

HEINONLINE

Citation: 39 Bus. Law. 209 1983-1984



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu May 1 03:03:03 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0007-6899](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0007-6899)

Recent Developments in Tort Law Reform

Edited by Joseph F. Johnston, Jr.

This is an edited transcript of a program presented at the spring meeting of the Corporation, Banking and Business Law Section of the ABA in Boston on April 30, 1983. The program was sponsored by the Ad Hoc Committee on Tort Law Reform, William F. Kennedy, chairman. The program chairman was Joseph F. Johnston, Jr., of Drinker Biddle & Reath, Washington, D.C. The panelists were: William F. Kennedy, chairman of the Ad Hoc Committee on Tort Law Reform and counsel to Hunton & Williams, Washington, D.C.; John C. Curtin, Jr., of Bingham, Dana & Gould, Boston; Kenneth R. Feinberg, of Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C.; George C. Freeman, Jr., of Hunton & Williams, Richmond, Virginia; L. Gordon Harriss, of Davis Polk & Wardwell, New York; Stephen B. Middlebrook, vice president and general counsel of Aetna Life and Casualty Company of Hartford, Connecticut; Richard A. Schmalz, vice president and general counsel of Hartford Insurance Company, Hartford, Connecticut; Anne M. Whittemore, of McGuire, Woods & Battle, Richmond, Virginia.

Participants in this program represent business organizations and associations in litigation and in legislative matters involving issues discussed in the various presentations.

INTRODUCTION

William F. Kennedy: This program has been organized by Joe Johnston on behalf of the Ad Hoc Committee on Tort Law Reform. It is the first public session of the committee. I suppose you might ask why there is another committee in the area of tort law reform and why another committee in the American Bar Association when we already have a proliferation of efforts both within and outside the Association. You may ask, further, what does the committee expect to do and what do we hope to accomplish?

Let me say first that we hope to be continually involved in the dialogue within the Association. We were unsuccessfully involved, as you may know, in New Orleans last February on the general issue of the Association's position on product liability. But we view that as the first step in a long series of internal discussions within the Association, within the profession, and between the profession and the rest of the society as to the workability and fairness of the

present system of compensating victims for physical injuries attributable to industrial activity.

In these opening remarks, I want to suggest an agenda for our committee, an agenda which I hope will differentiate it from the other efforts going on within and outside the Association.

Before I turn to that agenda, let me state some premises, as we see them, about the present system of enforcing legal responsibility for physical injury. Over the last two decades, we have witnessed a judicially created revolution in tort law doctrine—a revolution which has moved the law from what is commonly called a system of corrective justice, a system based on remedy for fault, to a system just this side of automatic liability for product-related injuries: a system, if you will, of distributive justice. Because the revolution has been made by judges, rather than by legislators, case by case rather than by general rule, it has proceeded without analysis of costs, without analysis of capacity to bear costs, and without analysis of the effects on resource allocation, innovation, and competitiveness. It has even proceeded without analysis of the capacity of the conventional tort litigation system to bear the burden of generalized victim compensation imposed on it by new substantive doctrines. The asbestos situation may be just the first of several instances where the problem of resolving claims becomes unmanageable within the classical system of product liability and tort litigation.

Departures from a fault basis of liability are not necessarily wrong. Almost all of us, for example, would concede that the doctrine of strict liability for manufacturing defects makes good social and legal/administrative sense. The question is a more refined one: where departures are made from a fault basis of liability, what is the framework within which the departure should be made? More particularly, leaving aside the question of strict liability for manufacturing defects, which most of us would concede as proper, should departures be made selectively rather than across the whole spectrum of products manufactured and distributed in this country? Should departures be made within a framework which establishes a claims payment mechanism outside the tort litigation system, and which establishes controls on transaction costs and on recovery for noneconomic loss? Should departures be made only where there is assurance of financial capacity and financial responsibility to respond to claims—that is, only in a context where adequate and reliable liability coverage is broadly available on a basis which is equitable to both insured and insurer? Finally, and perhaps most fundamentally, should departures be made prospectively by legislatures, which can address these problems and resolve them on a general basis, rather than by courts retroactively changing the rules, case by case?

There is a growing perception in the Congress and among the general public that the current tort litigation system is seriously flawed. If the object is to provide compensation to victims, there ought to be a less erratic, less expensive, and more expeditious way to deliver that compensation. If the object is to internalize cost, making each enterprise bear responsibility for the harm it

imposes on members of the public, then rigorous adherence to traditional concepts of causation is called for. If the object is deterrence of conduct creating unreasonable risks of physical injury, then one cannot justify relaxing concepts either of fault or of causation.

The present system is proving, in one degree or another, unworkable as a way of dealing with mass torts. The chapter 11 filings by several of the asbestos manufacturers may be a watershed. Asbestos-related claims are the clearest and most dramatic example but there are other mass tort situations: Agent Orange, DES, Dalkon Shield, and heaven knows what else may be coming along. In these mass tort situations, there are problems of both equity and manageability. The present system is also perceived in many quarters as inadequate to deal with potential claims arising out of exposure to toxic substances and hazardous wastes. And some of us would make the point that it is wasteful and inefficient in dealing with large accidents in commercial aviation.

The toxic tort situation is especially difficult because you have major uncertainties as to the state of scientific knowledge, long delays between exposure and manifestation, multiple causation or arguable causation of the same injury, and different states of knowledge at legally relevant points of time.

All these considerations present, among other things, frustrating problems of interpreting insurance coverage provisions, designed in earlier times from much simpler situations. Moreover, as Dick Schmalz has shown,¹ it is highly questionable whether one can develop, even prospectively, a workable system of insurance coverage for toxic torts without substantial reordering of the underlying liability rules.

There are other gross deficiencies in the system. The level of transaction costs—the costs of investigation, claim handling, fees for defense counsel, fees for plaintiffs' attorneys—is a continuing embarrassment. A system in which the accident victim receives less than half the insurance payment dollar is, to put it mildly, hard to defend. Next, the time required for resolution of claims is inordinately long and unjust for persons with meritorious claims. The system becomes even more indefensible when one considers the wide disparity in treatment of comparable cases—a disparity inevitable under the present tort litigation system.

Congressional recognition of these concerns is evident in pending proposals for federal legislation on asbestos, on the general subject of product liability, and on accidents in commercial aviation. It is evident also in the section 301 study mandated by the Congress under the Superfund legislation.²

These observations bring me back to the committee and its future efforts. The committee has been established by the section leadership on the premise that business lawyers both in law firms and in corporate law departments have a

1. Schmalz, *Superfunds and Tort Law Reforms—Are They Insurable?* 38 *Bus. Law.* 175 (1982).

2. Superfund Section 301(e) Study Group, Senate Comm. on Environment and Public Works, 97th Cong., 2d. Sess., *Injuries and Damages from Hazardous Waste—Analysis and Improvement of Legal Remedies* (Comm. Print 1982) (two volumes).

perspective on tort law reform which should be considered both within and outside the American Bar Association. I am not at all proposing that this is the exclusive or necessarily the automatically correct perspective, but I would propose the more modest proposition that it is a relevant perspective and one which should be weighed and considered both within the profession and outside.

The committee focus will be on pending proposals for federal legislation or for uniform state legislation and on reasonable alternatives to those proposals initially in five areas: asbestos; toxic substances and hazardous wastes; the general issue of product liability; accidents in domestic commercial aviation; and punitive damages for mass torts. At some later stage, the committee may elect to address the problem of coverage for uninsurable risks arising out of work on federal government contracts. More particularly, the committee focus will be on the conceptual underpinning for these proposals, on the basic policy choices that are presented thereby and by reasonable alternatives to those proposals.

This in turn leads to an agenda for the committee which, I suggest, is differentiated to a significant extent from other efforts directed to tort law, to dispute resolution, and to the reform of both. A fundamental issue in any consideration of the system of compensating victims of physical injury is to what extent the cost should be borne by the victim or perhaps through generally available social insurance programs, or should be internalized and imposed on the activity which gives rise to the injury. What costs should be internalized and what costs should be borne generally is one of the initial questions posed by any systematic look at the present system of liability and compensation.

That issue leads to the premises and procedures for establishing causation. I hope it will be conceded that if the causal link is not clear, you don't accomplish any objective of fairness or deterrence or economic efficiency by imposing costs on an activity which by hypothesis is not responsible for the harm. In some areas there are fundamental uncertainties in the present state of knowledge as to the causal link between exposure and injury. In others the causal link is relatively clear. There is typically not a causation problem, for instance, in an aviation accident. On the other hand, in some cases involving toxic substances, this issue of causation is absolutely fundamental.

What should be the procedures for determining causation where there are uncertainties of scientific knowledge? What is the principled basis for addressing causation issues? What is the role of generalized determinations of causation, of presumptions, and the like?

Next, we will be looking at what kinds of lines can be drawn between activities which should be subject to fault-based liability and activities which should be subject to no-fault liability. And in the no-fault context, what kinds of claims payment mechanisms can be designed for no-fault systems, particularly mechanisms outside the tort litigation system. We should be studying, for example, the experience in the black lung compensation program and what lessons can be derived from that. We should be looking at what limits might be imposed on types of compensable noneconomic loss in no-fault systems, what

the reasonable limits should be, whether there should be controls on transaction costs, and what kinds of controls.

A fundamental issue is how to design fair and workable financial responsibility mechanisms. One of the premises of the Price-Anderson legislation, for example, going back to the middle fifties, was to establish a system of mandated financial responsibility. What lessons can be drawn from that experience, and how do you design such a system that is reasonably protective, both of the insured and of the insurer, remembering that the whole economy has a vital stake in the financial viability of both elements of industry?

In the area of transaction costs, it seems to me that the committee should revisit the logic of the so-called American rule on legal costs. I'm not at all suggesting that we go to a pure English rule. I don't think that's either acceptable or workable in this country. But the contingent fee was not on the tablets of the law that came down from Mt. Sinai; and the question is, isn't there a reasonable alternate to that system? There are proposals, for example, looking toward a modified American rule or a modified English rule: some compromise between the two under which the successful plaintiff would receive a separate award of counsel fees but that would include down-side risks for the filing or prosecution of groundless claims. There would be controls on harrasing and dilatory tactics in the course of litigation, along the lines of those in the pending amendments to the Federal Rules of Civil Procedure proposed by the Advisory Committee on the Federal Rules,³ and mandated settlement offers with down-side risks for people who either made unreasonable offers or unreasonably rejected fair offers.

The whole question of treatment of litigation costs is intimately related to the issue of punitive damages. Some of us are persuaded that awards of punitive damages are made in many cases to compensate the plaintiff for the contingent fee. But shouldn't there be a revisiting of the issue of punitive damages, looking at such fundamental questions as disengagement of the punitive deterrence process from the process of determining liability and measure of damages on the compensatory claim? Shouldn't we look at the problem of multiple punitive awards in the mass case, substituting perhaps a single award to be applied to a public purpose? Should we go further than that and substitute for the present system of punitive damages a system of civil penalties, perhaps with incentives for private enforcement of those penalties?

Finally, the committee will be looking at some fundamental process issues. It was interesting to note the dialogue within the committee on product liability appointed by President Harrell of this Association some months ago. There concerns were expressed on one side of the table about judicial lawmaking without resources available to the judiciary to evaluate the consequences of such lawmaking, the economic effects, the cost-benefit trade-offs, the manageability of the new rules within the conventional system, and the like. Conversely, there were concerns and understandable concerns expressed on the other side of the

3. 97 F.R.D. 165 (1983).

table about the ability of the current federal legislative process to deal in any clear and effective and rational way with complex technical problems. All of us, in observing this process, have seen cases not just of trade-offs or horse trading, which can be expected, but cases of deliberate avoidance of fundamental issues and examples that question professional capability to deal with the technicalities of fundamental issues.

This is a large agenda for the committee, and we're not going to come up with any major solutions next week. We do hope that an effort directed to these issues—an effort in conjunction with other elements of the Association and with other disciplines outside the profession, an effort which will involve both research and analysis—will make a contribution over the next ten years to resolution of issues which are fundamental to our profession and to the legal system.

ASBESTOS

Chapter 11 "Solution" to the Tort Litigation System

L. Gordon Harriss: Ken Feinberg and I were asked to speak on two alternate solutions to the asbestos tort system as it exists today. I'm going to be directing my remarks to the chapter 11 solution as it exists. It's not really a solution, since quite obviously the constraints of filing for reorganization under the Bankruptcy Code are immense. It is an alternative, however, to the tort litigation system. And I believe that the crisis facing asbestos today may well be repeated in the future with respect to other products, among them DES, benzene, and formaldehyde.

The basic problem with asbestos has to do with the latent nature of the conditions or diseases that arise from it. In very shortened form, various conditions can arise from "prolonged" exposure to "high" levels of asbestos fiber. Neither of those terms can be quantified, and science is only learning now what duration periods and levels of exposure are required to manifest asbestos conditions or diseases. In any event, it is clear that there is a prolonged latency period. The period between exposure to asbestos fiber and the manifestation of an asbestos-related disease can be up to forty years.

Another significant aspect of asbestos is that the list of occupations identified as involving some risk from exposure to asbestos fiber has been expanded. Quite early on, it was recognized that miners and those working with raw asbestos fiber face some hazard. It wasn't until decades later, however, that the scientific community identified those working with manufactured products containing asbestos as being at risk.

The development of the number of lawsuits involving asbestos-related health claims rose dramatically in the 1970s. With respect to Manville, around 1976 there may have been thirty cases. By 1980, there were 5,000 cases with 9,000 plaintiffs; by the time that Manville filed for chapter 11 in August of 1982, there were more than 11,000 cases with more than 15,500 plaintiffs. This trend in asbestos lawsuits is expected to continue for the next twenty-five years, well

into the next century, with the exact number of prospective asbestos health claimants undetermined but well up in the tens of thousands.

In this whole period from the time when Manville first started encountering these suits to the date on which it filed for chapter 11, with almost 16,000 plaintiffs and thousands more to come in the future, only 3,500 cases had been disposed of by settlement. There were during this period a hundred trials with the results split fairly evenly between verdicts for the plaintiff and for Manville. However, the tort system is clearly incapable of handling the prospective volume of asbestos tort litigation.

The aspects of chapter 11 of the Bankruptcy Code which make a filing for reorganization an alternative to the tort litigation system are threefold. The first aspect of chapter 11 which makes it an alternative to the tort system is section 362(a) of the Code,⁴ which is an automatic stay of all litigation against the debtor. Essentially, as of the filing date, all the lawsuits against Manville have been stayed by operation of law. While under the Code a plaintiff in any underlying suit can seek to have the stay lifted by the Bankruptcy Court pursuant to section 362(d),⁵ the legislative history of 362(a), as well as the precedents under the prior Bankruptcy Act and its rules, make it very plain that the purpose of this automatic stay of litigation is to protect the debtor and halt such litigation.

A second aspect of the Bankruptcy Code that presents an alternative to the tort litigation system is the definition of what a claim is and who a creditor is within the meaning of the Code. This was a significant change that Congress enacted in the Bankruptcy Reform Act in 1978. As defined under the Bankruptcy Code, any person who has a claim against the debtor is a creditor. A claim is defined as the right to payment, whether the claim is fixed or contingent, liquidated or unliquidated, matured or unmatured, among other things.⁶ It is the position of Manville that all persons who have been exposed to Manville asbestos fiber prior to the filing of the reorganization have contingent, unliquidated claims against the estate that can be dealt with in a reorganization proceeding. This issue has not yet been litigated in the Manville proceeding. In the UNR reorganization proceeding in Chicago, however, Judge Hart recently rendered a decision in which he determined that claim within the meaning of the Bankruptcy Code does not include future claimants of the type who will manifest asbestos disease in ten or fifteen years.⁷ How that legal question will ultimately be resolved is obviously an important question for the chapter 11 solution to the tort system.

Finally, of the substantive provisions of the Code which make it an alternative to the tort litigation system, section 502(c) of the Code mandates that the Bankruptcy Court "shall" estimate that amount of the claims if individual litigation or determination of claims would unduly delay the closing of the

4. 11 U.S.C.A. § 362(a) (West 1979 & Supp. 1983).

5. 11 U.S.C.A. § 362(d) (West 1979).

6. 11 U.S.C.A. § 101(4) (West 1979).

7. *In re UNR Industries, Inc.*, 11 Prod. Safety & Liab. Rep. (BNA) 340 (1983).

reorganization proceeding.⁸ Clearly, the individual adjudication of 15,000 or more cases before a bankruptcy judge is not a very happy prospect. The alternative under section 502(c) allows the bankruptcy judge an opportunity to estimate. This is not necessarily a full jury trial proceeding but it does permit the bankruptcy court to use alternative methods to put a value on the claims for asbestos-related disease.

The manner in which these provisions of the Code can be used, again, is not yet determined. In the Manville proceeding, Manville filed several months ago a defendant class action pursuant to rule 23(b)(1)(B) of the Federal Rules of Civil Procedure, against a class of all persons who were exposed to Manville fiber prior to the filing of the chapter 11 proceeding. The relief requested is for the bankruptcy court to estimate the total aggregate liability to the class of persons who were exposed to Manville fiber and who were likely in the future to manifest asbestos disease, and to establish that amount for purposes of allowance in the reorganization proceeding. This procedural vehicle would permit the bankruptcy court to adjudicate in one lump sum the amount that may be owing, without any individual determination as to which particular plaintiff may or may not get any particular amount. In any case, it is our view that under this proceeding the total liability of Manville will be determined, whereas who will get what will be the subject of other proceedings down the road, not necessarily in the bankruptcy court and not involving Manville.

One practical aspect of chapter 11 proceedings, in addition to the Code provisions, is that there is an ingrained ethic in reorganization proceedings to try to negotiate a workable plan. The prospect of trying to do that on 15,000 to 35,000 individual cases is difficult to imagine. In a reorganization proceeding, where you do have organized committees representing identified constituencies, this structure, the procedural aspect of the proceeding, and the force of the history of bankruptcy court precedents favor negotiating a plan that is acceptable to all constituencies, as an alternative to litigation. This is certainly an alternative that is being tried. Perhaps it may some time turn out to be the real chapter 11 solution to the tort system.

LEGISLATIVE OPTIONS

Kenneth R. Feinberg: There are really five options open to the asbestos industry. First, do nothing; accept the status quo. Either the company has adequate insurance or does not confront that much litigation exposure; accordingly, leave the system alone and, over a period of the next five to ten years, the claims will recede and the company will weather the storm. This view—leave the system alone—is a position that is *not* shared by a dozen companies which have formed a group in Washington to secure federal legislation.

The second alternative is the Kasten bill,⁹ the product liability reform legislation. For the most part, such legislation really doesn't help the asbestos

8. 11 U.S.C.A. § 502(c) (West 1979).

9. S. 44, 98th Cong., 1st Sess. (1983).

industry. That is not to say that the industry does not favor the legislation; it does. But when you confront 17,000 claims, with 500 more each month, the problem of transactional costs and the history of the litigation, in terms of evidence of fault and responsibility, minimize the value of the Kasten bill.

A third alternative is a chapter 11 filing. I assure you that the asbestos industry, particularly the Manville codefendants, watches with great interest the Manville saga in the bankruptcy court, to see whether or not that is a viable option.

The fourth alternative is the voluntary resolution of claims. Let's get all the litigating parties in a room together and see if the insurers, the insureds, and the plaintiffs can work out a voluntary settlement of claims. That is an ongoing effort which shows signs of some hope of success.

The final option is federal legislation. Such legislation takes two forms. One is to amend the bankruptcy law to place everyone in the same litigation posture as Manville. Such legislative proposals would stay the litigation involving codefendants until resolution of the Manville bankruptcy. It is politically unrealistic to think that such a course will succeed; but, nevertheless, it is an option that must be pursued.

Second is the concept of federal legislation designed to deal specifically with the problem of asbestos compensation. There are currently two legislative vehicles. The first is Congressman George Miller's bill,¹⁰ which would establish an independent *federal* mechanism similar to black lung—although I'm doing the congressman a disservice, perhaps, because he would object to my comparison of his bill as similar to black lung. His bill creates a new federal mechanism, an overlay to existing state workers' compensation programs. The second alternative, quite different, is the bill we've drafted for the asbestos industry, which would create a no-fault administrative alternative to the tort system to pay off anticipated claims and would rely on *state* determinations of claims.

Let's focus for a moment on these two bills. They both deal with a few fundamental issues which are relevant not only to your evaluation of the asbestos problem, but, perhaps, to your evaluation of other toxic torts and how we might develop a no-fault alternative to tort in other areas.

First, both bills create an administrative no-fault alternative to tort. If you're a claimant, make your claim. If you suffer from an asbestos-related disease, you'll receive compensation. There is no tort litigation; instead, an administrative alternative is established.

Second, both bills deal with the critical problem of causation. (This is less an issue in cases involving claims of asbestosis and mesothelioma, which do not really raise causation problems.) The two bills deal with causation quite differently. The Miller proposal relies on presumptions; it loads the dice by developing statutory presumptions for asbestosis, mesothelioma, and lung cancer. This poses a problem for industry, which justifiably is concerned that such presumptions, if not narrowly drafted, could result in too many unjustifiable

10. H.R. 3175, 98th Cong., 1st Sess. (1983).

claims. The industry is also concerned that, even if the presumptions can be drafted initially in a neutral way, the black lung precedent stands as evidence that Congress will tinker with these presumptions until you have a pension system and not a true administrative claim mechanism.

The asbestos industry proposal is somewhat better, although it too raises concerns. This solution is to buck the causation issue to state workers' compensation agencies. Permit the workers' compensation system to decide the occupational asbestos claim. True, there's no guarantee that the workers' compensation system will not simply rubber-stamp the claim; but at least you're decentralizing the system. There are fifty workers' compensation systems, and a forceful argument can be made that such agencies are where these cases truly belong. The question of causation is resolved in the traditional forum without the use of federal presumptions.

The third issue is the possibility of a generic occupational disease bill that creates a mechanism for compensating other occupationally related illnesses in lieu of tort. Here, there is a political question. The asbestos industry initially proposed a generic bill. But we quickly discovered that other industries were not that enthusiastic about a general occupational disease bill. Accordingly, both the Miller bill and the industry bill deal only with asbestos. (However, there is a triggering mechanism in the Miller bill that would expand the bill's provisions to encompass other occupational diseases.)

The fourth issue, which I have already referred to, is the nature of the delivery mechanism. The Miller bill creates a new federal program structurally similar to black lung; it replaces and federalizes state workers' compensation. It would provide a federal claims mechanism to decide the cases. The asbestos industry bill, however, relies on existing state workers' compensation as the delivery mechanism to evaluate claims.

The fifth issue is a politically volatile one: who funds the claim mechanism? Who pays for the asbestos claims? This gets us to the very provocative issue of who should be deemed a "responsible party" in the asbestos controversy. The Miller bill says that there are two responsible parties: the manufacturer of asbestos and the employer. The government pays nothing; the manufacturer and the employer may look to their insurers for payment of their proportionate share. The asbestos industry bill says that the manufacturer will pay a *supplement* in addition to whatever the employer pays under state workers' compensation. The manufacturer will pay fifty percent of the supplement, with fifty percent being paid by the federal government. Since payment of any amount by the federal government is highly speculative, the manufacturer could end up paying 100% of the supplemental payment (in addition to workers' compensation payments by the employer). The manufacturer may also look to his product liability insurer to make the supplemental payment, if, indeed, it has sufficient product liability insurance.

The next issue is how much do you pay a claimant? How do you buy out of the tort system? Here the asbestos industry bill looks to what the claimant receives now, net, in his pocket. Whatever the claimant receives in litigation

today, the legislation will pay, while saving everybody litigation transactional costs. In other words, the asbestos industry suggests a lump sum payment of \$30,000, net, because that is what a successful asbestos claimant receives today in litigation. Organized labor questions this, explaining that such a figure is simply an average of what the *successful* and *unsuccessful* claimant receives. If you factor in only what the *successful* claimant receives, they maintain that the figure is closer to \$70,000. The bickering goes on. The Miller bill doesn't even set a figure. Instead, it creates a compensation formula which may yield substantially more than the asbestos industry can afford.

These two bills are available for anybody to examine. The Miller bill has been introduced as H.R. 3175, with hearings to be held in June. Congressman Miller is hopeful of processing such legislation. Senators Hatch, Nichols, and Kennedy are all interested in processing some variation of the Miller bill.

There are several concluding points that should be made. First, what are the implications of asbestos legislative alternatives for other toxic torts? I suggest to you that examining the asbestos legislative initiative is of some utility in determining whether similar legislative alternatives could deal with other hazardous products. Many of the issues are the same.

For example, do you have an *occupational* problem or an *environmental* problem? Asbestos is overwhelmingly an occupational problem, a work place exposure problem. So, in seeking solutions, you can look to mechanisms like workers' compensation and can argue that causation is somewhat less of a problem if you're talking about work place exposure, where the worker is dealing every day with a toxic substance. When you talk about environmental exposure, however, you confront a much more serious problem, not only as to the nature of the delivery system (workers' compensation is not readily available), but also because of the much more difficult causation problems. There are so many potential causal links giving rise to the disease.

The second issue, when you go beyond asbestos, is whether you have a *retrospective* problem or a *prospective* problem. Asbestos is a retrospective, historical problem. The cases, for the most part, arise out of exposures from 1935 to 1952. If you confront a historical problem, and you're trying to determine how much a person should receive and who should pay, you at least have some benchmark that you can look to: a company's actual litigation experience. If, on the other hand, you're looking at a prospective dilemma—the concern that in the next five years you'll confront 5,000 new cases—and if you have little or no tort litigation experience to rely on, one may begin to look at the contribution apportionment problem in terms of market share. This can, of course, pose a problem; but at least there is some precedent for the market share concept found in the Superfund legislation.

The third issue is the problem of voluntariness. Do you want to create a mandatory contribution system or some sort of voluntary mechanism? I am convinced that no matter what the substance or disease, if you're developing an exclusive no-fault alternative to tort, it must be mandatory. The problems of competition and adequate funding compel such a mandatory system.

The fourth issue is, who is going to pay? Should the tobacco industry be a payor? Should the government contribute? One has to decide who should be deemed a responsible party and how the payment formula should work.

Fifth, no matter what the disease and no matter what the substance, will everyone agree that the proposed system constitutes an exclusive alternative to tort? Here again I think the answer is yes. It makes very little sense, intellectually or structurally, to create a new cause of action on top of the existing tort system, as is proposed in various bills that have been introduced in Congress. Not only is it suspect intellectually, but I suggest that it constitutes one sure way to bankrupt the system by simply adding one new layer of transactional costs on top of the existing tort system.

In evaluating whether one should endorse an administrative no-fault system to tort, regardless of the disease, there are really two questions that industry has to ask itself. First, how much of a problem is posed by the existing tort system? If an individual company is trying to decide whether it wants to support an administrative alternative to tort, what is the nature of the company's current and anticipated tort exposure? Can it live with the existing system? There are asbestos companies, for example, that don't want to support alternative federal legislation because they either have the necessary insurance coverage or don't have the litigation exposure, so they're prepared to continue to live within the existing system.

The second question is: even if the tort exposure is not great, for whatever reason, if the Congress is determined to move forward with some type of generic occupational or environmental compensation legislation, can you afford to ignore that political reality and simply say that you disagree with the legislation, that you can live with the existing tort system, and urge the Congress to vote no? Is there not an obligation to offer some fallback position, some suggested alternative to the existing panoply of bills just around the corner?

PRODUCT LIABILITY LEGISLATION

Stephen B. Middlebrook: The issues that Bill Kennedy has laid out for you are at least in part addressed by Senate bill 44.¹¹ And some of the options that Ken Feinberg discussed and that manufacturers of asbestos products have faced were the very same range of options, with the possible exception of bankruptcy, that product manufacturers have faced across the board and that have led to the independent legislative approach to product liability tort reform.

Indeed, as we go through all the subjects on the agenda today, the biggest tort reform legislative game in town is clearly Senate bill 44 or, as it has come to be known, the Kasten bill. Last fall, I had the pleasure of appearing before the committee along with Sheila Birnbaum, a nationally recognized product liability tort expert, to describe in some detail what was then a committee draft of the Federal Product Liability Act. My purpose today is to try and explain to you what has happened to that bill since last fall and where it might be going.

11. S. 44, 98th Cong., 1st Sess. (1983).

Perhaps the easiest way to do that is in four parts: (1) highly condensed review of what the bill does; (2) a relatively quick tour through the process by which the ABA came to reiterate its 1981 opposition to federal legislation on product liability; (3) a report on where the bill now stands; and (4) a close look at a key aspect of the bill likely to stir controversy—sections 9, 10, and 11 of the bill, which deal with work place accidents and the concept of equitable apportionment or the “empty chair defense.” As we go through a very condensed review of S. 44, we will not be touching very much on the rationale; therefore, I would commend to those of you who do not have it, the Senate conference report that came out last year on Senate bill 2631.¹² It is an unusually good report, not only because it gives the rationale of the bill, which is still relevant, but also because it provides an excellent, quick summary of modern product liability law in this country.

THE KASTEN BILL

The principal purpose of the bill, as I understand it, is to set forth a uniform national standard that can guide courts in assessing liability against manufacturers and sellers with respect to harm suffered as the result of product usage. Proponents of the bill argue that this uniformity can only be accomplished through federal legislation. Why? Because efforts at enacting a uniform product liability law at the state level have failed, and because the common law in this area is widely divergent and thus promotes great uncertainty in the construction and design of products and in the warranties and warnings that should accompany those products in the marketplace.

To achieve its purpose, the bill adopts several major principles. It first preempts all existing common and state law in the area of product liability lawsuits. It does so, however, not by creating a federal agency, nor by assigning jurisdiction to the federal courts, but rather by setting forth in one place a uniform set of standards and then leaving it to the state courts to interpret those standards in the context of specific suits. When I say it preempts all state law, I refer, of course, to matters within the coverage of the bill. The bill is not designed to touch on every issue that might come up in a product liability context, but its coverage is very broad and to the extent that coverage exists, state law is in fact preempted.

Second, the bill seeks to divide the world of product liability actions into four parts. With respect to two of those parts, the bill in effect decrees that the rule of strict liability shall apply; the other two are to be guided by the rules of negligence. In each case, the claimant must prove by a preponderance of evidence that an unreasonably dangerous aspect of the product was the proximate cause of the harm complained of. The use of collateral estoppel to establish facts is virtually denied to both plaintiff and defendant except in cases involving mass accidents.

12. S. Rep. No. 670, 97th Cong., 2d Sess. (1982).

The strict liability doctrine applies to products that deviate in a material way from their design specifications and performance standards. It also applies to cases involving products that fail in a material way to conform to express warranties that the manufacturer has used to cover them. Why strict liability in those cases? Because departures from the standard are pretty easy to determine through objective standards that can be readily determined.

The negligence standard is invoked for cases involving defect in design or failure to warn as to unreasonably dangerous aspects of use. Why not strict liability? Because here, unlike the first two instances, there really is no objective measure for determining if defects exist. Therefore, standards of responsibility need to be established. As you might expect, the invocation of a negligence standard for defects of design and failure to warn requires a good deal more statutory language than does invocation of strict liability theory for construction defects or breaches of warranty. These details are discussed at great length in the Senate conference report.

Third, the bill draws a distinction between manufacturers of products and those who sell them. No longer would the liabilities of those two parties be coterminous as they appear to be today in several jurisdictions. In order to make product sellers liable, as well as manufacturers, it must be shown that the seller had some kind of an active role to play in the chain of events that led to claimant harm. The only exception to that rule is that if the manufacturer cannot be served or is in effect judgment-proof, then the seller's liability is equated to that of the manufacturer as established under the bill.

Principle number four of the bill is that the doctrine of comparative responsibility will apply to product liability actions. This is modified by notions of joint liability where individual parties appear to be judgment-proof and is further modified with respect to work place accidents, which I'll be discussing later; but, essentially, the so-called pure doctrine of comparative responsibility applies so that manufacturers can look to the comparative contributions of others in determining the extent to which they will be exclusively or only partly responsible for harm suffered by a claimant.

Related to the doctrine of pure comparative responsibility is the bill's endorsement of the "empty chair" defense. Simply put, if the manufacturer can show that the harm caused to the claimant was at least partly due to product misuse by parties other than the manufacturer and the claimant and other than parties to the specific litigation, then the court may order a proportionate reduction in the recovery in order to reflect the negligent contribution by the missing party. Hence, the empty chair defense.

Principle number five is the establishment of a period certain, beyond which no product liability actions can be brought regardless of the applicable statute of limitations. The present draft of the bill determines that period to be "more than 25 years from the date of delivery of the product to its first purchaser of lessee." Those terms refer to the actual user rather than persons who are in the business of selling or leasing products and it is known as a "statute of repose." It is limited in several other ways. It applies only to capital goods and contains

exceptions if there is fraud in the picture, or if there is a cumulative effect caused by prolonged exposure, or if there has been an absence of manifestation of harm until after the twenty-five-year period has expired. These are considerable erosions to the doctrine, but it is a statute of repose nonetheless.

Principle number six of the bill is to establish rules under which punitive damages may be granted in product liability actions and to establish procedures for claiming those types of awards. The standard for such damages is reckless disregard, defined to mean a "conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." Juries are given specific standards to determine if the criteria for punitive damage awards have been met by the plaintiff; the judge is then given a separate set of criteria to determine what the actual award should be.

The last so-called principle of the bill, in this simple overview, is that subsequent remedial measures cannot be introduced to show negligence, except for the specific purpose of impeaching witnesses who have testified that those subsequent measures were not feasible at the time of design.

That's the sum and substance of the bill. Now let me turn to a brief history as to what's happened between last fall and now.

ABA POSITION

As most of you know, a special ABA committee was set up last fall to consider whether the ABA's position in opposition to federal product liability bills should be reversed or left alone. The committee was headed up by Bob McKay and had, as one of its seven members, Bill Kennedy. The committee made several decisions, but for now I will consider only the product liability part of it. By a five-to-two vote, the committee ultimately recommended that the ABA continue to oppose the enactment of broad federal legislation "that would codify the tort laws of the fifty states as they relate to product liability." There was a specific reference to Senate bill 2631, which was the predecessor of this year's Kasten bill, as falling within the range of that opposition.

At the ABA's mid-winter meeting, the proposal was put before the House of Delegates and was adopted by a vote of 185 to 113, thus reiterating or reconstituting the position taken two years before by the ABA and continuing the organization's public opposition to federal product liability legislation. With this history, one can quite readily conclude that the door has been closed for the foreseeable future on any further ABA revisiting of the product liability issue. It is, however, quite interesting to note that in a poll taken towards the end of 1982, forty-nine percent of a sample of the ABA membership preferred a federal product liability statute, forty-three percent opposed it, and some eight percent are undecided. Moreover, of those lawyers in the poll who felt that the issue was serious to them, the vote in favor of federal law increased to sixty-two percent.

It might be worthwhile to spend just a minute or two on the major pro and con arguments that led to the McKay committee position, which is now the ABA position. For convenience, I'll use the term "traditionalist" when I refer to the view of the people who opposed federal legislation and the term "federalist" for the people who supported it, with no adverse connotations intended, of course, by either term.

The leading argument for the traditionalists was that a new bill would only produce a whole new set of terms that would need a whole new set of interpretations. And that would lead to more rather than less litigation. The federalists didn't contest the notion that new law breeds the need for new interpretations. They did argue, though, that this was true with any new statute and that, over time, the evolution of decisional outcomes pointed toward a single statute would necessarily produce more uniform, more stable, and more predictable law than the fluid, amorphous state of product liability law we know today. The federalists also pointed to the value of a legal process that allows for a free interplay between case law development and legislation: the latter applies needed correctives to decisional aberrations, the former interprets and implements legislative policies.

Another argument of the federalists has been and still is that product liability necessarily relates to interstate commerce, a matter traditionally best left to Congress rather than to individual states or to common law. Indeed, in every major commercial state, products that are manufactured within that state are more often sold and used in other states than within that state itself. (This is not a very surprising statistic. The only two states in the country that use more than fifty percent of their goods within their own boundaries are Montana and Hawaii.) The traditionalists acknowledge the data, but they argue that the same logic could apply to other areas of the law such as private contracts and automobile tort and those have traditionally and effectively, they argue, been left to the state legislatures.

There are many other arguments, but those are the fundamental philosophical debates that come up whenever the subject is addressed. And obviously the federalist approach is what underlies S. 44.

STATUS REPORT

There have been two rounds of hearings on the Senate bill. Several legal organizations, including, of course, the ABA, have testified. At the first round of hearings on April 6, 1983, there was spirited dialogue on the apparent discrepancy in the House of Delegates vote and the poll that I referred to a bit earlier. Ernie Sevier, speaking on behalf of the ABA, pointed out that the poll represented only a very modest sample of the entire ABA, and was possibly skewed toward younger lawyers and law student representatives (who are well known for their federalist mentality!). Senator Kasten, however, seemed to conclude that the ABA could not take a uniform stand on this bill, but rather would have to concede that different positions were being taken by those who were trial

lawyers and those who were not. He concluded that the trial lawyers apparently had a disproportionate representation in the House of Delegates—a point vigorously denied by Mr. Sevier. The senator also asked whether it was consistent to oppose federal law on the grounds that it interfered with the free play of the common law, while at the same time espousing a state legislative approach to product liability. The answer to that was unclear.

The second set of hearings concluded on April 28, 1983. Of particular interest is the testimony of two judges on opposite sides of the issue. From Texas, Jack Colt of the Texas Supreme Court raised the now-familiar specter of destroying common law and disrupting the concept of federalism. Against that testimony, Judge Warren Egington of the Connecticut Federal District Court cited some personal experiences in his own court where the complex choice of law questions that were involved in product liability cases had been so unclear to the parties under the state of the current law that intelligent settlement of those cases had been virtually impossible.

COMPARATIVE RESPONSIBILITY

Let me say a word or two about work place accidents. In our discussion last fall, we pointed out that S. 2631, the predecessor to S. 44, did away with the employer's right, and that of its insurers, to subrogate to claims of its workers against manufacturers in product liability suits. In turn, however, manufacturers (and therefore their insurers) could offset from their liability to a claimant not only the workers' compensation benefits payable to that claimant, but also the employer's comparative share, if any, of the product liability. This is simply an application of the comparative responsibility doctrine we've already discussed.

Abrogation of employer subrogation is, I think, a fair price to pay for preserving the separateness of the no-fault workers' compensation system and the fault-based product liability tort system. It also saves transaction costs and reduces burdens on the courts. The more troublesome part of S. 2631, and now S. 44, is the manufacturer's access to a comparative responsibility theory in a work place accident setting. Its application will expose innocent employee plaintiffs to reductions in recovery where there has been comparative employer fault, a result that will be hard to explain in Congress, given the widespread belief that employer fault is simply not a relevant consideration in work place accident cases.

I'll give some illustrations to show how this works. To correct the problem, some of the bill's proponents are now arguing that there should be no reduction in a claimant's award for fault attributable to an employer. It's enough when an employee sues a manufacturer to have his or her award reduced by the workers' compensation benefit that is otherwise payable. Employer conduct would be still relevant in determining whether the defendant manufacturer's action was the proximate cause of the injury, however. If employer activity, employer negligence, or any kind of employer conduct broke the chain of causation, then the

defendant manufacturer would still be off the hook. (The McKay committee approved, in essence, this overall approach to handling work place accidents, but it was rejected at the mid-winter meeting.)

Let me illustrate how these changes would work in practice by running through three very simple examples. In each, I'm going to assume that the value of the recovery (i.e., the value of the total damage recovery) is \$100,000.

Case 1. The total value of past and future workers' compensation benefits is \$25,000. The manufacturer is sixty percent responsible for the injury and the employer is forty percent responsible. Under the Kasten bill, as it now stands, the manufacturer would pay \$60,000, the employer would pay or be charged for its \$25,000 workers' compensation liability, and the total recovery would be \$85,000. So by virtue of the application of the Kasten bill's comparative responsibility and empty chair defense principles, something that is worth \$100,000 in loss reduces to \$85,000: \$25,000 for the workers' compensation plan and the rest to the manufacturer's share of tort responsibility. Under the change that I have been addressing, and I think this is consistent with the McKay recommendation, the employer would still pay \$25,000 because that's the amount of the compensation by definition. The manufacturer, however, would pay the remaining \$75,000. The jury would only look to plaintiff/employee fault vs. manufacturer fault and therefore find, under our facts, that the manufacturer was 100% responsible. The contribution to the loss by the employer would become irrelevant and inadmissible. And so the judgment of \$100,000 would then be reduced only by the workers' compensation benefits (\$25,000) and the employee comes out whole.

Case 2. The total value of past and future workers' compensation benefits is now \$60,000. Let's assume that the manufacturer is eighty percent responsible and the employer twenty percent responsible. Under the Kasten bill, the employer would pay \$60,000 to the plaintiff/employee, and the manufacturer would pay \$40,000—the *lesser* of its comparative fault responsibility (\$80,000) or the amount left over after payment of the workers compensation claim (\$100,000 less \$60,000). So in that case the plaintiff comes out whole at \$100,000 and under the proposed modifications, the same methodology applies and the same result would take place. In this situation, the workers' compensation benefit has been high enough to allow for complete net recovery.

Case 3. The total value of the workers' compensation is \$40,000. The manufacturer is fifty percent responsible, the employer twenty percent responsible, and the plaintiff thirty percent responsible. Under the Kasten bill, the employer would pay \$40,000 of compensation benefits. The manufacturer would pay \$30,000, computed by taking fifty percent of an amount equal to total damages less compensation (i.e., fifty percent of [\$100,000 less \$40,000]). The plaintiff would bear \$30,000 for his own share of the loss. The total recovery is \$70,000, which would appear to be a fair result because, in this case, the plaintiff has been responsible for thirty percent of the loss.

Under the changes that have been proposed, there would be the same result, \$70,000, but with a different methodology. The employer still pays \$40,000 of

workers' compensation benefits. The manufacturer still pays \$30,000, but employer liability doesn't get into the picture. The manufacturer is charged for seventy percent of the damage and is still entitled to deduct the compensation benefits (i.e., [seventy percent of \$100,000] less \$40,000). Why does the manufacturer pay only seventy percent? Because the plaintiff has been responsible for thirty percent of the damage and the doctrine of comparative responsibility would still apply to all parties to the litigation. The workers' compensation scheme is not disrupted under such an arrangement.

The point we're trying to make is that the bill in its current version, arguably, does not achieve total equity to the innocent plaintiff and probably needs to be focused on a little bit more.

Summing up: Kasten presents the opportunity for a classic debate among lawyers, businessmen, insurers, and consumers as to *where* the burdens of product-caused injuries should fall, *what* the priorities should be between uniformity and tradition, and *how* commercial policy and tort law should be juxtaposed against each other. I think it is a very live and provocative issue that will be with us for some time.

TOXIC SUBSTANCES AND HAZARDOUS WASTES

COMPENSATION FOR PERSONAL INJURIES FROM TOXIC SUBSTANCES AND HAZARDOUS WASTES

George C. Freeman, Jr.: I want to start by mentioning a bill proposed in 1980¹³ as a part of the Superfund legislation, which would have created, based on a very skimpy preliminary report that purported to study the law of six states,¹⁴ a federal cause of action for persons who had been injured in person or in property, though it would have imposed some limitations on their recovery. This federal cause of action would not have supplanted state law but simply supplemented it, and it would have been partially retroactive.

There was strong dissent in the Senate report. And largely as a result of that dissent, there was a compromise bill (the Superfund Bill) enacted in the lame duck session of Congress in 1980.¹⁵ The federal third-party cause of action provisions were deleted from the bill and, instead, studies were mandated, one of them the section 301(e) study of legal remedies in which I was a participant. But in other respects that compromise was a very untidy affair. The statute that emerged had substantial portions written in ambiguous language and those ambiguities were not resolved in the legislative history. This compromise took the form of a substitute Senate bill and therefore there was no conference as such between the House and the Senate and no conference report. The scanty

13. S. 1480, 96th Cong., 1st Sess. (1979).

14. Environmental Law Institute (under the supervision of the Congressional Research Service of the Library of Congress), Senate Comm. on Environment and Public Works, 96th Cong., 2d Sess., *Six Case Studies of Compensation for Toxic Substances Pollution: Alabama, California, Michigan, Missouri, New Jersey, and Texas* (Comm. Print 1980).

15. 42 U.S.C. § 9601-57 (Supp. IV 1980).

legislative history on the final version consists only of conflicting statements that were made at the time the substitute bill was enacted in the Senate and subsequently passed by the House.

There are substantial questions of interpretation that are open, and their ultimate resolution is being actively pursued through the court system. I thought it would be helpful if I mentioned the more important questions briefly.

One of the key issues still posed by the present Superfund Act is retroactivity. In the recent *Wade* case,¹⁶ a U.S. district court held that section 106 of the Superfund Act¹⁷ does not (and I could add parenthetically, nor does section 7003 of RCRA)¹⁸ authorize the government to order cleanup to be undertaken for a nonnegligent, off-site generator who deposited his materials in the dump prior to the enactment of either statute. The case is now on appeal. Implicit in the case, but not raised by the defendant, is the issue of whether the government could have itself expended funds for cleanup and then gone after the nonnegligent off-site generator under section 107.¹⁹ In the *Wade* case, no arguments of constitutionality were raised. Yet it seems to me that the retroactivity question is a constitutional one, and it is particularly troublesome if treble damages can be sought. If treble damages are authorized, must the statute pass the same constitutional test as a criminal statute? In that case it would fail under the *ex post facto* provisions of the constitution. Those are issues which are yet to be addressed; I simply point out the *Wade* case as a very important case in this area.

The question of whether third parties have a cause of action under section 107 of the Superfund Act is raised by the *City of Philadelphia*²⁰ case, where the city of Philadelphia went in and cleaned up a dump and, having cleaned it up, couldn't qualify for standing under the express language of section 107, which says that the federal government or a state can recover damages for funds expended pursuant to the National Contingency Plan. The city of Philadelphia was deemed not to be a state for purposes of the statute but to have an independent status and an implicit cause of action under section 107. An open question is whether that case will ultimately be the law of the land, as far as third parties are concerned. Another question is whether the *City of Philadelphia* case is restricted to the situation where the party is still a governmental entity, even though not the federal government or a state. The question of whether or not third-party plaintiffs have standing is posed by a case filed several weeks ago in the U.S. District Court for the Eastern District of Missouri as a class action for persons allegedly injured in the Times Beach situation and others.²¹ In that case, the plaintiffs coupled a diversity claim under state law with a federal question claim under section 107 seeking to expand the *City of*

16. *U.S. v. Wade*, 546 F. Supp. 785 (E.D. Pa. 1982), *appeal pending* No. 82-1715 (3d Cir.).

17. 42 U.S.C. § 9606 (Supp. IV 1981).

18. 42 U.S.C. § 6973 (1976 & Supp. IV 1981).

19. 42 U.S.C. § 9607 (Supp. IV 1981).

20. *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

21. *Wehner v. Syntex Corp.*, Civil No. 83-0642 (E.D. Mo., filed Mar. 18, 1983).

Philadelphia case and seeking reimbursement for funds yet to be expended in cleanup for which they are not reimbursed by the state or federal government under superfunds.

The case of joint and several liability under the statute is posed in the *Conservation Chemical* case²² by a motion to dismiss, and that's another interesting point.

Finally, another issue yet to be decided is: when are punitive damages under section 106 of Superfund appropriate? You will note when the federal government brought the recent *Stringfellow Dump* case,²³ the Justice Department expressly stated that it did not seek punitive damages since they were not appropriate in that case.

Other key questions which we will see evolve over the next several years are: How clean is clean when it comes to cleanup? What is a fair share where reimbursement is sought from a number of different sources?

The Superfund report²⁴ recommended that there be created a federally authorized system of administrative compensation, which in the report is referred to as "tier one." It would supplement existing state remedies rather than replace them. I think those of you who are familiar with developments in this area know the details and I will not go into them here at all.

The second set of recommendations in the Superfund report was for reform of the present tort system in certain ways. While in my separate comments I did not concur in all of the recommendations, I do think that the report put us a lot farther ahead than we were back in 1980 when we simply had the six-case study volume.²⁵ I do think that most of the important issues were addressed in the report except for one—the critical issue of punitive damages. It divided the group and, therefore, they decided not to discuss it. I mentioned this very briefly, as a key issue, in my separate comments.

Right after the report was unveiled in the last session of Congress, several congressmen and senators rushed to the floor to introduce bills they said would enact the recommendations in the report. It's quite clear, however, that neither they nor their staffs had read the report when they introduced the bills because the bills bore no resemblance to the report. Those bills were the Stafford/Mitchell bill²⁶ and the LaFalce bill.²⁷ Since that time, in the new Congress, we've had a new round of bills. We first have the old Stafford bill²⁸ and the old Mitchell bill,²⁹ which I'll call collectively "Stafford Mitchell One." And Stafford Mitchell One is simply to put back into the Superfund statute most of what was knocked out of the Senate bill by the Superfund compromise back in 1980.

22. U.S. v. Conservation Chemical Co., W.D. Mo., No. 82-0983.

23. U.S. v. J.B. Stringfellow, Jr., Civil No. 83-2501 (M.M.L.), (C.D. Cal., filed Apr. 21, 1983).

24. Superfund Study Group, *supra* note 2.

25. Environmental Law Institute, *supra* note 14.

26. S. 1486, 97th Cong., 1st Sess. (1981) (Mitchell bill reintroduced as amendment to FIFRA by Stafford on Sept. 30, 1982).

27. H.R. 7300, 97th Cong., 2d Sess. (1982).

28. S. 917, 98th Cong., 1st Sess. (1983).

29. S. 945, 98th Cong., 1st Sess. (1983).

"Mitchell Two"³⁰ is a very interesting bill that seeks to implement the Superfund report. Unlike the bill in the last session, it does show that the senator or his staff, or both, have read the Superfund report, though where there are ambiguities in the report, they have clearly read them against industry. In certain instances they have also acted contrary to what was in the report. Along that line, one of the recommendations in the report is that the states make certain reforms in their own laws but that Congress itself do nothing to change substantive state law. Senator Mitchell has taken the opposite course. Section 10 of his second bill (S. 946) follows the approach of the Kasten bill.³¹ It is an amorphous way of approaching the subject. Section 10 says that

It is the objective of this section that each State adopt such improvements as may be needed in the procedural and substantive rules followed by its courts in actions seeking compensation for personal injury resulting from a release of a hazardous substance from a vessel or a facility. At a minimum, improvements should be made so that the rules and standards in such actions provide: (1) [a three year statute of limitations or longer as the state may provide running from] the date the claimant discovers or reasonably should have discovered the injury . . . (2) Joinder of [plaintiffs' claims] . . . (3) [joint and several liability], except for contributions of a *de minimis* character . . . (4) [a standard of strict liability for defendants engaged in activities described in the bill.]³²

The approach he has taken is sort of half way between the approach followed in the PURPA Act,³³ which was upheld five to four in *FERC v. Mississippi*.³⁴ There Congress enacted a law that said that utility commissions had to consider certain federally mandated goals in setting utility rates. But it didn't say they had to adopt those policies. Here, it is evident that the state *must* revise its state laws, presumably legislatively, but perhaps through common law. Thus, the Mitchell bill is in the gray area of unconstitutionality that still survives whatever is left of *National League of Cities*³⁵ after the recent Supreme Court decision in *FERC v. Mississippi*. It poses a number of problems and it will be interesting to watch the debate along those lines.

Another very interesting bill is Congressman Markey's bill,³⁶ over on the House side, which is much more conservative compared to the Senate bills. It would extend the Superfund to cover personal injury and economic losses up to two thousand dollars a month. It contains some of the conservative recommendations in the Superfund report by excluding workers' compensation claimants,

30. S. 946, 98th Cong., 1st Sess. (1983).

31. S. 44, 98th Cong., 1st Sess. (1983).

32. S. 946, 98th Cong., 1st Sess. § 10 (1983).

33. Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

34. Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742 (1982).

35. National League of Cities v. Usery, 426 U.S. 833 (1976).

36. H.R. 2582, 98th Cong., 1st Sess. (1983).

requiring the offsetting of compensation received from private and public insurance and prohibits retroactive liability in subrogation.

And then of course we have the LaFalce bill,³⁷ which we've seen around for some time. The only change made from the LaFalce bill in the last Congress³⁸ is that previously he would have put the administrative system at EPA and now he puts it in a new agency (HHS).

Finally, let me briefly summarize other activities that are going on in the executive branch or in other areas that could have an impact on this subject. First, there is a major study going on in the Office of Management and Budget. Jim Tozzi, who is heading that effort, recently made available publicly a very interesting summary of all the information which OMB had received from all the federal agencies on the scope of the known problem. I think many of you will be quite interested in that.

Second, there is a National Science Foundation study which will be out in the immediate future,³⁹ the Environmental Law Institute has its own "model" state toxic torts act,⁴⁰ and finally, there are the activities which this committee is engaged in, which Bill Kennedy has discussed.

In short, there's a lot of legislative activity in this area. The clear-cut situation which we thought existed in 1981 with the passage of the Superfund Act wasn't quite as clear-cut as it seemed. But it is clear that insofar as liability under Superfund is concerned, the Justice Department is committed to the policy of reading every ambiguity against industry and for liability. The position of Justice and EPA on the question of an implied federal right of action under existing law is up for consideration at this time. It may be that since such a reading would conflict with the enforcement policy, the government might ultimately come out against third-party liability because it could totally wreck its own enforcement policy. But that remains to be seen.

THE SEARCH FOR TRUTH

Richard A. Schmalz: I want to focus today on something that our chairman said at the very beginning, that there was great uncertainty about the scope of knowledge concerning the magnitude of the problem, and great uncertainty about how to determine, with reasonable credibility, the causal link between toxic substances and injuries. I call this "the search for truth."

We have seen, as George Freeman says, no abatement in the flood of state and federal legislative proposals. I don't think George mentioned the state proposals, but there are at least three or four that I know of: Minnesota, Massachusetts, Maine, and maybe several others that have similar bills.

37. H.R. 2482, 98th Cong., 1st Sess. (1983).

38. H.R. 7300, 97th Cong., 2d Sess. (1982).

39. National Science Foundation, *Compensation for Victims of Toxic Pollution—Assessing the Scientific Knowledge Base* (Apr. 1983) (two volumes).

40. Trauberman, *Statutory Reform of "Toxic Torts:" Relieving Scientific, Legal and Economic Barriers on the Chemical Victim* (1983).

The Superfund study group report, as George said, made two types of recommendations. The tier one, which outlines the workers' compensation-like approach, and the tier two, which is a less fully developed set of recommendations but remains in the general tort law area.

One of the most interesting things about the study group's approach—in the main, a reflection of a dominant, widespread activist mood—was that the committee proceeded without ever finding out how large a problem, or how small, it had before it. This troubled some members, I think George in particular, and the group did make some attempts to get information, but it was charged with a mission and its time was short: it simply assumed that the problem was very, very large and went forward. This has been the case, with perhaps a soft dissenting note now and then, for nearly every government proposal that we have seen.

The approach is based on what I perceive as the "three Ps." First there are the premises, then the promises, then very quickly thereafter the proposals. S. 917⁴¹ is typical. This is Senator Stafford's bill of March 24, 1983, called the Victim Compensation and Pollution Liability Act, which he offers as an amendment to Superfund.

I'd like to just run through the premises of that bill very quickly for you. They are laid out in a sort of crescendo.

The Congress hereby finds that—

(1) the population of the United States is involuntarily exposed to an array of hazardous wastes and other toxic substances;

(2) many of these wastes and substances are known to cause serious illness, disease and injury, including, but not limited to, cancer, birth defects, genetic mutation, behavioral abnormalities, physiological malfunctions (including malfunctions in reproduction), physical deformations, and death;

(3) an increasing number of humans are being exposed directly and indirectly to levels of such wastes and substances sufficient to cause such serious diseases, illnesses, and injuries;

(4) the entire population of the United States is regularly exposed to and carries body burdens of such pollutants and poisons in small quantities;

(5) many persons who suffer disease, illness, or injury resulting from exposure are uncompensated;

(6) most persons whose risk of disease, illness, or injury is increased due to exposure, are uncompensated;

(7) injuries inflicted on the environment due to such pollutants and contaminants are not redressed;

(8) those responsible for causing such illnesses, diseases, and injuries to the people and the environment of the United States are often not held legally liable or otherwise responsible; and

41. S. 917, 98th Cong., 1st Sess. (1983).

(9) a significant reason for the lack of liability and compensation is that the current legal system contains identifiable barriers to recovery as well as remedies which are inadequate.⁴²

So, there we have both the premise and the call for action that underlies the toxic tort law reform movement. As a lawyer's drafting exercise, it is a classic, building artfully from point to point, but does it hang together as a matter of fact or logic?

Points (1) to (4) do indeed paint a dismal picture. The entire population of the United States is regularly exposed to an array of hazardous wastes and toxic substances. Many are known to cause serious injury, and increasing numbers of our population are being seriously injured. But did the drafters take the artist's license?

After the Superfund study group's report was submitted in September 1982, the Office of Management and Budget set up an Ad Hoc Group on Toxic Torts. This group was created to evaluate the various legislative proposals to modify state tort liability law, to create a fund similar to Superfund financed through industry taxes, and to adopt limited administrative no-fault compensation plans modeled on the workers' compensation laws.

The task of the ad hoc group is to identify the scope of the existing and foreseeable effects of exposure to hazardous substances, to describe economic and other aspects of each existing recompense system, and to compare the effects and implications of adopting each legislative proposal. The purpose is to help the administration determine if any change is needed, and, if so, which proposal is better.

On April 18, 1983, Mr. Tozzi, who is the director of the group, issued a status report.⁴³ The covering memorandum states in part:

After our meeting of March 4, USDA, EPA, Justice, Labor and the National Institute of Environmental Health Sciences sent us considerable information on toxic torts. Based solely on the material these agencies sent us, we have reached certain conclusions. These are summarized in the attached status report. As additional data is received, we will modify the conclusions as appropriate. The data supporting these conclusions is available to federal agencies for inspection in Room 3019, New Executive Office Building.⁴⁴

From the status report, it is clear that the only reasonably firm information that has been obtained from federal agency sources deals with cancer. The report notes:

There are over 58,000 chemicals and substances in existence. However, only 18 chemicals and industrial processes are proven to be carcinogenic

42. *Id.* at § 2.

43. Office of Management & Budget, *Evaluating the Merits of Alternative Legislative Proposals on Toxic Torts: Status Report* (Apr. 18, 1983) [hereinafter cited as *Status Report*].

44. Memorandum to the Ad Hoc Group on Toxic Torts accompanying the *Status Report*, *id.*

for humans. A further 18 chemicals and groups of chemicals are considered to be probably carcinogenic for humans, although the data are inadequate to establish a causal association.

Other information submitted by the agencies provides sketchy evidence that cancer mortality is not the only adverse effect resulting from exposure to toxic substances. An EPA report indicates that human health constituted eight percent of the affected areas damaged by hazardous waste mismanagement. However, the data do not indicate the type or extent of the effects. Pneumoconioses and diseases related to occupational exposure to asbestos are also mentioned. One EPA report on health and environmental effects indicates that acetaldehyde is a mucous membrane irritant in humans. Two studies reported exposure levels and environmental contamination but were not intended to identify human health effects.

One scientist has found no adverse health effects at all.⁴⁵

I'll summarize this scientist's findings very quickly. He has made during a four-year period nine pesticide applicator exposure studies involving 150 full-time applicators and more than 4,000 analytical determinations. Many of the compounds used were very toxic. He says he has yet to find "one case where any worker received anything approaching a level where it could be health threatening." This scientist points out that if no health effects are found among such a high risk group, "the likelihood of non-applicator personnel and the general public receiving toxic levels is nil."⁴⁶

If this is an accurate summary of the existing state of our knowledge concerning potential adverse effects on our population from exposure to toxic substances, the first four points of the premises of the Stafford bill are grossly overstated. If there is a problem, on the basis of knowledge that we have today, it seems mainly with carcinogens and cancer. And how big a problem is this? We again turn to Mr. Tozzi's report.

Two studies provided summary data on the number of cancer deaths and the extent to which these deaths are related to certain exposure factors. The Office of Science and Technology Assessment (OTA), reports that there were approximately 400,000 cancer deaths in the United States in 1978. Of these less than five percent are related to pollution. The second report estimates a slightly higher rate of seven percent when cancer deaths due to three factors—occupation, pollution and industrial products—are grouped together. The majority of this seven percent estimate is due to occupational factors.

It appears that exposure to toxic substances has not substantially affected cancer mortality rates, and that other factors have a much greater effect. For example, "the only cause whose effects are both large and

45. Status Report, *supra* note 43, at 3-4.

46. *Id.* at 4.

reliably known is tobacco," which is directly related to 25 to 40 percent of cancer deaths.

Another factor associated with a large proportion of cancer deaths is diet. Doll and Peto report a range of 10 to 70 percent of cancer deaths related to dietary habits. The OTA reports a narrower but consistent range of 35 to 50 percent and adds that "Dietary components such as high-fat and low fiber content, and nutritional habits are believed more important than additives and contaminants," which would indicate that chemical exposure through the food chain does not substantially increase the risk of cancer.

Data on the effects of occupational exposure to asbestos vary. OTA reports a range of 3 to 18 percent for cancer mortality due to asbestos exposure in the workplace. Doll and Peto report total occupational related cancer deaths in a range of 2 to 8 percent.⁴⁷

How does the status report interpret the actual evidence that the study group has been able to gather? Again, we quote:

To summarize, we can estimate that seven percent of cancer deaths are related to exposure to pollution. Causation is difficult to prove and other factors such as cigarette smoking and dietary habits, have a much greater effect on cancer mortality. One study summarizes existing cancer data with a statement that, "examination of the trends in American mortality from cancer over the last decade provides no reason to suppose that any major new hazards were introduced in the preceding decades other than the well-recognized hazard of cigarette smoking." Data on other effects are limited. One individual found no adverse effects in a very high exposure population.

Given the information made available to us today, we conclude that to protect the public health, the Federal Government could make the most efficient use of the nation's resources by focusing new programs on decreasing the use of tobacco and encouraging improved dietary habits.⁴⁸

We recall that points (5) and (7) of the premises for reform state that many persons who suffer injury from exposure to toxic substances are uncompensated, most persons whose risk of injury is increased are uncompensated, and injuries to the environment are not redressed.

If the state of our knowledge is accurately summarized in the status report, it would seem impossible for any fair-minded person to draw such conclusions, but in any event certainly not on the grand scale implied by the first four points. These points seem clearly without solid factual support.

And yet it is points (1) through (7) that are the foundation for points (8) and (9) and the two rather remarkable propositions they assert. The first of these is that those responsible for causing such injuries are often not held legally liable

47. *Id.* at 2-3.

48. *Id.* at 4-5.

or otherwise responsible for the injuries. The second is that a significant reason for the lack of liability and compensation is that the current legal system contains identifiable barriers to recovery as well as remedies which are inadequate.

One line of questions these propositions raise is what kind of responsibility should a person responsible for causing injury to others have other than a legal liability? How can a person be said to be responsible for causing injury in any sense, legal or otherwise, unless the person actually caused it? What standard of truth is to be applied?

Another line of questions is that if the identifiable barriers to recovery include the basic requirement that causation be proven under the standard of truth, how can that barrier be removed without destroying the concept of legal liability? Is that really what the proponents of reform seek—a means of compensating all injuries by a series of special taxes on industry? Is that what “otherwise responsible” means?

So much for the premises on which reform is to be based. Let’s take a brief look at the promises of the reform, as set out in S. 917: (a) to provide adequate compensation for injuries and increased risks caused by releases of hazardous wastes and substances; (b) to assure that the costs of such injuries are borne by those who create or contribute to the risk; and (c) by doing so, to encourage a higher standard of care, thereby minimizing the risk to the public and the environment posed by hazardous wastes and substances.

The promises require the same kind of critical analysis as the concluding points of the premises. One cannot assure that the costs of the injuries are borne by those who create and contribute to the risk unless one has a firm grasp on the causal connection between the two. If the drive to provide adequate compensation overpowers the standard of truth on which legal responsibility must be based—unless our legal standard is to become merely arbitrary and capricious—then the second and third of these promises fail. And if they fail, there can be no salutary effect whatsoever on safety by imposing liability on a strict basis.

We come now to the final “P,” the actual proposals—the way the promises are to be realized.

S. 917 assures adequate compensation by enlarging the Superfund remedy to include personal injury and economic loss. The concept of recoverable damages is also enlarged so that more things are included. In the main, however, S. 917 and similar bills assure compensation by watering down the standard of truth for the causal connection between a person’s conduct, activities, or products and injuries to others to the point where it virtually disappears. This is done through a series of presumptions and rules of evidence.

In S. 917, the standard is first watered down from the traditional standard that exposure must “cause” the injury. Instead, exposure must “significantly contribute” to the injury, with no definition of that term given. It’s quite a vague term and it remains to be seen how far this weaker standard would increase the level of recovery.

The next step is to allow the court to admit any evidence as relevant to establish the causal connection between the substance in question and an injury "of the sort" claimed to have been suffered by the claimant, including without limitation, studies based on animal data or human data without regard to sample size. No generally accepted scientific criteria for drawing reliable statistical inferences are required. There is a presumption of a significant contribution to the injury if, on the basis of the evidence submitted under the relaxed rules, one could find a "reasonable likelihood" of a significant contribution to the injury.

Other bills such as S. 946, introduced by Senator Mitchell also on March 24, 1983,⁴⁹ take a somewhat different approach. They direct the Secretary of Health and Human Services to prepare hazardous substance presumption documents for particular substances, pollutants, or contaminants. The documents must be prepared no later than eighteen months after enactment. For some substances, when prepared, these documents will establish a rebuttable presumption of causal connection.

Do we now have a more scientific search for the truth? Not necessarily. No standards are set for the credibility of the presumptions. The present available information for injuries other than cancer is very sketchy. Even for cancer, the most extensive data available today are for radiation-induced cancers, which are but a small fraction of all cancers. Researchers are having difficulty in measuring the increased risk from radiation. Some scientists are concerned about the credibility of the methods used, and smoking and dietary habits remain as the most significant cause by far.

But lest there be any doubt that we shall not have a more scientific search for truth, we need only consider for a moment the following provision of S. 946: "Evidence as to the physical weakness or personal habits of the individual on whom the claim is based shall not be used to rebut the presumption. . . ."

What can we in private industry do about this approach? We should make no mistake. There is a lot of steam behind it.

We in industry have a tough task ahead. We must educate the public and our governmental agencies that they have been bombarded with sensational reporting. From the evidence that we have seen so far, particularly as summarized in Mr. Tozzi's report, we ought to be able to convince fair minded people that the reforms being advocated are not needed at this point, that they are based on highly questionable premises, and that they will not contribute to greater safety.

Those of us in the insurance industry are glad to see that the Chemical Manufacturers Association has recently contracted for an independent study, to be completed shortly. They will try to marshal scientific data and expertise on health effects. The Nuclear Insurance Pools are undertaking a joint study with the Atomic Industrial Forum in connection with the Price-Anderson renewal which is certain to raise the very issues that we've been talking about with hazardous wastes. This study is going to be performed by the Columbia

49. S. 946, 98th Cong., 1st Sess. (1983).

Legislative Drafting Research Department and Arthur D. Little, and will concentrate on analyzing the problem of causation critically.

But in addition to these studies, much work needs to be done by industry to measure the economic transfer of costs and its potential impact.

I should make clear that I don't believe that any of us calling for caution should be misunderstood. The disappointing thing is not that reform is being urged upon us, but that the reformers are really asking us all to leap before they have looked.

PUNITIVE DAMAGES

Anne Marie Whittemore: The premise of my approach to punitive damages is that, without addressing the issue of punitive damages, we are not going to be able to fashion a response to the problems that we have in our present-day tort system, especially in mass litigation; and that, to a large extent, the misapplication of punitive damage notions explains the problems that we face. I do not question that punitive damages are still a viable theory, nor that they can be accommodated within the alternative systems that we have been discussing.

Punitive damages have become a litigation tool that is of enormous significance in the area of torts, but especially in product liability litigation. The reported punitive damage awards in product liability cases are only, however, the tip of the iceberg. Most litigators who are defending product liability cases can attest to the fact that the threat of punitive damages figures in countless unreported settlements and results in trials of claims that otherwise might have been settled. It is the prospect of the pot of gold at the end of the rainbow, the punitive damage award, that motivates plaintiffs and their counsel to go to trial.

As we move to the notion of eliminating or minimizing the concept of fault within our compensatory system, we have an inconsistency in that the whole notion of punitive damages is an emotional one, an appeal to society to punish and to deter conduct that has been determined by a judge or a jury to be outrageous and socially undesirable. It is in this context of wanting to achieve the social purposes, and yet not unnecessarily interfere with our compensatory system, that I think we need to address punitive damages.

Punitive damages, as we know, grew up in an entirely different context from the modern notion of corporate liability for product defects. Three factors mark the early history of punitive damages: (1) they evolved from intentional torts, an intent to inflict harm upon the victim; (2) they were awarded in a single victim situation, often a confrontation between two individuals; (3) punitive damages were designed to serve a social purpose in times of no significant governmental economic regulation.

From these roots until the 1960s, the history of punitive damages was primarily an extension of its applicability to situations where the defendant did not necessarily intend to harm the plaintiff but showed a conscious and deliber-

ate disregard of the interests of others, so that a judge or jury might determine that his actions had been willful or wanton.

The notions that we have developed over the history of punitive damages emerged in a hybrid of standards that now exist in our fifty different states and various common laws of punitive damages. In some states, they are even regarded as supercompensatory in nature, and the jury or the judge may take into account the costs of the litigation to the plaintiff.

Despite the variety of purposes, five characteristics of punitive damages have almost universally developed. The first is that an award of punitive damages is essentially a civil penalty. In most states its chief purpose is to punish a defendant and to deter him and others from similar misconduct in the future.

Second, an award of compensatory damages to a plaintiff is a condition precedent to the plaintiff's receiving a punitive award, although some states consider nominal damages a sufficient prerequisite. In this regard, in an effort primarily to protect the interest of the defendant, the notion of a "reasonable relationship" test has developed so that it is expected that the punitive award will bear some relationship to the compensatory award. This crystallizes the problem that we face today, because what we have are emotional appeals for punitive damages being heard in the context of requests for a compensatory award, thereby escalating potentially the compensatory award as well as exposing the defendant to the punitive liability.

Third, fault on the defendant's part is an essential element to support an award of punitive damages. Fault is the essence of punitive damages. And yet, in the compensatory area, we are looking to other criteria.

Fourth, broad if not totally unbridled discretion is given to the jury or the judge in determining both whether punitive damages will be awarded and also the amount of the award.

Finally, to the extent there are criteria for the amount of the award, they relate essentially to the character of the defendant's misconduct, the nature and extent of the plaintiff's injury, and the wealth of the defendant.

Punitive damage claims did not appear in products liability cases until approximately the mid-sixties. Interestingly enough, the first reported case is one in which the jury declined to return an award of punitive damages against the manufacturer. Professor David Owen noted that in 1976 there had only been three reported cases involving personal injury in which jury awards of punitive damages against product manufacturers had been upheld on appeal. Significantly, two of those three decisions were based on false statements or deliberate concealment by the manufacturer of known defects.⁵⁰

Since that time, there has been an evolving appeal to juries to apply human motivational standards such as willfulness, wantonness, maliciousness, or conscious and deliberate disregard to a wide variety of corporate activity in assessing punitive damages. The application of punitive damage theory to business entities raises serious problems of fairness, even in single victim

50. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976).

situations. All of those problems are multiplied in the context of the mass tort. The most recurring theme has been that since punitive damage awards resemble criminal fines, there should be some procedural safeguards for the defendant. In fact, there will be an article appearing shortly in the *University of Virginia Law Review*, in which Professor Wheeler of the University of Kansas Law School will explain the constitutional basis on which he believes our present system of punitive damages is defective.⁵¹

Furthermore, there is a lack of an objective standard to measure the amount of punitive damages, thereby inviting abuse and easily resulting in excessively severe sanctions on the defendant. In fact, I would suggest to you that punitive damages may not be susceptible to any meaningful objective standards as to liability and that controls on the amount of the award may be our only effective control.

Another consideration is that since punitive damages are usually considered not compensatory but supercompensatory, they result in an undeserved windfall to the plaintiff. Should not these awards, if made at all, be applied to a broader social benefit such as research in product safety? The significance of that is especially apparent in the mass tort situation. At some point, courts should accept the principle that, after a particular product defect has been litigated and relitigated and punitive damages have been awarded to some number of plaintiffs, there is an implied-in-law limit on the amount of punitive damages that can be awarded for a single course of conduct. If this be the case, why should those earlier plaintiffs be the beneficiaries of the windfall and the later plaintiffs be limited to their compensatory recovery?

In addition, the present state of the law of punitive damages raises serious questions of proof, how you demonstrate a corporation's motivation under the criteria that have been established for punitive damages. Should one out of a million corporate documents be exalted to the level of corporate motive, and isn't this hearsay in its most elementary sense? Should the action of one employee, regardless of his position in the corporate structure, result in an indictment of the entire corporation and potentially its economic demise? And what of the stockholder interest—the interest that extends beyond the profits of the company that have resulted from the acts that gave rise to punitive damages?

Finally, can a corporation ever be accorded a jury of its peers when the issue of punitive damages is raised?

Each of these criticisms, I believe, is valid in the single victim situation and is multiplied in the mass tort context. In addition to the potential for punitive damage overkill that Judge Friendly explored in the *Roginsky*⁵² opinion, the lack of enforceable standards is highlighted in the extreme. Where, for example, is objectivity or rationality in a system where, in the *Dalkon Shield* litigation, there have been successive punitive damage awards based upon the same course of conduct for \$75,000, for \$6.5 million, and then for \$1 million?

51. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

52. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

Let me turn now to recent developments and attempts that have been made to respond to this situation. Thus far, there has been limited focus on punitive damages. The increase in federal tort litigation has been a factor in the increase in the number of federal judgeships. But, the case load increase has exceeded the increase in judgeships.

There have been attempts made on the part of litigants, in the context of our present procedural law, to develop a mechanism whereby punitive damages can be resolved in the mass tort situation much more efficiently than presently, but they have not been upheld. Examples of these are the class actions that we attempted in the *Dalkon Shield* litigation and in the *Skywalk* litigation.⁵³ District court judges in both of those cases were struggling with their overburdened dockets and found a possible solution in the class action technique. In both the *Skywalk* and the *Dalkon Shield* cases, it was determined that there should be a single determination of multiple punitive damage claims. There was no attempt to say that all of the individuals seeking punitive damages did not have a claim to them, but only to arrive at a procedure by which the total amount might be determined in one proceeding and then provide for equitable distribution among all the claimants. On appeal of both of those cases, the circuit courts of appeal applied very traditional interpretations of the class action rules and reversed the class certifications. Both of the issues were presented to the Supreme Court through petitions for certiorari, and the Supreme Court denied the petitions in both cases.⁵⁴ I believe that the results in those cases were a factor when the Sixth Circuit recently looked at an asbestos case and, in the *Moran* decision,⁵⁵ decided that legislation was the only solution, that our present procedures cannot cope.

In the legislative area, the issue has been addressed in the context of federal products liability legislative proposals. No one seems to advocate the elimination of punitive damages, but we need to improve our procedural mechanism for awarding them. The Kasten bill, now S. 44, in its present form offers only a very limited response to this problem. It recognizes the quasi-penal nature of punitive damages only to the extent that it requires proof of liability by clear and convincing evidence. Furthermore, it establishes a standard of reckless disregard for the safety of product users as the measure of liability. To the extent that the proposal articulates standards that are subject to review, it limits the discretion of the trier of fact and approximates more a penal standard.

The Kasten bill also offers a variation on what has been described as the primary method by which punitive damages are limited—remittitur by the trial judge. Under the Kasten proposal, the trier of fact determines liability for punitive damages, but the court determines the amount. In effect, Kasten eliminates one step in the process of awarding punitive damages.

53. *In re Northern District of California, Dalkon Shield Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817. (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

54. *Dalkon Shield*, 693 F.2d 847.

55. *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982).

Finally, Kasten proposes substantive criteria to be considered both in imposing liability and in determining the amount of punitive damages. The criteria include consideration of other punitive awards. By establishing uniform criteria for the manufacturer of a product marketed nationally, Kasten may provide a sounder basis for a class action determination of the total amount of punitive damages awardable.

However, S. 44 does not address adequately the mass tort situation. Some notions that might be considered in addition to the present proposals are the following.

The prospect of repetitive, endless awards of punitive damages tends to inflate the value of the case for compensatory damage. One response is bifurcation of the issues of compensatory and punitive damages so that evidence pertinent only to liability and the amount of punitive damages will not influence the compensatory case.

Another issue not addressed by Kasten is the question of whether a manufacturer should be punished more than once for the same course of conduct. Can a procedure be developed whereby there will be a single determination of the total amount of punitive damages awarded? As a corollary, should the award be applied to a public purpose? Cannot the prospect of a percentage of the award being distributed to the prevailing plaintiff motivate a litigant to pursue the claim and eliminate any possible conflict between the private claim for compensatory damages and the public claim for punitive damages?

Finally, should a civil penalty system be substituted for the present system of multiple punitive damage awards?

In conclusion, the issue of punitive damages in mass products liability litigation poses unique and acute problems that invite reform. The consequences for plaintiffs, defendants, and our judicial system are so severe that punitive damages should receive legislative attention either as part of or independent of a comprehensive review of the federal tort system.

LITIGATION AND ALTERNATE METHODS OF DISPUTE RESOLUTION

John J. Curtin, Jr.: Products liability litigation costs too much and takes too long with doubtful results. Delays and uncertainties with consequent costs both in human terms and in dollars substantially affect plaintiffs and their families. From the defendant's perspective, manufacturers and distributors often endure huge judgments on questionable liability with enormous legal costs many times over although they arise from the same defect or failure to warn.

For those concerned about substantial justice, perhaps the most frustrating aspect is the growing doubt about whether a jury and judge will come to the right decision as products liability suits increase in technical complexity. Concerned people have been exploring alternative methods of making the resolution of products liability disputes work better.

These alternative techniques aim for three primary improvements: (1) more accurate determination of cases, (2) reducing the costs of obtaining a result, and (3) expediting reparation.

At least two different approaches are available to obtain the same objectives: (1) a binding decision by a third party and (2) a process which focuses on increasing the likelihood of settlement. Included in the binding decision category are: (1) binding arbitration, (2) rent-a-judge, and (3) a binding opinion by a neutral expert.

To avoid constitutional problems inherent in an extrajudicial binding decision, the parties have to consent to a binding decision either by prior contract or on an ad hoc basis. In general, a plaintiff's attorney is unwilling to become involved in a binding decision process outside of the courthouse. The prospect of a substantial jury award furnishes substantial motivation for the plaintiff's attorney to avoid extrajudicial binding decisions. In the light of the time available, therefore, I will concentrate on the second method: the encouragement of early settlement of disputes. This seems the most practical alternative available to confront the problems of cost, delays, and accuracy existing in products liability litigation.

The structure is complex, involving numerous combinations of parties, types of defects, and causes of action. Think about the problems of discovery and the problems of expert testimony. Think about making that expert testimony understandable to a judge or to a jury. Think about the time you spend in a deposition of an expert, the time you spend on the preparation of the expert before he gives his opinion, the time you spend in his direct examination, and the time you spend in his cross-examination. Think about the problems of the evidence, postaccident remedial measures, prior and subsequent similar actions (or the absence of such actions), collateral estoppel, and collateral source.

Think about the problems of proof, causation, or strict liability. What's the standard? How do you identify the defendant? Are you going to have some kind of industrywide market share enterprise rule? What about the unavoidably unsafe products? What about the defenses: contributory fault, statute of limitations, statute of repose, the "empty chair," the state of the art, and problems of damages (compensatory versus punitive)? These problems in a mass tort situation are exacerbated by the enormous uncertainty involved in the critical issues in a mass toxic tort case: (1) is the plaintiff sick; and (2) how sick is he and did some chemical cause or contribute to the illness?

Among the alternative methods that have been evolving over the last few years is compulsory nonbinding arbitration, almost a contradiction in terms. Its most distinctive characteristic is that it requires the parties initially to take products liability disputes to an arbitration panel; it encourages the settlement of the dispute, based on the arbitration result which is nonbinding. The process allows for a mutual selection of a decision maker from a developing pool of neutral experts. There is clearly, depending on that pool, a reduction in the educative function of a direct and cross-examination process since, assuming you have experts on the panel (and you don't always get them), the expert rather

than the uninformed judge or the jury is rendering a decision. In contrast, anyone who has ever tried a toxic tort case or a substantial product liability case knows that the first thing you have to do is educate the judge and the jury. The accuracy of the decision making should increase, at least in theory, because of the expertise of the panel. Less emphasis is placed on the emotional aspects of the case and the attorney's ability to dramatize the case. This has certain negative effects on plaintiffs' lawyers, but nonetheless, under some circumstances, they may be willing at least to try it. And if it's a required nonbinding arbitration, they must. There is a more informal evidentiary and procedural process in arbitration that should help reduce costs and delay, but because it is nonbinding, there has to be some kind of judicial *de novo* review.

Typically, these kinds of arbitration panels consist of a technical expert, an attorney familiar with products liability law, and a layman, but they tend to vary from case to case. Because there must be judicial *de novo* review, there is a somewhat delicate balance of how much review should be available. If the *de novo* review is too easily obtainable, then the cost and time savings are lost. As a matter of fact, it may even switch over the other way and result in an additional layer of proceedings. On the other hand, if you make judicial review too difficult to obtain, it may be an unconstitutional deprivation of the rights to jury trial and due process.

The way this has been resolved in some cases is to have a cost-shifting. That is, if the finding on *de novo* review is not more favorable to the party appealing the arbitration result, then you shift the costs. In the usual case, these would at least be the arbitration costs, perhaps the postarbitration costs, and possibly attorneys' fees. You also may allow the findings of the panel to be introduced as evidence during the subsequent trial. Going a little bit further, you may attach some form of presumption of the correctness of the arbitration. You should bear in mind that punitive damages will not be awarded in an arbitration proceeding unless there is some specific agreement to that effect, because the power to do so is regarded as a judicial prerogative. Also, most consumer arbitrations do not consider consequential damages.

The arbitration process can be applied through a statutory enactment to all or a class of products liability cases; it can be applied through contract provisions to guide any later disputes between the contracting parties (which is obviously most relevant to nonconsumer dispute matters); or it can be applied by agreement between the parties after the dispute has arisen.

There are some actual illustrations of this in effect now. The Magnuson-Moss Warranty Act⁵⁶ provides that if such a mechanism is established in compliance with the FTC rules and incorporated in the written warranty furnished the consumer, an individual (as distinguished from a class action) suit to enforce the warranty cannot be instituted until the consumer has resorted to the dispute resolution procedure. The Federal Interagency Task Force on Product Liability drafted an arbitration provision in section 116 of the Uniform

56. 15 U.S.C. § 2310.

Products Liability Act. Either party could compel nonbinding arbitration if the arbitration agreement provided for it or there was a subsequent agreement and the amount in controversy was less than \$50,000. There was a shifting of arbitration costs if there was a less favorable judgment.

Another alternative is fact finding by a neutral expert. The most distinguishing characteristic of that process is the third party with some technical expertise, who can be utilized to help resolve fairly complex problems. The Federal Rules of Evidence have some provisions that will permit you to use an impartial expert, and the Federal Rules of Civil Procedure provide for appointments of masters.

A hot topic now is the so-called mini-trial. The most distinctive characteristic of the mini-trial is that presentations are made not to the judge, not to a jury, not to an arbitrator, but to the parties themselves. This is a voluntary nonbinding confidential procedure that promotes exchange of information and arguments.

The object is to give each party a clear, balanced conception of the strengths and weaknesses of both sides as an aid to settlement. Informal, summary presentations are made by lawyers and experts from each party of each party's best case, followed by rebuttal and then questions from the facilitator concerning the presentations. Normally this is all done in a single day. The key is to have representatives of each party with actual authority to settle; and they have to meet immediately thereafter and discuss settlement. This gives clients on both sides an opportunity to be exposed to the merits of the positions and to participate directly in the dispute resolution process. Obviously this is much more likely to occur in a situation where you have substantial companies having a product liability dispute that doesn't involve a consumer.

The hearing can be presided over by a jointly selected experienced neutral advisor, who can, after the hearing, advise the parties of the strengths and weaknesses of their respective cases. What happens is that you merge the characteristics of an adjudicative proceeding, an arbitration, a mediation, and a negotiation. You have an adjudication by giving the parties a chance to try some of their case. You have an arbitration because they set their own rules of procedure and select a third person to help. There's a mediation because it's not a win-lose situation; the facilitator can move the parties along with his questions. It's a negotiation because they're trying to settle a case. There are a number of ways in which you could decide whether to apply this kind of procedure, depending on the stage of the dispute, the types of issues, and the motivations and relationships of the parties.

The mini-trial procedure has been used in Boston in a case involving Automatic Radio and TRW, a suit between manufacturers about alleged design and manufacturing defects in car radios. Union Carbide has used the procedure in a consumer (worker) dispute involving exposure to a chemical. The neutral advisor in this instance was a lawyer in the corporate law department with authority to settle the case. That case involved fifty employees and settled very shortly after the mini-trial.

There are other alternatives, such as mediation in a more pure form, which Roger Fisher has described as a procedure in which you seek to isolate interests of parties rather than positions of parties. The mediation process has been adopted by several courts as a procedural requirement. Detroit's Mediation Tribunal Association rules apply in Wayne County Circuit Court, and Michigan's general court rule 316 requires, in certain cases, that you go through a mediation process before you can bring your claim.

Are these kinds of alternate methods of dispute resolution likely to work in a toxic tort case? My initial reaction is no. Why should the plaintiff abandon a jury trial and a shot at those punitive damages? My tentative second thought is maybe. What's the key? The stage of the litigation. I give you two scenarios.

First situation: the plaintiff's lawyer is good, he's prepared his cases, and his best case is going to trial. His expectation is that a big verdict will leverage the settlement value of the remaining cases. Defense lawyers will never convince that plaintiff's lawyer to have anything other than a jury trial.

Second situation (and a situation that does happen): you've been trying a series of toxic tort cases, you've had a few trials, you've got mixed results. Plaintiff hasn't gotten a huge verdict but he's won some. Defendants have won some. There's been no big settlement. At this stage, the defendants begin to get a little tougher on how much money they're offering. The plaintiff begins to ask a little bit more. Each party is shooting for a big win in the next case, which is going to affect how the rest of the cases will fall. In this situation, both sides may want to avoid the risk of tipping the scales in either direction and to avoid the possibilities of a jury coming in with all or nothing. Alternatives may be worth exploring in such a situation.