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Institutional Response to Tort System Breakdown: Asbestos Enters a New Phase*



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I. Introduction

Most observers are familiar with the old aphorism that “there is law and there is asbestos law”—the notion being that legal protections for defendants were stripped away over time by both Federal and state courts attempting to deal with asbestos litigation. A relatively benign interpretation is that courts had to find innovative ways to deal with overwhelming masses of claims and many of these innovations backfired inadvertently.¹ A less charitable interpretation is that results-oriented courts condemned defendants and insurers to pay even the most specious of claims without regard to traditional principles of justice.² Whatever the reason, the failures in free enterprise and government safety regulation that created massive asbestos exposure were followed by a civil justice system response to the ensuing litigation that was, at best, highly flawed.

By the mid-1990s, it was widely recognized that asbestos litigation was a “crisis.”³ No fewer than three times in the past ten years, the Supreme Court called for national legislation to resolve “the elephantine mass of asbestos cases.”⁴ Since then, Congress has made progress toward forming a national trust fund that would take asbestos out of the tort system. But conflicts have prevented the legislation from becoming final. Further reliance on Congress to fashion a remedy has risks. For one, political conflicts will persist and may ultimately be irreconcilable. These include: practical issues (the need for Democrats to preserve support from key constituencies—trial lawyers and labor, who want a well-funded trust fund, which may be too rich to get the votes; the concern of Republicans that the national trust fund will be temporary, with litigation eventually falling back to state courts); and ideological differences (the Democrats’ emphasis on individual rights.)⁵ Second, although a federally legislated solution that is superior to the way the civil courts handle mass torts is undoubtedly possible, it is also the case

¹ See, e.g., Michelle White, “Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation and Bouquet Trials,” NBER Working Paper 9362, December 2002.

² See Lester Brickman, “On the Theory Class’s Theories of Asbestos Litigation: The Disconnect between Scholarship and Reality,” *Pepperdine Law Review*, Vol. 31:33, 2004.

³ See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

⁴ See *Amchem*; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *id.*, at 865 (Rehnquist, C. J., concurring); *id.*, at 866-67 (Breyer, J., dissenting); and *Norfolk & Western R. v. Ayers*, 538 U.S. 135 (2003).

⁵ There has also been opposition by some Republicans to Federal preemption, but historically, outside the context of asbestos, Republicans have tended to vote in favor of Federal tort reforms.

that through short-sightedness, pork barrel politics or interest group influence the legislation may fall well short of the ideal. If that were to happen, there would not necessarily be a mechanism to bring a legislated asbestos claims resolution system back to a rational equilibrium.

Fortunately, other institutions have been taming the most egregious excesses of ongoing asbestos litigation. State legislatures, state courts and, recently, a few Federal courts have been able to adapt, and in doing so, have defied the predictions of both plaintiff attorneys and doom-sayers of ever-increasing annual asbestos filings. To the economist, however, the wave of state tort reforms and court decisions limiting defendant and insurer exposure are unsurprising; they are the natural consequence of business interest groups, legislators and judges responding to a system where costs were far exceeding the benefits. These groups have witnessed massive amounts of wealth being transferred from private industry and insurers to plaintiffs and their attorneys in settlement of claims that lacked a sound medical basis. The rent-seeking behavior of plaintiff attorneys to manufacture such unfounded claims is, of course, an unproductive use of scarce talents and resources. To align incentives properly and conserve resources for injured claimants, these courts, on their own volition or by statute, are making it harder for unfounded and unimpaired claims to be compensated.

The adjustments that have been made include: tort reform in a number of key states, Third Circuit decisions limiting the moral hazard aspects of asbestos defendant bankruptcy, and changes in state court procedures limiting unimpaired claims. But the most dramatic event did not even occur in an asbestos context; it was a recent decision by Judge Janis Graham Jack in the Silica Multi-District Litigation (“MDL”), which attacked unfounded diagnoses of disease by the same doctors who are used by the asbestos plaintiffs’ bar.

We analyzed the probability of enacting one or more of the following reforms: venue reform, caps on punitive damages, medical requirements and joint and several liabilities. We estimate the model using data from 1991 to 1999 and then predicted, out of sample, the probability of enacting reform during the period 2001-2004. Variables such as the number of lawyers per capita, percentage of gross domestic product attributable to manufacturing and the number of firms in the state were not statistically significant.

We found that the main factors predicting the enactment of tort reforms include: the level of claimant activity (past Manville filings) and political factors (the same party controlling the State House and Senate).

Our results show that a forecast of ever increasing filings, which fail to take into account reactions by institutions, courts and legislators, will be biased upward. At a minimum, it is unrealistic to assume that if massive amounts of unimpaired claims and unfounded claims are settled for significant sums then they will continue to be liquidated the same way in the future. Yet, this is not only the most common assumption, but, under certain circumstances, it is even assumed that if the claiming rate increases, it will continue to increase for several years in the future coming to rest at a new, higher plateau. The truth is more complicated: when senses of justice are offended and large amounts of money are at stake, the underlying causes catch the attention of courts and lobbying groups. Though such a trend would not necessarily be reversed overnight, the lagged effect on courts and elected officials is nonetheless predictable. These institutions will respond by tightening the criteria under which plaintiffs will be compensated and the amounts that will be available, should a claimant be able to establish liability.

I. The Silica MDL Decision and Its Impact on Asbestos Litigation

A. Early Findings on the Low Quality of Evidence for Nonmalignant Asbestos Claims

The quality of medical information required (by defendants or trusts) or submitted (by plaintiffs) has been an issue of contention between asbestos defendants/trusts and plaintiffs' attorneys for many years. Beginning in the mid-1990s, the Manville Trust and insurers first began to question the quality the documentation provided by plaintiffs. Subsequently, medical researchers published a study documenting a high discrepancy rate between medical tests submitted by the plaintiffs and those read by independent experts.

§ In 1995, the Manville Trust initiated a medical audit program in which the Trust reviewed x-rays submitted by the plaintiffs.⁶ Following the medical audit, when the

⁶ The medical audit randomly selected pending claims against the Manville Trust from the entire population of claimants alleging pleural disease, asbestosis, and lung and other cancers that had been deemed eligible for payment. Two independent B-readers would review x-rays of claims selected to be audited. The audit was designed to be plaintiff-friendly, allowing a claim to be released from the audit if at least one doctor agreed with the initial reader.

Trust tried to require a 100 percent audit of nonmalignant claims, plaintiffs sued. The court then struck down the 100 percent audit requirement as failing to meet the original purpose of the trust, which was to pay claims quickly.

Although the court ruled against the new audit requirement, one outcome of the medical audit program was the identification of ten doctors with high failure rates: Dominic J. Gaziano, Ray A. Harron, Edward H. Holmes, Richard Smythe Kuebler, Richard B. Levine, Phillip Howard Lucas, Larry M. Mitchell, Robert A. Rosati, Mark A. Schiefer and Jay T. Segarra.

- § During the spring of 2001, the London Market Insurers (“London”) issued new document requirements, which were to become effective June 1, 2001. The document requirements provided separate criteria for asbestosis and pleural claims, specifically requiring asbestos claimants to supply evidence of ILO readings of 1/1 or greater, or pathological evidence of asbestos. Similarly for lung cancer and other cancer claims, claimants had to demonstrate either bilateral-asbestos induced pleural abnormalities or evidence of asbestosis through an ILO score of 1/1 or pathological evidence. Claims meeting these requirements would be eligible for reimbursement by London.

The document requirements also singled out seven doctors that must be identified for all claims that are supported by diagnoses, test readings or other medical reports from any of these doctors. The doctors included: Dr. Ray Harron, Dr. Richard S. Kuebler, Dr. Phillip Howard Lucas, Dr. Larry M. Mitchell, Dr. Mark Schiefer, Dr. James V. Scutero, and Dr. Jay T. Segarra.

- § In November 2001, in the wake of increased, suspect filings against the Manville Trust, Judge Weinstein moved to hold hearings again on the issue of a medical audit for the Manville Trust.⁷ Following these hearings, and seven years after the trust had first initiated an audit program, the Manville Trust adopted a new trust distribution

As part of the medical audit, the Manville Trust focused on 10 high volume doctors who accounted for over 70 percent of the x-ray submissions from 1995 to 1998. The Trust then assessed the overall “pass rate” of each B-reader. An audit of the asbestosis claims from each of the 10 doctors revealed a failure rate (indicating disagreement in the diagnosis of asbestosis) ranging from 36 percent to 70 percent, with an average failure rate of 63 percent. (Memorandum dated April 24, 1998 from Mark E. Lederer, CFO of Manville Trust to Elihu Inselbuch, Bates #CRMC 0168905.)

In addition, the audit revealed that only three doctors (each of whom had approximately 50 percent of their claims reclassified to no disease and an overall rate of downgrading, to no disease or a lesser disease, ranging from 66 percent to 70 percent) were responsible for almost 50 percent of the asbestosis claims. (*Id.*; Memorandum to Manville Trustees from Patricia Houser, Re: Meeting with the SCB, May 13, 1998 (Bates #CRMC 0191714-19 at 18.)

⁷ See Lester Brickman, “On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality,” *Pepperdine Law Review*, Vol. 31:33, 2004, pp. 135-36. Following the Court’s rejection of the audit process, plaintiffs filed a surge of claims against the Manville Trust, with most of the increase coming from claims with ILO readings of 1/0 and B-reader’s interpretations that the markings were only “consistent with asbestosis.”

plan (“2002 TDP”), which tightened up exposure and medical requirements. Moreover, in September 2002, the Trust actually barred supporting evidence from one doctor, Dr. Gregory Nayden.⁸

§ In 2004, Joseph Gitlin, Leroy Cook, Otha Linton, and Elizabeth Garret-Mayer from Johns Hopkins University designed a study of x-rays submitted by 551 asbestos claimants to determine the accuracy of the B-readings.⁹ As part of the study, they were able to obtain x-ray reports for 492 claimants. Six independent B-readers agreed to read each report and make their own determination as to film quality, whether it is completely negative, parenchymal abnormalities, small opacities profusion, and pleural abnormalities. Gitlin et al. analyzed their results to determine whether the readings by the consultants were consistent with those of the initial readers. They found that initial readers recorded ILO scores of 1/0 or higher for 95 percent of the x-rays. Similar readings were found by the independent B-readers in only 4.5 percent of the readings. Gitlin et al. found that these differing results were statistically significant.

The early audit by the Manville Trust (ultimately resulting in its much delayed adoption of the 2002 TDP), heightened payment requirements by insurers, and the 2004 academic study, all led up to a ground-breaking decision by Judge Jack in the Silica MDL in the Summer of 2005.

B. The Silica MDL Hearings and Evidence

During the Spring of 2005, Judge Jack, in the Silica MDL, “conducted Daubert hearings/court depositions” of the doctors and screening facilities put forth by the plaintiffs as experts.¹⁰ The doctors in question were the same doctors that frequently appear as experts in asbestos litigation, many of whom were cited in the Manville medical audit or the Gitlin study as having high failure rates.¹¹ The hearings culminated in a June 30, 2005 decision issued by Judge Jack.

⁸ See, memorandum from David Austern, “Suspension of Acceptance of Medical Records Prepared by Gregory Nayden and the American Medical Testing Facility.”

⁹ See Joseph P. Gitlin, Leroy L. Cook, Otha W. Linton, Elizabeth Garrett-Mayer, “Comparison of ‘B’ Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes,” *Academic Radiology*, Vol. XI, num. VIII, August 2004.

¹⁰ See *In Re: Silica Products Liability Litigation*, Order No. 29: “Addressing Subject-Matter Jurisdiction, Expert Testimony and Sanctions,” (hereafter, “Order No. 29”).

¹¹ In the published article, the authors do not provide information as to the identities of the initial B-readers. But in a report submitted in the *Pitts* litigation in Mississippi, they provide such information for the sample of 171 claims in that litigation from Mississippi. (See letter from Dr. Joseph N. Gitlin to David M. Setter, “Report on Asbestosis Group AB Tables dated April 21, 2004” dated June 1, 2004.) Those doctors included: James W. Ballard, Ray A. Harron, Phillip Howard Lucas, and Jay T. Segarra.

Although Judge Jack ruled that the court had subject matter jurisdiction over only one of the cases in the MDL, she addressed all of the diagnoses of 9 challenged doctors to prevent state courts from having to repeat the Daubert hearings. She identified the challenged doctors as: Dr. Ballard, Dr. Cooper, Dr. Coulter, Dr. Andrew Harron, Dr. Ray Harron, Dr. Hilbun, Dr. Levy, Dr. Martindale and Dr. Oaks.¹² See Figure 1 for doctors identified in different studies/decisions:

Figure 1

Doctor	Challenged in Silica MDL Decision 2005	Gitlin Pitts' Litigation Report 2004	Identified in the London Document Requirements 2001	Manville Medical Audit 1995-1998
James W. Ballard	X	X		X
Kevin Cooper	X			
Todd Coulter	X			
Andrew W. Harron	X			
Ray A. Harron	X	X	X	X
Glynn Hilbun	X			
Barry Levy	X			
George H. Martindale	X			
W. Allen Oaks	X			
Dominic Gaziano				X
Edward H. Holmes				X
Richard S. Kuebler			X	X
Richard Levine		X		
Phillip Lucas		X	X	X
Larry M. Mitchell			X	X
Robert A. Rosati				X
Jay Segarra		X	X	X
Mark Schiefer			X	X
James V. Scutero			X	

With regard to the challenged doctors, in her decision, Judge Jack wrote:

Looking no further than the first criterion [sufficient exposure], virtually all of the diagnoses fail to satisfy the minimum medically acceptable criteria for the diagnosis of silicosis, and therefore, the testimony of the challenged doctors cannot be admissible under standards set by Rule 702 and Daubert.¹³

¹² See Order No. 29, p. 127.

¹³ See Order No. 29, p. 127. Judge Jack identified three criteria for making a silicosis diagnosis: i) sufficient exposure, ii) radiographic evidence, and iii) no differential diagnosis. With respect to the other two criteria, she wrote, “the unsound nature of the diagnoses is betrayed not only by the opportunistic transformations of asbestosis into silicosis reads, but also by the improbable consistencies among the silicosis reads,” (pp. 135-36)

Specifically, Judge Jack criticized the uniformity of readings across claims reviewed by the challenged doctors, as well as the frequency of their finding of both asbestosis and silicosis in the same claimants.

1. Over 95 percent of the ILO readings by the challenged doctors were 1/0 or greater

One of Judge Jack's criticisms was that the readings by the challenged doctors were remarkably consistent across claimants, a finding that was similar to the one reported in the Gitlin study. For the claimants in the Silica MDL, approximately 94 percent of the profusions were 1/0 or greater, with 92 percent of the profusions scoring a 1/0 or 1/1.¹⁴ As noted above, in the Gitlin study over 95 percent of the initial readings were 1/0 or greater; when independent consultants read the same x-rays, the fraction of readings of 1/0 or greater dropped to 4.5 percent.

In her decision, Judge Jack quotes from the testimony of Dr. Parker, the former administrator of the NIOSH program, who said that:

What I find most stunning about the information I've seen in the last [*sic*], yesterday afternoon and this morning, is the lack of reader variability, because the consistency with which these films are read as 1/0 defies all statistical logic and all medical and scientific evidence of what happens to the lung when it's exposed to workplace dust. What again is stunning to me is the lack of variability. This lack of variability suggests to me that readers are not being intellectually and scientifically honest in their classifications.¹⁵

2. Many of the claimants that were diagnosed with silicosis had also been diagnosed with asbestosis

A second criticism of Judge Jack's was that many of the challenged B-readers and facilities have made both silica-related and asbestos-related disease diagnoses for the same claimant. Judge Jack questioned the competing diagnoses, citing, among others, Dr. Parker, the

and "In almost all of the MDL cases, the challenged diagnosing doctors simply ignored this final criterion (*i.e.*, the absence of any good reason to believe that the radiographic findings are the result of some other condition) altogether" (p. 137).

¹⁴ See Order No. 29, p. 136. "In reviewing over 6,510 B-reads produced during Plaintiffs' initial disclosures, over 92 percent of the profusions were 1/0 or 1/1, while less than 2 percent were 2/1 or greater (*i.e.*, 2/1, 2/2, 2/3, 3/2, 3/3, or 3/+)."

¹⁵ See Order No. 29, p. 96.

former administrator of NIOSH’s B-reader program, who testified that “he has never seen a clinical case of asbestosis and silicosis in the same individual.”¹⁶

a. Plaintiffs’ counsel in the MDL challenged the dual diagnoses

Even plaintiffs’ counsel in the MDL issued statements questioning the diagnoses of claimants making simultaneous asbestos and silica claims. On August 23, 2005 Judge Jack issued Order Number 31 in the Silica MDL. In footnote number 3 of that order, Judge Jack wrote,

During the status conference, Defendants represented that of the 82 Alexander Plaintiffs who recently submitted new diagnosing reports, 60 have previously filed claims for asbestosis. Plaintiffs’ counsel in Alexander, Richard Laminack, stated that his firm has “never, never represented an asbestosis claimant and then turned around and ‘retreaded’ as a silicosis claimant.” Mr. Laminack further stated: “I think the explanation in a lot of the cases is that the asbestos diagnosis is wrong.” Later, Mr. Laminack reiterated that “I doubt the diagnoses” underlying his clients’ previous asbestosis claims. If indeed the Plaintiffs have made asbestosis claims that are now suspect, Defendants are ordered to notify the appropriate court where such claim was made or settled.

b. Many of the dual diagnoses linked to the challenged doctors

In the course of the Silica MDL litigation, a mobile screening facility, N&M was required to turn over all of its medical records.¹⁷ N&M is the facility associated with Drs. Ray and Andrew W. Harron, Dr. Ballard and Dr. Oaks, four of the doctors challenged by Judge Jack.

In the Silica MDL, N&M was required to turn over all of its medical diagnoses. We obtained a database created from the N&M files for 27,558 individuals with information by social security number for screening date, name of the doctor, and whether the diagnosis was positive or negative for asbestos and/or silicosis. In 4,322 cases N&M B-readers screened claimants for both asbestosis and silicosis. In 3,558 of these cases the N&M file records that the claimant received a positive diagnosis for *both* diseases. That is, 82 percent of the time an N&M

¹⁶ See Order No. 29, p. 62.

¹⁷ As discussed in the Judge Jack decision, N&M stands for “Netherland & Mason,” the co-owners of the company. Prior to establishing N&M, the two co-owners and Charles Foster (the owner of Respiratory Testing Services (“RTS”))—a facility also identified by Judge Jack and banned by the Manville and Eagle Picher Trusts) worked together in another Alabama screening company called “Pulmonary Testing Services.”

B-reader tested for both diseases, the B-reader diagnosed the claimant as having both asbestosis and silicosis.

Additionally, in matching by social security number, we found that 19,684 of the N&M claims exist in the Manville Trust. Even accepting N&M's own diagnoses, 18 percent of the matched claimants against the Manville Trust were recorded as positive for both asbestos- and silica-related diseases. Thus, although in her order Judge Jack cites numerous experts that report having a patient with both an asbestos-related and silica-related condition is extremely rare, 18 percent of the matched claimants had such a diagnosis.^{18,19}

3. Several trusts ban materials from doctors challenged in the MDL Order

Following Judge Jack's decision, as of September 2005, the Manville Trust stopped accepting claims with medical support from the nine challenged doctors and two of the three screening facilities that were also highlighted in Judge Jack's decision.²⁰ On October 19, 2005, the Eagle Picher Trust also stopped accepting medical documentation from the same nine challenged doctors and two screening facilities.²¹ Notably, two of the doctors (Dr. Ray Harron

¹⁸ See Order Number 29. "It bears repeating that outside of the small cadre of doctors who diagnose for screening companies, even a single case of a dual diagnosis of silicosis and asbestosis is extremely rare. See Feb. 18, 2005 Trans. at 89-90, 263-64 (Dr. Parker testifying that he has never seen a clinical case of asbestosis and silicosis in the same individual); Friedman Ex. 2 (letter from Dr. Hammar: 'In the cases that I've had pathology to evaluate, I have never seen cases in which there was both silicosis and asbestosis in the same patient.');

see also David Weill, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 4 (Feb. 3, 2005) ('Even in China, where I saw workers with jobs involving high exposure to asbestos and silica (such as sandblasting off asbestos insulation), I did not see anyone or review chest radiographs of anyone who had both silicosis and asbestosis.');

Dr. Paul Epstein, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 3 (Feb. 2, 2005) ('[I]t is my professional opinion that the dual occurrence of asbestosis and silicosis is a clinical rarity.');

Dr. Theodore Rodman, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 2 (Feb. 2, 2005) ('Among the thousands of chest x-rays which I reviewed in asbestos and silica exposed individuals, I cannot remember a single chest x-ray which showed clear-cut findings of both asbestos exposure and silica exposure').

When informed that 6,000 silicosis Plaintiffs had previous asbestosis diagnoses, Dr. Parker testified: 'I find it stunning and not scientifically plausible.' (Feb. 18, 2005 Trans. at 90) Based upon the evidence presented, the Court agrees." pp. 134-35.

¹⁹ Of these 1,862 claims with multiple diagnoses, 1,729 were included in the 2,926 claims we reported matched to the MDL list in the Dunbar Supplemental Report as discussed above.

²⁰ See letter from David Austern, President Claims Resolution Management Corporation, dated September 12, 2005, "Suspension of Acceptance of Medical Reports." The screening facilities identified by Judge Jack were N&M Inc., RTS Inc. and Innervisions Inc. The Manville Trust banned medical documentation from N&M Inc. and RTS Inc. In addition, the Trust identified a third screening facility, Healthscreen Inc., from which it will no longer accept medical documentation.

²¹ See letter from William B. Nurre, Executive Director of the Eagle Picher Personal Injury Settlement Trust to Claimants' Counsel, dated October 19, 2005.

and Dr. Ballard) were previously identified both by Dr. Gitlin in the *Pitts* litigation (with readings in conflict with those of independent consultants) and in the 1995 Manville Medical Audit (with a high failure rate).

The ban by these trusts in operation has laid the foundation for similar bans by other trusts, either already in operation or currently being created.

II. Recent Development in Bankruptcies

A. The 2005 Manville Forecast As It Compares to Previous Manville Forecasts

In June 2005, before it banned documentation from specific doctors and screening facilities, the Manville Trust issued a revised forecast of its future liabilities. The new estimates ranged between 600,000 to 1.5 million future claims, with a point estimate of 900,000 for the period 2005 to 2049.²² In contrast, in 2001, Manville released higher forecasts which ranged from 748,000 to 2.7 million, with a point estimate of 1.42 million for the period 2001 to 2049, or 1.15 million over the period 2005 to 2049.

In the 2005 forecasts, the Manville Trust changed its methodology, breaking the forecast into U.S. and non-U.S. claims as well as splitting non-malignant claims into impaired and unimpaired claims according to the classifications in the 2002 TDP. In the new point estimate, U.S. claims represent almost 95 percent of the forecasted claims. Moreover, unimpaired claims represent approximately 80 percent of forecasted non-malignant claims. Previous Manville Trust forecasts made neither distinction. Table 1 summarizes the key scenarios of the 2005 Manville forecasts.

²² Tillinghast 2005 forecast of Manville asbestos liabilities, June 2005. Claim counts are rounded.

Table 1

**Tillinghast's Forecast of Future Manville Trust Claims 2005 - 2049
Selected Scenarios and Weighted Average
June, 2005**

	Cash	Unimpaired	Impaired Non-Malignant		Other	Lung Cancers		Mesothelioma	Total	Subtotal Malignants
	Discount	Non-	L3	L4	Cancers	L6	L7	L8		
	L1	L2			L5					
<i>All Future Claims</i>										
Scenario 12 (higher end)	33,239 2%	876,783 59%	365,163 24%	54,736 4%	11,290 1%	23,645 2%	57,009 4%	74,116 5%	1,495,981 100%	166,060 11%
Weighted Average	64,285 7%	559,430 62%	131,267 15%	12,543 1%	9,742 1%	32,199 4%	30,207 3%	62,234 7%	901,907 100%	134,382 15%
Scenario 6 (lower end)	79,530 13%	378,628 63%	38,050 6%	1,863 0%	7,817 1%	33,868 6%	12,990 2%	48,616 8%	601,362 100%	103,291 17%
<i>US Exposures Only</i>										
Scenario 12 (higher end)	29,642 2%	833,816 59%	358,974 26%	53,789 4%	11,124 1%	20,543 1%	48,368 3%	47,718 3%	1,403,974 100%	127,753 9%
Weighted Average	62,577 7%	538,581 63%	129,286 15%	12,312 1%	9,640 1%	28,403 3%	26,814 3%	42,510 5%	850,123 100%	107,367 13%
Scenario 6 (lower end)	78,680 14%	368,771 64%	37,571 7%	1,820 0%	7,754 1%	30,067 5%	11,800 2%	36,473 6%	572,936 100%	86,094 15%

Source: Tillinghast 2005 forecast of Manville asbestos liabilities, June 2005

The 2002 TDP classified claims as follows:

1. L1 (other asbestos disease or cash discount) if there is evidence bilateral asbestos-related nonmalignant disease and exposure to Manville asbestos products prior to December 31, 1982;
2. L2 (asbestosis/pleural disease) if there is evidence of bilateral asbestos-related nonmalignant disease, and six months occupational exposure to Manville asbestos products prior to December 31, 1982, plus five years cumulative occupational exposure to asbestos;
3. L3 (asbestosis/pleural) if there is evidence of ILO of 1/0 or greater or asbestosis determined by pathology, or bilateral pleural disease of B2 or greater, plus (a) TLC less than 80 percent, or (b) FVC less than 80 percent plus FEV1/FVC ratio greater than or equal to 65 percent, six months occupational exposure to Manville asbestos products prior to December 31, 1982 plus significant occupational exposure to asbestos, and supporting medical documentation establishing asbestos exposure as a contributing factor in causing the pulmonary condition in question; and
4. L4 (severe asbestosis) if there is evidence of diagnosis of asbestosis with ILO of 2/1 or greater, or asbestosis determined by pathology, plus (a) TLC less than 65 percent or (b) FVC less than 65 percent plus FEV1/FVC ratio greater than 65 percent, six months occupational exposure to Manville asbestos products prior to December 31,

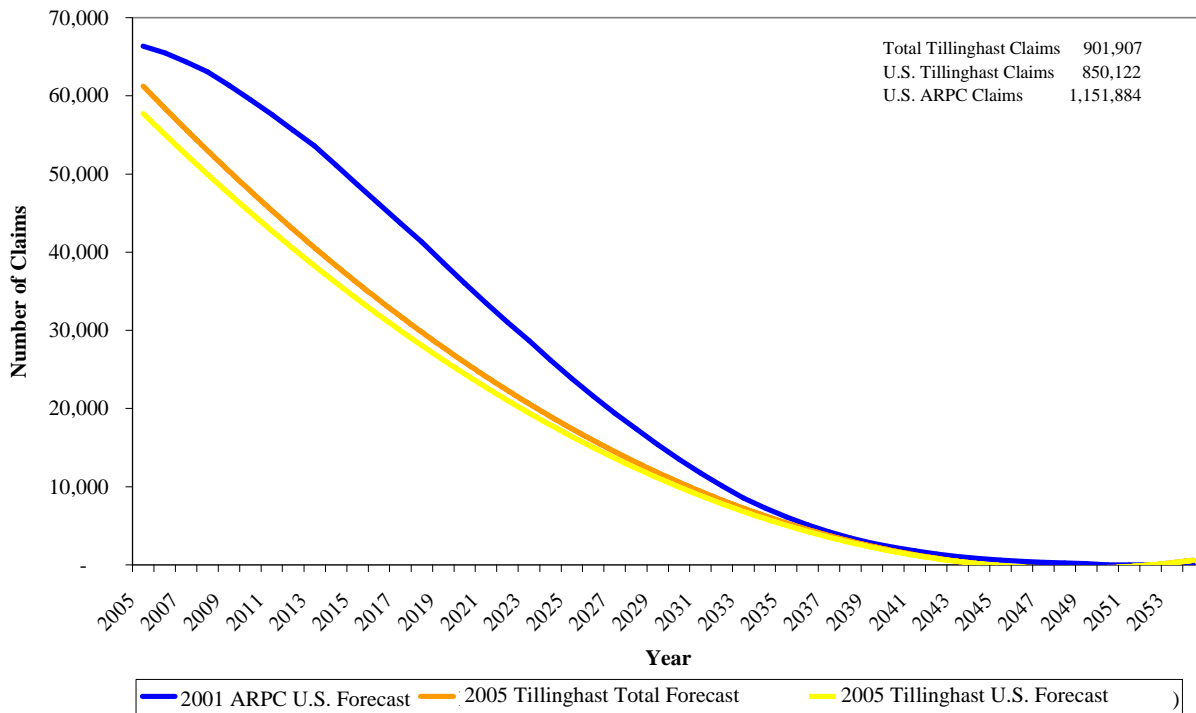
1982, plus significant occupational exposure to asbestos, and supporting medical documentation establishing asbestos exposure as a contributing factor in causing the pulmonary condition in question.²³

As shown in the table above, the unimpaired nonmalignants (L1 and L2) represent 69 percent of total forecasted claims in the point estimate 2005 forecast.

This forecast represents the first time since the establishment of the Manville Trust that the Trust lowered its base forecast. Moreover, we understand that the 2001 forecast did not include any non-U.S. claims. Thus, the 2005 point estimate for U.S. claims (850,000 claims) is 26 percent lower than the 2001 forecast (1.15 million claims) for the period 2005-2054. Figure 2 compares the forecasts over time.

Figure 2

**Comparison of Manville Forecasts
All Diseases: 2005 - 2049**



Total Tillinghast Claims 901,907
 U.S. Tillinghast Claims 850,122
 U.S. ARPC Claims 1,151,884

²³ The 2002 Manville TDP.

The lower revised forecast reflects the heightened criteria of the 2002 TDP, in which dubious claims will no longer be paid. But the forecast does not yet incorporate the impact of banning claims which rely on documentation from certain doctors and screening facilities. As shown in Figure 1 above, several of the doctors currently banned by the Trust are the same doctors the Trust had previously classified as high volume doctors, meaning the doctors frequently appeared as B-readers in the claimants' files. Thus, if Manville had factored in the recent ban, the resulting forecast would have been even lower.

With both courts and trusts changing the acceptability of documentation from mass screening facilities and certain doctors (per the Silical MDL decision) as well as imposing more stringent medical and exposure requirements, plaintiffs' attorneys will find it less profitable to file unfounded cases in the future.

B. Pre-packs Are Becoming More Difficult to Set Up – The Congoleum Experience

One strategy that defendants have pursued over the past several years to manage their asbestos liability is to enter into a prepackaged bankruptcy agreement (commonly called a "pre-pack"). Under such an arrangement, the defendant negotiates a global settlement with all of its current asbestos plaintiffs and creates a plan for paying future claimants. As a general matter, other creditors and the defendant's own insurers are not party to the agreement. To effectuate the agreement, the defendant will contribute its insurance assets to a trust that will be used to liquidate the settled claims as well as future claims. Once the agreements are in place, the defendant then files for Chapter 11 protection, with the intent to emerge from bankruptcy quickly. Typically, the settlement will compensate both asbestos claimants and their attorneys by more than they would have received in the tort system so as to ensure their votes for debtor's proposed plan of distribution.

While this strategy appeared to be working, two of the most recent pre-packs have not proceeded as expected. Specifically, the Third Circuit, which includes Delaware where many asbestos-related bankruptcies are sought, rejected Combustion Engineering's plan. Shortly afterward, the presiding judge in the Congoleum bankruptcy abruptly ended the Debtor's period of exclusivity, resulting in the insurance carriers filing the initial plan for liquidating Congoleum's asbestos claims. The experience of both should result in insurers and other

creditors having a larger say in asbestos pre-packs in the future. Below we discuss the Congoleum experience.

As a strategy to manage its asbestos liabilities, on January 13, 2003, Congoleum Corporation (“Congoleum”) announced its intention to negotiate a settlement with its current asbestos claimants and that negotiations with the principle plaintiffs’ attorneys were underway. Once the settlement negotiations were completed, Congoleum intended to file for Chapter 11 protection.²⁴

For the plan to succeed quickly, Congoleum had to obtain the backing of 75 percent of its current asbestos claimants. According to Congoleum’s parent company and 55 percent owner, American Biltrate, the company expected to file for Chapter 11 protection within four to six months, and to emerge from bankruptcy in another two to three months.²⁵

According to an analyst following the stock, the plan would be funded by \$1 billion in secondary insurance, which would cover current and future claimants.²⁶ But, of course, the insurance carriers themselves were not privy to any of the negotiations.

On March 31, 2003, Congoleum reached an agreement in principal with the attorneys representing more than 75 percent of its current asbestos claimants.²⁷ And in October 2003, the Company announced that it had mailed out voting materials to its current asbestos claimants, with a submission deadline of December 19, 2003. The company anticipated filing for Chapter 11 after the submission deadline with the hope of emerging from bankruptcy quickly.²⁸ Notably, Congoleum’s contribution to the plan would be the above-mentioned \$1 billion in insurance rights and a \$2.7 million note.

²⁴ See “Congoleum Corporation Seeking to Resolve Asbestos Liability, Expects to File for Bankruptcy,” Reuters Significant Developments, January 13, 2003.

²⁵ See “Congoleum seeks support from asbestos plaintiffs,” *The Daily Deal*, January 15, 2003.

²⁶ *Ibid.*

²⁷ See “Congoleum agrees to settle asbestos claims,” *Reuters News*, March 31, 2003.

²⁸ See “Congoleum Corporation Commences Solicitation of Reorganization Plan Approval,” *Business Wire*, October 27, 2003.

The plan was approved by the asbestos claimants and Congoleum formally filed for Chapter 11 on December 31, 2003.²⁹ The insurers, who were to fund the trust, had initiated a coverage action against the company. Congoleum had argued that the coverage action should be stayed, but on February 2, 2004, U.S. Bankruptcy Court Judge Kathryn C. Ferguson lifted the stay, allowing the coverage action to proceed. She ruled that since the insurance proceeds represented the bulk of the funding, the bankruptcy court could not approve the plan until the availability of such funding was determined.

According to Terry Schiavoni, attorney for the insurers, “The immediate impact of the decision,” Schiavoni said, “is to prevent any effort to bring the pre-pack on for confirmation on an expedited schedule.”³⁰ Historically, such actions are typically stayed until the bankruptcy case has been completed. By ruling that the action should take place outside the bankruptcy court, Judge Ferguson’s decision may impact other pre-pack bankruptcies and slow down the entire process.³¹

In April 2004, Judge Ferguson ruled against Congoleum’s motion to deny insurers standing in the reorganization plan, but she did grant the company’s motion to against the insurers participating in the disclosure statement process.³²

In October 2004, Congoleum petitioned for a four-month extension of its exclusive period during which to file a reorganization plan. According to bankruptcy law, companies filing for Chapter 11 have a period over which they have the exclusive right to submit a reorganization plan, meaning that other parties cannot submit competing plans during this period.³³ In early November 2004, the company filed a modified reorganization plan and predicted that it might be able to emerge from bankruptcy in the second quarter of 2005.³⁴ In

²⁹ See “Congoleum Files Bankruptcy Plan with Asbestos Liability,” *Bloomberg News*, January 1, 2004.

³⁰ See “Bankruptcy Court OKs Coverage Action Against Asbestos Debtor,” *Insurance Coverage Litigation Reporter*, March 5, 2004.

³¹ *Ibid.*

³² See “Insurers Win Standing to Challenge Congoleum’s Bankruptcy Plan,” *Asbestos Litigation Reporter*, Volume 26; Issue 15, May 20, 2004.

³³ See “Congoleum Seeks Extension Of Control Over Ch 11 Case,” *Dow Jones Corporate Filings Alert*, October 11, 2004.

³⁴ See “Congoleum Corporation Files Modified Reorganization Plan,” *Business Wire*, November 8, 2004.

January 2005, the company filed for another extension of its exclusivity period, this time through June 2, 2004, which was subsequently approved by the bankruptcy court.^{35,36}

Meanwhile, in December 2004, the Third Circuit US Court of Appeals rejected the pre-packaged bankruptcy plan of another defendant, Combustion Engineering, principally because the claimants approving the plan had already received payment for 95 percent of their claims.³⁷ This decision represented an important rejection of a pre-pack plan by the courts and signaled a changing tide in how the courts would view such plans.

Following the Combustion Engineering decision, 20 of Congoleum's insurers filed a motion with the court to deny confirmation of Congoleum's plan. The insurers claimed that Congoleum's plan suffered from the same deficiencies as Combustion Engineering's plan; that it would pay claimants without evidence of either impairment or exposure to asbestos released from the floor tiles, and that the company's contribution to the plan (\$2.7 million note and \$250,000 in cash) did not represent a "meaningful" contribution, as required under bankruptcy law.³⁸ At this point, more than two years had passed since Congoleum first announced its intention to negotiate a pre-pack bankruptcy, a far cry from the speedy process the company had envisioned.

In April 2005, the company again pulled its plan, after negotiating with members of the asbestos claimants' committee and the future representative, to make it more responsive to the Combustion Engineering decision. In particular, claims settled under the pre-petition settlement agreement would give up their security interest, thus, shifting to an equal standing with other current and future asbestos claimants.³⁹ The company floated the end of 2005 as the date by which its asbestos problems would be resolved.⁴⁰ Following the retraction of the plan, the

³⁵ See "Congoleum Seeks Extension Of Control Over Ch 11 Case," *Dow Jones Corporate Filings Alert*, January 12, 2005.

³⁶ See "Congoleum Wins Extension Of Control Over Ch 11 Case," *Dow Jones Corporate Filings Alert*, February 2, 2005.

³⁷ See "Defendant's 'Pre-Packaged' Bankruptcy Is Rejected," *The Legal Intelligencer*, December 7, 2004.

³⁸ See "Insurers Object To Congoleum Ch 11 Plan Confirmation," *Dow Jones Corporate Filings Alert*, April 5, 2005.

³⁹ See "Congoleum Corporation to Modify Plan of Reorganization," *Business Wire*, April 22, 2005.

⁴⁰ *Ibid.*

bankruptcy court granted Congoleum an extension of its exclusivity period through August 1, 2005.⁴¹ In August, the company petitioned for and gained approval for its fifth extension of its exclusivity period, this one for three months, through November 1, 2005.⁴²

On July 28, 2005, the bankruptcy court approved the disclosure statement for Congoleum's sixth amended restructuring plan, which meant the company would be able to approach creditors to gain approval for its plan.⁴³

On August 2, 2005, the trial in the coverage action between insurers and Congoleum began, with Congoleum arguing it had no option but bankruptcy and that the plan was reasonable; and the insurers building on Judge Jack's decision several months earlier, arguing that Congoleum cut a sweetheart deal with plaintiffs' attorneys to pay claimants who submitted suspect information, including documentation from doctors challenged by Judge Jack.⁴⁴

In October 2005, Congoleum filed for its sixth extension of its exclusivity period, this time a six month extension through May 2006. At the same time, a federal appellate judge ruled that Congoleum would have to fire one of its law firms, Gilbert Heinz, because the firm which negotiated the pre-pack settlement agreement for Congoleum had worked on behalf of the asbestos claimants before the negotiations.⁴⁵ Moreover, the Third Circuit found that Judge Ferguson should have rejected Congoleum's plan for reorganization because of the conflict of interest of Gilbert Heinz in negotiating the plan. The court stated:

“We do not approve of a bankruptcy court applying less than careful scrutiny to pre-petition procedures in pre-packaged plans,” Senior U.S. Circuit Judge Joseph F. Weis Jr. wrote. “For a court to approve a pre-packaged plan whose preparation was tainted with overreaching ... would be a perversion of the bankruptcy

⁴¹ See “Congoleum Wins Extension Of Control Over Ch 11 Case,” *Dow Jones Corporate Filings Alert*, April 26, 2005.

⁴² See “Congoleum Asks Court For 90-Day Exclusivity Extension,” *Dow Jones Corporate Filings Alert*, July 13, 2005.

⁴³ See “Congoleum finally gets nod,” *TheDeal.com*, August 1, 2005.

⁴⁴ See “Trial puts asbestos settlements center stage—Congoleum tile firm case a test for courts,” *The Star-Ledger*, August 3, 2005.

⁴⁵ See “Appeal Court Tells Congoleum To Fire Insurance Counsel,” *Dow Jones Corporate Filings Alert*, October 13, 2005.

process,” Weis wrote in an opinion joined by 3rd Circuit Judges Dolores K. Sloviter and Theodore A. McKee Jr.⁴⁶

According to Professor Lestor Brickman, who had criticized the Gilbert Heinz conflict before the Senate sub-committee hearings, the Third Circuit’s decision

is the latest in a series of 3rd Circuit pronouncements essentially holding that the ‘business as usual’ approach in which bankruptcy courts had largely rubber-stamped plaintiffs lawyers’ effective control over asbestos bankruptcy proceedings—irrespective of the bankruptcy rules and conflicts of interest—is no longer to be tolerated.⁴⁷

In November 2005, the bankruptcy court took the unusual step of denying Congoleum’s petition for an extension of its exclusivity period.⁴⁸ As a result, other creditors, including the insurers, would be allowed to submit their own reorganization plans. Typically, companies are granted numerous extensions of the exclusivity period—Owens Corning, which declared bankruptcy in 2000 has had 10 extensions, and Kaiser, which declared bankruptcy in 2002 has had 11 extensions.⁴⁹ In discussing her decision, Judge Ferguson referred to the new bankruptcy legislation enacted October 15, 2005, which while not binding on cases filed prior to its passage, included the provision that the exclusivity period shall last only 18 months.⁵⁰

Acting quickly on the removal of exclusivity, on December 5, 2005, insurers filed their own competing reorganization plan. This plan also established a trust to compensate future asbestos claimants, but imposed more stringent medical criteria and different settlement amounts.⁵¹

Thus, almost three years after Congoleum first announced its intention to file a prepackaged bankruptcy, not only has the company not yet emerged from bankruptcy, but it does

⁴⁶ See “Conflicts Put End To Congoleum’s Pre-Packaged Plan,” *The Legal Intelligencer*, Volume 232; Issue 201, October 17, 2005.

⁴⁷ *Ibid.*

⁴⁸ See “Congoleum Loses Bid For 6-Month Exclusivity Extension,” *Dow Jones Corporate Filings Alert*, November 10, 2005.

⁴⁹ See “Extensions: no problem in Delaware,” *TheDeal.com*, November 15, 2005.

⁵⁰ *Ibid.*

⁵¹ See “Congoleum Insurers File Competing Chapter 11 Plan,” *Dow Jones Corporate Filings Alert*, December 5, 2005.

not even have a plan to submit to the courts. The company's latest intention is to file a seventh amended plan on February 3, 2006.

The Congoleum experience, following on the heels of the rejection of Combustion Engineering's plan, may cause other companies to think twice about entering a pre-pack bankruptcy. Historically the pre-pack route offered companies a quick way to resolve their asbestos liabilities and emerge from bankruptcy. But with courts disallowing the typical pre-pack plan (a two trust plan in which pre-petition settlements are secured, while current and future claims are not) and with insurers pointing out the lax criteria in the plans (following up on Judge Jack's seminal decision in the Silica MDL), the pre-pack may not enjoy the same popularity with companies hoping to use the bankruptcy courts to manage their asbestos liabilities.

Thus, not only are existing trusts revising their payment criteria (as discussed relative to the Manville Trust above), but companies may no longer turn to a prepackaged bankruptcy as a means to manage their asbestos liabilities. Therefore, plaintiffs' law firms may lose some of the influence they once had over the terms of the trust, again, potentially making it harder for them to file the same proportion of unfounded claims as they have in recent years.

III. State Tort Reforms

A. Key Reforms in States with Largest Asbestos Filings

Prior to 2005, a number of jurisdictions created deferred dockets for unimpaired non-malignant claims or denied them standing. Others barred out-of-state claims from bringing claims in their jurisdiction. For example,

- i. In Mississippi, claimants that were not exposed in Mississippi and are not Mississippi state residents can no longer bring a claim in the state. According to the Manville Trust claims data, over 50 percent of claims filed in Mississippi were filed by out-of-state claimants.
- ii. In New York City, claimants that cannot demonstrate evidence of disease (in the case of cancers) or impairment (in the case of non-malignants) will no longer be assigned to an active trial docket.
- iii. In Ohio, unimpaired claims can no longer be filed in state court.

- iv. In Pennsylvania, unimpaired non-malignant claims are not considered a compensable disease.

The year 2005 marked significant legislative and judicial tort reforms in key jurisdictions. Texas passed legislation requiring evidence of impairment for the filing of asbestos-related disease claims. Georgia and Florida enacted similar legislation, with an impairment requirement. In addition, Florida and Georgia have both tightened their rules for doctors engaged in the mass screening business, requiring that doctors draw no more than 10 percent of their revenues from consulting or expert-related services.

Thus, five states (New York, Ohio, Texas, Georgia and Florida) now have laws or judicial decisions either barring the filings of unimpaired claims or relegating them to deferred dockets.

B. Impact of Tort Reforms on Filings

1. Asbestos defendants' annual reports

One expected impact of the recent tort reforms is a drop in filings. Plaintiffs' attorneys, in making the cost-benefit decision to bring an unimpaired non-malignant case, may elect to pass on the low benefit cases in light of the recent tort reforms.

To see whether filings have dropped with tort reforms, we obtained data on asbestos-related claim filings for all defendants that report claims in public filings as well as for the Manville Trust.⁵² For all companies, 2004 and 2005 filings are below the peak and for all the companies on the list, including the Trust, filings in 2005 are lower than filings in the prior year. (See Table 2. The boxed numbers represent the peak years.)

⁵² Not all defendants with asbestos liabilities are required to report asbestos claims in the annual reports. We ran a search of the word asbestos in the SEC filings of public companies. We then manually reviewed the filings and included companies that reported filings for several years to assess a trend. We focused on solvent defendants.

Table 2**Summary of New Asbestos Claims
2000 to 2005**

Company Name (1)	Number of Claims					
	2000 (2)	2001 (3)	2002 (4)	2003 (5)	2004 (6)	2005 (6)
Solvent Defendants						
AB Electrolux ¹					5,600	850
American International Group, Inc.	650	739	959	669	909	854
American Standard Companies, Inc.			45,404	26,988 ²	12,432 ²	10,544
Ameron International Corporation				9,279	1,633	72
Burlington Northern Santa Fe Corporation				1,023	712	835
CertainTeed Corporation ³	19,000	60,000	67,000	62,000	18,000	
Cooper Industries, Ltd			21,791	11,843	18,185	4,562
Crane Co.	3,123	10,985	49,429	19,115	18,932	7,986
Crown Cork & Seal ⁴	44,000	53,000	36,000	36,000	13,000	9,000
CSX Corporation			2,095	2,368	1,178 ⁵	765
Foster Wheeler	41,300	54,700	45,200			
Georgia Pacific Corporation	55,600	39,700	41,700	39,000	26,500	10,667 ⁶
Goodyear Tire & Rubber Company		17,100 ⁷	38,900 ⁷	26,700	12,700	6,200
Hercules, Inc.			11,000	16,885	8,305	4,408
Honeywell International, Inc			10,000	25,765	10,504	7,520
Owens-Illinois, Inc.	20,000	31,000	21,000	26,000	15,000	9,000
Union Carbide Corp.\ AmChem		73,806	121,916	122,586	58,240	34,394
Viacom Inc. ⁸		60,000	49,400	36,990	16,060	11,470
Bankruptcy Trust						
Johns-Manville Corporation ⁹	59,242	91,030	53,487	101,267	56,722	18,397

Notes and Sources:

All data were obtained from 10K filings, unless noted otherwise. All numbers are extracted from the most recent SEC filing that refers to a given year and may be restated numbers that are different from previously reported numbers. All discrepancies are noted. Numbers refer to the number of claimants unless otherwise noted.

¹ Data obtained from 6K filings

In 2002, there were 167 cases; in 2003, there were 497 cases; in 2004, there were 457 cases; in 2005, there were 802 cases. There was only new claims information for 2004 and 2005.

² In the 2004 10K, the number of claims filed for 2003 was 26,295 and for 2004 was 12,059.

³ Data was obtained from the CertainTeed Corporation 2004 Annual Report.

⁴ In 2003, Crown Cork & Seal Company, Inc. became a wholly owned subsidiary of its newly formed public holding company, Crown Holdings, Inc.

⁵ In the 2004 10K, the number of claims filed for 2004 was 984.

⁶ 8000 was given for three quarters and scaled by 4/3 to a full year

⁷ In the 2002 10K, the number of claims filed for 2002 was 36,500 and for 2001 was 18,000. In the 2003 10K, the number of claims filed for 2002 was 39,800 and for 2003 was 24,300.

⁸ In 1999, Viacom Inc. purchased Westinghouse Electric Corporation, making Viacom, Inc. the successor-in-interest to Westinghouse Electric Corporation.

In 2005, Viacom Inc. was renamed CBS Corporation and afterwards, separated into CBS Corporation and New Viacom. Data for 2005 was obtained from the CBS Corporation 2005 10K.

⁹ Data obtained from Manville Trust Financial Statements and Reports on www.mantrust.org. New claims data is cumulative and the numbers shown are the differences between a given year and the previous year.

Source: Company 10K SEC filings.

Thus, even before the enactment of 2005 tort reforms, claim filings overall dropped, likely in response to the pre-2004 tort reforms in Mississippi, Ohio and New York as well as a likely overall decline in annual asbestos disease incidence. This trend may be accelerated in 2005 given the additional reforms.

2. Manville Trust

In addition to the impact of state tort reforms, the drop in the Manville Trust filings can be related to the adoption of its 2002 TDP, with heightened medical and exposure

requirements.⁵³ The Trust delayed requiring claim submission under the 2002 TDP until October 2003, after which time the number of claims filed against the Manville Trust dropped dramatically. Filings in 2003 (during most of which claimants had a choice of filing under the 2002 TDP or the 1995 TDP) reached a record high, with over 100,000 claims filed against the Trust. But over 90,000 claims (or 90 percent) were filed prior to October 10, 2003, the date after which plaintiffs had to file under the new TDP.⁵⁴

According to the letter from Robert A. Falise, the Chairman and Managing Trustee, accompanying the third quarter 2004 report:

Total 2004 claim filings pursuant to the 2002 TDP were approximately 11,200 as of the end of the third quarter. In 2003, pursuant to the 1995 TDP, there were 51,400 third quarter filings and 88,500 as of the end of the third quarter. We attributed the comparatively low rate of claim filings in 2004 to three factors: 1) the more stringent exposure and medical criteria in the 2004 [*sic*] TDP and lower scheduled values for most non-malignant claims; 2) the slow pace at which new asbestos trusts are being formed; and 3) the uncertainty surrounding national asbestos litigation.⁵⁵

The immediate impact of the new TDP was to have plaintiffs' lawyers file a large number of claims before it went into effect. This filing pattern shows that plaintiffs' counsel did not want these claims to be filed under the new TDP. Thus, claim filings are sensitive to the strictness of the criteria necessary for payment, as also hypothesized by the Chairman of the Manville Trust.

Since the 2002 Trust Distribution Plan ("TDP") became effective in October 2003, filings against the Manville trust have declined with the nonmalignants being affected the most.

Figure 3 shows quarterly filings against the trust.

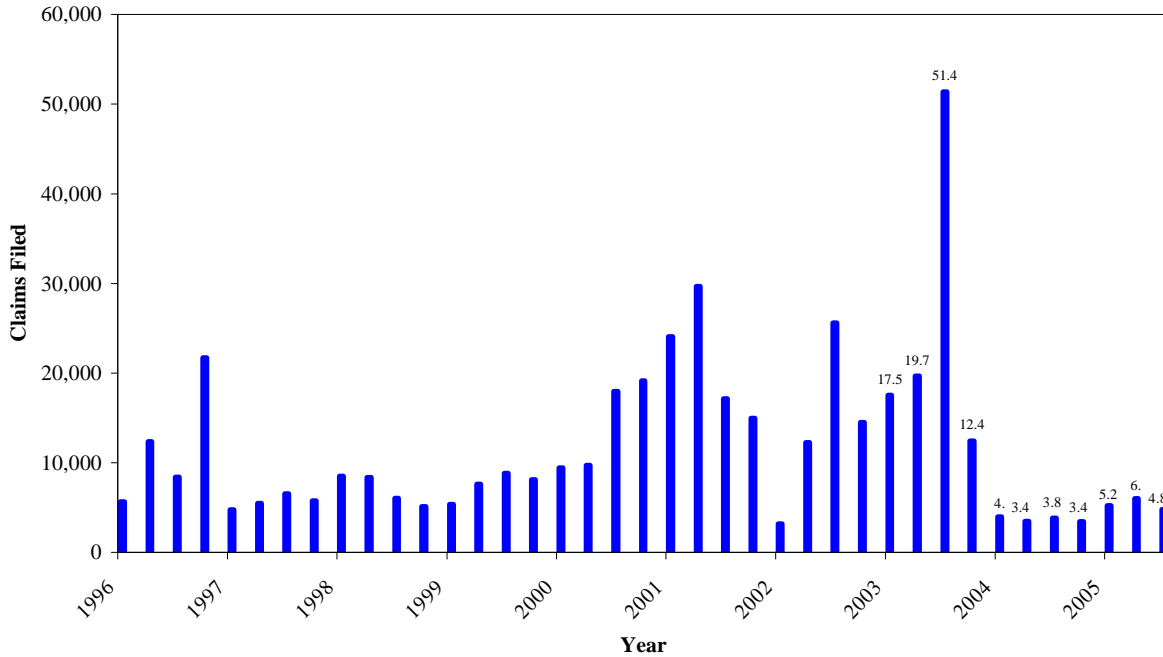
⁵³ See <http://www.mantrust.org>. As evidence of the tightening of requirements, in September 2002, the Trust barred supporting evidence from another doctor, Dr. Gregory Nayden. Eleven percent of the accepted non-malignants in the sample had a PFT reported by Dr. Nayden, of which 78 percent had a qualifying score. See, memorandum from David Austern, "Suspension of Acceptance of Medical Records Prepared by Gregory Nayden and the American Medical Testing Facility."

⁵⁴ See http://www.mantrust.org/FILINGS/Q4_03/4THQTR03.pdf.

⁵⁵ See letter from Robert A. Falise to Honorable Jack. B. Weinstein and Honorable Burton R. Lifland, dated October 29, 2004.

Figure 3

**Manville Trust
Filings by Quarter: 1996 - 2005**



C. Impact on Forecasting Methodology

1. Medical Criteria

As discussed earlier, several states, Texas, New York, Georgia, Florida and Ohio have established medical criteria for all pending and future asbestos claims.⁵⁶ This included a requirement that all claimants submit a qualifying medical report with a pulmonary function test that demonstrates physical impairment.⁵⁷ These reforms require that each asbestos case be tried on its own merits, not as a “bundle” of claims that may include a few truly sick claimants and dozens of unimpaired claimants. The reforms are meant to shut down the “mass screening” of

⁵⁶ New York’s criteria were set through the courts and apply to claims filed in New York county, but this jurisdiction received most of the claims in the state.

⁵⁷ www.atra.com

potential asbestos and silica claimants that has resulted in tens of thousands of unimpaired asbestos claims in the courts.

We used the 2004 Manville extract to estimate the percentage of nonmalignant filings that are classified by Manville as unimpaired in the states where the medical requirements reforms have been enacted. Table 3 shows that 65 percent of nonmalignant filings in these states were unimpaired and would have been unable to file under the new laws. We included New York because of the inactive docket for unimpaired claims.⁵⁸

Table 3
Percent of Manville Nonmalignant Unimpaired Claims

<u>Filing State</u> (1)	<u>Non-Malignant Claims</u> (2)	<u>Percent Unimpaired</u> (3)	<u>Count Unimpaired</u> (2) * (3)
Florida	24,533	67.92%	16,663
Georgia	6,576	60.72%	3,993
New York	28,112	84.95%	23,882
Ohio	48,209	79.68%	38,411
Texas	100,177	52.75%	52,847
Total	207,607	65.41%	135,796

2. Venue Reform

Mississippi passed a second venue reform bill in 2004 that provides that proper venue for a plaintiff is in the county where the defendant resides or where a substantial alleged act occurred. The 2004 venue reform is more strict than venue reform passed in 2002.⁵⁹

Using the 2004 Manville database, we find that 43,000 claims or 53 percent of Mississippi’s claims are filed by out-of-state claimants that would not be able to file in the state if the reform were enacted earlier. (See Table 4.)

⁵⁸ The following disease categories are defined as impaired: CT3 (Disabling Bilateral Interstitial Lung Disease, Pre-TDP), 3 (Disabling Bilateral Interstitial Lung Disease, 1995 TDP), L3 (Asbestosis/Pleural Disease, 2002 TDP), and L4 (Severe Asbestosis Disease, 2002 TDP). Unimpaired categories are: CT1 (Bilateral Pleural Disease, Pre-TDP), CT2 (Nondisabling Bilateral Interstitial Lung Disease, Pre-TDP), 1 (Bilateral Pleural Disease, 1995 TDP), 2 (Nondisabling Bilateral Interstitial Lung Disease, 1995 TDP), L1 (Other Asbestos Disease (Cash Discount Payment), 2002 TDP), and L2 (Asbestosis/Pleural Disease, 2002 TDP).

⁵⁹ Venue reform: H.B.13, 2004.

Table 4

Mississippi Out of State Filings

<u>Year Filed</u>	<u>Claims Filed in MS</u>	<u>MS Claims Filed by MS Residents</u>	<u>MS Claims Filed by Non-MS Residents</u>	<u>Percent In-State Filers</u>	<u>Percent Out of State Filers</u>
(1)	(2)	(3)	(4)	(3) / (2)	(4) / (2)
Overall	80,731	37,962	42,769	47.02%	52.98%

3. High volume doctors

As discussed above, in September 2005, Manville announced that it will deny payments to claims that are diagnosed by the following doctors and screening facilities:⁶⁰ Dr. James Ballard, Birmingham, AL Health Screen, Inc., Jackson, Mississippi; Dr. Kevin Cooper, Pascagoula, Mississippi Occupational Diagnostics, Ocean Springs; Dr. Todd Coulter, Ocean Springs, Mississippi N&M, Inc., all locations; Dr. Andrew Harron, Kenosha, WS RTS, Inc., Mobile, Alabama; Dr. Ray Harron, Bridgeport, West Virginia; Dr. Glynn Hilbun, Moss Point, Mississippi; Dr. Barry Levy, Sherborn, Massachusetts, Dr. George Martindale, Mobile, Alabama and Dr. W. Allen Oaks, Mobile, Alabama.

Using a Manville database on all claims filed against the Trust through 2004, Table 5 shows that these doctors (including Nayden) have diagnosed about 62,000 claims or 17 percent of all claims with doctors information that were filed against Manville.

⁶⁰ Memo from David Austern, President CRMC, September 12, 2005. Manville previously announced in 2002 that it would not accept any claims diagnosed by Dr. Nayden.

Table 5

Count of Manville Claims for Doctors Banned by Manville

Primary Doctor	Count	Percent of Banned Doctors	Percent of Claims with Doctor
HARRON, RAY A.	46,516	75.27%	12.61%
NAYDEN, GREGORY A.	8,211	13.29%	2.23%
BALLARD, JAMES WAYLAND	6,737	10.90%	1.83%
OAKS, W. ALLEN	218	0.35%	0.06%
HARRON, ANDREW	115	0.19%	0.03%
COOPER, KEVIN RICHARD	1	0.00%	0.00%
COULTER, H. TODD	1	0.00%	0.00%
HILBUN, GLYN R.	1	0.00%	0.00%
MARTINDALE, G.H.	1	0.00%	0.00%
Subtotal	61,801	100.00%	
Trust Claims with Doctor Information	368,848		16.76%
All Manville Trust Claims	746,335		

Sources:

Banned doctors found in CRMC memo Re: 'Suspension of Acceptance of Medical Records' on September 12, 2005 and CRMC memo Re: 'Suspension of Acceptance of Medical Records Prepared by Dr. Gregory Nayden and the American Medical Testing Facility' on September 24, 2002.
Based on Manville combined data through Sept. 2004.

In sum, Manville would have received at least 30 percent fewer filings historically if we were to take into account the Mississippi venue reform, the medical impairment requirements in Texas, Florida, Georgia, Ohio and New York, and the banned list of high volume doctors.

D. Predictability of State Tort Reform as a Function of Past Asbestos Filings

To determine whether the decline in asbestos claims was a foreseeable consequence of excessive filings, we analyze the factors determining the enactment of state tort reforms using statistical models. We collected data on the dates of enactment of various types of reforms in 34 significant filing states including venue reforms, joint and several liability, caps on punitive damages and medical criteria during the period 1991 to 2004. For each state and year, the model takes into account the following variables:

- 1) an indicator for whether the same party controls the State House and Senate;
- 2) an indicator for whether the Democrats control both the State House and Senate;
- 3) Manville filings.

We analyzed the probability of enacting one or more of the following reforms: venue reform, caps on punitive damages, medical requirements and joint and several liabilities. We estimate the model using data from 1991 to 1999 and then predicted, out of sample, the probability of enacting reform during the period 2001-2004. Variables such as the number of lawyers per capita, percentage of gross domestic product attributable to manufacturing and the number of firms in the state were not statistically significant.

We found that the main factors predicting the enactment of tort reforms include: the level of claimant activity (past Manville filings) and political factors (the same party controlling the State House and Senate). See Table 6 for statistical results.

Table 6
Random Effects Logistics Regression on
Probability of Enacting Tort Reform
1991 - 1999

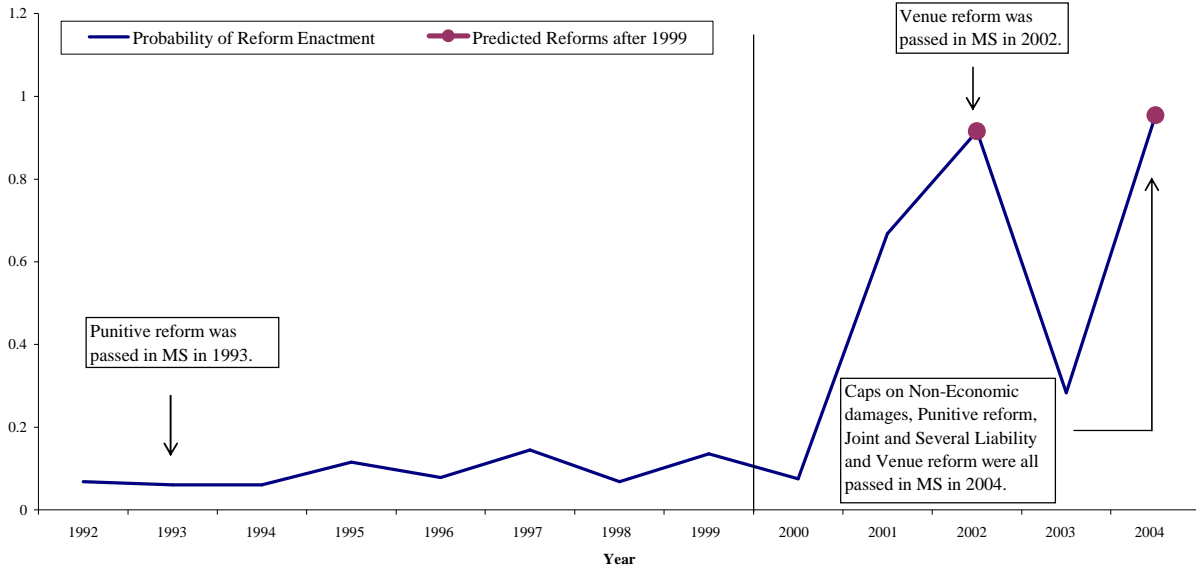
	<u>Param</u>	<u>z</u>	<u>Prob > z </u>
Prob > Chi2	0.0143		
Log Likelihood	(75.216)		
Observations	272		
Number of Groups	34		
Dependent Variable:			
REFORMS ¹			
Independent Variables:			
MANVILLE_LAGGED	0.000329	2.47	0.013 *
CONGRESS	1.808876	2.37	0.018 *
DEMOCRAT	(1.050893)	(2.13)	0.033 *
CONSTANT	(3.682832)	(5.02)	0.000 *

Notes:

¹ Reforms we took under consideration are: Punitive Damages reform, Joint and Several Liability reform, Venue reform and Medical Impairment Requirement.

The model shows that if lagged Manville filings in the prior year increased by 10,000 claims, the probability that reform will be enacted increases by 22 percent. To test the robustness of the results, we used the model to predict reforms out-of-sample for the states of Mississippi, Texas and Ohio. The figures below illustrate how the model predicts reforms during the period 2000 to 2004.

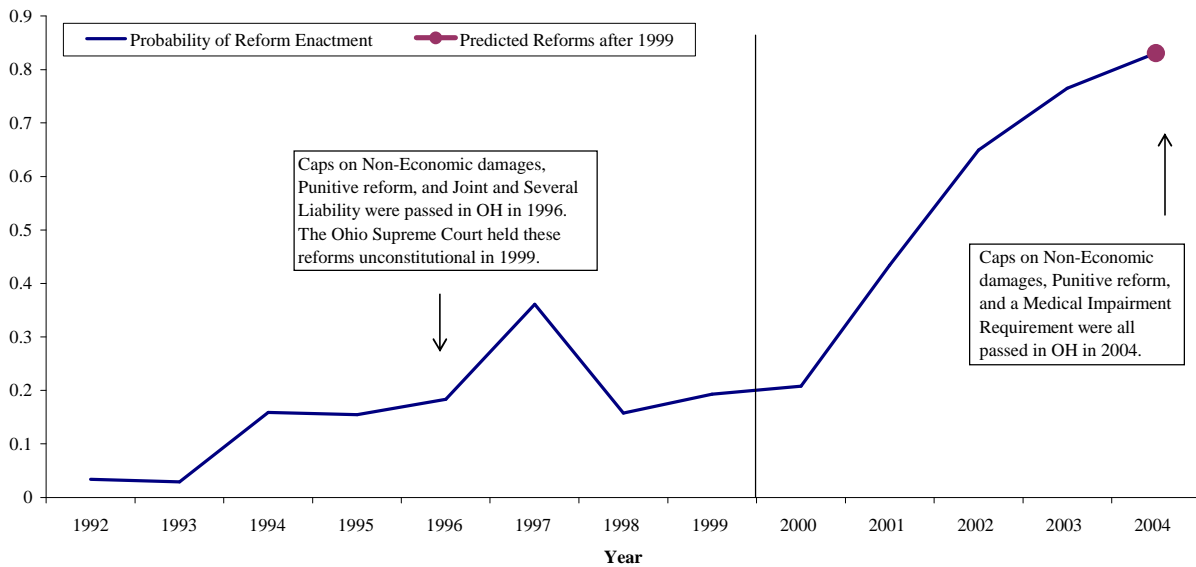
Figure 4
Predicted Probability of Passing Reforms in Mississippi



Note:

The regression model used to predict the probability of passing reforms is based on data between 1991-1999 over 34 states. The control variables include lagged Manville filings and the political parties who control the state house and senate.

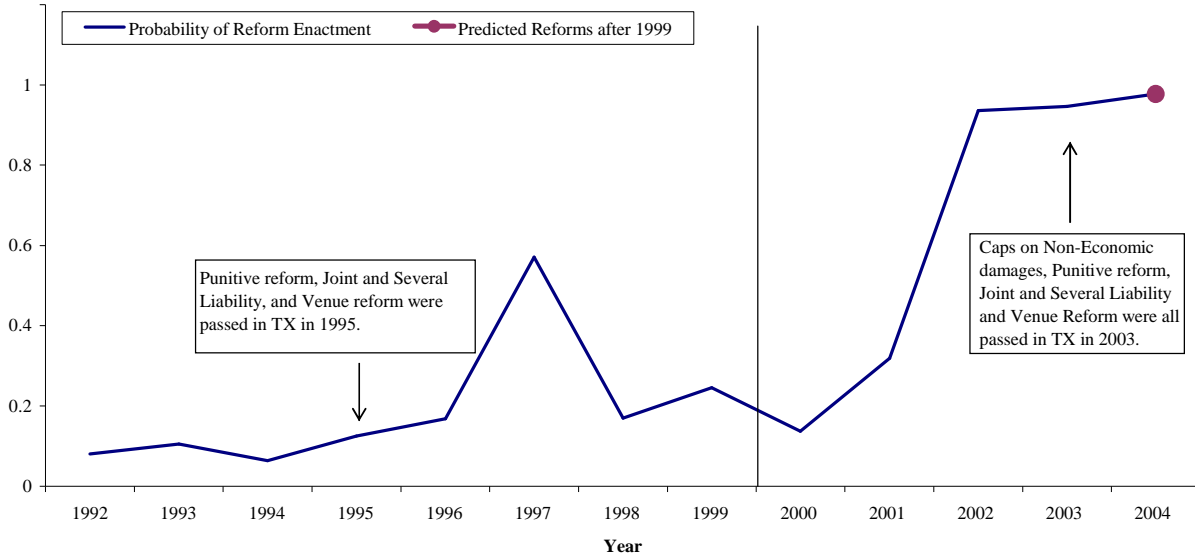
Figure 5
Predicted Probability of Passing Reforms in Ohio



Note:

The regression model used to predict the probability of passing reforms is based on data between 1991-1999 over 34 states. The control variables include lagged Manville filings and the political parties who control the state house and senate.

Figure 6
Predicted Probability of Passing Reforms in Texas



Note:

The regression model used to predict the probability of passing reforms is based on data between 1991-1999 over 34 states. The control variables include lagged Manville filings and the political parties who control the state house and senate.

IV. Conclusion

Our results show that a forecast of ever increasing filings, which fail to take into account reactions by institutions, courts and legislators, will be biased upward. At a minimum, it is unrealistic to assume that if massive amounts of unimpaired claims and unfounded claims are settled for significant sums then they will continue to be liquidated the same way in the future. Yet, this is not only the most common assumption, but, under certain circumstances, it is even assumed that if the claiming rate increases, it will continue to increase for several years in the future coming to rest at a new, higher plateau. The truth is more complicated: when senses of justice are offended and large amounts of money are at stake, the underlying causes catch the attention of courts and lobbying groups. Though such a trend would not necessarily be reversed overnight, the lagged effect on courts and elected officials is nonetheless predictable. These institutions will respond by tightening the criteria under which plaintiffs will be compensated and the amounts that will be available, should a claimant be able to establish liability.