Peripheral Defendants As Litigation Targets:

Defense Strategies For The Next Wave

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I. Summary Overview of Asbestos Litigation

Although widespread industrial sales and installation of asbestos-containing products and materials ("ACPs") in the United States ended in the 1970s, recent studies and estimates predict that at least half the claims are yet to be filed before asbestos litigation finally winds down. Two years ago market analysts were projecting total liabilities in the tens of billions of dollars. According to more recent studies, total liabilities may exceed $200 billion.

Faced with the mounting burdens and costs of asbestos litigation, almost all of the "traditional" asbestos defendants have filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Since the first major bankruptcy filing by Johns-

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1 The authors gratefully acknowledge the assistance of Beth Winston in the preparation of this paper. Ms. Winston is an associate in the Washington, D.C. office of Covington & Burling.


3 See Merrill Lynch, 12/18/00 ("liabilities are likely to be $20-30 billion, using an estimate of 500,000 claims still to be filed"); Credit Suisse First Boston, 11/28/00 ("total asbestos liability for all companies could be as high as $50 billion divided among roughly 120 defendants that have varying amounts of liability"); G. Zuckerman, Specter of Asbestos Litigation Haunts Companies, WALL ST. J., Dec. 27, 2000 at C1, available at 2000 WL 26621157.


5 Some such defendants are attempting to create trusts under section 524(g) of the United States Bankruptcy Code, 11 U.S.C. § 524(g) (2001). See, e.g., Halliburton Co. Form 8-K dated Dec. 18, 2002, filed Dec. 20, 2002 (announcing proposed global settlement involving prepackaged bankruptcy filing by successors to Halliburton (footnote cont’d)
Manville Corp. in 1982, nearly 70 companies that either made or installed asbestos insulation or that sold or used products containing asbestos have filed for bankruptcy. Since the beginning of 2000, at least 23 companies have filed for bankruptcy protection as a result of asbestos claims.\(^6\)

With nearly all of the traditional asbestos defendants in bankruptcy, the plaintiffs’ bar has turned its sights on traditional, mainstream, household-name corporations. It recently was estimated that more than 8,400 companies have now been sued in asbestos litigation.\(^7\) Defendants now include companies in almost every sector of the American economy. The RAND Institute stated in its recent "Interim Report" that asbestos litigation has now touched companies in 90% of the industrial classifications recognized by the U.S. Department of Commerce.\(^8\)

\(^6\) Babcock & Wilcox (February 2000); Pittsburgh Corning (April 2000); Owens Corning (October 2000); Armstrong World Industries (December 2000); Burns & Roe (December 2000); G-I Holdings (parent of GAF) (January 2001); W.R. Grace (April 2001); U.S. Gypsum (June 2001); United States Mineral Products (July 2001); Federal-Mogul (including T&N and brake and gasket subsidiaries) (October 2001); North American Refractories (NARCO) (January 2002); Harbison-Walker Refractories (February 2002); A.P. Green Industries (February 2002); Kaiser Aluminum (February 2002); Plibrico (March 2002); Porter-Hayden (March 2002); Shook & Fletcher (April 2002); Artra Group (June 2002); Asbestos Claims Management Corp. (formerly National Gypsum Co., which had filed for bankruptcy in 1990) (August 2002); ACandS (September 2002); A-Best (September 2002); JT Thorpe (October 2002); and Combustion Engineering (Feb. 2003).


\(^8\) See RAND 2002 Report at 49-50.
With the asbestos manufacturers and insulators gone, the plaintiffs’ bar is now focusing on companies that once sold products that had minor asbestos-containing components (e.g., automakers whose cars once had asbestos-containing brake assemblies), or on companies that own, or once owned, subsidiaries that used ACPs as minor components in their products. Ominously, the plaintiffs’ bar is also filing increasing numbers of premises liability claims, which are based not on products the defendants made, but on ACPs in the premises they owned or occupied. Nearly every company that owned or maintained conventional industrial plants constructed or renovated prior to the 1970s has some degree of potential vulnerability to such premises liability suits.

In addition, the astonishing size of some recent verdicts in product cases, such as the one delivered by a Mississippi jury in the *Curry* case in October 2001 against three defendants – $150 million in compensatory damages in favor of six plaintiffs, none of whom had malignant disease9 – encourages some plaintiffs’ lawyers to file more cases on

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9 See *Curry v. ACandS* (Miss. Cir. Ct., Holmes County, 10/26/01), *reported in* 16 No. 19 MEALEY’S LITIG. REP.: ASBESTOS, 11/9/01, at 4; *Miss. Jury Awards $150M to Workers Exposed to Asbestos*, 24 No. 1 ANDREWS ASBESTOS LITIG. REP. 12/13/01, at 6; R. Parloff, *The $200 Billion Miscarriage of Justice*, *Fortune* (Mar. 4, 2002).

Other notably large verdicts rendered recently include a $55.5 million award to a 47-year-old construction worker with mesothelioma based on exposure to asbestos in joint compound product, see *Hernandez v. Kelly-Moore Paint Co.* (Tex. Dist. Ct., El Paso County, 8/29/01), *reported in* 16 No. 15 MEALEY’S LITIG. REP.: ASBESTOS, 9/07/01, at 3; $53 million to a brake mechanic (who also had worked in shipyards) for mesothelioma, against 36 defendants including Honeywell as successor to brake-manufacturer Bendix, which was found to be 45.75% culpable, see *Brown v. ACandS* (N.Y. Sup. Ct., New York County), *reported in* 17 No. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/15/02, at 3; $33.7 million to a former U.S. Navy electrician (and his wife) who was found to have developed mesothelioma from asbestos-containing boiler (footnote cont’d)
behalf of unimpaired claimants, and to make far higher settlement demands than they have in the past. Relaxed evidentiary standards in some state courts, loose state court joinder rules such as those in Mississippi, and docket-clearing mass trial procedures like West Virginia’s Trial Court Rule 26.01 that contemplate trials of thousands of plaintiffs against hundreds of defendants, exacerbate the problem.

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insulation made by Foster Wheeler, which was held 30% liable, see Todak v. Asbestos Defendants (Cal. Super. Ct., San Francisco County, 3/27/02), reported in 17 No. 5 MEALEY’S LITIG. REP.: ASBESTOS, 4/5/02, at 3; a combined $111 million verdict against multiple defendants in various industries in favor of nine plaintiffs with mesothelioma, see Anselmi v. A.P. Green Industries, Arsenaault v. ACandS, Inc., Berkowitz v. A.P. Green Industries, Cook v. ACandS, Inc., Lopez v. AlliedSignal Corp., Powers v. ACandS, Semon v. ACandS, Inc., Tancredi v. ACandS, Inc., reported in 17 No. 19 MEALEY’S LITIG. REP.: ASBESTOS, 11/1/02, at 4; $20 million to a housewife who claimed she developed mesothelioma from childhood exposure to asbestos-containing flooring in her home, see Peterson v. Hill Brothers Chemical Co., (Cal. Super. Ct. Alameda County, 6/4/02), reported in 17 No. 11 MEALEY’S LITIG. REP.: ASBESTOS, 7/8/02, at 4; $13 million verdict against the maker of asbestos-insulated cable, see Matteson v. Various Defendants (N.Y. Sup. Ct. New York County, 5/30/02), reported in 17 No. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/7/02, at 5, E1; and $11.5 million to a woman who claimed she developed mesothelioma from fibers brought home on her husband’s clothes from his job as a pipe fitter, see Gunderson v. A.W. Chesterton Co., et al., reported in 17 No. 22 MEALEY’S LITIG. REP.: ASBESTOS, 12/20/02, at 10.


See MISS. R. CIV. P. 20 and comment thereto. Recently enacted “tort reform legislation” in Mississippi is not expected to curb this practice.

See W. VA. TRIAL CT. Rule 26.01. One of the U.S. Supreme Court’s first acts in its 2002-2003 term was to decline to review the constitutionality of the application of that rule. See Mobil Corp. v. Adkins, 123 S. Ct. 346 (2002), denying cert. to State ex rel. Mobil Corp. v. Gaughan, 563 S.E.2d 419 (W. Va. 2002).

Not all signs are bad, however. As a result of an order issued in January 2002 by Judge Weiner, the presiding judge in the asbestos cases in federal courts consolidated for pretrial purposes, non-malignant claims initiated through mass screenings in federal court now are subject to administrative dismissal. See Administrative Order No. 8, In re (footnote cont’d)
Meanwhile, the Supreme Court continues to refuse to intervene in any meaningful way. Although the Court granted certiorari in one asbestos-related Federal Employers Liability Act (“FELA”) case recently, the issues there are so narrow that it is unlikely that a ruling will provide any meaningful relief to the vast majority of defendants.\(^{14}\) This term the Supreme Court elected not to review lower court rulings in two additional cases in which relief had been denied to asbestos defendants.\(^{15}\)

These developments have combined to make asbestos litigation a potential “bet-the-company” problem for many peripheral defendants. The first wave of asbestos suits bankrupted almost all the major asbestos insulation makers.\(^{16}\) The new wave has already

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\(^{14}\) See *Norfolk & Western Ry. Co. v. Ayers*, No. 93-C-6876 (W.Va. Oct. 4, 2001), *cert. granted*, 70 U.S.L.W. 37 (April 2, 2002) (granting certiorari to review whether fear of cancer arising from asbestosis is recoverable as intentional infliction of emotional distress under federal common law developed under FELA, and whether liability thereunder is joint and several).

\(^{15}\) See *Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002), *denying cert. to* *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002) (denying application for writ of mandamus staying mass bifurcated trial in West Virginia); *DaimlerChrysler Corp. v. Official Committee of Asbestos Claimants*, 123 S. Ct. 884 (2003), *denying cert. to In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002) (affirming order denying motions of asbestos defendants asserting contribution claims against bankruptcy debtor to transfer claims against them to bankruptcy court for consolidation with claims against the debtor for omnibus *Daubert* motion on causation, and granting asbestos claimants’ motions to remand those claims to state courts).

\(^{16}\) For a discussion of the widespread adverse impact of these bankruptcies on the economy generally, see J. Steiglitz, J. Orszag and P. Orszag, *The Impact of Asbestos* (footnote cont’d)
adversely affected critical elements of business for many remaining defendants –
including share values, the ability to plan capital expenditures, and employee job security
– and will surely raise solvency concerns for some companies, large and small.

II. “Peripheral Defendants” Now The Targets

Peripheral defendants constitute that large and still growing group of companies
that have been sued in asbestos personal injury cases but until recently have largely
managed to avoid the massive filings and eye-catching jury awards that have been the
downfall of the traditional asbestos defendants. While no bright line distinctions separate
“traditional” from “peripheral” defendants in all cases, peripheral defendants tend to
share most or all of the following four characteristics:

-- they did not manufacture, sell or install asbestos-containing insulation or construction materials;

-- although asbestos may have been present in some of their products or facilities, it was incidental to their main commercial purposes;

-- if they made or sold asbestos-containing products, the asbestos in those products was enclosed or encapsulated in ways that permitted, at most, minimal fiber release; and

-- with notable exceptions, to date, their dockets of pending asbestos cases have numbered in the hundreds or thousands, as opposed to the tens and hundreds of thousands of claims faced by traditional defendants.

Recent case reports indicate there are several broad categories of peripheral
defendants:

Liabilities on Workers in Bankrupt Firms, available at
**Premises Defendants** -- Boundary lines are somewhat indistinct here, since there was a premises liability element in many of the claims filed by shipyard and steel mill workers who were employed in facilities where application of asbestos-containing products – especially insulation materials – was a key element of the manufacturing process engaged in at these locations. What makes the more recent premises defendants “peripheral” is that they tend to be owners of conventional commercial and industrial buildings and facilities with no asbestos-related functions, as opposed to shipyards and other industrial sites where asbestos was utilized or installed regularly and in large quantities.\(^\text{17}\) Recent examples of this new generation of peripheral premises defendants include:

- **PSI Energy Inc.**, which recently was found 13% liable for a $3.8 million verdict awarded to an employee of an independent contractor who entered its premises to repair insulation. Three other premises defendants, The Kroger Co., Eli Lilly & Co. and Central Soya, Inc., were found not liable by the same jury.\(^\text{18}\)

- **Business Men’s Assurance Co. of America**, which recently paid $5 million to settle premises liability claims by a building engineer based on allegedly hazardous conditions at the BMA building in Kansas City, Missouri.\(^\text{19}\)

- **Unocal**, which was found by a jury to be 15% at fault in causing the plaintiff, a scaffolding builder and disassembler, to contract

\(^{17}\) This paper discusses premises liability in the context of potential claims by workers in commercial settings as opposed to claims related to residences or schools or other public facilities.

\(^{18}\) See Roberts v. Cent. Soya, Inc. (Ind. Super. Ct., Marion County, 5/24/02), reported in 17 NO. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/7/02, at 8.

mesothelioma while erecting the scaffolding for pipefitters and insulators at a refinery.\footnote{See Kinsman v. Unocal Corp., reported in 15 NO. 19 MEALEY’S LITIG. REP.: ASBESTOS, 11/3/00, at 6.}

\textbf{Tosco}, which was found by a San Francisco jury to be negligent in a case involving a bricklayer who alleged that he was exposed to asbestos while working on Tosco’s premises. The jury ultimately concluded, however, that Tosco was not liable for the plaintiff’s asbestosis and lung cancer, perhaps because there was evidence that the plaintiff smoked up to three-fourths of a pack of cigarettes per day over a 26-year period.\footnote{See Barkat v. Asbestos Defendants, reported in 35 TRIALS DIGEST 2d 1, available at 1997 WL 638840.}

We discuss the theory and impact of premises litigation at greater length at pp. 11-16, infra.

\textbf{Friction Defendants} -- These cases are brought mainly by garage mechanics and other auto industry workers (or by their spouses or children, see pp. 16-20, infra).

\textbf{--} In \textit{Grewe v. Ford} (1998), a brake mechanic who developed mesothelioma was awarded $8 million in a suit against Ford. The jury rejected Ford’s contention that installing and servicing brakes could not have subjected the plaintiff to levels of asbestos sufficient to cause asbestos-related disease (“ARD”), and that there was no epidemiological evidence to link auto mechanics with heightened levels of ARD.\footnote{See Ford Motor Co. v. Wood, 703 A.2d 1315 (Md. Ct. Spec. App. 1998). Another plaintiff in the same case who obtained a $6 million verdict against Ford, was not a brake mechanic. In its lengthy opinion, the Maryland Court of Appeals reversed the award to the non-mechanic on the ground that there was insufficient evidence that Ford’s brake and clutch lining products were a substantial contributing factor of his mesothelioma. See id. at 1328, 1330.}

\textbf{--} In \textit{Chavers v. Owens-Illinois, Inc.} (2000), a living mesothelioma plaintiff who had served on a naval vessel and later worked as a garage mechanic obtained a $4.6 million verdict from a San Francisco jury against the maker of the asbestos insulation used on the ship, but recovered nothing from the brake defendant, because
there was no evidence that the plaintiff had been exposed to its product or that the brake defendant had engaged in a conspiracy to conceal the harmful effects of asbestos.\footnote{See Chavers v. Owens-Illinois, Inc., reported in 44 No. 24 JURY VERDICT WEEKLY (CA), 5/8/00, available at 2000 WL 796798.}

\begin{itemize}
\item In Mitchell v. Raybestos-Manhattan Inc. (2000), a California jury awarded $5.9 million to a mesothelioma plaintiff who alleged that he had been exposed to asbestos from many sources, including his work with brake linings on John Deere tractors in the 1940s. The jury found John Deere to be 1.5% at fault. The court vacated the verdict and granted a new trial, finding that the plaintiff’s case did not “amount to substantial evidence of exposure to John Deere parts.”\footnote{See Mitchell v. Raybestos-Manhattan, Inc., reported in 15 No. 3 MEALEY’S LITIG. REP.: ASBESTOS, 3/3/00, at 4-5.}
\item In Horton v. Allied Signal (2001), a former garage mechanic who developed mesothelioma obtained a $1.8 million settlement from Ford, Chrysler, General Motors, Allied Signal, Abex and other brake defendants, and from Metropolitan Life Insurance Co. (which often is alleged to have suppressed early knowledge of the hazards of asbestos) prior to trial in a case filed in Cuyahoga County, Ohio.\footnote{See 15 No. 9 OHIO TRIAL REP., 2/23/01, at 6.}
\item In Berning v. A.P. Green (2002), another California jury awarded $1.1 million to a mesothelioma plaintiff who claimed that his disease resulted from exposures he sustained while changing asbestos-containing brakes on his family vehicles. The jury found Allied Signal 100% liable for failure to warn.\footnote{See Berning v. A.P. Green Ind. Inc., reported in 17 No. 1 MEALEY’S LITIG. REP.: ASBESTOS, 2/1/02, at 14-15.}
\end{itemize}

Not all brake cases result in victories for the plaintiffs, however. Listed below are illustrative examples of recent defense wins:

\begin{itemize}
\item AlliedSignal (as successor to Bendix, a maker of asbestos-containing brakes), won a defense verdict in early 2001 in a case involving an individual allegedly suffering from mesothelioma,
who spent 20 years working in a shipyard and 20 years as an auto mechanic in the service department of a Chrysler dealership. The jury evidently concluded that, if the plaintiff suffered ARD, it most likely resulted from his shipyard experience, not his experience as an auto mechanic working with AlliedSignal brake assemblies.  

-- Raybestos-Manhattan, Moog Automotive, DaimlerChrysler, Ford and Allied Signal, won defense verdicts in a February 2001 trial in San Francisco, in which the plaintiff, an auto parts counterman, claimed exposure to asbestos-containing automotive friction products during a 40-year career in the automotive business.  

-- Chrysler, won a defense verdict in a mesothelioma case in Shelby County, Texas, apparently on the strength of the defense that the plaintiff’s asbestos exposure from shipyard work, rather than from working in the parts department and as service manager of a Chrysler dealership.  

-- Ford, Chrysler, General Motors, Bendix and Borg-Warner obtained directed verdicts from a Texas court at the end of plaintiffs’ case in chief in a case involving multiple alleged exposures to asbestos.  

Other Peripheral Defendants -- This is a broad category that includes a diverse collection of many other product types that included some asbestos in prior years. Illustrative examples include joint compound, electrical cable and wire, and flooring materials:  

-- Kelly-Moore Paint, which made an asbestos-containing joint compound, was found 100% liable for a $55 million verdict in

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27 See King v. Allied Signal and DaimlerChrysler, reported in 16 No. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/23/01, at 15.  
favor of a 47-year old construction worker who developed mesothelioma.\footnote{See Hernandez v. Kelly-Moore Paint Co. (Tex. Dist. Ct., El Paso County, 8/29/01), reported in 16 No. 15 MEALEY’S LITIG. REP.: ASBESTOS, 9/07/01, at 3.}

\begin{itemize}
\item Okonite, which once made asbestos-containing cable and wire, and John Crane, which had made cable tube packing, were found 55\% and 45\% liable, respectively, for $13 million for the mesothelioma death of an electrician who worked on Naval vessels during World War II.\footnote{See Matteson v. Various Defendants (N.Y. Sup. Ct. New York County, 5/30/02), reported in 17 No. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/7/02.}
\item Hill Brothers Chemical, the manufacturer of asbestos-containing flooring, which was found liable for $20 million in compensatory damages for the mesothelioma of a woman who alleged childhood exposure from polishing the floor in her home and from fibers brought home on her father’s clothes from his job at a lumber and construction supply company.\footnote{See Peterson v. Hill Brothers Chemical Co. (Cal. Super. Ct. Alameda County, 6/4/02), reported in 17 No. 11 MEALEY’S LITIG. REP.: ASBESTOS, 7/8/02, at 4.}
\end{itemize}

III. **New and Evolving Theories of Recovery**

A. **Premises Liability Claims**

1. **Overview**

By their nature, asbestos premises liability claims differ from one another and from products liability claims in general in that each premises case raises a unique set of factual and legal circumstances based on the particular cluster of ACPs at the facility, the timing of the company’s efforts to identify and then to abate the ACPs, the plaintiff’s job description and exposure period at the site, specific features of the particular state law that is applicable to the site where the facility is located, and other factors.
For some peripheral defendants used to achieving a reasonable degree of success at trial based on “low-fiber-release” defenses for their encapsulated products, premises cases – often considered by defendants as an after-thought or “catch-all” category of plaintiff claims – can come as something of a rude shock. For many defendants, premises claims are usually far fewer in number in comparison to their products claims. Products claims typically receive far more management attention than premises claims, mainly because the former go to the heart of core business lines, whereas the latter present a host of obscure and often unrelated industrial hygiene issues, perhaps arising at plants far from corporate headquarters, that tend to vary widely among different company facilities. Yet premises claims can create significant, often unexpected, problems for companies for several reasons.

First, many companies with no previous experience in defending asbestos products cases – because they never made products that used asbestos or incorporated asbestos-containing components – are suddenly finding themselves listed among the scores of more traditional defendants included in mass asbestos filings for the simple reason that their industrial facilities included ACPs prior to the 1970s (and, in some cases, long after that). *In situ* asbestos-containing building materials that were conventional and indeed pervasive in US industry during that era – including insulation materials on skeletal steel and piping, cement and sheetrock, floor and ceiling tiles, gaskets, valves and the like – have recently attracted more pronounced attention from plaintiff law firms.
A second surprise facing premises defendants – including even those with prior asbestos products defense experience – is more subtle but no less profound. Whereas in products cases many peripheral defendants have developed credible causation defenses based on the “low-fiber-release” characteristics of their encapsulated products, in premises cases the major issues most often involve industrial hygiene practices as to which there are fewer clearly defined defenses. If ACPs were present in a defendant’s industrial or even commercial facilities built prior to the 1970s – and for many companies they undoubtedly were – it may be extraordinarily difficult for the defendant to refute anecdotal testimony by the plaintiff and co-workers that conditions were “dusty” or that exposures were “uncontrolled.” Not many companies were alert to the potential hazards of in situ asbestos in buildings during this period, and continuous monitoring of airborne asbestos was not a routine practice. As a consequence there will rarely be definitive, documented proof that there was zero or de minimis fiber release in any particular building. Some premises defendants may be able to show that they had no OSHA citations for asbestos problems, but this fact may have only limited value. OSHA was not functioning before the early 1970s, and even after the first OSHA air quality standards were promulgated in 1971 and that agency was able to build up its enforcement function, many OSHA inspections during the 1970s and into the 1980s may have been more concerned with other workplace hazards rather than asbestos.

2. **Recent Verdicts in Premises Cases**

The factors listed above have produced a number of surprisingly high jury verdicts in premises cases that have gone to trial in recent years. A selection of some of
the more recent premises trial outcomes is set forth below, beginning with the largest awards.

One of the largest verdicts in a premises case was entered in May 2000, in *Hutcheson v. Shell Wood Refiners*, in which a Madison County, Illinois, jury awarded $34.1 million to a former union roofer suffering from mesothelioma.\(^{34}\) The plaintiff had worked for ten years at a Shell Oil refinery in Wood River, Illinois. The large verdict was almost certainly influenced by a sanction order issued by the trial judge following alleged discovery misconduct by the defendant, purportedly including failure to disclose the existence of 100 boxes of allegedly relevant documentation, and failure to provide accurate and complete answers to interrogatories. The sanction order effectively constituted a directed verdict in the plaintiff’s favor on liability and causation issues, leaving only damages to be determined by the jury.

Union Carbide, which was one of only eight defendants to go to trial in the recent mass consolidated bifurcated trial in West Virginia and the only defendant to go to verdict, was found liable for creating and maintaining an unsafe work environment between 1945 and 1980 by using asbestos in its facilities. The jury set a punitive damages multiplier of three.\(^{35}\) “Mini-trials” on causation and compensatory liability, with actual plaintiffs, were to commence later before different juries.

\(^{34}\) *Hutcheson v. Shell Wood River Refinery Co., et al.*, (Ill. Cir. Madison Co., 5/20/00, *reported in* 15 No. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/2/00, at 3.

\(^{35}\) See *West Virginia Jury Finds Union Carbide Product Defective, Premises Unsafe*, 17 No. 19 MEALEY’S LIT. REP.: ASBESTOS, 11/1/02. The same jury found that Union Carbide had liability arising from an asbestos product used in tape compounds. See *id*.
In 1999 a San Francisco jury found Aerojet General Corp. to be 5% liable for $2 million in compensatory damages suffered by a welder (an employee of an independent contractor) who was allegedly exposed to asbestos in the defendant’s plant.  

Premises cases have also produced defense verdicts or comparatively low awards, as illustrated by the following summaries of selected cases:

-- **Began et al. v. USX Corp. - U.S. Steel Group**, in which the jury returned defense verdicts in a case involving 24 plaintiffs who alleged harmful exposure to asbestos in U.S. Steel facilities in Western Pennsylvania. The jury concluded that 15 of the plaintiffs did not suffer from ARD, and that the defendant’s premises and products were not a substantial contributing factor in causing the ARD suffered by the remaining plaintiffs.

-- **Lilley v. Board of Supervisors**, in which firefighters alleged that they contracted ARD due to exposure to asbestos contained in a building used as a training facility. After a bench trial, each of the plaintiffs who fought a fire at the facility was awarded damages of $30,000 for past, present and future physical and mental pain and suffering plus $12,000 for medical monitoring; each plaintiff who had contact with the facility but did not fight a fire there was awarded $15,000 for pain and suffering; and those who alleged exposure only as a result of their proximity to equipment that was used at the facility were awarded nothing. On appeal, the medical monitoring award was reversed because of absence of proof of significantly increased risk of contracting a serious latent disease, but the remainder of the jury’s verdict was affirmed.

-- **Grahn v. Tosco Corporation**, in which a San Francisco jury awarded $1,074,420 to a brick mason suffering from asbestos-

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36 Palmore v. A.P. Green Indus. Inc., (Cal. Super. Ct., San Francisco County, 8/6/99), *reported in* 14 NO. 17 MEALEY’S LITIG. REP.: ASBESTOS, 10/8/99, at 19 (indicating that motion for new trial was sought; however, authors could find no indication whether such motion was granted).

37 See 16 NO. 15 MEALEY’S LIT. REP.: ASBESTOS, 9/7/01, at 6.

related lung cancer after having worked at, among other places, the
defendant’s oil refinery. Approximately 200 other defendants
settled or were dismissed prior to trial. However, the refinery
owner was found to be only 3% at fault under California’s
comparative fault scheme.  

-- Roberts v. Central Soya Inc., et al., in which an Indiana jury
returned defense verdicts to the owners of three facilities (Kroger
Co., Eli Lilly & Co. and Central Soya, Inc.). The plaintiff, a third-
generation insulator, worked as a maintenance and repair employee
of an insulation contractor.

-- Torrejon v. Mobil Oil Corp., in which a Louisiana jury returned a
defense verdict in a Jones Act suit by a plaintiff who claimed he
contracted mesothelioma while working on ships owned by Mobil
Oil Corp.

B. Secondhand Exposure Claims

A disturbing trend, affecting all remaining defendants, is the increasing number of
“secondhand exposure” claims. By “secondhand exposure claims” we mean those
asserted not by people allegedly exposed in the workplace, but rather, by people who
allege that they contracted ARD from fibers brought home on clothes or hair of family
members – usually the father – whose alleged exposure occurred at his workplace. For
example, in Cargile v. ACandS in 2001, a Baltimore jury awarded $40 million to
5 mesothelioma plaintiffs, including one who claimed childhood exposure to asbestos

1997) (The verdict was reversed on appeal on the ground that the trial judge’s instruction
to the jury (“Was [the premises owner] negligent?”) was too vague and confusing.).
40 Roberts v. Central Soya, Inc., reported in 17 No. 9 MEALEY’S LIT. REP.: ASBESTOS, 6/7/02 at 8. The jury apportioned 13% of the liability to a fourth facility
owner (PSI) making its share of the verdict $494,000.
41 Torrejon v. Mobil Oil Corp., reported in 17 No. 22 MEALEY’S LIT. REP.: ASBESTOS, 12/20/02 at 11.
Nemours & Co. in 2002, a West Virginia jury awarded $6.4 million to the survivors of a man who died of mesothelioma allegedly contracted from fibers brought home from his father’s insulation job.\[42\]

Peripheral defendants are not immune to secondhand exposure cases. Recently, a St. Louis, Missouri jury awarded $5.1 million to the daughter of a machinist who worked at an Aerojet facility from 1959 to 1964.\[43\] The plaintiff claimed that she contracted mesothelioma as a result of having been exposed to asbestos dust on her father’s clothing when he came home from work, where he used an asbestos-containing resin compound. As sanction for the defendant’s inability to produce in discovery records regarding the product from the period in question, the judge instructed the jury to find that the woman was exposed in the manner she alleged and that the defendant knew of the hazards of asbestos at the time.\[44\]

\[42\] See Cargile v. ACandS, Inc. (Md. Cir., Balt. City, 12/12/01), reported in 16 No. 22 MEALY’S LITIG. REP.: ASBESTOS, 12/21/01; Cox v. E.I. du Pont de Nemours & Co. (W. Va. Cir. Ct., Kanawha County, 2002), reported in 17 No. 6 MEALY’S LITIG. REP.: ASBESTOS, 4/19/02. Other examples of secondhand exposure verdicts and rulings against traditional asbestos defendants include Anchor Packing Co. v. Grimshaw, 692 A.2d 5 (Md. Ct. Spec. App. 1997) (plaintiff who alleged that she got mesothelioma from asbestos fibers her stepfather brought home from his job as an insulator awarded $3.21 million against the insulation manufacturer; on appeal the Maryland Court of Appeals held that her injuries were “not unforeseeable as a matter of law”); Stegemoller v. ACandS, Inc., 767 N.E.2d 974 (Ind. 2002) (holding that spouse of insulator, who washed her husband’s clothing, was within the meaning of state Product Liability Act’s definition of a bystander who would reasonably be expected to be in the vicinity of asbestos and therefore had standing to bring action against asbestos manufacturers).

\[43\] See Goede v. Aerojet-General Corp. (Mo. Cir., St. Louis County., 11/15/02), reported in 17 No. 22 MEALY’S LITIG. REP.: ASBESTOS, 12/20/02, at 8.

\[44\] See id.
Other large verdicts awarded against peripheral defendants in secondhand exposure cases include the following:

-- In Gunderson v. A.W. Chesterton Co., in December 2002, a San Francisco jury found Unocal liable for 9.3% of an $11.5 million verdict in favor of a homemaker who claimed that her mesothelioma was caused by asbestos fibers brought home on the clothes of her husband, who worked as a pipe fitter for a contractor on Unocal construction jobs.\(^{45}\)

-- In Cavitt v. Alcoa in 1999, a Texas jury awarded $2.11 million to the wife of a man who worked with asbestos at Alcoa.\(^{46}\)

-- In Franklin v. USX in 2000, an Oakland, California jury awarded $6.5 million to a woman whose parents worked for Western Pipe & Steel.\(^{47}\)

-- In Georgia-Pacific Corp. v. Pransky, in 2002, the Maryland Court of Appeals upheld a $9 million verdict awarded to a woman who claimed she developed mesothelioma as a result of being exposed at age 8 to asbestos from a joint compound used by her father in making repairs to the basement of their home.\(^{48}\)

-- In Peterson v. Hill Brothers Chemical Co., in 2002, an Oakland, California jury awarded a 42-year-old woman $20 million against the maker of an asbestos-containing cementitious floor in her childhood home. She alleged that her mesothelioma was caused

\(^{45}\) Gunderson v. A.W. Chesterton Company (Cal. Super. Ct. San Francisco County, 12/12/02), reported in 17 No. 22 MEALEY'S LITIG. REP.: ASBESTOS, 12/20/02 at 10.

\(^{46}\) Cavitt v. Alcoa (Tex. Dist. Ct., Milam County, 1/11/99), reported in 13 No. 24 MEALEY'S LITIG. REP.: ASBESTOS, 1/22/99 at 1. The case was settled during the pendency of an appeal.

\(^{47}\) Franklin v. USX Corp., 105 Cal.Rptr.2d 11 (Cal. Ct. App. 2000). On appeal the verdict was thrown out on the ground that the defendant had not assumed the liabilities of the company that was found to have exposed the plaintiffs’ parents to the asbestos fibers they allegedly brought home.

by, among other things, asbestos fibers releases by people walking on or polishing the floor.\textsuperscript{49}

\begin{quote}
-- In Burns v. Kaiser Gypsum Co., the defendant was found liable by a San Francisco jury for $1.7 million in favor of a woman who claimed that her peritoneal mesothelioma was caused by her presence for nine hours in 1963 when that company’s joint compound was sanded during construction of her home, and by her sanding it when she removed paneling from her home in 1971. She also alleged exposure to asbestos brought home on her husband’s clothes when he worked on ships and, later, as a telephone mainframe operator for GTE. The jury found Kaiser Gypsum not liable for negligence, but imposed liability under the doctrine of strict product liability, based on its finding that the joint paint compound failed to meet consumer expectations. \textsuperscript{50}
\end{quote}

Obviously, these claims raise troubling issues of proximate cause and foreseeableability. To date, most courts have allowed secondhand claims to proceed. In Anchor Packing v. Grimshaw, in which the plaintiff was awarded $3.21 million on her claim that she contracted ARD from fibers brought home on her stepfather’s clothes, the Maryland Court of Appeals held that the plaintiff satisfied the traditional “frequency, proximity and regularity” test.\textsuperscript{51} In Fuller-Austin Insulation Co. v. Bilder, a Texas trial court allowed the jury to decide a claim by a woman who alleged that she contracted

\textsuperscript{49} Peterson v. Hill Brothers Chemical Co. (Cal. Super. Ct., Alameda County, 6/4/02), \textit{reported in} 17 NO. 11 MEALEY'S LITIG. REP.: ASBESTOS, 7/8/02, at 4.

\textsuperscript{50} Burns v. Kaiser Gypsum Co., Inc., \textit{reported in} 17 NO. 5 MEALEY'S LITIG. REP.: ASBESTOS, 4/5/02, at 8.

mesothelioma from fibers brought home by her husband (an insulation worker) without applying that test, and the Texas Court of Appeals held that evidence that plaintiff was “routinely” exposed to asbestos that he brought home and expert testimony that her “daily and direct” exposure to asbestos in her home caused her mesothelioma, was sufficient to support the plaintiff’s verdict.52

C. Fraudulent Conveyance Claims

Another weapon increasingly being used by plaintiffs’ counsel to enlarge the number of defendant-targets is fraudulent conveyance suits, which challenge corporate restructuring transactions that included divestiture of assets allegedly associated with asbestos liabilities. In these cases the “new” parties being drawn into the asbestos litigation whirlpool are parent or affiliates corporations of “traditional” asbestos defendants, or other firms or entities that acquired assets from those parents or affiliates. Recent examples include:

GAF: GAF made asbestos-containing insulation and floor tiles. In 2001, GAF’s parent, G-I Holdings, filed for bankruptcy protection. In September 2001, the Official Committee of Asbestos Claimants of G-I Holdings sued the former chairman and chief executive officer of G-I and GAF, alleging that a 1997 restructuring transferred to the chairman corporate assets that should have remained assets of the GAF-related entities

52 See Fuller-Austin Insulation Co. v. Bilder, 960 S.W.2d 914 (Tex. App. 1998).
that eventually filed for bankruptcy four years later. The court denied the defendant’s motion to dismiss in April 2002 and the matter remains pending.\(^{53}\)

**W.R. Grace:** Grace filed for bankruptcy in 2001. In March 2002, the Official Committee of Asbestos Personal Injury Claimants commenced two adversary proceedings alleging that several years prior to the bankruptcy filing Grace fraudulently conveyed to the defendants several billion dollars in assets in an attempt to shield those assets from potential asbestos judgments. In this so-called “Sealed Air” litigation, the claimants sought recovery of all of the stock and assets received by the defendants and a declaration that the corporate veil between Grace and the corporate defendants should be pierced.\(^{54}\)

A critical issue in the Sealed Air litigation was whether asbestos claims rendered Grace insolvent at the time of the asset transfers. In July 2002 the court ruled that personal injury claims filed against Grace subsequent to the challenged transfers should be considered in determining whether Grace was solvent at the time of the transfers.\(^{55}\) In September 2002 the case was stayed after the United States Court of Appeals for the Third Circuit ruled in an unrelated case that a claimants committee cannot maintain a fraudulent conveyance action; only a debtor in possession or a bankruptcy trustee has

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standing to maintain such a claim.\footnote{See Official Committee of Unsecured Creditors of Cybergenics Corp. \textit{v.} Chinery, 304 F. 3d 316 (3d Cir.), \textit{vacated by} 2002 U.S. App. LEXIS 23786 (3d Cir. Nov. 18, 2002).}

While the judge’s stay order was being appealed to that appellate court, the case was settled for approximately $870 million in cash and stock paid to a trust for the benefit of Grace creditors in return for protection against pending and future asbestos claims.\footnote{See Sealed Air Reaches $853 Million Agreement in \textit{W.R. Grace} Case, 17 No. 21 \textit{MEALEY’S LITIG. REP.: ASBESTOS}, 12/6/02, at 4.}

\textbf{ABB:} Asbestos claimants sued ABB Ltd. and others in Ohio state court, alleging that they conspired to conceal assets of ABB subsidiary Combustion Engineering (“CE”) from asbestos claimants by a 1999 transaction in which they transferred CE’s boiler business to a third party – allegedly for inadequate consideration – while ABB retained CE’s other assets, thus rendering CE insolvent and unable to pay the more than 100,000 asbestos personal injury claims pending against the company.\footnote{See Mitcheltree \textit{v.} ABB Ltd., (Ohio Ct. Comm. Pls. Cuyahoga County), \textit{reported in} 17 No. 21 \textit{MEALEY’S LITIG. REP.: ASBESTOS}, 12/6/02, at 5.}

These instances all concern traditional asbestos defendants, but peripheral defendants may well find themselves embroiled in fraudulent conveyance litigation if they attempt to divest or separate assets tainted by asbestos liability exposure from those that are not. While a detailed analysis of the law regarding fraudulent conveyance in the asbestos context is beyond the scope of this article, as a general matter there may be grounds for a fraudulent conveyance challenge if the seller was insolvent at the time the asbestos liability-encumbered asset was sold and the sale was for less than fair market
value; or if the sale rendered the seller insolvent; or if the sale was made with intent to hinder, delay or defraud creditors.\textsuperscript{59} As noted above, the recent bankruptcy court ruling in \textit{Sealed Air (Grace)} is potentially very troublesome, because the court held that claims that had not yet been filed at the time of the transfer may have to be considered in determining whether the seller was insolvent when the transfer took place.\textsuperscript{60}

\textbf{IV. Trial Strategy: “Take Your Best Shot”}

Though no defendant in an asbestos case relishes the prospect of having to go to trial, many peripheral defendants with encapsulated, “low-release” ACPs believe that their products could not have caused injury and that a fair jury, willing to listen objectively to the facts, should return a defense verdict. Yet, trial outcomes for peripheral defendants present a mixed picture. There are some defense verdicts to be sure. But there are also a significant number of awards to plaintiffs in “encapsulated product” cases, including some very large verdicts. We have already summarized trial outcomes in premises and brake cases. See pp. 7-10, 13-16, supra. A representative sampling of outcomes in recent trials involving other categories of peripheral defendants is set forth below.

\textbf{A. Gaskets}

\textit{De minimis} release defenses have been presented (with similarly mixed results) in cases involving gaskets. Flexitallic at one time manufactured metal gaskets with

\textsuperscript{59} See Uniform Fraudulent Transfer Act §§ 4, 5.
\textsuperscript{60} See 281 B.R. at 859-62.
embedded asbestos fibers. In recent cases in which Flexitallic elected to go to trial rather than settle, its minimal-release defense has had a mixed record. In *Lewis v. John Crane Inc., et al.* for example, involving a living plaintiff pipefitter/shipyard worker suffering from mesothelioma, Flexitallic won a defense verdict. An award of nearly $5 million was entered against its co-defendants.\(^{61}\)

Flexitallic has also lost at trial, however, in California, Texas and Louisiana. In the California case, the jury awarded $4.2 million, including $2.5 million in non-economic damages, to a mesothelioma plaintiff who claimed exposure to Flexitallic’s wire brushing gaskets.\(^{62}\) In the Texas case, the jury awarded $35.2 million in damages divided evenly among 22 refinery workers suffering from asbestosis.\(^{63}\) In the Louisiana case, Flexitallic was found 10% liable for a $1.072 million verdict in an action involving a boilerman/navy veteran who died from mesothelioma at age 49.\(^{64}\)

Dana Corp. recently won a defense verdict from a jury in state court in Beaumont, Texas, against claims by nine plaintiffs, eight with asbestosis and one with lung cancer, who claimed that its asbestos-containing gaskets were defective.\(^{65}\)

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61 See *Lewis v. John Crane, Inc.* (Cal. Super. Ct. 5/5/00), *reported in* 15 No. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/2/00, at 4.

62 See *Lane v. Flexitallic, Inc.* (Cal. Super. Ct., Los Angeles County, 6/29/01), *reported in* 23 No. 15 ANDREWS LITIG. REP.: ASBESTOS, 8/2/01, at 3.

63 See *Wells v. Flexitallic, Inc. and U.S. Gypsum Co.* (Tex. Dist. Ct., Jefferson County), *reported in* 16 No. 2 MEALEY’S LITIG. REP.: ASBESTOS, 8/15/01, at 2; see also NATIONAL L.J., 2/26/01, at A-12.

64 See *Nunez v. Owens-Corning Corp.* (La. Dist. Ct., Vermillion Parish, 3/2/00), *reported in* No. 4 MEALEY’S LITIG. REP.: ASBESTOS, 3/17/00, at 19.

65 See *Cole v. Dana Corp.* (Tex. Dist. Ct., Beaumont County, 5/31/02), *reported in* 17 No. 9 MEALEY’S LITIG. REP.: ASBESTOS, 6/7/02, at 6.
B. Flooring Materials

Flooring manufacturers faced with asbestos litigation similarly have asserted the *de minimis* exposure defense. In *Peterson v. Hills Brothers Chemical Co.*, the only non-settling defendant, a manufacturer of an asbestos-containing floor, was hit with a $20 million verdict in favor of a woman who claimed that she developed mesothelioma from people walking on or polishing the floor in her childhood home (as well as from fibers brought home by her father from his construction supply job).^66^  

In *Ehret v. Congoleum*, the only non-settling defendant, a manufacturer of vinyl floor tiles, argued, among other things, that the chrysotile asbestos fibers in its floor products were encapsulated in the vinyl matrix, were not respirable and were not capable of causing the plaintiff’s mesothelioma. A California jury rejected these arguments and awarded approximately $3.3 million to the widow of a vinyl floor installer who died of pericardial mesothelioma.^^67^ An appellate court reduced the award to $817,896.^68^  
Congoleum recently settled a mesothelioma case after the jury returned an $8.6 million verdict in phase I of a reverse bifurcated trial.^69^

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In a case against Mohasco, another California jury awarded approximately $1 million to the widow of a man who had worked with floor tiles as a flooring mechanic in the 1950s and 1960s and had died of mesothelioma. The award consisted of $145,432 in economic damages and $850,000 in non-economic damages.\footnote{See Petrini v. Mohasco Corp. (Cal. Super. Ct., San Francisco County, 12/18/99), reported in 14 NO. 4 MEALEY’S LITIG. REP.: ASBESTOS, 3/19/99, at 25.}

C. Joint Compounds

Kelly-Moore Paint Company made a joint compound called PACO that contained asbestos. Kelly-Moore has chosen to contest claims at trial, with mixed results. In late 2001, an El Paso, Texas jury found Kelly-Moore 100% liable for a $55.5 million verdict in favor of a 47-year old construction worker who developed mesothelioma, and his family.\footnote{See Hernandez v. Kelly-Moore Paint Co. (Tex. Dist. Ct., El Paso County, 8/29/01), reported in 16 NO. 15 MEALEY’S LITIG. REP.: ASBESTOS, 9/07/01, at 3. That $55.5 million total included $15 million in punitive damages, which far exceeds Texas’ statutory punitive damages cap. See id.} Kelly-Moore subsequently prevailed, however, in two Texas trials, one brought by a woman suffering from mesothelioma who claimed household exposure to PACO, and a second by a drywall installer who also contracted mesothelioma. It appears that the juries in these cases accepted Kelly-Moore’s defense that the plaintiff was not exposed to PACO.\footnote{See Dalbec v. Kelly-Moore Paint Co. (Tex. Dist. Ct., Hunt County, 7/25/02), reported in 17 NO. 13 MEALEY’S LITIG. REP.: ASBESTOS, 8/02/02; Love v. Kelly-Moore Paint Co. (Tex. Dist. Ct., Orange County, 6/13/02), reported in 17 NO. 11 MEALEY’S LITIG. REP.: ASBESTOS, 7/08/02.}
D. **The Aggressive Trial Approach**

Some peripheral defendants have attempted to hold the line and follow an aggressive trial strategy in which they stand ready to try any case that cannot be settled at very low cost. Several companies have announced policies of never settling, and of trying all cases that reach the trial stage. Case reports over recent years indicate that generally the aggressive strategy produces a robust trial docket for companies following this path, and that the win-loss column thus generated yields a fair number of plaintiff verdicts, including some large awards. Whether an aggressive trial strategy is in the interest of any particular peripheral defendant depends on a host of factors that must be examined with reference to the unique circumstances of that company. Some of the more important factors are: the strength of the company’s *de minimis* release and product identification defenses, the impact on the inclinations of particular plaintiff law firms that have targeted the company in terms of new claims filings or the movement of pending claims to trial settings, the views of insurance carriers, the effect on the company’s balance sheets, and numerous other factors.

Even those companies that have had good success with an aggressive trial strategy may find that it may not be equally applicable to all types of claims. For example, a defendant whose “no settlement” policy is based primarily on strong “encapsulation” or “*de minimis* release” defenses may find that premises liability litigation – which usually involves asbestos-containing insulation in buildings rather than their encapsulated products – poses more severe problems that may require different litigation management strategies.
E. Conclusion

The lesson from the litigation track record in premises and encapsulated products cases, often involving only minimal asbestos fiber releases, is clear: some (and perhaps many) such cases can be won at trial but some will inevitably be lost. It appears that in the special case of asbestos, many courts and juries are prepared to relax the plaintiff’s traditional burden of proving causation. For these courts and juries, a defendant shown to have any potentially respirable asbestos fibers in its products – even if only at minimal levels in relation to other contributors – will often be required to pay some proportionate share of the plaintiff’s damages.

V. Settlement Strategy: “Let’s Make a Deal”

As noted above, some asbestos defendants, faced with mounting litigation costs and knowing that many juries are prone to award at least some damages to asbestos plaintiffs irrespective of shortcomings in their trial proof on causation, have attempted to curb long-run litigation costs by negotiating early settlements. Unfortunately, many defendants who may have hoped they could settle their way out from the riptide of asbestos personal injury filings have been disappointed. A look at the results of a number of different settlement strategies followed by various traditional defendants reveals that, though they followed different paths, many came to the same destination: bankruptcy.

73 See, e.g., 16 No. 8 BNA TOXICS L. REP., 2/22/01, at 185 (discussing “lenient” standard of proof applied to asbestos cases under New York law, citing Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990)).
A. The CCR Joint Settlement Model

The Center for Claims Resolution (“CCR”) was the unsuccessful proponent of a “futures” class action settlement mechanism whereby all potential future asbestos bodily injury claims against the CCR member companies would have been resolved in accordance with an administrative process with compensation based on pre-determined methods of computation. While the class action settlement was struck down by the Supreme Court in Amchem v. Windsor in 1997, the CCR had also negotiated separate large “inventory” settlements with the two major asbestos plaintiffs’ law firms that had entered into the class action arrangement: Ness, Motley and Greitzer & Locks. The cost of those inventory settlements was $200 million.\(^{74}\) In December 1999, the CCR agreed to pay $161 million in settlement to 3,898 plaintiffs and their lawyers in the Cosey litigation in Mississippi, a transaction billed as the largest per-victim settlement in an asbestos case.\(^{75}\)

A year later, and following the bankruptcy filings of several of its members, the CCR announced that, after having settled more than 400,000 claims and having paid more than $5 billion on behalf of its member companies, it would no longer provide claims negotiation and legal administration services to its members.\(^{76}\) Many of the post-1999 bankruptcy filers have been former members of CCR (e.g., GAF, Armstrong, U.S.

\(^{74}\) See 521 U.S. at 601.

\(^{75}\) See 15 NO. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/17/00, at 3.

\(^{76}\) See 16 NO. 11 MEALEY’S LITIG. REP.: ASBESTOS, 7/06/01, at 10F; see also 16 NO. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/23/01, at 7-8.
Although it would probably be a mistake to conclude from the CCR experience that joint settlements should never be employed as a means to control asbestos litigation, it would appear that a policy of attempting to settle large numbers of claims without the assistance of bankruptcy courts may have the opposite of its intended effect. Rather than reduce the number of pending claims, such large-scale, joint settlements seem to attract new filings against the settling defendants.

**B. Fibreboard “Structured Settlement” Model**

A second model that was employed in an effort to resolve the tidal wave of asbestos filings is the so-called “structured settlement” approach followed by Fibreboard. As summarized in the Supreme Court’s *Ortiz* opinion, this was a settlement arrangement under which plaintiffs received an assignment of Fibreboard’s claim against its insurance carriers for coverage of the underlying liability. The Supreme Court’s brief summary of the evolution of this settlement strategy reveals its shortcomings:

> With asbestos case filings continuing unabated, and its secure insurance assets almost depleted, Fibreboard in 1988 began a practice of “structured settlement,” paying plaintiffs 40 percent of the settlement figure up front with the balance contingent upon a successful resolution of the coverage dispute. By 1991, however, the pace of filings forced Fibreboard to start settling cases entirely with the assignments of its rights against Continental, with no initial payment. To reflect the risk that Continental might prevail in the coverage dispute, these assignment agreements

[77] See fn. 6, *supra*. 
generally carried a figure about twice the nominal amount of earlier settlements.\textsuperscript{78}

Fibreboard thus faced a situation in which it was simultaneously litigating (i) underlying claims brought by injured workers, and (ii) coverage suits against its insurers who were resisting their duty to pay the underlying claims. Fibreboard obviously wished to achieve the most efficient practicable outcome: one in which the underlying claimants might pursue the insurers directly, thereby, in effect, taking Fibreboard out of both the underlying and the coverage litigation. But in doing so the company was forced to pay more – “about twice the nominal amount” – to settle the underlying claims. Perhaps not surprisingly, this strategy appears not to have resulted in any significant abatement of new filings.

Whatever else may be said about the Fibreboard “structured settlement” strategy, it did not lead to a net downturn in new claims filings against the company. Indeed, it seems evident that the mounting pressure of new claims prompted Fibreboard and its insurers to enter into a “Global Settlement Agreement” in August 1993, pursuant to which two of Fibreboard’s insurers agreed to contribute $1.525 billion and Fibreboard (with additional insurance proceeds) agreed to contribute $10 million.\textsuperscript{79} This “Global” settlement then led to a “Trilateral Settlement Agreement” creating a $2 billion fund “to defend against asbestos claimants and pay the winners, should the Global Settlement

\textsuperscript{78} 527 U.S. at 823 (footnote omitted).

\textsuperscript{79} See id. at 824-25.
Agreement fail to win [court] approval.\textsuperscript{80} As noted above, the Supreme Court rejected the settlement for a number of reasons, and Fibreboard was thrown back to the conventional tort system for litigating or settling claims on a case-by-case basis. In May 1997 Fibreboard was acquired by Owens Corning, whose own asbestos liabilities were very substantial. On October 5, 2000, Owens Corning and seventeen affiliates including Fibreboard filed for bankruptcy.

C. The “Go It Alone” Settlement Model

W.R. Grace, Babcock & Wilcox and Foster Wheeler offer examples of a third model, in which individual asbestos defendants have chosen to “go it alone” in attempting to deal with large numbers of personal injury claims. Because the circumstances of individual companies can differ markedly, and comparisons must therefore be highly qualified, we would simply call attention to the bottom line results reported by three traditional defendants that followed this third approach:

W.R. Grace, which had made asbestos-containing fireproofing, and declared bankruptcy in 2001, stated in documents it filed with the SEC that its bankruptcy filing was in response to a sharply increasing number of asbestos-related bodily injury claims. In particular, such documents stated, in 2000 there were 81\% more personal injury claims filed against W.R. Grace than in 1999, and more than in any previous year. They also indicated that the company had disposed of 163,698 asbestos personal injury claims

\textsuperscript{80} Id. at 825.
through settlements and judgments for a total of $645.6 million, and that 129,191 such claims were pending at the time of the bankruptcy filing.\(^81\)

Babcock & Wilcox, which had made asbestos-containing boilers, followed a “settle everything” policy. As described on its website, Babcock & Wilcox’s settlement policy was as follows:

Since the first claims, it has been B&W’s practice to settle virtually all claims out of court. This responsible approach has enabled the company to minimize overall expenses and maximize settlement funds going to claimants.

Unfortunately, B&W has been forced to reexamine its practice. In recent months, some plaintiffs’ attorneys have dramatically increased the demands for settlement. These increases are not justified by any change in the facts, the law, or in B&W’s liability posture.\(^82\)

Babcock & Wilcox reported in its February 2000 bankruptcy filing that it had settled more than 340,000 claims at a cost of $1.6 billion since 1982.

Foster Wheeler, which had made asbestos-containing boilers, reported in its 10-K filing in March 2001 that the company was facing 92,100 pending asbestos claims as of December 31, 2000. Although it had resolved 68,800 claims during 1998-2000, it had received 95,900 new claims during that same three-year period. During the three-year period ending December 31, 2001 (the latest full year for which it has publicly disclosed such information), the number of claims pending against the company in the United States at year-end had increased steadily, from 73,600 in 1999, to 110,700 in 2001, with amounts paid for settlement and litigation expenses increasing each year, from $40.4


million in 1999, to $56.2 million in 2000, to $66.9 million in 2001.\textsuperscript{83} By the end of the third quarter of 2002, Foster Wheeler had paid an additional $45.4 million and the number of outstanding claims against the company had risen to 132,400.\textsuperscript{84}

D. Recent Proposed Global 524(g) Resolutions

In recent months some peripheral defendants that face large numbers of asbestos claims have negotiated proposed global resolutions with some plaintiffs’ counsel, that contemplate utilizing the channeling injunction provisions of Section 524(g) of the Bankruptcy Code. Section 524(g), enacted in 1994, provides for the creation of a “qualified settlement fund” for present and future asbestos claimants.\textsuperscript{85} The fund assumes all future liabilities of the debtor and sets a cap on each settlement.\textsuperscript{86} The 524(g) provision allows the court to issue a “channeling injunction” barring all future plaintiffs from filing asbestos claims against the reorganized company.\textsuperscript{87} As a general rule, the fund must be vested with at least 51% of a company’s worth, but historically such trusts have held sums closer to 80-90% of each company’s assets.\textsuperscript{88}

Halliburton, one of the defendants found liable in the infamous $150 million Curry case, is facing approximately 328,000 claims arising from the asbestos-containing

\begin{itemize}
\item \textsuperscript{83}See Foster Wheeler Ltd. Form 10-K, filed Apr. 12, 2002.
\item \textsuperscript{84}See Foster Wheeler Ltd. Form 10-Q filed Nov. 12, 2002, at 13; Foster Wheeler Ltd. Form 10-Q filed Aug. 19, 2002, at 11-12; Foster Wheeler Ltd. Form 10-Q filed May 13, 2002, at 8.
\item \textsuperscript{86}See 11 U.S.C. § 524(g)(3)(A).
\item \textsuperscript{87}See 11 U.S.C. § 524(g)(1)(B).
\item \textsuperscript{88}See Kim, \textit{supra}; see also 11 U.S.C. § 524(g)(2)(B)(i)(III).\end{itemize}
refractory products made by Harbison-Walker, a former subsidiary and present
indemnitee of its Dresser Industries subsidiary, and from operations of its own Kellogg
Brown & Root construction subsidiary.\(^{89}\) In December 2002 Halliburton announced an
agreement in principle to resolve all those claims, and all future claims arising from those
sources. The proposed arrangement, which is subject to bankruptcy court approval,
contemplates that Dresser and Kellogg Brown & Root would file prepackaged
bankruptcies, that Halliburton would contribute approximately $2.775 billion in cash,
59.5 million shares of Halliburton stock, and notes in an amount to be determined, to a
524(g) trust. Thereafter Halliburton, its two subsidiaries and Harbison-Walker, all would
be protected against claims by a channeling injunction.\(^{90}\)

Honeywell International, which was hit with nearly half of a $53 million verdict
in New York in December 2001,\(^ {91}\) faces approximately 236,000 claims arising from
refractory products made by its former subsidiary, North American Refractories
(“NARCO”), and another 50,000 claims arising from the brake business of Bendix (for
which claimants look to Honeywell as a result of its 1999 merger with AlliedSignal,
which previously had acquired Bendix).\(^ {92}\) In 2001 Honeywell attempted to deal with the
brake claims by joining the Big 3 automakers in removing claims from state courts and


\(^{91}\) Brown v. ACandS (N.Y. Sup. Ct., New York County), reported in 17 No. 2
MEALEY’S LITIG. REP.: ASBESTOS, 2/15/02, at 3.

moving to transfer and consolidate those claims with the Federal-Mogul bankruptcy case. Honeywell sought thereby to obtain an omnibus Daubert hearing on whether chrysotile asbestos, the type used in brakes, causes disease. That attempt was rejected by the Federal-Mogul bankruptcy court and the Third Circuit, and the Supreme Court recently declined to review that case.93

In 2002 Honeywell joined Mobil Corp. and others in a constitutional challenge in the U.S. Supreme Court to the West Virginia judiciary’s rules subjecting hundreds of defendants to a bifurcated “common issues” trial. That effort, too, was unsuccessful.94

In mid-January 2003, Honeywell announced a tentative agreement with approximately 90% of the plaintiffs who have claims against NARCO for the creation of a 524(g) trust and a channeling injunction applying to all future NARCO-related claims against NARCO or Honeywell.95 At the end of January, 2003, Honeywell announced another proposed agreement to deal with the brake claims: a letter of intent to convey its Bendix business (other than certain U.S.-based assets) to Federal-Mogul, in exchange for bankruptcy court protection against Bendix-based asbestos liabilities. The deal would be subject to inclusion of those liabilities in a 524(g) trust and court issuance of a channeling injunction against the filing of pending and future asbestos claims against Honeywell.

95 See Honeywell Reports Settlement with NARCO Plaintiffs, 17 No. 24 MEALEY’S LITIG. REP.: ASBESTOS, 1/24/03, at 4.
arising from its friction business. The deal also is subject to the approval of the Federal-Mogul bankruptcy court and other governmental approvals.  

A third proposed global resolution was announced recently by ABB, Ltd., a Swiss engineering firm whose subsidiary, Combustion Engineering (“CE”), faces approximately 111,000 claims. Under this arrangement, CE would file a prepackaged bankruptcy, ABB would fund a 524(g) trust with up to $350 million in cash and $50 million in ABB stock, and ABB and CE would be protected against pending and future claims by a channeling injunction. On February 17, 2003, CE did file for bankruptcy. If this arrangement receives the approval of at least 75% of the plaintiffs with pending claims, it will proceed to the stage of bankruptcy court review.

Whether these proposed global resolutions obtain requisite court approvals and are finally effectuated remains to be seen. It would appear, however, that the 524(g) trust

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96 See Honeywell International Inc. Form 8-K, filed Jan. 30, 2003; Federal-Mogul To Buy Honeywell’s Frictions Business, 18 No. 1 MEALEY’S LITIG. REP.: ASBESTOS, 2/7/03, at 8. The authors’ law firm, Covington & Burling, represents Federal-Mogul in connection with one aspect of its proposed acquisition of Honeywell’s Bendix assets. The authors have not worked on that matter, and all statements in this article concerning that transaction are based entirely on public information.

97 See ABB Announces $1.2 Billion Agreement with Asbestos Plaintiffs, 17 No. 24 MEALEY’S LITIG. REP.: ASBESTOS, 1/24/03, at 4.


99 See ABB Files U.S. Unit For Bankruptcy Early to Prevent Chapter 7 Filing, 18 No. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/18/03, at 8.

100 Recent reports indicate the ABB plan is likely to obtain the requisite claimant approval. See ABB Files U.S. Unit For Bankruptcy Early to Prevent Chapter 7 Filing, 18 No. 2 MEALEY’S LITIG. REP.: ASBESTOS, 2/18/03, at 8. (reporting that, as of February 15, 2003, 103,000 of the 111,000 claimants had voted, with only 1,000 expressing opposition to the ABB arrangement).
may not be a model for many peripheral defendants. Unlike Halliburton, Honeywell and ABB, most peripheral defendants face far smaller numbers of claims in a four- or five-figure range rather than six-figures. Moreover, for many remaining defendants, there may be no distinct subsidiary possessing all asbestos-related liabilities that can be carved out and placed in bankruptcy. Therefore an unfortunate effect of these proposed global settlements may very well be to increase still further the pressure on remaining defendants by removing three more major targets from the field.

VI. Neutral Strategy: “Keep Your Head Down and Your Eyes Open”

Obviously, no defendant should voluntarily pursue a settlement strategy that calls for the payment of hundreds of millions of dollars but fails to stem the tide of asbestos personal injury claims and runs a high risk of bankruptcy. Nor will an aggressive trial strategy be wholly optimal for every peripheral defendant if in practice it exposes the company to repeated jury awards of substantial damages without stemming the flow of new claims filings.

But if in practice trials do not consistently produce defense verdicts, even in truly compelling cases involving encapsulated asbestos products, and if settlement payouts appear in many cases simply to increase or accelerate asbestos filings, what is left for the peripheral defendant to do?

There is no entirely satisfactory answer to that question. But there is at least a practical strategy that draws from conventional battlefield wisdom and may have some utility for defendants given the current dynamics of asbestos litigation: “Keep your head
down during the shelling, and then fight to hold your position.” There are several practical applications for peripheral defendants who adopt this approach:

**Strategy Evaluation:** First, and most important, each peripheral defendant should review its overall litigation profile and ask itself three questions:

1) Have we invested sufficient resources in establishing the bases for our core defenses – especially the encapsulation and *de minimis* release defenses – so that we can credibly communicate to the plaintiffs’ bar our readiness to go to trial and our plausible expectation to win more verdicts than we are going to lose?

2) Have we established a system for identifying the types of cases that should be settled rather than tried, and a process for assigning realistic settlement values for those cases?

3) Have we assembled a tight network of asbestos defense counsel who are highly experienced in (i) trying cases that must be tried and that can be won, (ii) settling cases that pose excessive risk, and (iii) recognizing the difference between the two?

**Additional Scientific Research Regarding Mesothelioma:** Second, despite the fact that a substantial percentage of mesothelioma cases appear to be idiopathic (i.e.,
occurring without any apparent occupational exposure to asbestos fibers)\textsuperscript{101} – cases of childhood-onset mesothelioma\textsuperscript{102} being the paradigm example – this deadly malady is still characterized in jury trials as a "signature" asbestos disease. Juries routinely return the highest awards in cases involving mesothelioma. Recent advances in epidemiology have raised substantial questions as to whether mesothelioma can be caused by exposure to chrysotile\textsuperscript{103} – the kind of asbestos used in 95% of commercial applications in North America. It follows that additional research to identify and document non-asbestos causes for this disease should be given a high priority. This task has been given even greater urgency by a still small but nevertheless highly disturbing increase in secondhand exposure claims by individuals who allege that they contracted mesothelioma after being exposed as children to asbestos fibers brought home on their fathers' clothing or from ACPs in their homes (see pages 16-20, above). This is a subject on which additional pathology, toxicology and epidemiology research is urgently needed if defendants are soon to be faced with a wave of mesothelioma claims by people who were not even in the work force when large-scale asbestos use was discontinued.

Scientific Support for “De Minimis” Defenses: Third, all peripheral defendants have a strong interest in continuing to develop and, where appropriate, press for judicial

\textsuperscript{101} See, e.g., J. Craighead, Pathology of Environmental and Occupational Disease (St. Louis, Mosby 1995), at 468.


acceptance of, scientific support for the proposition that small, “de minimis” releases of asbestos fibers do not cause ARD.

The EPA has stated repeatedly that there is no known level of exposure to asbestos “below which health effects do not occur.”\textsuperscript{104} Plaintiffs’ medical experts have asserted that exposure to a single asbestos fiber is sufficient to cause disease.\textsuperscript{105} Defendants have challenged this “single fiber theory.”\textsuperscript{106} To date, however, we are unaware of any court that has excluded expert testimony supporting the single fiber theory. Conversely, there are several reported cases in which courts have shown a willingness to accept the single fiber theory.\textsuperscript{107}


\textsuperscript{105} See, \textit{e.g.}, \textit{Harashe v. Flintkote Co.}, 848 S.W.2d 506, 508 (Mo. Ct. App. 1993) (plaintiffs’ expert testified that it is a reasonable inference that a single fiber which can successfully evade the body defenses and move into the pleura could cause disease); \textit{United States v. Reserve Mining Co.}, 380 F. Supp. 11, 47 (D. Minn. 1974), \textit{modified in part and remanded with directions} (on other grounds), 514 F.2d 492 (8th Cir. 1975); \textit{Menaquale, et al. v. ACandS Inc., et al.} (N.J. Super Ct. App. Div. 1994).


\textsuperscript{107} See, \textit{e.g.}, \textit{Bonnelette v. Conoco, Inc.}, No. 01-2097(La. Ct. App. 3d Cir. Sept. 13, 2001) at 15 (holding that expert’s opinion “that one asbestos fiber could be enough to induce cellular change that would result in cancer” presented an issue for resolution by the jury); \textit{Harashe, supra} note 84 (“It is not clear from the medical testimony that multiple fibers in the pleura are necessary to development of the disease and from the defense expert's testimony it is a reasonable inference that a single fiber which can successfully evade the body defenses and move into the pleura could cause the disease,” id. at 508); \textit{Reserve Mining Co., supra} note 105, (“there is no known safe level of exposure”); and \textit{Menaquale, supra} note 105.
This is an area where peripheral defendants, either singly or in groups, must invest resources to enable them to demonstrate – by clear, scientific evidence presented by qualified, reputable epidemiologists, toxicologists, pathologists and other experts – that use of their products and exposure to ACPs on their premises could not cause ARD.

**Know Your Corporate History:** Fourth, it is important for peripheral defendants to identify the sources of potential asbestos exposure arising from their past acquisitions or divestitures of companies or assets that once may have made asbestos-containing products or operated premises that had ACPs. The only "asbestos connection" for some companies being sued today is that at some point in the past – sometimes the distant past – they acquired the stock or assets of companies that once made, sold or used ACPs. Others are being sued, or are having suits tendered to them, long after they divested themselves of subsidiaries or assets that once made, sold or used ACPs and indemnified the acquiring party with respect to asbestos liabilities. Peripheral defendants in such situations should carefully review their corporate genealogies and those of the companies or assets they acquired or sold, and the instruments pursuant to which those acquisitions or divestitures were made, to determine whether under applicable law or the terms of those instruments they may have defenses to claims being asserted against them. Some have obtained from courts in which their indemnitees’ bankruptcy cases are pending an extension of the automatic stay to claims pending against them (at least temporarily) on the ground that the bankruptcy estate will be harmed if claims against the non-bankrupt indemnitor are allowed to proceed and devour the resources with which it would honor
the indemnification.\textsuperscript{108} Others have prevailed on the basis of insufficient proof that their predecessors, which sold the ACP, had knowledge of hazards at the time of sale.\textsuperscript{109}

Any company considering a corporate acquisition or combination should conduct due diligence to ascertain any potential asbestos liability that may be inherited through the transaction, and if some such liability is found, to evaluate the scope of potential legal safeguards.\textsuperscript{110} A company’s internal “asbestos audit” also should identify any companies

\textsuperscript{108} For example, Dresser Industries (and its parent Halliburton) and bankrupt Harbison-Walker Refractories have been seeking, so far successfully, to stay the more than 250,000 asbestos cases pending against Dresser on the ground that an insurance policy held by Dresser covering claims against Harbison-Walker for which Dresser indemnified it in connection with a 1992 spin-off is a significant asset of the Harbison-Walker bankruptcy estate. The Harbison-Walker bankruptcy court issued such a stay in February 2002, shortly after that company filed for bankruptcy, and has extended it several times. See In re Harbison-Walker Refractories Co., No. 02-21627 (Bankr. W.D. Pa.), Harbison-Walker Refractories Co. v. Indesco Inc., Adv. No. 02-2080 (Bankr. W.D. Pa. 4/4/02), \textit{reported in} 17 No. 3 MEALEY’S LITIG. REP.: ASBESTOS, 3/1/02, at 3, 17 No. 6 MEALEY’S LITIG. REP.: ASBESTOS, 4/19/02, at 10, 17 No. 10 MEALEY’S LITIG. REP.: ASBESTOS, 6/21/02, at 21, 17 No. 13 MEALEY’S LITIG. REP.: ASBESTOS, 8/2/02, at 21, and 17 No. 24 MEALEY’S LITIG. REP.: ASBESTOS, 1/24/03, at 9.

Similarly, the court in which the North American Refractories Co. (NARCO) bankruptcy is pending imposed in January 2002 and has continued repeatedly an order extending the automatic stay to its former parent, and indemmitor, Honeywell. See, e.g., In re North American Refractories Co., No. 02-20198 (Bankr. W.D. Pa., 4/4/02), \textit{reported in} 17 No. 6 MEALEY’S LITIG. REP.: ASBESTOS, 4/19/02, at 10; Stay on Asbestos Claims in Penn. Court Extended for Halliburton, Honeywell, 17 No. 17 MEALEY’S LITIG. REP.: ASBESTOS, 10/4/02, at 8.

\textsuperscript{109} See, e.g., In re Asbestos Litigation; Colgain v. Oy-Partek Ab (Del. 5/22/02), \textit{reported in} 17 No. 11 MEALEY’S LITIG. REP.: ASBESTOS, 7/8/02.

\textsuperscript{110} For example, in December 2001 Pennsylvania enacted a law limiting Pennsylvania corporations’ liability for asbestos claims attributable to an acquired subsidiary to “the “fair market value of the total assets of the transferor determined at of the time of the merger or consolidation” (and adjusted for inflation) 15 Pa. Cons. Stat. Ann. § 1929.1 (2002). This so-called “Crown Cork & Seal” law was enacted at least in part because of the situation faced by the Pennsylvania corporation of that name, which never made or sold asbestos-containing products but which had acquired a cork company in 1963 for $7 million, to obtain its bottle cap business, and since then had spent (footnote cont’d)
to which it sold asbestos or asbestos-containing products. In this new wave of asbestos litigation some defendants are filing cross-claims against others.\textsuperscript{111}

\textbf{Flexible, Jurisdiction-by-Jurisdiction and Situational Litigation Approach:} Fifth, peripheral defendants must learn to calibrate their litigation approach to the separate and distinct realities of courts and plaintiffs’ counsel in each jurisdiction in which cases against their companies have been filed. The considerations here, though perhaps obvious, are not amenable to generalization. It is enough to say that in some circumstances an approach emphasizing aggressive litigation and resistance to settlement demands will be desirable. In other circumstances, a good rapport with plaintiffs’ lawyers will allow an appropriate sorting by which the truly non-meritorious claims may be voluntarily dismissed and the plausible claims can be tried or settled. All of these circumstances should be considered in determining whether a peripheral defendant

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\textsuperscript{111} For example, Kelly-Moore Paint Company, which suffered a $55.5 million verdict in 2001, see Hernandez v. Kelly-Moore Paint Co. (Tex. Dist. Ct., El Paso County, 8/29/01), reported in 16 No. 15 MEALEY’S LITIG. REP.: ASBESTOS, 9/07/01, at 3, recently sued Union Carbide Corp., Dow Chemical Co., Cooper Industries and Flintkote, alleging that Union Carbide (recently acquired by Dow) fraudulently induced Kelly-Moore to buy raw asbestos from it from 1963 to 1978 for use in its paint compound by advising it that asbestos fiber was safe, and that Union Carbide and the other named defendants participated, directly or through predecessors in interest, in the alleged suppression of evidence of the dangers of asbestos. See Kelly-Moore Sues Union Carbide, Others Alleging Conspiracy, Seeks $1 Billion, 17 No. 12 MEALEY’S LITIG. REP.: ASBESTOS, 7/19/02, at 4.
should “keep a low profile,” or, alternatively risk raising its profile by litigating pretrial issues aggressively. For some companies this question is still a no-brainer. For some, claims inventories remain low and many leading plaintiff’s law firms are unaware of their existence as potential defendants. For others, their profiles are already so high that visibility is a moot point. Most companies, however, are at neither end of the visibility spectrum, and calibrating the appropriate level of their pretrial litigation activity requires well-informed judgment.

Monitor Developments and Plan for the Long Haul: Finally, “stay tuned.” The past three years have seen significant changes to the asbestos litigation landscape and some ominous new developments. The remaining peripheral defendants must keep in mind that there is no readily apparent “quick fix” or easy solution to the asbestos litigation. Some hope for reform through Congressional legislation, but the deep schism between factions of the plaintiffs’ bar with respect to the need for and shape of acceptable national legislation should serve to restrain undue optimism that an effective solution will emerge from Congress anytime soon.¹¹²

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¹¹² Hearings before the Senate Judiciary Committee regarding asbestos were held on September 25, 2002. On February 13, 2003, a bill that would establish medical criteria a claimant must meet before filing a claim, toll the statute of limitations for unimpaired claimants, and limit venue shopping, was introduced in the Senate. See S.413. As of the date of this article, additional hearings in the Senate have been scheduled for March 5, 2003.