

RETHINKING THE LANDSCAPE OF TORT REFORM: LEGISLATIVE INERTIA AND COURT-BASED TORT REFORM IN THE CASE OF ASBESTOS*

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On its face, the asbestos case seems a quintessential example of the obstacles to enacting major tort reform in the United States, even when judges repeatedly ask for legislative relief and tort law is demonstrably costly and inconsistent. However, a closer look reveals that, since the early 1980s, judges and lawyers have been implementing “court-based tort reform”: the creative use of existing rules and procedures to alter the litigation process. Understanding this institutional capacity, in turn, broadens leading conceptions of the landscape of American tort reform in terms of both the possibilities for change and the politics of change.

Judges have been urging Congress to pass major asbestos litigation reform for years. In 1991 the Judicial Conference called for “congressional action to establish a national asbestos claim resolution system” (Judicial Conference, 1991:31). In *Amchem Products v. Windsor* (1997), *Ortiz v. Fibreboard* (1999), and *Norfolk & Western Railway Co. v. Ayers* (2003), the Supreme Court reiterated the need for federal action, arguing that “the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation” (*Ortiz*:821).

Following the 2004 elections, Congress finally seemed poised to act (Stern, 2004, 2005). On April 13, 2005, Senator Arlen Specter (R-Pa), chair of the Senate Judiciary Committee, announced he was “very close” to reaching an agreement on the Fairness in Asbestos Injury Resolution Act (the FAIR Act), which proposed to replace tort litigation with a \$140 billion no-fault trust fund that would compensate asbestos-injury victims according to detailed medical criteria. Senator Patrick Leahy (D-Vt), ranking Democrat on that committee, one-upped his colleague’s enthusiasm, stating, “I think we are very, very close to a bill.” Wall Street shared the senators’ optimism, as stock values of companies with significant asbestos-litigation exposure, such as Armstrong Holdings and Owens Corning, jumped over 80 percent (Higgins, 2005).

Almost immediately, however, opposition emerged (Stern, 2006). Conservatives warned that the trust would grow and become a permanent fixture in the federal bureaucracy. Liberals argued that the bill was underfunded and overly restrictive and that it tilted toward big business. Another sticking point was that the

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FAIR Act would allow victims to return to court upon the trust's insolvency, a real possibility given the difficulty of estimating future asbestos claims. The United Auto Workers reportedly called this provision "essential" (White House Press Bulletin, 2005). Some insurers and business groups balked, arguing that it would deny them certainty about future asbestos liability.

By summer, opposition had hardened (*Inside OSHA*, 2005). Long before hurricanes Katrina and Rita blew many initiatives off Congress's agenda and the Senate turned to the confirmation of two Supreme Court justices, Senate Minority Leader Harry Reid (D-Nv) quipped, "If anyone thinks they can bring up the asbestos bill and get it passed, I think we can get them a magic show in Las Vegas" (Knight, 2005). Reid was right. Although proponents were able to push the bill out of committee, the FAIR Act was defeated in a procedural vote on February 14, 2006.

The demise of the FAIR Act was "déjà vu all over again" (*CQ Weekly*, 2003). Over the past thirty years, Congress has consistently failed to enact major asbestos-litigation reform, despite a growing expert consensus that asbestos litigation is woefully inefficient and fails to serve other values, such as deterring corporate misconduct or providing individualized treatment to victims (Kakalik et al., 1983; Hensler et al., 1985; Carroll et al., 2002, 2005). In the absence of federal legislation, the states have taken some action, passing damage caps and other laws that seek to deter or delay the filing of lawsuits. These piecemeal measures, however, do not change the structure of the litigation process; they merely aim to reduce the volume of cases.

On its face, the case of asbestos seems to illustrate a recurrent theme in the scholarly literature on the battle over tort law in the United States: once it takes hold, the litigation process is very difficult to replace, even when it is inefficient and unpredictable (Burke, 2002, 2001; Kagan, 2001, 1994; Barnes, 1997; see also Hathaway, 2001). The point is not that tort reform is impossible; rather, reforms will tend to work only at the margins, as they seek to reduce the amount of litigation while preserving core attributes of the tort system that engender cost and uncertainty, such as juries, open-ended rules, and adversarial contestation and dispute resolution.

This article challenges this conventional interpretation and argues that legislative inertia tells only part of the asbestos story. Since the early 1980s, judges and lawyers have been implementing "court-based tort reforms"—the adaptation of existing rules and procedures by lawyers and judges to change the standards and enforcement mechanisms governing who decides, who pays, how much, and when. Most strikingly, judges and lawyers have used these tools on an ad hoc basis to create independently administered trust funds with their own rulemaking power and funding sources, actions typically associated with legislatures, not courts. The point is not an academic quibble over the proper description of the case of asbestos. Court-based tort reforms have not merely worked at the margins of asbestos-injury compensation. They have altered its structure in both pending and future cases and affected the resolution of hundreds of thousands of claims and the distribution of billions of dollars. Moreover, court-based tort reforms have had significant political implications, cast-

ing a shadow over attempts to create a comprehensive federal response to what has been called “the worst industrial accident in U.S. history” (Cauchon, 1999:4).

The article further contends that, although extreme in some ways, the case of asbestos holds broader lessons for understanding the landscape of tort reform in the United States, in terms of both the possibilities for change and the politics of change. After all, the tools of court-based tort reform used in the case of asbestos, such as Chapter 11 reorganizations, group settlements, multidistrict litigation, the doctrine of collateral estoppel, and pretrial orders, are available in other policy domains. The general availability of these tools, in turn, suggests that we must broaden our conception of tort reform to include not only the formal revision of rules but also the informal adaptation of existing rules and procedures, as well as consider the ways in which judicial innovation reinforces legislative inertia. Finally, by drawing connections between litigation and legislation, it is hoped that the analysis will highlight the value of interdisciplinary approaches to studying the courts, encouraging those interested in the legislative process to focus more carefully on the details of litigation while prompting those interested in litigation to consider the political implications of evolving legal strategies.

To develop these arguments, this article begins with a snapshot of the standard account of the obstacles to passing major tort reform legislation. It then argues why the case of asbestos seems a quintessential example of this conventional wisdom, but, in fact, suggests its limitations. It concludes by setting forth a new typology of tort reform that builds on existing frameworks and points to avenues of future inquiry.

THE POLITICAL LANDSCAPE OF TORT REFORM: THE CONVENTIONAL VIEW

In his superb analysis of civil-litigation reform, Burke identifies three main types of anti-litigation legislation: discouragement, management, and replacement reforms (Burke, 2002:27-44, Table 1.1). Discouragement reforms, such as damage caps, aim to deter the filing of lawsuits by making them harder to bring or potentially less remunerative. Management reforms, such as “legislative overrides” that seek to clarify conflicting interpretations of the law, or bills that streamline existing procedures, aim to make disputing more efficient and less adversarial. Replacement reforms, such as workers’ compensation, no-fault auto insurance, and the FAIR Act, offer an administrative alternative to litigation that may replace litigation but more typically provides an additional remedy to claimants.

Burke adds that each type of legislation typically engenders a distinct mode of politics (Burke, 2002:27-41; see also Campbell, Kessler, and Shepperd, 1995; Elliot and Talarico, 1991). Discouragement reforms limit defendants’ exposure to litigation at the expense of plaintiffs’ access to courts. As a result, these reforms tend to pit plaintiff groups, trial lawyers, and their allies in the Democratic Party against defendant groups, political conservatives, and their allies in the Republican Party. Management reforms, by contrast, do not obviously favor either plaintiff or defendant

groups; rather, they seek to reduce administrative costs to the advantage of both sides. As a result, these measures tend to be less controversial and to produce less division along partisan lines. If resistance does arise, it typically emerges among lawyers and judges, who benefit from the status quo, want to protect their turf, and may be more ideologically committed to the value of adversarial procedures that promise high levels of individual due process.

Replacement reforms are the most ambitious, as they aim to alter the underlying structure of the system rather than regulate the volume of suits or ameliorate existing procedures. Given their scope, it is not surprising that replacement reforms face the greatest political obstacles. Part of the reason is that the American lawmaking process generally favors incremental change, because it is highly fragmented and features multiple veto points that provide reform opponents ample opportunities to water down or block major reforms (see generally Steinmo and Watts, 1995; Steinmo, 1994).

A further complicating factor is that Americans are notoriously suspicious of centralized authority and prefer private solutions to public problems. As Kagan (2001:9) explains, "The taproot of [American reliance on litigation] is the 'liberalism' that has dominated American political culture since the Nation's birth, [which] has always emphasized the primacy of individual liberties and rights vis-à-vis governmental control" (see also Lipset, 1996).

Given these institutional and cultural tendencies, trying to create new administrative compensation schemes is always an uphill battle and may be particularly steep for replacement reforms. Similar to other new program initiatives, replacement reforms involve the unappealing political prospect of adding to the bureaucracy and, depending on the funding mechanism, raising taxes or increasing deficits. Unlike other new program initiatives, replacement reforms may also involve curtailing individual rights, which is generally more difficult than providing new ones (see generally Pierson, 1994). Conversely, deferring to the courts offers elected officials a politically enticing combination of blaming judges for unpopular decisions while shifting much of the costs of governmental intervention to private litigants (Burke, 2002; see also Melnick, 2004).

The implication is that the passage of replacement reforms should be relatively rare. Consistent with this expectation, the American Tort Reform Association (ATRA) reports an impressive number of state tort reforms, but all involve discouragement: forty states have enacted joint and several liability reform; thirty-one states have enacted caps on punitive damages; twenty-three states have passed caps on non-economic damages; eighteen states have enacted product-liability reform; eight have enacted class-action reform; and the list goes on. It should be added that these reforms have produced mixed results with respect to actually reining in the frequency and cost of litigation (Pace, Golleni, and Zakaras, 2004; Burke, 2002:32-33; Lee, Browne, and Schmidt, 1994; U.S. Office of Technology Assessment, 1993; Carroll and Pace, 1987), although assessing the impact of tort reform is enormously complex given the potential for indirect effects on the attitudes of jurors and judges as well as lawyers' ability to adapt over time to changing rules (see Hans, 2000; Daniels and Martin, 2004).

Discouragement reforms also dominate congressional action. Since the 1980s, Congress has, among other things, curbed small-plane manufacturers' liability, immunized volunteers from litigation, taxed tort awards for emotional distress and punitive damages, limited Amtrak's liability for accidents to \$200 million, protected the makers of some medical devices, capped claims for damages related to the "Y2K" computer bug, and constrained the filing of class-action lawsuits. It is true that Congress has also enacted a handful of replacement reforms, including the creation of compensation funds for the victims of the September 11 attacks and for families whose children fall ill after being vaccinated. However, these instances only underscore the difficulty of enacting replacement reform, because their passage involved highly anomalous circumstances, such as the perception of an industry crisis or shortage of childhood vaccines. Even then, passage required deft political entrepreneurship and, even more tellingly, acceptance of provisions that left the door ajar to the filing of tort suits (Burke, 2002). In short, the literature on civil-litigation-reform legislation, for very good reasons, suggests that the rise of tort litigation is a narrow path, which is easy to turn down but offers few convenient exits, much less places to turn around.

THE CASE OF ASBESTOS AND LEGISLATIVE INERTIA

The case of asbestos seems a textbook example of these dynamics. Lawyers and judges came, saw, and seemingly conquered an important policy area. Congress, meanwhile, has repeatedly failed to replace asbestos litigation despite its inefficiency and growing judicial calls for legislative relief. In the absence of federal legislation, states have tinkered at the edges and passed discouragement reforms. To elaborate, the next sections briefly review the rise of asbestos litigation, its growing critiques, and the legislative response to date.

The Rise of Asbestos Litigation. Modern asbestos litigation traces its roots to the convergence of two factors—one medical, the other legal—in the mid-1960s (Brodeur, 1986). In October 1964, a team of doctors and epidemiologists led by Dr. Irving Selikoff presented a detailed study of mortality rates among asbestos-insulation workers, which provided scientific support for workers' claims that asbestos had caused their illnesses (Selikoff, Churg, and Hammond, 1965). And in the spring of 1965, the American Law Institute published the second edition of its *Restatement of the Law of Torts*, a comprehensive redefinition of tort law by a leading group of law professors, judges, and lawyers. Section 402A of the *Restatement* recognized an emerging theory of product liability, which holds that, if manufacturers fail to warn users of a product's dangers, they are strictly liable for resulting harms, even if the product is unavoidably unsafe.

By the late 1960s and early 1970s, entrepreneurial plaintiff lawyers working on contingency fees began suing companies that allegedly failed to provide adequate warnings about their asbestos-laden products. The first major legal breakthrough occurred in 1973, when the Fifth Circuit for the U.S. Court of Appeals decided *Borel v. Fibreboard Paper Products Corporation* (1973), which recognized that third-party suppli-

ers of asbestos products to the workplace could be strictly liable under Section 402A. Other circuits followed suit (see, e.g., *Karjala v. Johns-Manville Products Corporation* [1975]; *Moran v. Johns-Manville Sales Corporation* [1982]).

Following these decisions, asbestos litigation grew from a steady stream to a flood. Experts estimate that over 730,000 individual claims for asbestos-related injuries had been filed as of 2002 and that the number of annual claims is rising (Carroll et al., 2005:xxiv). Over 8,400 firms have been sued, including at least one company in seventy-five of eighty-three categories of economic activity in the Standard Industrial Classification (Carroll et al., 2005:xxv). In 2002 *Barron's* named forty publicly traded companies with significant, and growing, asbestos-liability exposure, often through the acquisition of firms that once produced asbestos products (Abelson, 2002). The list reads like a corporate *Who's Who*, including Dow Chemical, Daimler Chrysler, Ford, IBM, Kaiser Aluminum, Pfizer, Sears, Viacom, and even Disney.

The Growing Critiques of Asbestos Litigation. At the outset, asbestos litigation served important, even heroic policy functions (Brodeur, 1986; Bowker, 2003; see generally Frymer, 2003; Bogus, 2001; Mather, 1998). Courts provided asbestos workers a forum to raise concerns when other branches and levels of government were not responsive. Once established, asbestos litigation provided a means to bypass the limited state workers' compensation programs; increase awareness of the dangers of asbestos; and uncover decades of corporate malfeasance.

As asbestos litigation gained momentum, however, experts began to question its efficiency and fairness. A 1983 RAND study showed that asbestos plaintiffs received only thirty-seven cents of every dollar spent to resolve asbestos claims, which is significantly less than ordinary tort claims (Kakalik et al., 1983). Recent follow-up studies show that these patterns have persisted as administrative costs still consume over half of all compensation paid, and these costs may go up as new litigants enter the fray (Hensler et al., 2001; Carroll et al., 2005; see also White, 2002, 2005).

These costs might be tolerable if asbestos litigation produced fair and consistent decisions, but it has been erratic. In Texas, five juries in a multiplaintiff trial heard exactly the same evidence and ruled differently on specific liability and causation issues (Bell and O'Connell, 1997:22). Jury damage awards also have varied case to case and jurisdiction to jurisdiction, providing similarly situated plaintiffs different compensation and those with harder-to-prove claims nothing at all (Sugarman, 1989:46; Carroll et al., 2002:63).

Some may counter that unpredictability enhances the effectiveness of tort law as a deterrent, forcing companies to become extra vigilant. Even under the best circumstances, however, tort law's deterrent value is uncertain (Kagan, 2001). As Sugarman (1989) has argued, manufacturers are subject to a host of other pressures to act with care, including market forces that provide strong financial incentives to prevent widely publicized problems with their products. Moreover, as asbestos litigation has increasingly focused on defendants who played a relatively minor role in expos-

ing workers to asbestos and covering up its dangers, the deterrence value of these suits has become attenuated. A recent RAND report made the point as follows: "If business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure" (Carroll et al., 2005:129).

Others may stress that asbestos litigation promises individualized treatment of asbestos claims, which is essential to perceptions of procedural fairness and trust in the legal system (Tyler, 1990). However, as early as the mid-1980s, many asbestos claimants did not enjoy their day in court. After six or more years of asbestos litigation, the state court in San Francisco had completed only 11 percent of asbestos cases. In Massachusetts, the news was worse; the state court had resolved only 10 of 2,141 claims, or less than 1 percent (Hensler et al., 1985:84-85). Today, many claims are tried en masse or lumped into massive group settlements (Carroll et al., 2005).

The Legislative Response to Date. Despite these problems, Congress has generally stayed on the sidelines. A search of CIS congressional hearing abstracts and THOMAS bill summaries from 1973 to 2005, combined with detailed content analyses of testimony and actual text of bills, located fifty-one significant bills and thirty-five hearings on asbestos-compensation issues. Congress enacted only one into law: the Bankruptcy Amendments of 1994 that, among other things, retroactively approved the bankruptcy court's power to issue "channeling injunctions," which direct future litigation from a reorganized company to private trust funds. In other words, far from replacing litigation, the only major federal law passed to date codified the status quo.

With Congress staying on the sidelines, the states have taken some action, enacting or considering a whole host of reforms, such as limits on punitive and noneconomic damages, requirements for pre- and postjudgment interest appeal bonds, and restrictions on the imposition of strict liability (see Table 1). These state measures only provide a piecemeal response to a national problem and, according to leading practitioners, can often be circumvented through forum shopping. Equally important, these discouragement reforms, by definition, do not provide an alternative to litigation or even seek to streamline the litigation process. They aim to deter the amount of litigation by impeding the filing of suits and making them potentially less lucrative while leaving many structural features that drive tort litigation firmly in place, such as juries, contingency fees, and pliable common-law rules.

Of course, the legislative process is notoriously fickle. As of mid-2006, proponents of the FAIR Act in the Senate insisted they could win a motion to reconsider. In the House of Representatives, conservatives had introduced a far more modest "medical criteria" bill, which would require lawsuits to meet eligibility standards while allowing the "worried well" to sue if they become ill. Yet even if Congress finally acts, legislative inertia would remain an important part of the asbestos story. After all, if Congress revives the FAIR Act and replaces asbestos litigation, decades of federal inaction and limited state action despite mounting costs and growing criticism

Table 1
Enacted or Proposed State Asbestos-Litigation Reforms

Reform	States
Punitive damage caps	AK, ID, SC, NM, MS, OH
Noneconomic damage caps	MS, OJ
Caps on appeal bonds	AK, CO, ID, MO, NC, TN, TX, GA, IA, MN, NE
Limits on pre- and post-judgment interest	GA, IA, ME, TX, OK, WA
Settlement/Fee-shifting bills	CO, TX
Limits on joint and several liability	ID, MS, MN, TX, OK
Limits on product liability	CO, MS, TX
Curbs on forum shopping	AK, GA, WV, TX, MS

seem ample evidence of the difficulty of replacing tort litigation. Alternatively, if Congress passes a medical-criteria bill or the states enact additional discouragement reforms, the essential features of the tort system would endure.

COURT-BASED TORT REFORM

The legislative record in the case of asbestos supports a central tenet of the literature on tort reform legislation: passing replacement reform legislation is a Herculean task. However, legislation is not the only avenue of change. Scholars have long recognized that judges can powerfully shape the adjudication process in the absence of legislation. Most prominently, judges were on the forefront of expanding the scope and potency of tort law from the 1960s to 1980s (see Kagan, 2001:133-35; Polisar and Wildavsky, 1989:129-55; Ursin, 1981:243-44). Among other things, judges modified defenses to tort claims, such as the defense of “contributory negligence,” which bars recovery by plaintiffs whose carelessness adds to their injuries; they eliminated governmental and charitable institutions’ immunity to tort suits; they relaxed evidentiary rules in medical-malpractice cases; they recognized strict liability for product defects; and, in some cases, they allowed lawyers to aggregate claims into massive and lucrative class-action lawsuits.

However, judicial policymaking can cut both ways, and scholars have described a vast array of judicial techniques for reining in tort law. Some scholars stress the ways in which judges curb tort law by interpreting existing tort doctrine narrowly (e.g., Eisenberg and Henderson, 1992; Henderson and Eisenberg, 1990; see also Schwartz, 1992). Others stress how judges can use the tools of case management to promote settlement and bypass traditional adjudication (e.g., Resnik 2000, 1982; see also Fiss, 1984). Still others have described the ways in which judges have used existing rules and procedures to aggregate claims and create alternative claims-resolution processes (e.g., Carroll et al., 2005; Hensler et al., 2000; Peterson, 1990; Schuck, 1986).

Although scholars tend not to describe these judicial innovations in terms of tort reform, these innovations can easily be conceived in these terms. Indeed, reviewing the record of judicial innovation in the case of asbestos, it is clear that judges and lawyers have used existing rules and procedures to implement their own brand of discouragement, management, and replacement reforms, which aim to regulate the flow of cases, make the adjudication process less adversarial and more efficient, and seek to offer administrative alternatives to tort litigation. Some examples should make matters more concrete. The treatment here is not exhaustive, as it could easily encompass other examples, including class-action lawsuits, group settlements, and the creation of defense consortiums, such as the Asbestos Claims Facility or the Center for Claims Resolution (see Hensler et al., 2000; Coffee, 1995; Peterson, 1990; Fitzpatrick, 1990). Instead, these examples are intended to illustrate the breadth of court-based tort reforms, which run the gamut from discouragement to replacement.

Court-Based Discouragement Reform. The most familiar mode of court-based discouragement reform involves judges construing doctrine narrowly to make tort suits harder to bring or potentially less remunerative. Indeed, some have argued that popular disapproval of tort law may have caused judges to curb products-liability law since the 1990s, resulting in a “quiet revolution” that has made it harder for plaintiffs to bring and win these claims (Eisenberg and Henderson, 1992; Henderson and Eisenberg, 1990).

Courts may have begun limiting the reach of some tort theories used in asbestos litigation (compare *Holdampf v. A.C. & S., Inc.* [*In the Matter of New York City Asbestos Litigation*, 2005; *CSX Transportation, Inc. v. Williams*, 2005 with *Olivio v. Owens-Illinois, Inc.*, 2006). In addition, courts have made it more difficult to prove some types of claims by raising the requirements for expert testimony (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993; *Mealey’s Litigation Report: Asbestos Bankruptcy*, 2005). More interestingly, judges have implemented court-based discouragement reform through their inherent powers to manage dockets. Specifically, they have issued standing orders that have created inactive dockets, which are also known as pleural registries, unimpaired-asbestos dockets, and deferred dockets (see generally Behrens and Lopez, 2005; Hensler et al., 1985; see, e.g., *In re USG Corp.*, 2003; *Sophia v. Owens-Corning Fiberglass*, 1999; and *In re Report of the Advisory Group*, 1993). Under these orders, cases of claimants who are currently ill are placed on an active docket, while claims of the worried well are placed on an inactive docket. Claims placed on the inactive docket are exempt from discovery and the statute of limitations is tolled. Once a claimant can present medical evidence of impairment, it is placed on the active docket and litigation proceeds. Put differently, these orders represent court-based medical-criteria reforms, which screen or delay claims without changing the underlying litigation process.

Court-Based Management Reform. Judges have not limited themselves to court-based discouragement reforms. They have also implemented court-based management reforms, which have taken many forms in the case of asbestos. Some changed pretrial

processes; others altered adjudication. Some were implemented at the level of individual courtrooms; others were applied more systemically. All aimed at making dispute resolution less redundant and adversarial by constraining how individual parties and their lawyers gather evidence, frame issues, select juries, and choose forums.

A leading innovator was Judge Robert M. Parker, appointed in 1979 to the federal district court of the Eastern District of Texas, the home for the "Golden Triangle," a heavily industrialized region along the Sabine River that divides Texas and Louisiana and one of the "ground zeroes" for asbestos litigation (McGovern, 1989). In 1982 he issued a standing pretrial order for his courtroom that substantially limited the discretion of lawyers during "discovery," the process through which lawyers gather evidence for trial. Among other things, the order barred duplicative depositions; limited interrogatories to a single set of master questions that could be supplemented by court order only under "extraordinary circumstances"; preemptively ruled on a range of pretrial motions, including motions for summary judgment, regardless of whether the lawyers for individual clients filed such motions; and required lawyers to coordinate their efforts (*Hardy v. Johns-Manville Sales Corporation*, 1982:348-52).

Not limiting himself to the discovery process, Judge Parker also consolidated individual trials to quicken dispute resolution and enhance consistency. For example, Parker empanelled five juries to hear evidence on common issues in five cases at once, but, while this may have saved courtroom time, it failed to standardize outcomes as the juries divided on liability issues despite hearing the same evidence. Undaunted, the judge designated lead cases and aggressively applied the doctrines of collateral estoppel and judicial notice to bar future litigation on liability issues. When these techniques were reversed on appeal (*Hardy*, 1982:334), he grouped thirty defendants for trial and had one jury decide common liability issues. Similar techniques were used elsewhere (Hensler et al., 1985:104-07).

Court-based management reform has not been confined to single courtrooms. As early as 1977, lawyers urged the Judicial Panel on Multidistrict Litigation (JPML) to centralize all federal asbestos litigation for pretrial purposes under a statutory provision, 28 U.S.C. §1407, which empowers the JPML to consolidate civil actions brought in different jurisdictions for pretrial proceedings if the actions involve at least one common question of fact and the transfer will be convenient and "promote the just and efficient conduct of such actions" (on the JPML, see generally Hensler, 2001). The JPML initially refused to consolidate asbestos litigation on the grounds that pending actions presented too many unique factual issues and that pretrial consolidation would serve little purpose because many cases were close to trial (*In re Asbestos and Asbestos Material Products Liability Litigation*, 1977). The parties tried again, but the JPML refused to budge, denying motions for consolidation in 1980, 1985, 1986, and 1987.

Then in the early 1990s things began to change. In 1990 Chief Justice William Rehnquist convened a special committee of the Judicial Conference to consider asbestos litigation. In 1991 the committee issued a report that called for the immedi-

ate consolidation of pending federal asbestos litigation under Sec. 1407. In the wake of the report, a group of plaintiff and defendant lawyers filed another motion for consolidation. This time, the JPML granted the motion, ordering almost 27,000 federal cases to be transferred to the Eastern District of Pennsylvania for pretrial purposes.

Court-Based Replacement Reform. Judges have gone even further and implemented court-based replacement reforms, which have created quasi-administrative mechanisms that compensate asbestos victims according to detailed medical criteria and preexisting payment schedules and, thus, provide an alternative to torts. The tools of court-based replacement reform include Chapter 11 bankruptcy reorganizations, group settlements, and, in some circumstances, class-action lawsuits. Indeed, during the mid- to late 1990s, class actions seemed poised to become a central tool for implementing court-based replacement reform, promising a means to create private trusts without the costs of bankruptcy, but the Supreme Court pulled the plug on this technique in a series of decisions, including *Amchem* (1997) and *Ortiz* (1999) (see Hensler, 2002).

The Johns-Manville Corporation's bankruptcy provides a striking example of court-based tort reform. Johns-Manville was the leading asbestos mining-and-manufacturing company in the United States and a primary target of asbestos litigation. In 1982 Johns-Manville filed for reorganization under Chapter 11 of the bankruptcy code, even though it was a Fortune 500 company and its day-to-day operations were profitable. Johns-Manville defended its unprecedented move on the grounds that mounting asbestos liability threatened the company's future solvency. Under these conditions, filing for bankruptcy promised several advantages: staying pending litigation; removing all litigation to a single bankruptcy court where there is no right to jury trial and the debtor's attorneys' fees are reviewed by the court; preventing a race to the courthouse that would favor those who happened to sue first; and giving the company a chance to reorganize its business and preserve assets for the benefit of all of its creditors.

Johns-Manville's bankruptcy did more than rationalize the payment of claims and reorganize the company. It created an entirely new administrative entity with its own source of funding and rulemaking authority, which was authorized not only to handle claims pending at the time of the company's bankruptcy but also to resolve future claims. Specifically, in 1986, after four long years of negotiation and litigation, the bankruptcy court confirmed Johns-Manville's first plan of reorganization, which featured two main components: the creation of the Asbestos Health Trust (the "Trust") and a channeling injunction, which directs all future asbestos litigation against Johns-Manville to the Trust and, thus, away from the newly reorganized company, called the Manville Corporation. The Trust was funded by Johns-Manville with cash, proceeds from various settlements with its liability-insurance companies, and a substantial equity stake in the Manville Corporation.

The initial version of the Trust can be understood as a weak form of court-based replacement reform that offered alternative dispute resolution without actively directing claims away from the tort system. The Trust required claimants to first

attempt to settle claims. If settlement failed, claimants could choose to arbitrate, mediate, or litigate their claims. The Trust promised claimants 100 percent of their settlement values and, in the case of tort litigation, 100 percent of their compensatory damages—but no punitive damages. In practice, it proved too weak. By 1990 the Trust became insolvent, in part because it underestimated claims and in part because too many claimants opted for tort litigation (Peterson, 1990). The Trust's financial collapse sent the parties back to the drawing board. After a hotly contested appeals process and a foray into Congress that resulted in the Bankruptcy Reform Amendments of 1994, the new Trust began making distributions in 1996.

Under the restructuring of the Trust, several basic features of the original plan endured: the Trust continued to be funded with a large equity stake in the Manville Corporation, and the channeling injunction still directs claims to the Trust and away from the reorganized company. Unlike the original arrangement, which promised to pay claimants 100 cents on the dollar, the new arrangement creates a limited pool of assets, whose value is closely tied to the value of the reorganized company and whose distribution is made according to the Trust's ability to pay.

Specifically, the restructuring created a new claims-processing method, called the "Trust Distribution Process" (or TDP). The TDP designates categories of asbestos-related diseases and sets values for each. For example, the standard values for severe asbestosis and lung cancer are \$95,000, and the standard value for mesothelioma is \$350,000. Once the Trust assigns a disease category, claimants are entitled to a percentage of its value—now only 5 percent—set by the Trust. The Trust has the power to adjust the medical criteria and payout percentages, and has done both. Disputed claims must go to arbitration, and lawyer fees are capped at 25 percent of the amounts actually paid to claimants. Under the rules of joint and several liability, claimants can sue others in the chain of distribution for any remaining unpaid damages.

As a technical matter, the TDP allows claimants to file tort claims, but effectively diminishes them. First, claimants can file a tort claim only if they select non-binding arbitration and reject the results. Second, the TDP does not pay punitive damages, even if the claimant wins a tort suit. Third, and most important, if a tort claim exceeds the value of the amount determined through the TDP, that portion of the claim is not paid until all claimants receive 50 percent of the value of their claims; an unlikely prospect given that current payments are only 5 percent.

In sum, the Manville bankruptcy produced two examples of court-based replacement reform: the original Trust that offered alternative dispute resolution alongside of torts, and the TDP that directed claims to an administrative dispute resolution process that is very different than tort law. Tort law features juries; the TDP does not. Torts allow for punitive damages; the TDP does not. Torts apply general common-law principles to the merits of individual cases. The TDP calculates payments based on detailed medical criteria and payment schedules that apply across-the-board.

By itself, the Manville Trust represents a significant source of asbestos-claim compensation. As of December 31, 2004, the Trust had settled almost 640,000 claims

Table 2
Companies Filing Asbestos-Related Chapter 11
Reorganizations Following Johns-Manville (as of 01/01/2005)

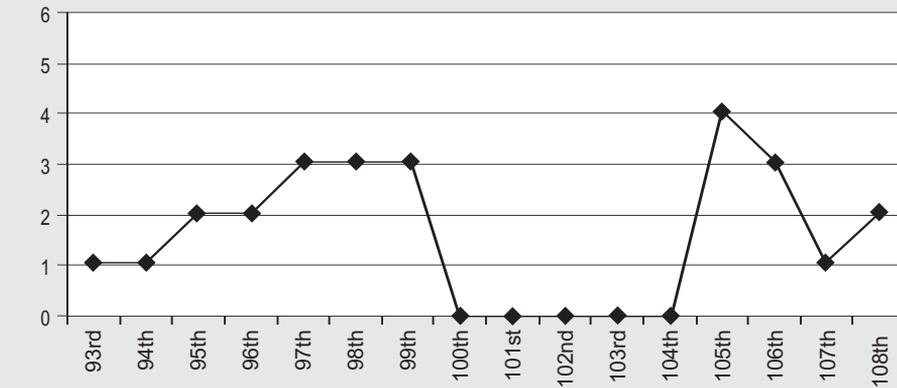
<p>2004</p> <ul style="list-style-type: none"> • Flintkote • Pfizer/Quiglet <p>2003</p> <ul style="list-style-type: none"> • CE Thurston • Combustion Engineering • Congoleum • Muralo <p>2002</p> <ul style="list-style-type: none"> • A-Best • AC&S • A. P. Green • ARTRA (Synkoloid) • Harbison Walker • JT Thorpe • Kaiser Aluminum and Chemical • North American Refractories (NARCO)/RHI • Plibrico • Porter Hayden • Shook & Fletcher • Western MacArthur <p>2001</p> <ul style="list-style-type: none"> • Bethlehem Steel • Eastco Industrial Safety Corporation • Federal Mogul • G-I Holdings • Skinner Engine Company • Swan Transportation • U.S. Gypsum 	<p>2001 (cont.)</p> <ul style="list-style-type: none"> • U.S. Mineral • Washington Group International • W.R. Grace <p>2000</p> <ul style="list-style-type: none"> • Armstrong World Industries • Babcock & Wilcox • Burns & Roe Enterprises • E. J. Bartells • Owens Corning Fiberglass • Pittsburgh Corning • Stone and Webster <p>1999</p> <ul style="list-style-type: none"> • Harnischfeger Industries • Rutland Fire & Clay <p>1998</p> <ul style="list-style-type: none"> • Atlas Corporation • Fuller-Austin Insulation • M.H. Detrick <p>1996</p> <ul style="list-style-type: none"> • Rock Wool Manufacturing <p>1995</p> <ul style="list-style-type: none"> • Lykes Brothers Steamship <p>1993</p> <ul style="list-style-type: none"> • American Ship Building • Keene Corp. <p>1992</p> <ul style="list-style-type: none"> • Cassiar Mines • Kentile Floors 	<p>1991</p> <ul style="list-style-type: none"> • Eagle Picher Industries • HK Porter Co. <p>1990</p> <ul style="list-style-type: none"> • Celotex • National Gypsum <p>1989</p> <ul style="list-style-type: none"> • Delaware Insulations • Hillsborough Holdings • Lone Star Steel • Raytech Corporation <p>1987</p> <ul style="list-style-type: none"> • Gatke Corp. • Nicolet • Todd Shipyards <p>1986</p> <ul style="list-style-type: none"> • Pacor • Prudential Lines • Standard Insulations Inc. • United States Lines <p>1985</p> <ul style="list-style-type: none"> • Forty-Eight Insulations <p>1984</p> <ul style="list-style-type: none"> • Wallace & Gale <p>1983</p> <ul style="list-style-type: none"> • H&A Construction • Waterman Steamship Corp <p>1982</p> <ul style="list-style-type: none"> • Amatex • UNR Industries
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and distributed over \$3.4 billion. The Trust, of course, does not stand alone. Over seventy companies with asbestos exposure have filed for Chapter 11 reorganization (see Table 2). As the Manville Trust has done, these other trusts have resolved hundreds of thousands of claims and distributed billions of dollars (White, 2002). The aggregate effect has been profound. These actions, combined with other court-based tort reforms, are said to have rendered the common-law ideal of “individualized process a myth” in the case of asbestos (Carroll et al., 2005:129).

COURT-BASED TORT REFORM AND THE POLITICS OF LEGISLATIVE REFORM

Political scientists have long recognized that new programs create new politics (Campbell, 2003; Wilson, 1989; Lowi, 1972; Schattschneider, 1935; see also Epstein, 1988). The same is true for court-based tort reforms, a point that many accounts of

Figure 1
Number of Replacement Reforms: 93rd to 108th Congress (1974 to 2004)



Source: Content Analysis of THOMAS Bill Summaries and Legislation

judicial innovation gloss over because they focus narrowly on the adjudication process. In the case of asbestos, these reforms, especially court-based replacement reforms, have significantly shaped the politics of congressional tort reform in at least two ways: 1) They have provided a policy rationale for congressional deference to the courts and, thus, contributed to the “politics of wait-and-see,” and 2) They have helped to fragment stakeholder interests within and across party lines, which has complicated the difficult task of building a legislative coalition for major tort reform. Each is discussed in turn.

The Politics of Wait-and-See. Congress has limited resources, and asbestos-injury compensation issues are complex and contentious. Under these circumstances, why should Congress act before judicial innovations have been given a chance? At a minimum, Congress could reasonably wait, monitor developments in the courts, and learn which approaches seemed most promising.

Consistent with this argument, court-based tort reform has encouraged congressional deference to the judiciary, especially in the mid-1980s when group settlements and class actions promised to “solve” the asbestos crisis by providing a means to create trust funds without the costs of filing for bankruptcy. A prominent Washington lawyer and lobbyist explained, “You stop getting bills around 1986 . . . [because] everyone thought that this was really a solved problem. The coverage issues were largely resolved; the people were getting into agreements that processed them more or less administratively” (see Figure 1).

It is not surprising that congressional activity seems to recede as judicial innovation advances, because reform advocates framed the need for congressional action in terms of the adequacy of judicial remedies. For example, in 1982, the leading proponent for asbestos reform, Representative George Miller (D-CA), argued that a federal

asbestos-injury compensation fund was necessary because the existing system “failed to meet the needs of occupational disease victims” (Occupational Health Hazards Compensation Act of 1982 Hearings:93). The following year, Representative Miller convened a special hearing on the effect of bankruptcy cases and private settlements, arguing that the “testimony we will hear this morning will further establish the need to replace years of failure with a compensation system that can meet the needs of the disabled asbestos workers” (Committee on Education and Labor Hearings, 1983:2). This view was also reflected outside of Congress. The leading study of asbestos litigation in the mid-1980s argued that “[w]hether one believes that alternatives to the tort system, such as those proposed in recent legislation introduced by Congressmen George Miller and others, are necessary, should rest in part on an assessment of how well the tort system has processed asbestos claims” (Hensler et al., 1985:4-5).

Of course, congressional inaction cannot be reduced to any single factor or set of factors. Many factors are relevant, and more than one factor may be sufficient to derail legislation. However, according to insiders, this framing of the issue created a very favorable political environment for replacement-reform opponents, as long as there was a sense that courts were in the process of “solving” the asbestos problem. They simply had to argue that Congress should wait-and-see before taking the controversial step of creating a new administrative program.

The Fragmentation of Shareholder Interests. In the case of asbestos, court-based tort reform has been grafted onto existing remedies, creating a patchwork of potential sources of compensation for claimants. This patchwork, in turn, has produced a complex matrix of winners and losers, legal uncertainty, and crosscutting preferences among various stakeholder groups. In a fragmented lawmaking system with multiple veto points, the splintering of stakeholder interests within and across political party lines has added another obstacle to the already arduous task of replacing litigation through the legislative process.

Divisions are not hard to find. Media accounts of the FAIR Act—the Senate bill that proposes to create a no-fault trust fund to replace asbestos litigation—reveals splits among prominent members of all the major stakeholders (see Table 3). Among defendants, asbestos litigation has fragmented groups according to their exposure to liability. Businesses without insurance and growing liability favor congressional intervention. Businesses with insurance, diminishing liability, or enough assets to absorb their liability generally oppose it. Similarly, not all insurers covered asbestos manufacturers, and those that provided coverage used different strategies for sharing risk through reinsurance markets. Under these circumstances, why should insurers with relatively low exposure agree to legislation that bails out competitors with higher exposure?

Asbestos litigation has also divided plaintiff groups. Victims with cancers and other serious illnesses tend to do well in jury trials and typically oppose a national trust fund that would cut off access to the courts. The worried well, by contrast, are generally more receptive to the creation of a central program that aims to spread compensation among present and future claimants.

Table 3
Fragmentation of Prominent Stakeholder Groups:
Public Positions on the FAIR Act

GROUP	FOR	AGAINST
Business	National Association of Manufacturers (small and large businesses) Asbestos Study Group Honeywell General Electric General Motors Pfizer Owens-Illinois Asbestos Alliance (coalition of manufacturers and insurance companies) Small Business and Entrepreneurship Council American Small Business Association Women Impacting Public Policy (women business owners)	Coalition for Asbestos Reform (small businesses) Common Interest Group (coalition of bankruptcy trusts) Exxon-Mobil USG Corporation AIG Borg Warner
Insurers	Asbestos Alliance	National Association of Mutual Insurance Companies American Insurance Association Property Casualty Insurance Association of America
Victims	RetireSafe Veterans of Foreign Wars The Seniors Council	White Lung Association Committee to Protect Mesothelioma Victims Asbestos Disease Awareness Organization
Lawyers	Richard Scruggs (prominent trial lawyer)	American Trial Lawyers Association
Unions	United Auto Workers	AFL-CIO
Others	Council for Citizens Against Waste in Government National Legal and Policy Center	Public Citizen (liberal public-interest group founded by Ralph Nader) National Taxpayer Union (anti-spending group) FreedomWorks (conservative public-interest group led by Dick Armey)

Source: Content Analysis of *CQ Weekly*; Lexis-Nexis September 2005 to March 2006.

Even the plaintiff bar is split. At least one prominent trial lawyer, Richard Scruggs, who was a leading plaintiff's lawyer in the tobacco litigation, has publicly supported a trust fund, arguing that a federal trust will prevent further bankruptcies and preserve assets for future claimants. The American Trial Lawyers Association (ATLA), the leading lobbying group for the trial bar, vehemently opposes any federal trust fund that would eliminate tort suits. More subtly, the complexity of asbestos litigation has resulted in specialization among lawyers, which, in turn, has engendered further divisions on the need for congressional intervention. Thus, lawyers specializing in cancer cases vigorously oppose a trust fund but favor legislation that would prioritize their clients' claims, such as medical-criteria bills. Large-inventory lawyers, by contrast, tend to prefer the status quo, because they can obtain higher settlements if they package a few cancer claims with a large number of claimants who have been exposed to asbestos but have not (yet) suffered asbestos-related diseases.

Court-based tort reforms have furthered this process of balkanization. Companies that have established Chapter 11 trust funds oppose any bill that would threaten these arrangements. They argue that attempts to tap their trusts for a national fund would constitute an unconstitutional taking of property and insist that a national program allow them to opt out. According to insiders, an opt-out provision would be largely moot; these companies have no desire to replace their private trusts with a public program that would be subject to political revisions down the road. Under this logic, as more companies file for bankruptcy, fewer companies with high levels of exposure to litigation—arguably the most likely reform proponents with political clout—will support a comprehensive legislative solution.

It is also worth noting that these dynamics have shifted over time. In the mid-1980s, court-based tort reform provided a rationale for congressional deference to the courts. This rationale eroded in the mid- to late 1990s, as studies showed the weaknesses of the existing regime and confidence eroded in the courts' ability to resolve the underlying problems. By this time, however, the process of fragmentation among the stakeholders had taken hold, providing a separate obstacle to reform. Thus, the interbranch dynamics that reinforced congressional failure to intervene at the inception of the litigation differed from those that helped to impede congressional action as the litigation matured and its shortcomings came into focus.

IMPLICATIONS

The case of asbestos suggests that leading accounts of the landscape of tort reform legislation are incomplete, failing to incorporate court-based tort reforms. Specifically, the case of asbestos suggests that court-based discouragement, management, and replacement reforms should be added to the list of legislative reforms, even though management and replacement types of reforms typically require the creation of new procedures and administrative mechanisms, actions typically associated with legislatures not courts (see Table 4). The tools of court-based tort reform include judges'

Table 4
Rethinking the Landscape of Tort Reform

Type of Reform	Definition	Examples of Legislative Tort Reform	Examples of Court-Based Tort Reform
Discouragement	Actions that seek to deter the filing of lawsuits by making them harder to bring or potentially less remunerative	Damage caps	Narrow interpretation of tort doctrine, inactive dockets
Management	Actions that seek to streamline the adjudication process by clarifying the law and making procedures more efficient and less adversarial	Legislative overrides (aimed at clarifying conflicting interpretations of statutes)	Pretrial discovery orders, collateral estoppel, MDL
Replacement	Actions that create administrative alternatives to litigation	No-fault trust funds	Chapter 11 compensation trusts

power to interpret existing doctrine, manage caseloads, and adapt existing procedures, such as MDL and Chapter 11, to create alternative adjudication processes and compensation schemes. As a result, focusing on legislative reforms may understate the system's capacity for change because the failure to pass legislative reforms may mask significant reform through the adaptation of preexisting rules and procedures, a point that resonates with a growing literature on the complex nature of institutional stability and change in contemporary welfare states (e.g., Streeck and Thelen, 2005; Hacker, 2002, 2004; Thelen, 2003; Schickler, 2001; Clemens and Cook, 1999).

The case of asbestos also adds an important gloss to our understanding of the politics of replacement reform in the United States. As noted earlier, the literature on tort reform legislation identifies a series of cultural, institutional, and strategic barriers to passing replacement reform in the United States, such as distrust of centralized authority, fragmented political power, and incentives to shift costs to private litigants and blame to the courts (Burke, 2002; Kagan, 2001; Barnes, 1997). The case of asbestos suggests that court-based tort reform can reinforce these obstacles in dynamic ways, initially offering Congress a rationale to stay on the sidelines and then dividing likely proponents of reform. Court-based tort reform can divide reform advocates by offering businesses an exit strategy and cost-shifting tool. After all, if businesses with high levels of exposure to litigation can use court-based tort reform to exit the tort system unilaterally, they have less reason to come to the bargaining table and accommodate rival interests as part of global reform efforts. In addition, if individual businesses can use court-based tort reform to shift litigation costs to their competitors, these businesses have no reason to improve the efficiency of the system—in fact, the more inefficient the system, the better. The larger point is that judicial inno-

vations not only reshape adjudication processes, but also affect broader political processes by shifting the institutional framework of injury compensation.

Of course, the case of asbestos is only a single example and case studies, like statistics, can be misleading. However, even extreme cases can add to the store of useful knowledge by sharpening concepts and pointing to missing variables (Gerring, 2004). Moreover, there are very good substantive reasons to think that court-based tort reforms are not confined to the case of asbestos. The tools of court-based tort reform described in this article are available in other policy domains.

In addition, asbestos is not the only dangerous product that has caused unexpected losses. Examples abound: coal, DDT, Thalidomide, lead, mercury, tobacco, intrauterine devices, and polyvinyl chlorides. More recent examples include Phen-Fen, an untested or “off-label” combination of federally approved obesity medications linked to increased risk of valvular heart disease, and COX-2 Inhibitors, such as Vioxx, Celebrex, and Bextra, a group of medications for arthritis and other inflammation-caused pain, which were linked to increased risk of heart attacks and strokes.

These dangers can create huge classes of claimants, seeking compensation for injuries, lost wages, and diminished quality of life, as well as retribution for any corporate wrongdoing that contributed to their losses. Some of these claimants will turn to private insurance; some will rely on preexisting social-benefit programs; and some will lobby Congress and state legislatures for new programs. However, some will inevitably turn to the courts, ensuring that litigation will remain a significant part of the American response to the problem of defective products and other unexpected losses. Indeed, fueled by the chance to claim one-third of their clients’ recovery though contingency fees, plaintiff lawyers have built a large and permanent “tort industry” in the United States (Kagan, 2001:133). This industry has proven remarkably adept and increasingly sophisticated at inventing new legal causes of action, advertising their services, locating clients, and devising strategies for bringing suits in litigation-friendly jurisdictions.

Whenever there is a sudden surge of litigation, court-based reform will represent an important potential avenue for institutional change. The simplest reason is that judges, who have limited staffs, and plaintiffs’ lawyers, typically organized into small firms, lack the resources to apply the machinery of litigation to every case. Defense lawyers, meanwhile, have every incentive to adapt the tools of court-based reform to new circumstances and have done so, using Chapter 11 to rewrite union contracts, reduce pension obligations, and avoid environmental clean-up costs. Under these circumstances, we should expect court-based tort reform to be a fixture in the landscape of tort reform in the United States.

A final caveat is that the Bankruptcy Amendments of 1994 created a special provision for asbestos-related bankruptcies: Section 524(g) of the bankruptcy code, which provides that channeling injunctions in asbestos-related reorganizations may be granted if, among other things, the trust is funded by stock in the reorganized company and that at least 75 percent of the trust beneficiaries have approved the plan of

reorganization. Although Section 524(g) is limited to asbestos cases, the use of Chapter 11 to manage liability is not (Peterson, 1990; Vairo, 2004). Other companies facing “mass tort” claims have used Chapter 11 to implement court-based replacement reform; these include A.H. Robins, the maker of the Dalkon Shield (an intrauterine device, or IUD), and Dow Corning, the maker of silicone breast implants. There is no reason to think that other companies will not do so in the future. Indeed, according to practitioners, defendants in other sectors of the economy may be *more likely* to avail themselves of Chapter 11 than asbestos defendants because Sec. 524(g) requires such a large amount of the companies’ equity to be shifted to claimants.

CONCLUSION

This article has examined American tort reform through the lens of thirty years of American asbestos litigation. It argues that the asbestos case seems a classic example of the conventional wisdom in the literature on tort reform legislation, which stresses the difficulty of reforming the tort system, in general, and passing replacement reforms, in particular. A closer look, however, reveals that the tort system has not been wholly resistant to structural change. In the absence of major legislation, judges and lawyers implemented significant court-based tort reforms, including court-based discouragement, management, and replacement reforms, by adapting existing rules and procedures. The result has been a deeply layered institutional response to the problem of asbestos-injury compensation that reflects a complex mix of tort law, workers’ compensation programs, private group settlements, and ad hoc administrative schemes created by the courts. Not surprisingly, each new layer of institutional response has shifted the politics of asbestos litigation reform, as lawmakers and the stakeholders adjust to the new terrain. In the case of asbestos, these adjustments have reinforced obstacles to the creation of a national response to asbestos compensation issues by first providing a rationale for Congress to wait-and-see if judicial innovations would resolve politically nettlesome issues and then by dividing potentially powerful reform advocates within and across party lines.

Because the tools of court-based tort reform are not limited to the case of asbestos, this institutional capacity and its political consequences should be seen as an essential part of tort reform in the United States. Of course, identifying this relatively unexplored territory raises as many questions as it answers. Future research should systematically examine the policy implications of court-based tort reforms, exploring a whole host of issues, such as whether these reforms reduce overall administrative costs or merely shift them; whether the reforms appropriately distribute the risks of litigation and insolvency or deflect these risks to other, less-culpable parties; and whether these reforms provide adequate protections to victims, especially future claimants, or are subject to strategic manipulations, such as “reverse auctions” in which distressed corporations ask competing counsel to negotiate global arrangements on the most favorable terms, with the lowest bidder then rewarded for fees pro-

vided under the settlement. Regardless of the final assessment of these important policy issues, which are likely to be highly contingent and context specific (see generally Rubin, 1996; Williamson, 1995; Komesar, 1994), it is important to recognize that the landscape of tort reform can significantly shift, even when, as is often the case, formal rules stay stubbornly in place and comprehensive legislative action remains frustratingly out of reach. **jsj**

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