealed associations between asbestos and illness.⁶ Asbestos exposure is the only known cause for two diseases, and they may thus be thought of as "signature" diseases: (1) mesothelioma, a cancer of the lining of the chest or abdomen;⁷ and (2) asbestosis, a debilitating and possibly fatal chronic lung disease caused by inhalation of asbestos fibers.⁸ In addition, researchers generally agree that lung cancer may be caused by asbestos,⁹ but controversy remains as to asbestos's causation of other cancers, such as leukemia and cancers of the bladder, breast, colon and prostate.¹⁰

4. While some presenters prepared papers for this issue, others did not. Some presenters submitted papers that expand on or depart from the ideas included in their oral remarks. One question and answer participant prepared a paper that was not presented or discussed at the conference. A final article was donated by one gracious nonparticipant following the symposium's conclusion.

5. See, e.g., Minnesota Department of Human Health, *Asbestos in Minnesota Homes*, available at <http://www.health.state.mn.us/divs/eh/asbestos/homeowner/asbinhomes.html> ("When disturbed, asbestos breaks down into very small fibers up to 1,200 times thinner than a human hair.").

6. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 6 (RAND Inst. for Civil Justice 2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf.

7. See, e.g., *id.* at xix ("Mesothelioma is a deadly cancer of the lining of the chest or abdomen for which asbestos is the only known cause."); see also *id.* at 12 ("Asbestos is the only demonstrated cause of mesothelioma, although some mesothelioma cases have not been traceable to asbestos exposure.").

8. See, e.g., *id.* at xix ("Asbestosis, a chronic lung disease resulting from inhalation of asbestos fibers, can be debilitating and even fatal."); see also *id.* at 13 ("[A] person diagnosed with asbestosis might be asymptomatic or only mildly impaired.").

9. See, e.g., *id.* at xix ("Lung cancer is the other frequently claimed malignant disease that can be caused by asbestos[.]"); see also *id.* at 13.

10. See, e.g., *id.* at xix ("[M]any other forms of cancer have been related to asbestos exposure, including leukemia, and cancers of the bladder, breast, colon, pancreas, and prostate."); see also *id.* at 13 ("The relationship of these other cancers to asbestos is a subject of

Furthermore, asbestos can cause plaques, thickening, and effusion of the pleura, a membrane that lines the inside of the chest wall and covers the outside of the lungs.¹¹

Several aspects of plaintiffs' injuries differentiate asbestos from various other mass torts. For example, although plaintiffs are capable of proving that asbestos causes certain "signature" diseases, they often have difficulty identifying the source of their asbestos exposure. That task is made more difficult by the startlingly long latency period between asbestos exposure and injury—typically, a 20 to 40 year latency period might elapse between exposure to asbestos and asbestos-related disease.¹² As a result, asbestos litigation is plagued by the omnipresent problem of representation of, and funds for, future plaintiffs.¹³ Moreover, in addition to future plaintiffs, asbestos litigation includes what might be termed "shadow plaintiffs"—those who may have some cognizable injury, such as pleural thickening, but have no current functional impairment and indeed may never have one.

Compared to other mass torts, the number of asbestos plaintiffs is mind-boggling. Perhaps as many as approximately 230,000 asbestos-related deaths will have occurred between 1985 and 2009¹⁴—a figure that is nearly 100 times the number who died in the terrorist attacks in the United

contention . . .").

11. *See, e.g., id.* at xix ("Pleural plaques, pleural thickening, and pleural effusion are abnormalities of the pleura, the membrane that lines the inside of the chest wall and covers the outside of the lung."); *see also id.* at 14 (noting that such problems may be diagnosed by x-ray).

12. *See, e.g., id.* at xix (noting the "long latency period before any symptoms are manifested—about 40 years, according to the Manville Personal Injury Settlement Trust"); *id.* at 15 ("Typically, 20 to 40 years elapse between the first exposure to asbestos and disease manifestation.").

13. *See, e.g., id.* at xvii ("[T]here are growing concerns on all sides that the cost of settling masses of claims filed in recent years will deplete funds needed to compensate claimants whose symptoms have not yet surfaced but who will eventually become seriously ill."); *id.* at 45-47.

14. *See, e.g., id.* at xix (noting that "[l]itigators rely heavily on a study by Nicholson et al. . . . which claimed that 228,795 deaths would occur from 1985 to 2009 as a result of cancer caused by extensive asbestos exposure from 1940 through 1979"); *see also id.* at xx ("We found that Nicholson et al.'s projections are very close to the actual rates observed during those years."). Because asbestos was widely used in industrial settings throughout much of the twentieth century, asbestos plaintiffs are often employees who worked in those industrial settings. *See, e.g., id.* at xxv (noting that from approximately 1973 to 1983, most plaintiffs "were exposed to asbestos in industries such as asbestos mining and manufacturing, shipyards, railroads, and construction," but that since then, "many claims come from workers . . . in other industries, such as textiles, paper, glass, and food and beverage."); *see also id.* at xix (referring to asbestos litigation as "the worst occupational health disaster in U.S. history."). In fact, reports show that millions of American workers were exposed to asbestos. *See, e.g., id.* at xviii ("Millions of American workers have been exposed to asbestos."); *id.* at 11.

States on September 11, 2001.¹⁵ According to RAND, approximately 730,000 persons have brought suit through 2002,¹⁶ and perhaps as many will bring suit in the future.¹⁷ So over a million asbestos claims may actually be filed before asbestos is done, and this mass tort keeps exceeding expectations. Indeed, in recent years, asbestos suit filings have surged.¹⁸

Moreover, the geographic reach of asbestos exposure spanned the entire country, though the numbers of lawsuit filings have fluctuated in different states over the years. In the early years of the litigation, beginning in the 1970s, California, Illinois, New Jersey and Pennsylvania had most of the cases.¹⁹ But in more recent years, most of the cases were filed in Texas, Mississippi, New York, Ohio and West Virginia.²⁰ By comparison, Maryland and Florida have always been important in asbestos litigation.²¹ In addition, there is a sense locally among the bar that Southern California may be in the midst of a surge.

With regard to asbestos litigation defendants, most noteworthy is their number and breadth. In contrast to most mass torts, which usually focus on only a handful of defendants, at least 8,400 entities have been sued in asbestos litigation through 2002.²² Though concentrated in 8 industries, 75 out of 83 industries classified by the U.S. Department of Commerce had at least one entity named as an asbestos litigation defendant.²³

In addition, unlike other mass torts, many asbestos defendants have

15. See, e.g., Phil Hirschhorn, *New York Reduces 9/11 death Toll by 40*, CNN, Oct. 29, 2003, <http://www.cnn.com/2003/US/Northeast/10/29/wtc.deaths/> (noting death toll of 2,752 persons).

16. See, e.g., CARROLL ET AL., *supra* note 6, at xxiv (“Approximately 730,000 people had filed an asbestos claim through 2002.”); see also *id.* at xviii (“Of those exposed to asbestos in the United States, more than 700,000 had brought claims through 2002 and almost as many more are likely to bring claims in the future.”) While the tobacco mass tort litigation also potentially involved many plaintiffs, far more plaintiffs in asbestos have actually brought suit.

17. See, e.g., *id.* at 2.

18. See, e.g., *id.* at xvii (“Within the past few years, there have been sharp and unanticipated increases in the number of asbestos claims filed annually and the number and types of firms named as defendants.”); see also *id.* at xxiv (“[D]efendants who were receiving 10,000 to 20,000 claims per year in the early 1990s were receiving three to five times as many claims per year by the year 2000.”). Most of the increase resulted from persons filing with nonmalignant injury. See *id.* at xxiv. But a rise in mesothelioma claims also occurred. See *id.*

19. See, e.g., *id.* at 61 (from 1970 to 1987, these states had 61% of state-court asbestos claimants).

20. See, e.g., *id.* (from 1998 to 2000, these states had 66% of state-court asbestos filings).

21. See, e.g., *id.* (“Only two states that have been important in the litigation, Maryland and Florida, have had a relatively stable proportion of the filings.”).

22. See *id.* at xxv (“At least 8,400 entities have been named as asbestos defendants through 2002.”). Of course, many defendants could be sued by a single claimant. See *id.* at 3 (“The typical asbestos claimant brings a claim against many defendants.”).

23. See *id.* at xxv.

gone into bankruptcy.²⁴ Indeed, there was a particular surge in bankruptcies after the United States Supreme Court rejected the class settlements in *Amchem*²⁵ and *Ortiz*.²⁶ From 1976 through the 1980s, there were 19 defendant bankruptcies in asbestos.²⁷ Then in the 1990s, 17 bankruptcies occurred.²⁸ But from 2000 to 2004, after *Amchem* and *Ortiz*, 36 defendant bankruptcies occurred.²⁹ As defendants have gone bankrupt, the litigation has expanded to ever-more peripheral defendants, in search of further funds for compensation.³⁰

The parameters and methods of asbestos litigation are also noteworthy. First, the duration is remarkable. No other mass tort has lasted as long as asbestos.³¹ Asbestos litigation has churned forward since the 1970s when manufacturers were found strictly liable to workers injured as a result of exposure to their products.³² And the litigation has included forays into insurance disputes about coverage.³³ Indeed, if or when the era of mass torts ever comes to an end,³⁴ one can readily imagine an asbestos case being

24. See, e.g., *id.* at xx (“The focus of the litigation has shifted . . . increasingly, to bankruptcy courts.”).

25. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997).

26. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see also CARROLL ET AL., *supra* note 6, at 109 (“[Asbestos-related b]ankruptcy is more common today than in the past, with as many new petitions filed in the 2000s as were filed in the previous two decades combined.”).

27. See, e.g., CARROLL ET AL., *supra* note 6, at xxvii.

28. *Id.*

29. *Id.*

30. See, e.g., *id.* at xx (“Corporations that initially were perceived to have little or no exposure to asbestos-related liability now find themselves at the center of the litigation.”); *id.* at xxiii (noting that in the late 1990s, “[bankruptcy-related] stays in litigation . . . drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.”).

31. See *id.* at 21 (“Asbestos litigation is the longest-running mass tort litigation in the United States.”).

32. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973); see also CARROLL ET AL., *supra* note 6, at 1 (“Following [*Borel*], increasing numbers of product liability claims against asbestos manufacturers flowed into the courts.”).

33. See, e.g., Insurance Information Institute, *Asbestos Liability*, <http://www.iii.org/media/hottopics/insurance/asbestos/> (“For the U.S. insurance industry asbestos-related losses could eventually reach as much as \$65 billion, more than the combined total for the September 11 terrorist attacks and Hurricane Andrew.”).

34. Two years ago, *American Lawyer* declared that this time was already here. See Alison Frankel, *It's Over: Tort reformers, business interests, and plaintiffs lawyers themselves have helped kill the mass torts bonanza*, AM. LAWYER (Dec. 1, 2006), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?hubtype=Cover%20Story&id=1165320496651>. One of the authors has disputed this view. See Posting of Byron G. Stier to Mass Tort Litigation Blog, *The End of the Wild West Era of Mass Torts?*, http://lawprofessors.typepad.com/mass_tort_litigation/2006/12/the_end_of_the_.html (Dec. 7, 2006).

called as the last matter on the final mass tort docket.

In addition, the total costs of asbestos litigation are stunning. Total spending topped \$70 billion by the end of 2002, according to RAND.³⁵ Compare that to the recent proposed Vioxx mega-settlement of a relatively mere \$4.85 billion.³⁶ For asbestos litigation, defense transaction costs totalled \$21 billion by 2002 (31% of total spending), while claimants' transaction costs (plaintiff counsel fees and expenses) are \$19 billion (27% of total spending).³⁷ Interestingly, even though plaintiff counsel may have saved cost through routinization, the savings seem not to have been passed on to clients. Plaintiff attorney's fees and expenses were approximately 38% of gross compensation. Claimants' net compensation is \$30 billion (42% of total spending), less than half of societal money spent.³⁸ RAND estimates future costs at \$130 billion to \$195 billion before the end of asbestos litigation.³⁹ Indeed, total spending on asbestos litigation may cost more than the Iraq War was initially expected to cost.⁴⁰

Similarly remarkable are the variety of procedural approaches tried in asbestos litigation. The various approaches in asbestos litigation have followed the various procedural mass tort trends over the decades. For example, in the 1990s, the Eastern District of Texas used class-action statistical sampling, which the Fifth Circuit reversed.⁴¹ Similarly, as mentioned, there have been some attempts to use class actions settlements, which the Supreme Court of the United States reversed, based in part on the difficult problem of adequate representation for future claimants.⁴² But nothing seems to have worked to resolve the asbestos litigation. Unlike other mass torts, there has been no comprehensive settlement,⁴³ though

35. See, e.g., CARROLL ET AL., *supra* note 6, at xxvi, 92.

36. See Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement*, N.Y. TIMES (Nov. 10, 2007), http://www.nytimes.com/2007/11/10/business/10merck.html?_r=1&hp&oref=slogin.

37. See, e.g., CARROLL ET AL., *supra* note 6, at xxvi, 95, 103.

38. See *id.* at xxvi, 104.

39. See *id.* at 106.

40. See Bob Davis, *Bush Economic Aide Says Cost Of Iraq War May Top \$100 Billion*, WALL ST. J., Sept. 16, 2002, at A1 ("President Bush's chief economic adviser estimates that the U.S. may have to spend between \$100 billion and \$200 billion to wage a war in Iraq[.]").

41. See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).

42. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 864 (1999) (rejecting limited fund settlement class under Rule 23(b)(1)(B)); *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 (1997) (rejecting settlement class under Rule 23(b)(3) and noting that "[i]n significant respects, the interests of those within the single class are not aligned. . . . [F]or the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.").

43. See, e.g., CARROLL ET AL., *supra* note 6, at 47 ("Ultimately, the search for a single overarching settlement failed.").

In most mass torts, once the dimensions of claimed injuries are understood, the parties in the

there have been significant group settlements with defendants.⁴⁴ Some group settlements used claims-resolution facilities, such as the Center for Claims Resolution.⁴⁵ In addition, some courts have utilized creative plaintiff-bundle settlement negotiations, raising vexing ethics issues.⁴⁶ As a result, the litigation continues, with various trial-level innovations. Some courts have consolidated cases for trial, sometimes including complex multiphase trial plans and sometimes including hundreds or thousands of claims.⁴⁷ Courts have also used deferred dockets for unimpaired plaintiffs,⁴⁸ as well as expedited dockets that give priority to cancer claims.⁴⁹

litigation (with the courts' assistance) negotiate a settlement that resolves all or most claims, usually using some type of administrative scheme. The profile of asbestos litigation contrasts sharply with this conventional pattern. To date, notwithstanding extensive efforts over time, neither the parties nor the courts have arrived at a comprehensive settlement of asbestos claims.

Id. at xx.

44. *See, e.g., id.* at 46 (“Some corporations that face mass asbestos filings have entered into standing settlement agreements with leading plaintiff attorneys’ firms.”); *id.* at 1 (discussing “settlements of large numbers of cases with leading plaintiff attorney firms” that “typically called for settling hundreds or thousands of cases per year at amounts specified in administrative ‘schedules’ that reflected differences in injury severity and other characteristics deemed to affect the value of cases”).

45. *See, e.g.,* Lawrence Fitzpatrick, *The Center for Claims Resolution*, 53 LAW & CONTEMP. PROBS. 13 (1990).

46. *See, e.g.,* Admin. Order No. 2006-6, Prohib. on “Bundling” Cases (Mich. Aug. 9, 2006), <http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2003-47-080906.pdf>.

47. *See, e.g., In re Eastern & Southern Dists. Asbestos Litig.*, 772 F. Supp. 1380, 1388 (E.D.N.Y. & S.D.N.Y. 1991), *aff’d in part, rev’d in part sub nom. In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831 (2d Cir. 1992); 3M Co. v. Johnson, 895 So.2d 151 (Miss. 2005); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 422 (W. Va. 2002); *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369 (W. Va. 2001); *In re Ethyl Corp.*, 975 S.W.2d 606, 620 (Tex. 1998); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 305 (W. Va. 1996); *ACandS, Inc. v. Godwin*, 667 A.2d 116, 119-20 (Md. 1995); *Abadie v. Metro. Life Ins. Co.*, 784 So. 2d 46, 61 (La. Ct. App. 2001); *Bickham v. Metro. Life Ins. Co.*, 764 So. 2d 345, 346 (La. Ct. App. 2000); *ACandS, Inc. v. Abate*, 710 A.2d 944, 957-58 (Md. Ct. Spec. App. 1998); *In re Asbestos v. Bordelon, Inc.*, 726 So. 2d 926, 935-36 (La. Ct. App. 1998); CARROLL ET AL., *supra* note 6, at xx (noting that “[i]n the past several years, the most significant developments in asbestos case processing have [included] . . . the increased frequency and scale of consolidated trials”); *id.* at xxii (noting that half of asbestos trials between 1993 and 2001 involved six or more plaintiffs, and “[i]n some instances, judges have consolidated hundreds or thousands of asbestos claims for trial”); *id.* at 30-45 (listing consolidated asbestos trials).

48. *See* CARROLL ET AL., *supra* note 6, at xxi (noting that “some courts have established deferred dockets . . . which enable unimpaired asbestos plaintiffs to satisfy statutes of limitations by filing their lawsuits but delay processing and resolving those lawsuits until the plaintiffs’ injuries have progressed further”); *id.* (noting existence of deferred dockets in Illinois, Maryland, Massachusetts, New York, and Washington); *id.* at xx (noting that “[i]n the past several years, the most significant developments in asbestos case processing have [included] . . . the reemergence of deferred dockets as a popular court management tool”); *id.* at 26-28.

49. *See* CARROLL ET AL., *supra* note 6, at xxi (“[S]ome courts have established ‘expedited dockets’ that give priority to cancer claims, placing the claims of those without functional impairments at the back of the queue.”).

The trial patterns and settlement trends within asbestos litigation stand out as well. Over the last decade or so, juries have decided 50 to 250 asbestos cases per year, a high figure which actually marks a reduction from the astounding numbers from prior years.⁵⁰ Because of courts' doubts about the reliability of mass screening procedures used to recruit plaintiffs in silicosis cases,⁵¹ newer asbestos actions will likely face greater difficulty even getting to the courthouse. Of those cases that are filed, most appear ripe for settlement because they present "mature" claims with relatively clear monetary values.⁵² Yet, according to RAND, only 6% of claims on average were settled within one year of filing.⁵³ This apparent anomaly raises some nagging questions. Is the low settlement rate attributable to process scarcity,⁵⁴ or have new defendants (8,400 defendants in total so far)⁵⁵ rejected prior claim values in the hope of convincing juries these figures are outdated and inadequate? During the live symposium, panelist Professor Howard Erichson offered a third possibility, suggesting that defendants' recent repudiation of reverse bifurcation⁵⁶—which determines damage issues first—indicates their belief that liability is not a given, and accordingly, that these claims are not mature enough for mass disposition.

With regard to the fora, cases are spread throughout state courts, and also centralized in the Eastern District of Pennsylvania via the federal MDL statute. Beginning in 1991 with the multidistrict litigation (MDL) transfer of asbestos cases, Judge Charles Wiener managed the cases, and recently, Judge James Giles took over.⁵⁷ Subsequent to the creation of the asbestos

50. See, e.g., CARROLL ET AL., *supra* note 6, at 49-50 (noting 481 plaintiffs' claims tried in 1993); see also *id.* at xxii (noting 526 jury trials between 1993 to 2001, involving 1,570 plaintiffs' claims).

51. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005); see also Lester Brickman, *Disparities Between Asbestos and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 577 (2007); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 290 (2006).

52. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

53. See CARROLL ET AL., *supra* note 6, at 89.

54. See, e.g., Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

55. See CARROLL ET AL., *supra* note 6, at 6.

56. See, e.g., Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 527 (2008) ("On the whole, reverse bifurcation is considerably less popular than it was a decade ago.").

57. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991); see also CARROLL ET AL., *supra* note 6, at 28 (noting that Judge Wiener managed nearly 108,000 asbestos cases between 1991 and 2004, and that of those, over 74,000 were dismissed and 366 were remanded to the transferor court for trial); Peter Geier, *Judge Focuses on Discovery, Not Fraud: Asbestos Defense Lawyers Sought Doctor's Records*, NAT'L L.J., Feb. 5, 2007, at 6 (noting

MDL transferee court, there was a surge of state cases,⁵⁸ and bankruptcy courts and the trusts they spawn became increasingly important.⁵⁹ Indeed, Congress amended the bankruptcy code, adding section 524(g) to facilitate post-bankruptcy trusts and resolve claims.⁶⁰ Under section 524(g), a proposed plan must obtain support from 75% of current asbestos claimants to win court approval.⁶¹ Still, bankruptcy trusts have had their share of problems, including, most glaringly, the gross underestimation of claim values. The Manville Trust paid only 5 cents on the dollar for every claim in 2001, and prospects for future claimants appear even bleaker.⁶² Such problems have led to the creation of “prepackaged bankruptcies” in which the terms of the claimants’ trust are negotiated before defendants file for bankruptcy.⁶³ However, even these novel approaches are not without drawbacks. Indeed, because they replicate the “mass” dynamics of complex tort litigation, prepackaged bankruptcies face challenges similar to settlement class actions, such as providing adequate representation and estimating claim values for large groups of people.⁶⁴

For all of these reasons, many people inside and outside of the court system have sought to restrict, control or expedite asbestos litigation. One suggestion for reform is the creation of a public compensation fund, which has been considered in Congress for a number of years.⁶⁵ Such a fund

Judge James Giles as the “judge overseeing discovery in the 99,000 asbestos cases pending in Philadelphia’s federal court”).

58. See, e.g., CARROLL ET AL., *supra* note 6, at 61.

[A]fter the JPMDL transferred all asbestos cases to Judge Charles Weiner in the Eastern District of Pennsylvania for pretrial processing, many plaintiff attorneys became wary of filing in federal court, knowing that their new cases as well would be transferred to Judge Weiner, whose rulings many plaintiff attorneys perceived as antithetical to their clients’ interests.

Id.

59. See, e.g., *id.* at 66-68.

60. 11 U.S.C. § 524(g) (2008).

61. See CARROLL ET AL., *supra* note 6, at 119.

62. See *id.* at 114; see also *id.* at xxix (“It is certain that many of the asbestos personal injury trusts were established as a result of Chapter 11 bankruptcy reorganizations to pay only a small fraction of the agreed-upon value of plaintiffs’ claims.”).

63. See, e.g., *id.* at xxxii (noting “prepacks” have the potential to shorten bankruptcy process, but that some have been subject to lengthy appeals and criticism as “unfair[] to certain classes of asbestos plaintiffs.”); see also *id.* at 119-21.

64. See, e.g., Andrea K. Walker & Paul Adams, *Asbestos Victims Offered Billions: W.R. Grace Reaches Deal to Settle Suits, Clear Bankruptcy*, BALT. SUN, Apr. 8, 2008, at 1A; *Grace reports 4Q and FY 2007 financial results: Chapter 11 proceedings*, CHEM. BUS., Jan. 30, 2008, 2008 WLNR 3372451 (“The trial to determine the Bankruptcy Court’s estimate of Grace’s pending and future asbestos personal injury liability began in Jan 2008 and is currently scheduled for approximately 20 trial days ending in mid-May 2008.”).

65. See, e.g., CARROLL ET AL., *supra* note 6, at xxxi (discussing demise of bill in the 108th Congress, and reconsideration of compensation fund in the 109th Congress).

would be administrative, and funded by defendants and insurers.⁶⁶ In addition, there have been proposals put forth by the ABA and various states to limit compensation to those with specified medical criteria and exclude unimpaired plaintiffs.⁶⁷ Moreover, there is legislation limiting successor liability, as in Pennsylvania and Texas.⁶⁸ And some states, such as Mississippi, Ohio and Texas have enacted stricter venue rules.⁶⁹

III. PURPOSE AND STRUCTURE OF THE SYMPOSIUM

Because of its unique history and characteristics, asbestos litigation has been studied and debated perhaps more than any other mass tort. Over the years, it has been addressed by a wide variety of commentators in a number of contexts, including many conferences.⁷⁰ While these past efforts have had much to offer, they have not provided the final word on the subject. Instead, they have magnified the need for a more collegial, comprehensive and coordinated approach.

One problem with the current debate is its partisan and pugnacious tone. Supporters and detractors of asbestos litigation often square off in barbed, vitriolic attacks.⁷¹ As a result, the exchanges sometimes do more to

66. See, e.g., *id.* (“[T]he administrative compensation strategy requires that defendant corporations and insurers agree on a funding formula.”).

67. See *id.* at xxx (“[T]his proposal would prevent people who are not currently functionally impaired and do not have an asbestos-related cancer from claiming compensation in the tort liability system, even if they have clinical evidence of asbestos exposure—e.g., pleural scarring[.]”); see also Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 492 (2006) (discussing efforts in Florida, Georgia, Kansas, Ohio, South Carolina and Texas).

68. See, e.g., CARROLL ET AL., *supra* note 6, at xxxii.

69. See, e.g., MISS. CODE ANN., § 11-11-3 (LexisNexis 2008); OHIO R. CIV. P. 3(B)(11) (2008).

In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, [venue is proper] only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.

Id.; *Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1097 (Miss. 2004) (stating that “[j]oinder of parties . . . is not unlimited”); CARROLL ET AL., *supra* note 6, at xxxii (“Venue rules that had invited large-scale consolidations in Mississippi were amended, and stricter venue rules were also adopted in Texas.”).

70. Recent academic conferences include: *Asbestos: Anatomy of a Mass Tort*, 12 CONN. INS. L.J. 1 (2005); *Asbestos Litigation & Tort Law: Trends, Ethics & Solutions*, 31 PEPP. L. REV. 1 (2003); *Asbestos Litigation Symposium*, 44 S. TEX. L. REV. 839 (2003). Several private organizations, including ABA-ALI and Mealy’s, regularly hold practical conferences on asbestos issues.

71. See Charles Silver, *A Rejoinder to Lester Brickman: On the Theory Class’s Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765 (2005) (recounting and continuing a particularly rancorous exchange between Professor Charles Silver, an asbestos litigation proponent, and

challenge the credibility of the participants than to illuminate the issues they seek to address.

A second, and related, problem is the one-dimensional focus of the arguments. No matter the field or specialty, members from each group tend to eschew “outsiders” and rely on their own. Tort theorists and practitioners often remain in separate worlds, tackling the same problems from different, dissociated perspectives. Not surprisingly, tort scholars mainly concentrate on tort issues like culpability, causation and damages, while civil procedure experts stick to process questions like class certification, settlement and trial. Though legal thinkers may consult the social scientists, a truly meaningful dialogue has yet to develop between them.

Finally, both of these problems are exacerbated by a lack of systemization. While past conferences have assembled many notable experts and considered many important issues, they have mostly ignored the big picture, preferring instead to tackle individual topics in a rather *ad hoc* fashion.

To avoid these pitfalls, this conference seeks to place asbestos litigation in perspective. Specifically, it provides a more comprehensive cross-section of perspectives, organizes them into logical categories, groups these viewpoints into dialectic or symbiotic pairings, all with the purpose of fostering a multilateral conversation that may lead to reconciliation, synthesis and solutions.

This scheme prefigured the live symposium’s structure, which moved in four subdivisions from the most narrow and practical issues to the most broad and theoretical. The first subdivision, entitled *Practical and Judicial Perspectives*, offered observations by attorneys, a judge and a law professor on issues arising from within the trenches of asbestos litigation. In the second subdivision, denominated *Moral and Economic Perspectives*, the focus shifted from practice to tort theory, by providing the viewpoints of various tort scholars on the fairness and efficiency of asbestos actions. Next, the third subdivision, called *Private and Public Law Perspectives*, incorporated the insights of procedure experts who explored the boundaries of tort, the role of complex litigation, and the viability of non-tort alternatives. Finally, in the fourth subdivision, entitled *Social and Cultural Perspectives*, the live symposium culminated with legal and social science thinkers considering the litigation’s broader ramifications for the civil justice system and beyond.

Professor Lester Brickman, an asbestos litigation opponent); Lester Brickman, *A Rejoinder to the Rejoinder to On the Theory Class’s Theories of Asbestos Litigation*, 32 PEPP. L. REV. 781 (2005) (extending the exchange further still).

IV. SUMMARY OF CONTRIBUTIONS

The entries in this symposium consist of presentation abstracts and original articles. They are organized according to the conceptual framework used at the live conference, as noted above.

A. *Judicial and Practical Perspectives*

In their paper, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, defense counsel Mark Behrens of Shook, Hardy & Bacon LLP and William Anderson of Crowell & Moring critique the “any exposure” theory of causation, under which any exposure to asbestos is considered to substantially contribute to ultimate disease.⁷² Messrs. Behrens and Anderson highlight the decisions of numerous courts in recent years that have excluded such “any exposure” testimony as inadmissible under *Daubert*⁷³ or *Frye*⁷⁴ or as not sufficient under state tort law of causation. Messrs. Behrens and Anderson suggest that rejecting the “any exposure” theory and applying standard tort causation requirements would assist in gaining control over asbestos litigation.

For twenty years, Justice Helen Freedman managed asbestos litigation for New York City as a Justice of the New York Supreme Court.⁷⁵ Drawing upon her vast judicial experience, Justice Freedman addresses a variety of timely issues arising in asbestos litigation in her paper, *Selected Ethical Issues in Asbestos Litigation*.⁷⁶ Initially, Justice Freedman discusses the grounds for, and results of, adopting a deferred docket for unimpaired claimants. Next, Justice Freedman relates the difficulties attending aggregation of asbestos claims, whether by class or consolidation. Justice Freedman then addresses the ethical problems in crafting aggregate settlements in mass torts, particularly with regard to complying with Model Rule of Professional Responsibility 1.8(g) and its analogs, and with restrictions on right to practice. Subsequently, Justice Freedman focuses on questionable advertising practices involving compensation for case referrals, and in particular discusses her approach to managing cases

72. Mark A. Behrens & William L. Anderson, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479 (2008).

73. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

74. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

75. Freedman, *supra* note 56.

76. *Id.*

obtained through mass screenings by doctors paid by plaintiff's counsel.⁷⁷ Justice Freedman also comments on judicial supervision of attorneys' fees, decreasing use of reverse bifurcation, prohibition of punitive damages and utilization of special masters.

A different viewpoint on the causation issue is offered by Professor Michael Green, holder of the Bess and Walter Williams Distinguished Chair at Wake Forest University School of Law and Co-Reporter to the *Restatement (Third) of Torts* projects on apportionment of liability and general principles. In his paper, *Second Thoughts About Apportionment in Asbestos Litigation*,⁷⁸ Professor Green reassesses the traditional apportionment approach of first determining causation and then assessing comparative responsibility among defendants who caused an indivisible harm. Breaking from the official *Restatement* position he helped to promulgate, Professor Green suggests that, except where plaintiffs are exposed to non-trivial doses of the defendant's asbestos, risk contribution may provide a superior basis for apportioning damages among defendants, given the difficulties and transaction costs of establishing traditional causation among defendants.

During the panel, noted counsel Phil Harley of Kazan, McClain, Abrams, Lyons, Greenwood & Harley PLC presented the perspective of plaintiffs' counsel.⁷⁹ Mr. Harley noted that defendants may have been able to avoid much of the burdens of asbestos litigation had they undertaken settlement in the litigation's early stages. In addition, according to Mr. Harley, defendants' later decisions to settle suits for nuisance values further lead to the filing of greater claims, some of which may have been fraudulent. In addition, Mr. Harley noted that plaintiffs' counsel filed numerous additional cases because of judicial findings that the statutes of limitations were triggered for injured, but unimpaired plaintiffs. Furthermore, Mr. Harley discussed the creation and payment approaches of asbestos bankruptcies, which in some instances have let companies flourish by shedding liability, despite not being adequately funded to compensate those injured. Finally, Mr. Harley discussed recent legislative attempts to resolve asbestos litigation, arguing that such approaches imperiled the bedrock right of individual trial.

77. *Id.*; see also *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

78. Michael D. Green, *Second Thoughts About Apportionment in Asbestos Litigation*, 37 SW. U. L. REV. 531 (2008).

79. Phil Harley, *Judicial and Practical Perspectives: Transcript of Phil Harley*, 37 SW. U. L. REV. 553 (2008).

B. Moral and Economic Perspectives

As noted earlier, one of the most perplexing problems in asbestos litigation is how to fairly and efficiently manage the thousands of claims presently filling the court dockets. An increasingly popular solution is to prioritize claims according to the severity of the claimants' injuries, expediting the worst cases and deferring or even precluding the others. Not surprisingly, this issue has captured the interest of both moralists and economists, including two of our contributors, who take dramatically different positions on the subject.⁸⁰

Moralist David Owen, the Carolina Distinguished Professor of Law at the University of South Carolina School of Law, opposes the "worst-goes-first" approach. In his article *Against Priority*,⁸¹ Professor Owen argues that this approach is both illogical and immoral: illogical in that it assures compensation to people who likely will not live long enough to benefit from the proceeds and denies relief to those who could use it to treat or prevent their illnesses and immoral because it denies the liberal entitlement of all citizens to equal respect for each component of their individual bundle of interests. Thus, he advocates an alternative scheme that would give even unimpaired claimants a timely opportunity to recover their fair, proportionate share of limited asbestos funds without losing their rights to future recovery for more severe injuries.

Unlike Professor Owen, economist Keith Hylton, Professor and Paul J. Liacos Scholar at Boston University School of Law, views priority schemes as appropriate means of achieving optimal deterrence. However, as he proposes in his paper *Asbestos and Mass Torts with Fraudulent Victims*,⁸² he would not discriminate on the basis of the severity of the plaintiff's injury, but rather on the culpability of the defendant's conduct and the authenticity of the plaintiff's claim. Thus, where the defendant's conduct is malicious or reckless, he argues, courts should not require that it pay damages for more questionable claims, but transfer some proceeds to the state and sanction the attorneys who bundle such claims together for bargaining leverage. Conversely, where the offending conduct is merely

80. At the live conference, economist and moralist Mark Geistfeld, the Crystal Eastman Professor of Law at New York University School of Law, presented a talk entitled *Tort Law and Bankruptcy*, in which he favorably likened these priority systems to bankruptcy schemes and traditional tort doctrines, which ensure that the most worthy claimants are adequately compensated out of limited funds. Mark Geistfeld, *Tort Law and Bankruptcy* 74 (Jan. 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

81. David G. Owen, *Against Priority*, 37 SW. U. L. REV. 557 (2008).

82. Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575 (2008).

negligent, he concludes that courts should examine questionable claims more carefully to avoid overcompensation of plaintiffs and overdeterrence of defendants.

Another issue plaguing asbestos litigation is how to assign responsibility to the expanding class of new defendants whose contributions to the asbestos crisis are far more remote and tenuous than the now defunct companies which originally made and sold this substance to the public. The next paper in this Part, offered by James Henderson, Jr., the Frank B. Ingersoll Professor of Law at Cornell Law School, takes up this question. In *Sellers of Safe Products Should Not Be Required to Rescue Users From Risks Presented by Other, More Dangerous Products*,⁸³ Henderson contends that it is both unfair and inefficient to require sellers of safe, nondefective products—like pumps and valves—to provide warnings that asbestos might be added by others during post-sale use, except when either the seller actively and substantially participates in this integration or the integration creates significant joint risks of harm.

The last paper in this Part explores a middle ground between these opposing views and provides a final assessment of asbestos litigation in the pantheon of tort theory. In *The Heroic Enterprise of the Asbestos Cases*,⁸⁴ Professor Gregory Keating, the William T. Dalessi Professor of Law and Philosophy and Associate Dean for Academic Affairs at the University of Southern California's Gould School of Law, describes asbestos litigation as a heroic effort to construct an unusual, product-specific kind of industry-wide enterprise liability—a scheme whose ideals of fairness, loss prevention and loss spreading are well-suited to the systemic risks of the ongoing activity of asbestos production. Nevertheless, he argues that asbestos-related risk is so expansive and enduring that it ultimately proves too much for that theory to handle. Thus, while courts deserve praise for attempting to address the asbestos crisis, Professor Keating concludes that a legislatively enacted administrative scheme appears to offer the best hope for resolving this unique and perplexing problem.

83. James A. Henderson, Jr., *Sellers of Safe Products Should Not Be Required to Rescue Users from Risks Presented by Other, More Dangerous Products*, 37 SW. U. L. REV. 595 (2008).

84. Gregory C. Keating, *The Heroic Enterprise of the Asbestos Cases*, 37 SW. U. L. REV. 623 (2008).

C. *Public and Private Law Perspectives*⁸⁵

During his presentation at the symposium, Professor Richard Nagareda, holder of the Tarkington Chair in Teaching Excellence at Vanderbilt University School of Law, provided a menu of the ways to resolve asbestos litigation, ranging from most private to most public: private individual litigation and settlement; class actions; bankruptcy; aggregate settlement; and overtly public methods such as public compensation funds.⁸⁶ Professor Nagareda argued that examining the array of existing institutional alternatives aids in determining the levels of judicial supervision and due process required for each setting. In addition, Professor Nagareda offered suggestions from his recent book, *Mass Torts in a World of Settlement*, such as tying contingency fees to the equitable treatment of future claimants.⁸⁷

Our next speaker, Professor Howard Erichson, Professor of Law at Fordham Law School, suggested that the lessons of asbestos might not be generalizable to other mass torts.⁸⁸ Asbestos might warrant comprehensive resolution, because of the large number of plaintiffs and defendants, long latency periods, product-identification problems and inadequate defendant

85. Besides the three presenters who contributed papers or transcripts for this subdivision, the live symposium panel included two other distinguished participants. Professor Linda Mullenix, holder of the Morris & Rita Atlas Chair in Advocacy at the University of Texas School of Law, described empirical studies that would aid in assessing future asbestos litigation procedure. One study might examine what happened to asbestos claims after the objectors succeeded in stopping the proposed settlements in *Amchem*, 521 U.S. 591 (1997), and *Ortiz*, 527 U.S. 815 (1999). Claimants may have done better in the rejected settlements than they were able to achieve otherwise. Another study might compare the results obtained by tort claimants who did not go into the 9/11 fund with those who did. Such studies might inquire into the satisfaction of claimants under the alternatives, as well as their motivations. In addition, Professor Mullenix noted that our evaluation of such studies and techniques of mass tort resolution generally, would be improved by an overarching theory of justice. Linda Mullenix, *Public and Private Law Perspectives: Transcript of Professor Linda Mullenix* 170 (Jan. 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

Professor Francis McGovern, Professor of Law at Duke Law School, proposed in his presentation a hybrid tort-administration approach arising in the asbestos bankruptcy trusts that both evaluates claims and dispenses funds. Professor McGovern noted the effect of this model on the decision of plaintiffs' counsel to invest in this litigation as well as the interaction of multiple trusts for plaintiffs' recovery. Francis McGovern, *Public and Private Law Perspectives: Transcript of Professor Francis McGovern*, 158 (Jan 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

86. Richard A. Nagareda, *Public and Private Law Perspectives: Transcript of Professor Richard Nagareda*, 37 SW. U. L. REV. 659 (2008).

87. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, xx (2007) ("The key move consists of tying the contingency fees to be garnered from the representation of present claimants to the real contingency about which we care: whether the peace arrangement ends up affording equitable treatment to future claimants.").

88. Howard Erichson, *Public and Private Law Perspectives: Transcript of Professor Howard Erichson*, 37 SW. U. L. REV. 665 (2008).

assets. But most mass tort litigation does not have all these difficulties, Professor Erichson noted, and so seeking settlements with the option of litigation may be preferable. Many mass torts may utilize pretrial management via multidistrict litigation procedure and federal-state coordination. But in the absence of a certified class action, with its attendant safeguards for absent class members, Professor Erichson argued that the plaintiffs in mass torts should generally themselves retain the decision to sue or settle, because their claims belong to them. In his comments, Professor Erichson discussed not only asbestos, but also fenphen and Vioxx. In closing, Professor Erichson noted that mass tort litigation, whether through adjudication or settlement, may be able to achieve greater justice than ordinary tort litigation, given the latter's problems of economically implausible claims and inconsistency of result for similarly situated claimants.

D. Social and Cultural Perspectives

In the next subdivision in this issue, the focus expands still further, encompassing the broader social and cultural ramifications of asbestos litigation.⁸⁹ One development with such rippling effects is the enactment of state medical criteria statutes, which require nonmalignant claimants to provide proof of a current physical harm and malignant claimants to adduce substantial evidence that their injuries are caused by asbestos and not other factors like smoking. In *Medical Criteria Acts: State Statutory Attempts to Control Asbestos Litigation*,⁹⁰ Joseph Sanders, the A.A. White Professor of Law at the University of Houston Law Center, takes a closer look at this unique legislative solution. While generally in accord with the nonmalignant harm provisions, Professor Sanders acknowledges that the malignant harm provisions invade the traditional role of juries to resolve questions of causation in adversarial proceedings. Nevertheless, he concludes that such statutory developments ultimately represent a "step in the right direction" of moving asbestos litigation from a model of

89. Besides the three presenters who contributed papers or transcripts for this subdivision, the live symposium panel included another distinguished participant, Professor Deborah Hensler, the Judge John W. Ford Professor of Dispute Resolution and Associate Dean for Graduate Studies at Stanford Law School, and co-author of the exhaustive 2005 RAND Report on asbestos. Professor Hensler used her unique, global perspective to inform and enrich the discussion and offer incisive assessments and prognoses for this landmark phase in American jurisprudence. Deborah Hensler, *Social and Cultural Perspectives: Transcript of Professor Deborah Hensler* 220 (Jan. 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

90. Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 SW. U. L. REV. 671 (2008).

individualized justice to one of inquisitorial justice.

Other developments are more controversial. To some onlookers, the spate of change wrought by asbestos litigation is largely attributable to greedy and unscrupulous attorneys seeking preferential accommodations for their uninjured clients. However, our next author, Professor Anita Bernstein, the Anita and Stuart Subotnick Professor of Law at Brooklyn Law School, sees things differently. In *Asbestos Achievements*,⁹¹ Professor Bernstein seeks to “set the record straighter than it now stands”⁹² by praising the entrepreneurial lawyering of the plaintiff’s bar in these cases. After surveying the procedural victories, causation innovations and apportionment achievements of the asbestos era, Bernstein celebrates the victors as zealous and determined trailblazers who tore down conservative rules and presumptions and gave new hope and greater opportunity to the next generation of asbestos claimants and to the future victims of the next great social scourge, whatever it may be.

The last entry in this section—the transcript of a presentation given by legal scholar and social scientist, Professor Neil Vidmar, the Russell M. Robinson II Professor of Law at Duke Law School—places all of these developments in context.⁹³ Building upon the findings of the RAND report, and drawing from research conducted alone and together with his collaborators, Professor Valerie Hans and Mirya Holman, Professor Vidmar offers a comprehensive profile of asbestos cases up to 2006, covering such things as the number and places of jury trials, the types of illness claims, the number and types of plaintiffs and defendants, win rates, median awards, and trends in apportionment of responsibility. Not content with the raw statistics, Professor Vidmar turns to juror interviews to explore juror attitudes towards asbestos. He finds that although past jurors initially harbored skepticism toward asbestos claims, their views could be changed by good lawyering and compelling evidence of defendant misconduct.

E. *Keynote Address*

Many of the themes of the symposium, and all of its collegial spirit, were captured in the keynote address delivered by Judge Barbara Rothstein, a jurist with a wealth of experience in mass tort litigation, including

91. Anita Bernstein, *Asbestos Achievements*, 37 SW. U. L. REV. 691 (2008).

92. *Id.* at 694.

93. Neil Vidmar, *Social and Cultural Perspectives: Transcript of Professor Neil Vidmar*, 37 SW. U. L. REV. 717 (2008).

asbestos cases, and the current Director of the Federal Judicial Center.⁹⁴ Introduced by Southwestern's Professor Judy Sloan, whose remarks are included,⁹⁵ Judge Rothstein traced the asbestos crisis to a "perfect storm"⁹⁶ of factors, ranging from the infancy of the MDL system and the dispersal of asbestos cases throughout the federal and state courts, to judicial inexperience with case management and complicated scientific issues, to the increasing numbers of defendants and plaintiffs, to the egregious guilt of some defendants and the expanding array of plaintiffs' asbestos-related injuries, and finally to some troubling misconduct by plaintiff and defense attorneys. While Judge Rothstein characterizes previous attempts at resolving this crisis as a "colossal failure,"⁹⁷ she concludes on an upbeat note by concentrating on the lessons it has to offer judges in complex cases, showing them how to be better case administrators, better discovery coordinators, better assessors of scientific evidence, and better watchdogs against fraud inside and outside the courtroom.

V. CONCLUSION

Whether we like it or not, asbestos has forever changed the way we think about and respond to mass and toxic torts. Indeed, asbestos' effects have been so rapid, extensive and dramatic, it is difficult to take them all in, let alone to know what they mean or what we should do about them. One thing, however, is clear. We will not get any clarity by burying our heads in the past.

This conference offers a fresh perspective. On one level, it suggests a new methodology for analyzing the gargantuan and complex problems of mass torts. As prior experience proves, these problems will not be resolved by the isolated machinations of a few biased, contentious and unorganized advocates. Rather, as the present experiment reveals, they can and must be addressed by the collaborative and collegial efforts of many experts sharing information, exchanging views and working synergistically toward a single common goal: the good of the civil justice system.

On another level, this conference foreshadows a new, or at least a newly reinvigorated, paradigm of analysis. Despite the diversity of

94. Judge Barbra Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733 (2008).

95. Judy Sloan, *Perspectives on Asbestos Litigation: Introduction to the Keynote Address*, 37 SW. U. L. REV. 731 (2008).

96. Rothstein, *supra* note 94, at 735-39.

97. *Id.* at 734.

perspectives on display, one perspective has proven transcendent: justice. Lawyers and judges, moralists and economists, torts and civil procedure experts, legal theorists and social scientists alike all seem to cite justice as the ultimate standard of evaluation. While they may not share a common conception of justice, a growing consensus of thinkers recognizes that current notions of justice are hopelessly insufficient to the task at hand. Thus, if we are to promote justice in asbestos litigation, we cannot rely upon ready-made concepts like corrective or distributive justice, which apply respectively to purely private or purely public modes of human interaction. Rather, we must begin to develop new justice concepts to help us judge the public effects of large-scale private conduct. Although the current conference cannot fulfill this mission, it certainly raises the right questions and moves us in the right direction. It is now up to other collaborators to carry us forward.