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Crafting an Asbestos Scheduled Compensation Solution for Louisiana and the Nation

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INTRODUCTION

"Have you been exposed to asbestos?" On a regular basis, our television poses this question. Before we have time to formulate an answer, we know that a website filled with information along with a 1-800 hotline waits at the end of the commercial. Often, we shrug these advertisements off as mere annoyances and assure ourselves that somewhere, a lawyer is banking on a legal get-rich-quick scheme. After the advertisement concludes, we ponder why asbestos claims still exist, because asbestos' health effects have not plagued recent generations.

We fail to recognize, however, that these commercials are merely the public façade of a problem facing courts across the country. Asbestos not only affects those with one of its associated health problems, but also all citizens, because society must bear the substantial costs of litigating the claims of those injured by asbestos. The cost of asbestos litigation has caused an amount of medical and economic suffering never experienced under American tort law.[1] Asbestos litigation has left plaintiffs without compensation, corporations without assets, courts with crowded dockets, and litigators with hearty bank accounts.

Unfortunately, the solutions offered by state governments and the federal government to reform asbestos litigation have been ineffective.[2] Recently, *Rando v. Anco Insulations Inc.* forced the Louisiana Supreme Court to choose a solution for Louisiana's asbestos litigation crisis.[3] Due to judicial constraints, however, the court was unable to consider the myriad of other solutions available in other states.[4] Therefore, the court's decision not only failed to advance any solution to the asbestos litigation problem but also worsened it.

The inability of the Louisiana Supreme Court to craft a proper solution for Louisiana's asbestos litigation problem requires legislative action. This Comment seeks to remedy the asbestos

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1. *See* discussion *infra* Part I (discussing the history of the asbestos litigation crisis).

2. *See* discussion *infra* Part II (discussing the pros and cons of consolidation and medical criteria statutes as a solution to the asbestos litigation crisis).

3. Rando v. Anco Insulations Inc., 16 So. 3d 1065 (La. 2009).

4. *See* discussion *infra* Part II (explaining the use of asbestos case consolidation and medical criteria statutes as solutions to the asbestos litigation crisis).

litigation crisis by formulating a state-administered scheduled compensation model that balances the interests of asbestos plaintiffs, defendants, and attorneys. Part I lays out the history of asbestos and its accompanying litigation and explains the jurisprudence behind Louisiana's asbestos litigation crisis. Part II examines the pros and cons of the solutions offered by other state legislatures to combat the asbestos litigation problem. Part III analyzes why a state-administered compensation schedule that incorporates provisions from the 2006 Fairness in Asbestos Injury Resolution Act and the Louisiana Medical Malpractice Act fairly balances the interests of asbestos plaintiffs, defendants, and attorneys.[5] Part V concludes by arguing that the Louisiana Legislature, as well as other state legislatures, should enact a scheduled compensation plan for asbestos injuries.

I. THE ASBESTOS PROBLEM

The asbestos problem began when asbestos transformed from a miracle fiber into an occupational hazard that ravaged society. Asbestos litigation costs negatively affect not only asbestos plaintiffs but also defendants and the judicial system. In Louisiana, courts split on whether to adjudicate asbestos claims in the workers' compensation or tort system. The Louisiana Supreme Court recently resolved this split and sent Louisiana courts down a path of increased asbestos litigation costs for plaintiffs, defendants, and the State.

A. The Miracle Fiber

Asbestos is a group of six different naturally occurring fibrous minerals.[6] Chrysotile, also known as white asbestos, was the primary form of commercial asbestos throughout the United States until the Environmental Protection Agency largely banned the use of asbestos in 1989.[7] Like other forms of asbestos, chrysotile does

5. *See* Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. (2006); LA. REV. STAT. § 40:1299.41 (2010); *see also* discussion *infra* Part III (explaining how a state administered compensation scheduled incorporating provisions from the FAIR Act and the Louisiana Medical Malpractice Act presents a solution for Louisiana's asbestos litigation crisis).

6. U.S. DEP'T OF HEALTH & HUMAN SERVICES, TOXICOLOGICAL PROFILE FOR ASBESTOS (2001) (noting the six different types of asbestos: amosite, chrysotile, crocidolite, tremolite, actinolite, and anthophyllite).

7. *Id.* (noting that although chrysotile was the primary form of commercial asbestos, amosite and crocidolite were also widely used); 40 C.F.R. § 763.160–.179 (2011) (largely banning the commercial use of asbestos in the United States).

not evaporate or dissolve in water and is resistant to thermal, chemical, and biological degradation.[8] The durability of asbestos led to its incorporation in a variety of manufactured products, building materials, friction products, and heat resistant fabrics.[9] With all of its positive characteristics, asbestos became known as "the miracle fiber."[10]

The miracle fiber became an occupational nightmare for tort law systems throughout the United States. In the early twentieth century, medical professionals began to recognize fibrosis in the lungs of factory workers.[11] The common link between victims of the disease was exposure to asbestos within factories.[12] In 1930, medical professionals discovered that inhaled asbestos fibers settled between the air cells of the lungs and caused scar tissue to develop.[13] This condition became known as asbestosis and was recognized as an occupational hazard for those working with asbestos.[14] Asbestosis results in breathing difficulties, fatigue, and, in serious cases, right ventricle failure.[15]

The medical problems associated with asbestos did not end with asbestosis. Factory workers exposed to asbestos soon exhibited signs of lung cancer.[16] In the 1940s, British and American doctors began seriously examining the link between asbestosis and lung cancer.[17] Their studies revealed three major findings: (1) the large number of cases involving asbestos workers with lung cancer originating in the lower lobes of the lungs, (2) the latency period between exposure to asbestos and the development of cancer, and (3) the large number of asbestosis victims also suffering from lung cancer upon autopsy.[18] The findings comprised the earliest epidemiological support for the link between asbestos

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8. U.S. DEP'T OF HEALTH & HUMAN SERVICES, TOXICOLOGICAL PROFILE FOR ASBESTOS (2001).

9. *Id.*

10. MARYLAND DEP'T OF THE ENV'T, FACT SHEET ON ASBESTOS (2010), *available at* http://www.mde.state.md.us/Programs/Air/FactsaboutAsbestos/Pages/index.aspx.

11. BARRY I. CASTLEMAN, ASBESTOS: MEDICAL & LEGAL ASPECTS 7 (2d. ed. 1986).

12. *Id.*

13. *Id.* at 10–11.

14. *Id.* at 9.

15. THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 470 (Merck Research Laboratories, 18th ed. 2006) [hereinafter MERCK].

16. CASTLEMAN, *supra* note 11, at 40.

17. *Id.* at 39.

18. BARRY I. CASTLEMAN, ASBESTOS: MEDICAL & LEGAL ASPECTS 113 (3d. ed. 1990).

and cancer.[19] It was not until the mid-1950s, however, that any consensus regarding the carcinogenic properties of asbestos was established.[20]

Asbestos' most sinister health effect is mesothelioma, an incurable malignant cancer.[21] The most common form of the disease is pleural mesothelioma, and it accounts for 90% of mesothelioma diagnoses.[22] Pleural mesothelioma results in pleural thickening that encases a victim's lungs.[23] Pleural thickening causes chest pain, weight loss, fluid buildup in the abdomen, blood clotting, anemia, and bowel obstruction.[24] Workers exposed to asbestos have a 10% chance of developing mesothelioma, and its average latency period is 30 to 50 years.[25] Upon diagnosis, mesothelioma is a virtual death sentence with an average survival time of 8 to 15 months.[26] The primary care given to its victims is simply to relieve pain and suffering.[27]

Asbestos' deadly health problems created the largest mass personal injury tort in history.[28] Asbestos litigation will eventually cost nearly $265 billion,[29] which surpasses the litigation costs for tobacco and Agent Orange.[30] Of the $70 billion spent on asbestos litigation since the first asbestos lawsuit, plaintiffs recovered $29 billion compared to legal counsels' $41 billion benefit.[31] When compared to the $13 billion collected by litigators in tobacco's $246 billion litigation, the disparity between asbestos litigation costs and other mass torts is startling.[32] This disparity signals an inherent problem in the judicial system's adjudication of asbestos claims.

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19. *Id.*
20. *Id.* at 144.
21. MERCK, *supra* note 15, at 471.
22. *Id.*
23. *Id.* Pleural thickening affects the membrane covering the pleural cavity which protects human lungs.
24. NAT'L CANCER INST., ASBESTOS EXPOSURE AND CANCER RISK (2009), *available at* http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos.
25. MERCK, *supra* note 15, at 471.
26. *Id.* at 472.
27. *Id.*
28. *See, e.g.*, STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION COSTS & COMPENSATION (2004); Michelle J. White, *Asbestos and the Future of Mass Torts*, 18 J. ECON. PERSP. 183 (2004).
29. CARROLL ET AL., *supra* note 28, at vii.
30. White, *supra* note 28, at 192 (noting the total costs of Agent Orange litigation ($180 million) and tobacco litigation ($246 billion)).
31. *Id.* at 195 (outlining the distribution of asbestos litigation costs among plaintiffs ($29 billion), their attorneys ($20 billion), and defense counsel ($21 billion)).
32. *Id.* at 192.

The large number of asbestos defendants causes the disparity between the costs of asbestos litigation and other mass torts. Asbestos litigation has involved an unprecedented number of defendants. Plaintiffs have filed more than 730,000 suits against more than 8,400 defendants.[33] There are 400 times more asbestos defendants than the combined number of defendants in the litigation over Agent Orange, Dalkon Shield, breast implants, Fen Phen, and tobacco.[34]

Asbestos litigation costs have taken a toll on major asbestos manufacturers and their customers. In the 1980s, companies facing massive asbestos liability began filing for bankruptcy in droves because of rising litigation costs from asbestos claims.[35] As of 2007, seventy-eight companies had filed for bankruptcy protection due to asbestos litigation costs.[36] Bankruptcy protection, however, is utilized not only by major asbestos manufacturers but also nontraditional asbestos defendants with primary business interests in shipbuilding, flooring, and automotive part manufacturing.[37] Most asbestos bankruptcies establish a bankruptcy trust to

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33. Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365 (2006). For a further discussion of the rise in asbestos claims see CARROLL ET. AL, *supra* note 28, at 22–30.

34. *See* White, *supra* note 28, at 192 (comparing the differences in plaintiff, defendant, and attorney compensation statistics between asbestos, Agent Orange, Dalkon Shield, breast implant, Fen-Phen, tobacco, lead, firearm, and fast-food litigation).

35. Mark D. Plevin et al., *Where Are They Now, Part Four: A Continuing History of the Companies that have Sought Bankruptcy Protection Due to Asbestos Claims*, MEALEY'S ASBESTOS BANKR. REP. 8 (Feb. 2007) [hereinafter Plevin, *Where Are They Now?*] (showing companies filing for bankruptcy protection due to asbestos litigation costs as of February 2007). For a further discussion of bankruptcies associated with asbestos see Eric D. Green et al., *Prepackaged Asbestos Bankruptcies: Down But Not Out*, 63 N.Y.U ANN. SURV. AM. LAW. 727 (2008); Douglas G. Smith, *Resolution of Mass Torts in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613 (2008); Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883 (2003) [hereinafter Plevin, *Pre-Packaged*].

36. Plevin, *Where are They Now?*, *supra* note 35.

37. *Id.* I use the term "traditional asbestos defendants" to describe companies with a primary business interest in incorporating asbestos into products and asbestos mining. Johns-Manville, Philadelphia Asbestos Corp, and Lake Asbestos of Quebec, Ltd. are examples of traditional asbestos defendants. The term "nontraditional asbestos defendants" is used to describe companies who used products containing asbestos in their normal course of business. Nontraditional asbestos defendants do not actively incorporate asbestos into a product. The term includes companies with a primary business outside of asbestos mining and incorporation.

compensate asbestos claims.[38] Unfortunately, asbestos bankruptcy trusts are often quickly depleted and fail to compensate plaintiffs properly.[39]

Mass asbestos bankruptcies hinder a plaintiff's ability to seek recovery against a single traditional asbestos defendant.[40] Therefore, plaintiffs are now suing dozens of nontraditional asbestos defendants to garner the recovery they normally would have received from a single traditional defendant.[41] Often, nontraditional defendants have exposed their plaintiffs to asbestos only in extremely small quantities.[42] The nontraditional defendant phenomenon increased the number of defendants in asbestos litigation and poses difficult causation and damage allocation determinations for the courts.[43]

Asbestos was once the miracle fiber. But, the mix of asbestos exposure to more than 27 million individuals, asbestos' dire health effects, and rising litigation costs destroyed asbestos' miraculous appeal.[44] Plaintiffs now face a litigation scheme where compensation is only available by suing dozens of defendants, and defendants must sacrifice their own economic well-being to litigate asbestos claims. What was once the miracle fiber is now nothing more than a nightmare.

B. The Louisiana Problem

Until recently, Louisiana possessed a unique problem in modern day asbestos litigation. Throughout the state, the Louisiana circuit courts of appeal waged judicial warfare over the applicability of the 1952 Louisiana Workers' Compensation Act's Occupational Disease Amendment (the Amendment) to individuals affected by mesothelioma.[45] At the time, the circuit courts were

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38. *See* Plevin, *Pre-Packaged*, *supra* note 35, at 888 (noting that asbestos bankruptcies are often filed under an expedited bankruptcy procedure under Chapter 11 of the U.S. Bankruptcy Code and establish a bankruptcy trust to compensate future asbestos claims).

39. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L. J. 1879, 1895 n.42 (1991) (describing the rapid depletion of the Johns Manville asbestos bankruptcy trust after only 25,000 of more than 140,000 claims were adjudicated).

40. *See* White, *supra* note 33, at 369.

41. *Id.*

42. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxix (2005).

43. *See* discussion *infra* Part III.B (discussing the need for plaintiffs to utilize nontraditional tort theories to prove causation of an asbestos injury in the tort system).

44. CARROLL ET AL., *supra* note 42, at 19; White, *supra* note 33, at 365.

45. LA. REV. STAT. § 23:1031.1 (1952).

split on whether recovery for mesothelioma damages was exclusively under the Amendment or Louisiana tort law.[46]

In 1952, the Louisiana legislature adopted the Occupational Disease Amendment to the Louisiana Workers' Compensation Act.[47] The Amendment responded to the extension of workers' compensation coverage across the country at the time.[48] Initially, the Amendment was a general coverage statute providing recovery for all occupational diseases under Louisiana's workers' compensation system.[49] The legislature modified the Amendment, however, and adopted a scheduled workers' compensation statute covering only diseases enumerated under the statute.[50] In 1975, the Louisiana legislature changed the Amendment and enacted a general coverage statute.[51]

The Amendment provided coverage for poisoning or diseases resulting from contact with 16 classifications of elemental compounds.[52] It also provided coverage for specific diseases such as asbestosis, silicosis, dermatosis, and pneumoconiosis.[53] Prior to the Amendment's enactment, occupational disease victims sought recovery against their employers in tort.[54] The Amendment's exclusivity clause, however, barred any action in tort against one's employer for occupational diseases covered in the Amendment.[55] Therefore, employees under the Amendment were unable to seek a remedy in Louisiana tort law for asbestosis, silicosis, dermatosis,

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46. Rando v. Anco Insulations Inc., 16 So. 3d 1065, 1071 (La. 2009) (noting the Louisiana Supreme Court's decision to grant writs to resolve the split among the Louisiana circuit courts of appeal regarding mesothelioma coverage under the Amendment). *Compare* Johnson v. Ashland Oil Co., 684 So. 2d 1156 (La. Ct. App. 1st 1996); Gautreaux v. Rheem Mfg. Co., 694 So. 2d 977, 979 (La. Ct. App. 4th 1996) (noting the exclusion of asbestos injuries other than asbestos under the Amendment), *with* Adams v. Asbestos Corp. Ltd., 914 So. 2d 1177, 1183 (La. Ct. App. 2d 2005); Brunet v. Avondale Indus., 772 So. 2d 974, 984 (La. Ct. App. 5th 2005), *reh'g denied*, 2000 La. App. LEXIS 3470 (2000) (noting the Second and Fifth Circuit's inclusion of asbestos injuries other than asbestosis under the Amendment).

47. WEX S. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW & PRACTICE § 218 (Supp. 1964) (noting the practice in other states of extending worker's compensation coverage).

48. *Id.*

49. H. B. 1098, 1952 Leg., 19th Reg. Sess. (La. 1952).

50. MALONE, *supra* note 47, § 218 (explaining the Louisiana legislature's decision to enact a scheduled worker's compensation statute).

51. LA. REV. STAT. § 23:1031.1 (1975).

52. LA. REV. STAT. § 23:1031.1(A)(1)(a) (1952).

53. LA. REV. STAT. § 23:1031.1(A)(2–6) (1952).

54. MALONE, *supra* note 47, § 218 (explaining the general practice of employees seeking recovery for occupational diseases against their employers under the tort system).

55. LA. REV. STAT. § 23:1031.1(F) (1952).

and pneumoconiosis. In addition, the Amendment barred suits for diseases and poisoning caused by substances within the 16 elemental-compound classifications.[56]

The Louisiana circuit courts of appeal split over the interpretation of the Amendment's coverage and exclusivity clauses. For years, Louisiana courts held that the Amendment covered diseases not specifically enumerated in the statute. Some of the non-enumerated diseases held to be within the Amendment's parameters included bullous emphysema caused by spray paint exposure, pneumoconiosis, pneumonitis from a chemical spray, lung injuries from spray-on detergent and sandblasting, and trinitrotoluene (TNT) toxemia from TNT dust.[57]

The circuit courts also explicitly addressed asbestos injury coverage under the Amendment. The first circuit in *Johnson v. Ashland Oil Co.* held mesothelioma was not compensable under the Amendment.[58] Because mesothelioma was not listed as a covered disease, and asbestos was not specifically listed as a toxic substance under the Amendment, the *Johnson* court reasoned that the only remedy for asbestos injuries other than asbestosis was in tort.[59]

In *Gautreaux v. Rheem Manufacturing Co.*, a two-judge plurality on a five-judge panel in the fourth circuit held lung cancer caused by asbestos was not compensable under the Amendment.[60] Although the plurality reasoned that lung cancer was not a specifically listed disease under the statute, it was willing to grant coverage under the Amendment for diseases caused by substances

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56. *Id.*

57. *See* Austin v. Travelers Ins. Co., 79 So. 2d 383 (La. Ct. App. 1955) (holding that toxemia from exposure to TNT dust was compensable under the Amendment); Bernard v. La. Wild Life & Fisheries Comm., 152 So. 2d 114 (La. Ct. App. 1963) (holding that employee's injuries from exposure to a chemical spray were compensable under the Amendment); Riley v. Avondale Shipyards, 305 So. 2d 742 (La. Ct. App. 1974) (holding that injuries from employee's inhalation of detergent solution were compensable under the Amendment); Zeringue v. Fireman's Fund Ins. Co., 271 So. 2d 613 (La. Ct. App. 1975) (holding that an employee's contraction of bullous emphysema from exposure to spray painting products was compensable under the Amendment).

58. *See* Johnson v. Ashland Oil, 684 So. 2d 1156 (La. Ct. App. 1st 1996). In *Rando*, the Louisiana Supreme Court cited *Terrance* as the case stating the First Circuit's interpretation of the Amendment. Rando v. Anco Insulations Inc., 16 So. 3d 1065, 1074 (La. 2009). However, the court in *Terrance* relied on the reasoning from *Johnson* in its ruling. Terrance v. Dow Chem. Co., 971 So. 2d 1058 (La. Ct. App. 1st 2007).

59. *Johnson*, 684 So. 2d at 1158.

60. Gautreaux v. Rheem Mfg. Co., 694 So. 2d 977, 979 (La. Ct. App. 4th 1996).

not specifically listed in the statute.[61] The court, nonetheless, ruled that asbestos did not meet one of the elemental-compound classifications under the Amendment.[62] In addition, the determination regarding asbestos' elemental makeup was made without any expert testimony.[63]

The *Gautreaux* plurality reached its decision over a strong dissent. The dissenting justices held that asbestos was a covered substance under the elemental classifications in the Amendment.[64] The dissenters reasoned that the Amendment's language allowing for coverage of diseases caused by oxygen and its compounds included *all* compounds containing oxygen, and since asbestos contains oxygen, its diseases are covered under the Amendment.[65] The dissent also stressed the agreement of assured compensation by an employer in exchange for a plaintiff's right to a remedy in tort underlying workers' compensation.[66] Therefore, liberal coverage interpretations must be accompanied by liberal exclusivity clause interpretations to preserve the workers' compensation system.[67] Finally, the dissenting opinion stated that the legislature likely did not mean to include asbestosis while excluding other diseases caused by asbestos.[68]

The second circuit in *Adams v. Asbestos Corp.* refused to follow the reasoning in *Gautreaux* and held mesothelioma was a compensable disease under the Amendment.[69] The court in *Adams* reasoned that asbestos' elemental composition brought it under the elemental-compound classifications in the Amendment.[70] It also reasoned that the legislature would not intend for different coverage for individuals with different diseases caused by the same substance.[71] Finally, the court stated that the legislature's failure to include mesothelioma as a specifically listed disease under the Amendment was due to its lack of knowledge about mesothelioma at the time of the Amendment's passage.[72]

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61. *Id.* at 978.
62. *Id.* at 979.
63. *Id.* (Culotta, J., concurring).
64. *Id.* at 980 (Byrnes, J., dissenting).
65. *Id.* (noting that a junior high level student would recognize that asbestos was a compound containing oxygen).
66. *Id.* at 983.
67. *Id.* at 984.
68. *Id.*
69. Adams v. Asbestos Corp., 914 So. 2d 1177, 1183 (La. Ct. App. 2d 2005).
70. *Id.* at 1182.
71. *Id.* at 1183
72. *Id.*

In *Brunet v. Avondale Industries Inc.*, the fifth circuit held asbestos-related diseases were covered by the Amendment.[73] The court reasoned that one must look to the elemental-compound classifications within the Amendment if a particular disease is not specifically listed.[74] The majority also attacked the weak procedural posture of *Gautreaux*.[75] The majority criticized the use of the *Gautreaux* decision as binding precedent given that its plurality opinion garnered support from only two judges on a five-judge panel.[76] Finally, the court stressed the importance of the fact that the legislature included asbestosis in its list of specifically covered diseases.[77] The majority argued that asbestosis' inclusion was likely a signal to cover all diseases caused by asbestosis' causative agent, asbestos.[78] The court stated that a liberal coverage interpretation would further the policy of workers' compensation by relieving the economic burden of injured workers while diffusing the costs of doing so in the channels of commerce.[79]

The split among the Louisiana circuit courts of appeal shows that the systems of workers' compensation and asbestos tort recovery are inherently at odds with one another. Although workers' compensation guarantees quick and modest compensation for injuries, asbestos plaintiffs frequently want to avoid the system to gain larger recovery in tort.[80] The theoretical battle between workers' compensation and asbestos tort recovery presented the Louisiana Supreme Court with a major question in *Rando v. Anco Insulations Inc.*[81] The court was given the option of placing asbestos injury claims into a low-cost and efficient workers' compensation system or shifting asbestos claims into the Louisiana tort system.[82] Although the effects of the court's decision have yet to be seen, *Rando* drastically changed asbestos litigation in Louisiana and set the stage for Louisiana's asbestos litigation crisis.

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73. Brunet v. Avondale Indus., 772 So. 2d 974, 984 (La. Ct. App. 5th 2000).
74. *Id.* at 982.
75. *Id.* at 980.
76. *Id.*
77. *Id.* at 983.
78. *Id.*
79. *Id.*
80. Lori J. Khan, *Untangling the Insurance Fibers in Asbestos Litigation: Toward a National Solution to the Asbestos Injury Crisis*, 68 TUL. L. REV. 195, 228 (1993).
81. *See* Rando v. Anco Insulations Inc., 16 So. 3d 1065 (La. 2009).
82. *Id.* at 1071.

C. Louisiana Falters: The Rando v. Anco Insulations *Decision*

In September 2005, Ray Rando, a retired pipefitter, was diagnosed with mesothelioma.[83] In November of 2005, Rando initiated a tort suit against his former employers, alleging asbestos exposure during his time as a pipefitter from 1970–1972.[84] As a result of the Louisiana Supreme Court's holding in *Austin v. Abney Mills Inc.*, the trial court applied the law in place during the time of Rando's significant exposure to asbestos.[85]

The trial court dismissed defendants' motion for summary judgment, arguing that Rando's disease was covered under the Amendment and barred by the Amendment's exclusivity clause.[86] The court held asbestos was not a disease-causing substance and that mesothelioma was not an enumerated disease under the Amendment.[87] After trial, the jury found in favor of Rando and awarded general damages of $2.8 million and $402,000 in special damages.[88]

The defendants appealed the trial court's decision, which was upheld by the Louisiana First Circuit Court of Appeal.[89] The first circuit followed *Terrance v. Dow Chemical Co.*, which held that the Amendment did not include mesothelioma as an enumerated disease or asbestos as a disease-causing substance.[90] The court also upheld the trial court's causation and damages determinations.[91]

The Louisiana Supreme Court granted writs to resolve the circuit split over mesothelioma and asbestos coverage under the Amendment.[92] The Louisiana Supreme Court affirmed the first circuit's ruling and held that mesothelioma was not an enumerated disease under the Amendment.[93] In addition, the Court held that

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83. *Id.*
84. *Id.*
85. *Id.*; *see* Austin v. Abney Mills Inc., 824 So. 2d 1137 (La. 2002) (accepting the significant exposure theory in Louisiana asbestos cases and requiring the application of the law in place at the time of an individual's significant exposure to asbestos).
86. *Rando*, 16 So. 3d at 1073.
87. *Id.*
88. *Id.*
89. *Id.* at 1074.
90. *Id.*; *see also* Terrance v. Dow Chem. Co., 971 So. 2d 1058, 1066 (La. Ct. App. 1st 2007), *writ denied*, 970 So. 2d 534 (La. 2007).
91. *Rando*, 16 So. 3d at 1074.
92. *Id.*; *see also supra* Part I.B. (discussing the split within the Louisiana circuit courts of appeal over asbestos injury coverage under the Amendment).
93. *Rando*, 16 So. 3d at 1079, 1094.

asbestos was not a disease-causing agent under the elemental-compound classifications in the Amendment.[94]

The *Rando* majority used the canons of interpretation from the Louisiana Civil Code to interpret the Amendment's coverage.[95] While the majority agreed that the Amendment broadened the scope of workers' compensation, it held that mesothelioma was not a covered disease under a clear and unambiguous interpretation.[96] The court argued that the language stating that "[a]n occupational disease shall only include those diseases hereinafter listed" barred coverage for mesothelioma, because mesothelioma was not specifically stated in the statute.[97] The majority also reasoned that an interpretation including mesothelioma would have been outside of the legislature's intent because mesothelioma was not recognized as a disease caused by asbestos exposure in 1952.[98] The majority rejected the argument that asbestosis' inclusion in the Amendment signaled the legislature's intent to cover all diseases caused by asbestos exposure due to the limited knowledge of asbestos' health effects in 1952.[99]

The elemental-compound classifications in the Amendment provided compensation for "diseases resulting from contact with . . . oxygen, nitrogen, carbon, and their compounds . . . [and] metals other than lead and their compounds."[100] Although the majority did state that asbestos was an oxygen and metal compound, it rejected the argument that asbestos was a disease-causing substance under any of the elemental-compound classifications in the Amendment.[101] The majority also reasoned that Louisiana's adoption of a general coverage workers' compensation statute in 1975 limited the scope of the elemental-compound classifications in the Amendment.[102] The court determined that a liberal

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94. *Id.* at 1080.

95. *Id.* at 1075; *see* LA. CIV. CODE ANN. art. 9 (2009) ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."); LA. CIV. CODE ANN. art. 10 (2009) ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law."); LA. CIV. CODE ANN. art. 11 (2009) ("The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter.").

96. *Rando*, 16 So. 3d at 1079.

97. *Id.*

98. *Id.*

99. *Id.* at 1080.

100. *Id.*

101. *Id.*

102. *Id.*

interpretation of the elemental-compound classifications would compensate diseases resulting from exposure to over 90% of all elemental compounds known to man.[103] The majority concluded that a liberal interpretation rendered language in the statute superfluous.[104]

Justice Victory's dissent attacked the majority's holding that asbestos was not a disease-causing agent under the elemental-compound classifications in the Amendment.[105] Justice Victory argued that the majority's characterization of asbestos as an "oxygen or metal compound" required its inclusion under the Amendment because the Amendment covered diseases resulting from oxygen and metal compounds.[106] The dissent also reasoned that the remedial policy of workers' compensation supported a liberal interpretation of the Amendment that includes asbestos as a disease causing agent.[107]

Justice Victory also argued that the majority's interpretation was not compatible with the policy behind workers' compensation.[108] He thought the majority's interpretation limited the amount of covered diseases to a "fairly narrow and arbitrary list."[109] The dissent found that coverage of asbestosis and not mesothelioma established a compensation system where co-workers exposed to the same disease-causing agent received different coverage due to the agent's disease manifestation.[110] The exclusion of certain asbestos disease manifestations was therefore contrary to the goal of the workers' compensation scheme.[111] Finally, the dissent argued that the legislature's inclusion of coverage limitations throughout the Amendment, such as the exclusion of compensation for tuberculosis, supported a liberal interpretation of the Amendment allowing coverage for diseases not specifically excluded.[112]

The *Rando* decision shows that Louisiana is not immune to the burdens of asbestos litigation. While the Louisiana Supreme Court could have shifted all asbestos claims into an efficient workers' compensation system, the court's decision placed asbestos in the

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103. *Id.* at 1080 n.9.
104. *Id.*
105. *Id.* at 1096 (Victory, J., dissenting).
106. *Id.*
107. *Id.* at 1099.
108. *Id.* at 1095.
109. *Id.* at 1101 n.6 (quoting Gautreaux v. Rheem Mfg. Co., 694 So. 2d 977, 983 (La. Ct. App. 1996) (Byrnes, J., dissenting)).
110. *Id.* at 1103.
111. *See id.*
112. *Id.* at 1103 n.7.

tort system, which has historically failed to adjudicate asbestos claims efficiently. Therefore, Louisiana must search for a solution to its impending asbestos litigation crisis.

II. SEARCHING FOR A SOLUTION

The Louisiana Supreme Court's ruling in *Rando* opened the floodgates for asbestos litigation in Louisiana by requiring asbestos plaintiffs in the second and fifth circuits to seek recovery in the tort system.[113] Although the Louisiana judiciary has yet to study the effect of the *Rando* decision on asbestos filings in Louisiana, the decision is likely to increase asbestos claims in the state. Therefore, Louisiana must craft a solution that adequately adjudicates asbestos claims while limiting litigation costs. Louisiana could look to other states that have enacted procedural mechanisms, including consolidation and medical criteria statutes, to efficiently resolve asbestos litigation costs.

A. The Consolidation Solution

Asbestos case consolidation occurs throughout the country.[114] In consolidation, claims are grouped together when they possess a common question of law or fact.[115] The specific purpose behind asbestos consolidation is the quick and efficient resolution of asbestos cases.[116]

In theory, consolidation has several positive effects. The joinder of numerous claims involving similar injuries and questions of fact promotes judicial efficiency by streamlining the discovery and liability portions of a case.[117] Furthermore, consolidation gives jurisdictions facing massive amounts of

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113. *Id.* at 1074.

114. Victor E. Schwartz et al., *Asbestos Litigation and Tort Law: Trends, Ethics, & Solutions: Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 281 (2003) (noting the practice of asbestos consolidation in Virginia and West Virginia); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L. J. 531, 543 (2002) (noting the practice of asbestos consolidation in Mississippi and West Virginia).

115. *See* Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139, 1142 (1994).

116. *Id.* at 1141.

117. Schwartz, *supra* note 114, at 281–84 (discussing the perception that consolidation promotes efficiency).

asbestos claims a mechanism to lower the litigation costs of plaintiffs, defendants, and the courts.[118]

The practical effects of consolidation, however, negate its theoretical positives.[119] Modern asbestos consolidations bear little resemblance to the first consolidations of nearly 30 years ago. The first consolidations normally involved a small number of cases, usually around five, with very similar claims and questions of liability.[120] The rise in asbestos litigation, however, expanded consolidations into actions with hundreds and even thousands of plaintiffs.[121] In addition, large consolidations often involve plaintiffs with dissimilar claims and liability questions against dozens of unrelated defendants.[122]

Defendants in mass consolidations face heavy discovery burdens that require investigations of thousands of dissimilar claims against multiple defendants along with massive potential liability costs.[123] The risk of massive liability and high litigation costs often forces defendants to settle consolidated asbestos claims.[124] Consolidations are now characterized as a form of judicial blackmail because of the increased pressure on defendants to settle.[125] In addition, judges, facing hundreds to thousands of

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118. *Id.*

119. *Id.*

120. *See The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 186, 189 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School), *available at* http://commdocs.house.gov/committees/judiciary/hju62442.000/hju6242_0f.htm.

121. *Id.*; State *ex rel* Mobil Corp. v. Gaughan, 565 S.E. 2d 793, 794 (W. Va. 2002) (Maynard, J., concurring) (noting that a West Virginia asbestos consolidation involved thousands of plaintiffs; 20 or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spanned the better part of six decades.).

122. *See* explanatory parenthetical, *supra* note 121.

123. *See Mobil Corp.*, 563 S.E. 2d at 421 (Maynard, J., concurring).

124. *See, e.g.*, Cosey v. E.D. Bullard Co., Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County Sept. 16, 1998). In a mass asbestos consolidation case, the judge, after the trial of 12 plaintiffs, pressured defendants to settle the cases of nearly 1700 other plaintiffs. *See also* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 255 (2000).

125. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1421 (noting that although class actions and mass consolidations are different, both still pose the risk of creating a bargaining scale more favorable to plaintiffs).

claims, often dispense with discovery procedures for many claims in the spirit of judicial efficiency.[126]

Consolidation also negatively impacts asbestos plaintiffs. Mass asbestos consolidations often group plaintiffs with serious asbestos injuries, such as mesothelioma and lung cancer, with plaintiffs claiming only breathing difficulty or no physical impairment at all.[127] Unimpaired plaintiffs with minor or no asbestos injury other than exposure now account for a large number of asbestos claims filed throughout the country.[128] Knowing that defendants facing massive liability are more likely to settle, attorneys are more inclined to join unimpaired plaintiffs to consolidated asbestos cases.[129] Because consolidation encourages large settlements, the majority of asbestos recovery in consolidations is going to individuals without a serious asbestos injury.[130]

Consolidation risks diverting resources away from truly injured claimants and into the hands of unimpaired plaintiffs. Public policy suggests that the tort system should be directed toward holding defendants who are true wrongdoers responsible and compensating only plaintiffs who are truly injured.[131] The consolidation method fails to achieve this end and cannot be the proper solution to the asbestos litigation crisis.

B. The Medical Criteria Statute Solution

As opposed to consolidation, medical criteria statutes represent the strongest procedural stance against asbestos litigation costs. Since 2004, Ohio, Georgia, Florida, Texas, Kansas, and South Carolina have enacted medical criteria statutes.[132] In addition, courts in other states established inactive docket programs similar to medical criteria statutes without statutory authorization.[133] The statutes establish an inactive docket, allowing only plaintiffs with

126. *See* Schwartz & Tedesco, *supra* note 114, at 536; *see also* Schwartz & Lober, *supra* note 124, at 258.

127. *See* Schwartz & Tedesco, *supra* note 114, at 544.

128. *Id.* at 538.

129. *See* Matthew L. Cooper, *Too Far or Not Far Enough?: Michigan Supreme Court Administrative Order 2006-6 and Its Impact on Asbestos Litigation in Michigan*, 85 U. DET. MERCY L. REV. 407, 418 (discussing the use of asbestos consolidations by plaintiffs' attorneys as leverage for mass asbestos settlements); *see also* Schwartz et al., *supra* note 114, at 285.

130. Schwartz & Tedesco, *supra* note 114, at 542.

131. *Id.* at 536.

132. Philip Zimmerly, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 ALA. L. REV. 771, 778 (2008).

133. *Id.*

serious asbestos injuries to advance through the court system.[134] Medical criteria statutes require plaintiffs to assert prima facie evidence of a serious asbestos injury to gain court access.[135] Claims that do not meet the prima facie evidence requirements are dismissed or suspended until sufficient evidence of an injury is presented.[136] In addition, some states limit asbestos consolidation and require asbestos claims to have a significant connection to the jurisdiction.[137] Medical criteria statutes and inactive docket programs have limited asbestos filings in particular jurisdictions, and New York, Texas, Mississippi, and Ohio have seen decreases in asbestos claims between 35 and 90%.[138]

The success of medical criteria statutes led some scholars to believe that the statutes are the solution to the asbestos litigation crisis.[139] Medical criteria statutes, however, are not a panacea to the asbestos problem for several reasons. First, medical criteria statutes fail to adjudicate valid asbestos injury claims through procedural barriers.[140] Second, retroactive application of the statutes fails to preserve claims and reduce strategic behavior by plaintiffs' attorneys. Finally, medical criteria statutes do not limit asbestos claims, but instead shift claims to other jurisdictions.[141]

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134. *See id.* at 780.

135. *See, e.g.*, FLA. STAT. § 774.204(1) (2007) ("Physical impairment of the exposed person, to which asbestos or silica exposure was a substantial contributing factor, is an essential element of an asbestos or silica claim."); *see also* GA. CODE ANN. § 51-14-4 (2007); KAN. STAT. ANN. § 60-4902(a) (2006); OHIO REV. CODE ANN. § 2307.92 (2007); S.C. CODE ANN. § 44-135-50(A) (2007); TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(1)(B) (Vernon 2007).

136. Zimmerly, *supra* note 132, at 780.

137. South Carolina's statute specifically limits asbestos case consolidation and case transfer within its state courts. *See* S.C. CODE ANN. § 44-135-20(A)(5) (2006). Georgia and Florida require plaintiffs to be domiciled in the state or suffer their injury due to some interaction with the state. *See* FLA. STAT. § 774.205 (2007); GA. CODE. ANN. § 51-14-9(a) (2007).

138. Mark A. Behrens, *What's New in Asbestos Litigation*, 28 REV. LITIG. 501, 524 (2009) (noting the decrease in asbestos filings in states with a medical criteria statute or inactive docket program).

139. *See, e.g.*, Mark A. Behrens, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1 (2001); Paul F. Rothstein, *What Courts can do in the Face of the Never-ending Asbestos Crisis*, 71 MISS. L. J. 1 (2001).

140. *See* Jordana Mishory, *Riding the Herd: Scores of South Florida Silicosis Cases Are in Jeopardy After Fraud Allegations in Texas Bring Tough Judicial Scrutiny*, MIAMI DAILY BUS. REV., June 12, 2006, at 8 (noting legislators' concerns that Florida's medical criteria statute for asbestos and silicosis injuries establishes too stringent a pleading standard for plaintiffs).

141. Behrens, *supra* note 138, at 539–541 (noting the increase in asbestos claims in California, Delaware, and Illinois).

While the effort to compensate only serious asbestos injury claims is admirable, medical criteria statutes exclude plaintiffs with minor injuries and the potential for future injuries through procedural barriers.[142] Stringent pleading standards requiring extensive prima facie medical evidence of a serious asbestos injury pose procedural difficulties for plaintiffs.[143] At the pleading stage, plaintiffs must show *physical* impairment to which asbestos exposure was a significant contributing factor because claims for economic asbestos injuries, like medical monitoring, are barred.[144] Consequently, plaintiffs are now required, at the pleading stage, to assert prima facie medical evidence showing causation of injuries, with latency periods spanning several decades.[145] The need to assert prima facie evidence requires plaintiffs to acquire numerous medical and employment records from their defendant–employers, a practice normally reserved for the discovery process.[146] Because discovery mechanisms do not attach after a case's placement on an inactive docket, the ability of plaintiffs to retrieve documents detailing their work history and employers' use of asbestos is severely hindered.[147]

The exclusion of plaintiffs with only a minor asbestos injury defeats the purpose of tort litigation. While some plaintiffs may be at risk of death from lung cancer and mesothelioma, others suffer from the increased costs associated with the need to monitor for a potential asbestos illness or difficulty in breathing.[148] While minor asbestos injuries may not manifest into major health problems, asbestos exposure can result in financial injuries that impact the lives of victims.[149] Furthermore, the tort system is in place to

142. Zimmerly, *supra* note 132, at 700 (explaining medical criteria statutes' exclusion of minor asbestos injury claims).

143. Mishory, *supra* note 140 (noting that medical criteria statutes pose procedural difficulties for plaintiffs in states with notice pleading).

144. *Id.*

145. Randy Maniloff, *An Inactive Asbestos Docket: Understanding the Risks*, MONDAQ BUS. BRIEFING, Apr. 16 2003, *available at* 2003 WLNR 10830999; MERCK, *supra* note 15 (noting the latency periods for asbestos injuries).

146. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (noting how the discovery and summary judgment process is used to shape the prima facie elements and issues of a case).

147. Maniloff, *supra* note 145.

148. MERCK, *supra* note 15, at 470 (noting the wide range of possible asbestos injuries).

149. *See* Bower v. Westinghouse Elec. Corp., 522 S.E.2d 424, 431 (W. Va. 1999) (noting the important public health policy behind compensating individuals with an increased need for medical monitoring due to the tortious act of another); Ayers v. Jackson Tp., 525 A.2d 287, 312 (N.J. 1987) (noting that medical monitoring recovery may enable early detection of a future health problem and decrease the liability of future defendants).

compensate not only plaintiffs with serious physical injuries but also all plaintiffs injured by another, as well, including those only suffering from minor physical and economic injuries.[150] By excluding claims for minor asbestos injuries, medical criteria statutes produce many unadjudicated claims and uncompensated plaintiffs.[151]

Medical criteria statutes also pose due process concerns as a result of retroactivity provisions requiring plaintiffs who filed claims prior to a medical criteria statute's enactment to reassert their claims showing prima facie medical evidence of an asbestos injury.[152] Florida, Georgia, and Ohio retroactively applied medical criteria statutes to existing asbestos claims.[153] Each jurisdiction's retroactivity provision was challenged in the court system. While Ohio upheld its retroactivity provisions, courts in Florida and Georgia declared retroactivity unconstitutional.[154] However, both interpretations present problems for states considering medical criteria statutes as a solution to asbestos litigation.

First, medical criteria statutes provide an incentive for strategic behavior by plaintiffs' attorneys. Although legislation cannot completely discourage strategic behavior, medical criteria statutes encourage plaintiffs' attorneys to flood courts with asbestos claims prior to a medical criteria statute's enactment to avoid the statute's stringent pleading requirements. For states not allowing

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150. LA. CIV. CODE ANN. art. 2315 ("*Every* act whatever of man that causes damage to another obliges him by whose fault it happened.") (emphasis added).

151. *See* Schwartz & Lober, *supra* note 124, at 258 (explaining the rise in unimpaired asbestos plaintiffs); Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12.

152. *See* Maniloff, *supra* note 145.

153. *See* FLA. STAT. § 774.204 (2010); GA. CODE ANN. § 51-14-1 (2010); OHIO REV. CODE ANN. § 2307.92 (LexisNexis 2010).

154. *See* Wilson v. AC&S Inc., 864 N.E.2d 682 (holding that retroactive application of provisions in Ohio's medical criteria statute did not burden an invested right and could be applied to asbestos claims filed prior to the statute's enactment); *but see* Daimler Chrysler Corp. v. Ferrante, 637 S.E.2d 659 (Ga. 2006) (holding that provisions of Georgia's asbestos claims statute requiring plaintiffs to produce evidence establishing that their exposure to asbestos was a substantial contributing factor to their medical conditions affected plaintiffs' substantive rights and could not retroactively be applied to their claims). *See also In re* Asbestos Litigation, 933 So. 2d 613 (Fla. Dist. Ct. App. 3rd Dist. 2006) (holding that Florida's "Asbestos and Silica Compensation Fairness Act" could not be applied to plaintiffs suffering from nonmalignant asbestos injuries who had received a trial date prior to the statute's enactment); Williams v. American Optical Corp., 985 So. 2d 23 (Fla. Dist. Ct. App. 4th Dist. 2008) (holding that that Florida's "Asbestos and Silica Compensation Fairness Act" cannot be retroactively applied to prejudice or defeat causes of action already accrued and in litigation).

retroactivity, the result of this strategic behavior is a crippling mass of asbestos cases remaining on their courts' dockets.[155] States allowing retroactivity, however, risk destroying valid claims or making claims dormant for a number of years. The catch-22 presented by retroactive application shows that simply dismissing claims or placing them on an inactive docket is a fatal flaw within medical criteria statutes because, under each approach, strategic behavior is encouraged or claims are impeded. This problem signals the need for a solution that reduces the benefits of strategic behavior while still preserving valid injury claims.

Second, medical criteria statutes increase asbestos litigation in other jurisdictions.[156] By excluding vast amounts of claims in some jurisdictions, asbestos litigation is growing in jurisdictions without medical criteria statutes.[157] Traditional asbestos havens such as Texas and South Carolina are being replaced by jurisdictions more hospitable to asbestos claims, and courts in California, Delaware, and Illinois are experiencing a rise in nonresident asbestos claims.[158] The shift in asbestos litigation has even prompted plaintiffs' firms specializing in mass torts to establish offices in states without medical criteria statues.[159] Even though jurisdictions with medical criteria statutes are experiencing a lower number of asbestos filings, the asbestos problem still remains. The burdens of asbestos litigation, however, must now be borne by fewer states with an even greater concentration of asbestos claims than ever before. Therefore, medical criteria statutes fail to curb asbestos

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155. *See* Jordana Mishory, *No Turning Back: Judge Rules Law that Required Plaintiffs to Submit Medical Histories Can't be Applied Retroactively*, MIAMI DAILY BUS. REV., Aug. 8, 2006, at 1 (noting the over 2,500 cases pending on the Miami-Dade Circuit Court's docket prior to the passage of Florida's medical criteria statute).

156. *See* discussion *infra* Part III. The failure of medical criteria statutes to impact claims at the national level supports the need for federal asbestos tort reform. Part III will discuss the failure of the federal government to pass such legislation and call for a state solution that prevents the shifting of asbestos claims to other jurisdictions by formulating a state-administered compensation schedule that adequately reduces the need for plaintiffs' attorneys to employ strategic behavior and increase the asbestos litigation burden on other jurisdictions.

157. Behrens, *supra* note 138, at 539 (noting the increase in asbestos claims in California, Delaware, and Illinois).

158. *Id.*; *see also* Victor E. Schwartz et al., *Litigation Tourism Hurts Californians*, 21-20 MEALEY'S LITIG. REP. ASB. 20 (2006) (noting that in California over 30% of asbestos plaintiffs are nonresidents and lack any connection to the forum). The term "traditional asbestos haven" is used to describe jurisdictions that historically have been a popular forum for asbestos plaintiffs.

159. Cortney Fielding, *Plaintiffs' Lawyers Turn to L.A. Courts for Asbestos Litigation*, DAILY J. (Los Angeles, Ca.), Feb. 27, 2009, at 1.

litigation and instead encourage forum shopping by asbestos plaintiffs.

Consolidation and medical criteria statutes do not adequately resolve the asbestos litigation problem, and states must formulate new remedies to counteract asbestos' stranglehold on the judicial system. These remedies should allow states to resolve asbestos claims efficiently without sacrificing the interests of plaintiffs, defendants, and other jurisdictions. One plan not yet enacted at a state level may provide the necessary remedy: the adoption of a scheduled asbestos compensation fund.

III. THE SCHEDULED COMPENSATION SOLUTION

The failure of medical criteria statutes and consolidation signals the need for a national solution. Although the federal government attempted to enact federal asbestos litigation reform with the Fairness in Asbestos Injury Resolution Act (FAIR Act), political and business interests halted the act's passage. Therefore, the Louisiana legislature must reform asbestos litigation at the state level. The Louisiana solution, however, must adequately balance the interests of all parties in asbestos litigation and address the criticisms that led to the FAIR Act's failure. Louisiana can achieve these ends by enacting a scheduled compensation plan that incorporates the substantive provisions of FAIR Act under the procedural framework of the Louisiana Medical Malpractice Act.

A. The Failed Federal Solution

In 1997, the United States Supreme Court called for an administrative solution to the "elephantine mass" of asbestos claims and litigation costs in the United States.[160] In 2006, Senator Arlen Specter, responding to the Supreme Court's request, proposed the FAIR Act to the United States Senate.[161] The 2006 FAIR Act, at its core, would establish an administrative compensation schedule providing recovery for individuals

160. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999) (describing asbestos litigation as an "elephantine mass" that defies customary judicial administration and requires national legislation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) ("[A] nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure.").

161. Elise Gelinas, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 168 (2009) (noting Congress' failure to enact previous versions of the FAIR Act and Senator Arlen Specter's proposal of the 2006 version of the act).

adversely affected by asbestos.[162] An administrative staff would run the compensation fund[163] and process asbestos claims on a no-fault basis and in a nonadversarial setting.[164] The administrative staff would promulgate procedures for filing claims and establish a payment schedule based on a claimant's injuries and medical history.[165] The FAIR Act's compensation model would establish a $140 billion compensation fund.[166] Defendant companies, their insurers, and prior asbestos defendants' bankruptcy trusts would be the primary financiers of the compensation fund.[167] Recovery under the fund would be disbursed according to a tiered compensation schedule.[168] Compensation would range from $25,000 for claimants requiring medical monitoring to $1.1 million for claimants diagnosed with mesothelioma.[169]

Unfortunately, Congress did not enact the FAIR Act due to immense pressure from political and business groups.[170] Critics believed that the compensation fund's no-fault model would increase claims by individuals without serious asbestos injuries.[171] Critics also feared the rise in claims would bankrupt the compensation fund and require a federal bailout of the fund.[172] Conversely, legislators felt that the fund's compensation levels did

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162. Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. § 2 (2006) ("[The purpose of this Act is to] create a privately funded, publicly administered fund to provide the necessary resources for a fair and efficient system to resolve asbestos injury claims that will provide compensation for legitimate present and future claimants of asbestos exposure as provided in this Act.").

163. *Id.* § 101 ("There is established within the Department of Labor the Office of Asbestos Disease Compensation, which shall be headed by an Administrator.").

164. *Id.* § 112.

165. *Id.* § 101 ("[The Administrator shall be responsible for] promulgating such rules, regulations, and procedures as may be necessary and appropriate to implement the provisions of this Act.").

166. *Id.* § 221.

167. *Id.* §§ 201–226 (outlining the contributors and payment methods under the Asbestos Injury Resolution Fund).

168. *Id.* § 233.

169. Stephen Labaton, *Asbestos Bill is Sidelined by the Senate*, N.Y. TIMES, Feb. 15, 2006, *available at* http://www.nytimes.com/2006/02/15/politics/15asbestos.html?pagewanted=1&ei=5088&en=8818b422c430a43a&ex=1297659600&partner=rssnyt&emc=rss.

170. *Id.*

171. 152 CONG. REC. S837, 838–39 (daily ed. Feb. 8, 2006) (statement of Sen. Cornyn).

172. *Id.*; *see also The Fairness in Asbestos Injury Resolution Act of 2006: Hearing on S. 3274 Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2006) (statement of Douglas Holtz-Eakin, Director, Council on Foreign Relations) (arguing that a future Congress will most likely use taxpayer dollars to bail out the fund instead of reducing claim values or heightening eligibility standards).

not properly punish defendants and their insurers.[173] Furthermore, financial actuaries argued the fund failed to subrogate workers' compensation claims and allowed claimants to double dip in both state workers' compensation programs and the compensation fund.[174]

Asbestos defendants also split on their support for the FAIR Act. Defendants facing massive asbestos liability, like McDermott International and United States Gypsum, stated that a no-fault compensation system allowed them to compensate claimants while avoiding anywhere from $600,000 to $3 billion in litigation costs.[175] On the other hand, defendants with limited asbestos liability argued that payment obligations under compensation funds bail out large corporations while punishing small businesses.[176] The intense backlash from political and business critics ultimately led to the failure of the FAIR Act on February 14, 2006, when the Act failed to survive a budget objection in the Senate.[177]

At this point, the possibility of a federal scheduled compensation plan looks grim. Since Senator Specter's attempt to pass the landmark legislation in 2006, no legislator has proposed the FAIR Act again. Thus, the asbestos litigation crisis seems to continue without any federal solution in sight. Calls still remain for a scheduled compensation plan, similar to that proposed by the FAIR Act.[178] Therefore, in an effort to combat federal inactivity, states must enact scheduled compensation. In the wake of *Rando*, Louisiana has a prime opportunity to be the proving ground for state-administered scheduled compensation by enacting a scheduled compensation plan based on the substantive principles in

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173. Labaton, *supra* note 169.

174. *See Current Issues in Asbestos Litigation*, ISSUE BRIEF (Am. Acad. of Actuaries, Washington, D.C.) Feb. 2006, at 8 (noting the Academy's letter to Senators Specter and Leahy regarding the risk of double dipping by plaintiffs in the Fair Act's compensation fund and workers' compensation programs).

175. *See* Julie Creswell, *Large and Small Businesses Part Ways on Asbestos Bill*, N.Y. TIMES, Feb. 9, 2006. United States Gypsum's parent company, USG, stated that an administrative compensation scheduled would save them roughly $3 billion in litigation costs. McDermott International stated that a compensation schedule would save them roughly $600,000 in litigation costs.

176. *Id.* (noting the financial difficulties imposed on smaller corporate defendants A.W. Chesterton and Hopeman Brothers by the FAIR Act's required payments).

177. Labaton, *supra* note 169.

178. *See, e.g.*, Gelinas, *supra* note 161 (discussing the reasons why Congress should enact a scheduled compensation system); *see also* Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1123 (2008) (discussing the benefits of a scheduled compensation system).

the FAIR Act and the procedural framework of the Louisiana Medical Malpractice Act.[179]

B. The Need for State Administered Scheduled Compensation

1. A Fair Recovery System for All Parties Through Scheduled Compensation

Scheduled compensation solves many of the problems associated with asbestos litigation while fairly balancing the interests of plaintiffs, defendants, and attorneys. For plaintiffs, the establishment of a compensation fund possesses several advantages. Scheduled compensation ensures timely and appropriate recovery for plaintiffs suffering from an asbestos injury in a no-fault system.[180] In the traditional tort system, plaintiffs are often forced to file suit against multiple defendants to gain adequate recovery.[181] The need for plaintiffs to sue multiple defendants to gain adequate recovery often results in difficult proximate cause questions for plaintiffs.[182] These questions often force plaintiffs to use nontraditional tort theories, such as market share and alternative liability, to prove causation.[183] Louisiana and

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179. *See* discussion *infra* Part III.B.3 (explaining the procedural framework of the Louisiana Medical Malpractice Act and its possible application in a Louisiana Scheduled Asbestos Compensation Plan).

180. JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REP. OF THE AD HOC COMM. 33 (1991) (noting the importance of establishing timely and appropriate compensation for plaintiffs suffering from a legally cognizable asbestos injury in an administrative compensation system).

181. *See* White, *supra* note 33, at 368–69 (noting the need for asbestos plaintiffs to file suit against numerous defendants due to bankruptcies induced by asbestos litigation costs).

182. The identification problem stems from two causes. First, many asbestos products carry no manufacturer's label. Second, plaintiffs often are exposed to several different asbestos products in their workplace, resulting in causation by multiple defendants and an inability to recall specific manufacturers. *See* Jeffrey C. Endress & Stephen G. Sozio, *Market Share Liability: A One Theory Approach Beyond DES*, 1 DET. C.L. REV. 1, 8–9 (1983); *see also* Case v. Fibreboard Corp., 743 P.2d 1062, 1066–67 (Okla. 1987) (describing how identification of an asbestos manufacturer is almost impossible when the materials were installed years before the plaintiff's exposure).

183. *See* George v. Hous. Auth., 906 So. 2d 1282, 1287 (La. Ct. App. 2005) (stating that "[m]arket share liability imposes pro rata liability in the ratio of market share of each manufacturer of a fungible product that is so generic that the individual manufacturer cannot be identified. The key element enabling complainants to recover under the market share theory in a fungible products case is the shift of the burden of proof from the plaintiff to the defendant-manufacturers, requiring them to show that they did not manufacture the offending product."); *see also* Gaulding v. Celotex Corp., 772 S.W.2d 66, 68–69 (Tex. 1989)

other jurisdictions, though, do not welcome market share or alternative liability, and many plaintiffs suffering from cognizable asbestos injuries are denied recovery because they cannot meet the causation burden.[184]

Furthermore, the allocation of damages across multiple parties also poses risks for many plaintiffs. For example, many states have adopted comparative fault schemes that allocate a percentage of fault to each liable party.[185] The rash of asbestos-related bankruptcies has led to a massive number of insolvent defendants.[186] In addition, plaintiffs cannot always identify all the defendants contributing to their injury.[187] As a result, plaintiffs' damages awards may shrink significantly if a large percentage of liability is apportioned to an insolvent or absent defendant.[188] Plaintiffs' recoveries are also significantly diminished by the contingency fees under their representation contracts with attorneys.[189] Therefore, the traditional tort system fails plaintiffs due to difficult causation burdens and the diminishment of awards by comparative fault systems and contingency fees.

(noting that "[a]lternative liability . . . relaxes the plaintiff's burden of identifying the actual tortfeasor and thus may allow the plaintiff to prevail when the traditional rules of causation would prevent recovery. When independent acts of negligence are simultaneously committed by two or more tortfeasors and only one act results in injury, the plaintiff is relieved of his burden of proof. The burden shifts to the defendants to exculpate themselves.").

184. *See George*, 906 So. 2d at 1287 (noting that no Louisiana court has ever endorsed the market share liability theory); *see also* Quick v. Murphy Oil Co., 643 So. 2d 1291, 1294 (La. Ct. App. 2004) (noting the United States Fifth Circuit Court of Appeal's rejection of alternative liability and Louisiana's endorsement of traditional tort theories).

185. *See* LA. CIV. CODE ANN. art. 2323 (2010); KY. REV. STAT. ANN. § 411.182 (LexisNexis 2010); FLA. STAT. § 768.81 (Westlaw 2011) (establishing a pure comparative fault standard allocating a percentage of fault to each liable party); *but see* GA. CODE. ANN. § 51-11-7 (Westlaw 2011); OKLA. STAT. tit. 23, § 13 (Westlaw 2011) (establishing a comparative fault standard barring recovery to plaintiffs who could have avoided the consequences of a defendant's negligence by exercising reasonable care).

186. *See* Plevin, *Where are They Now?*, *supra* note 35.

187. *Id.*

188. For a further discussion of insolvent and absent defendants in comparative fault cases, see Gerald W. Boston, *Apportionment of Harm in Tort Law: A Proposed Restatement*, 21 DAYTON L. REV. 267 (1996); Steven B. Hantler et al., *Moving Toward the Fully Informed Jury*, 3 GEO. J. L. & PUB. POL'Y 21, 46 (2005).

189. *See* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 841–842 (2005) (noting that plaintiffs' lawyers charge contingency fees in asbestos litigation ranging from 25% to 50%, with a plurality of contingency fees charged at 40%).

The principles of nonadversarial and administrative adjudication of asbestos claims in the FAIR Act eliminate causation and damages concerns for plaintiffs. Because plaintiffs only need to show a cognizable asbestos injury, plaintiffs are not forced to use nontraditional tort theories such as market share or alternative liability.[190] Furthermore, the establishment of a single solvent compensation fund eliminates the need to assert numerous claims against multiple defendants. Without the risk of an insolvent or absentee defendant, plaintiffs' recovery will not be diminished in states with a comparative fault regime. Therefore, scheduled compensation limits the causation burden for plaintiffs while ensuring adequate recovery.

In order to counteract the massive contingency fees charged by plaintiffs' attorneys, scheduled compensation funds must cap attorneys' fees. Fee caps, however, must be weighed against the costs and potential losses attorneys may incur by having to adjudicate claims in an administrative scheme. By providing fees weighed against attorney costs, a scheduled compensation plan can reduce the incentive for strategic behavior by plaintiffs' attorneys and prevent attorneys from shifting Louisiana asbestos claimants into jurisdictions without fee caps. As a result, scheduled compensation, unlike medical criteria statutes, discourages strategic behavior by plaintiffs' attorneys filing asbestos claims.

Asbestos defendants and their insurers also benefit from scheduled compensation. Defendants have paid tens of billions of dollars for defense counsel in asbestos litigation,[191] and asbestos litigation costs will eventually total $265 billion.[192] Scheduled compensation, however, provides several remedies to lower this cost. Scheduled compensation funds establish the required contribution amounts from defendants, their insurers, and asbestos defendant bankruptcy trusts.[193] Furthermore, scheduled compensation allows defendants to pay contributions over a number of years to ensure defendants' economic viability.[194] Therefore, defendants can accurately project their asbestos liability and manage economic resources in a way that ensures financial solvency. Most importantly, scheduled compensation operates in a nonadversarial setting and eliminates the need for asbestos defense counsel,[195]

190. Fairness in Asbestos Injury Resolution Act of 2006, S. 3274, 109th Cong. §§ 111–115 (2006).
191. White, *Future of Mass Torts*, *supra* note 28, at 192.
192. CAROLL ET AL., *supra* note 28, at vii.
193. FAIR Act, S. 3274, §§ 201–226 (2006).
194. *Id.*
195. *Id.* § 101.

which substantially limits litigation costs for asbestos defendants.[196] By lowering the litigation costs of asbestos defendants and their insurers, scheduled compensation decreases the risk of insolvency that many asbestos defendants currently face.

2. Addressing the Criticisms of the FAIR Act

Although scheduled compensation plans possess many benefits, political and business interests derailed scheduled compensation at the federal level.[197] Because medical criteria statutes and consolidation fail to resolve asbestos claims adequately,[198] state-administered scheduled compensation presents the best solution to the asbestos crisis. State-administrated scheduled compensation, however, must adequately address the concerns with the FAIR Act. By adopting scheduled compensation plans that address the criticisms of the FAIR act, states can formulate a proper solution to the asbestos crisis.

The risk that a mass influx of asbestos claim would bankrupt a federal compensation fund was a major criticism of the FAIR Act.[199] State-administered scheduled compensation, however, can alleviate this criticism through several measures. Although scheduled compensation on a national level cannot turn away claimants based on jurisdictional connection, states enacting scheduled compensation can establish jurisdictional barriers, such as requiring a claimant to have been exposed to asbestos within a jurisdiction's boundaries.[200] By establishing jurisdictional barriers, a state compensation fund can eliminate claims for minor asbestos injuries that have no significant connection to the state. In addition, states must require plaintiffs to produce prima facie medical evidence in order to recover compensation. Unlike the prima facie requirements imposed by medical criteria statutes, which exclude minor asbestos injuries, states can establish guidelines for asserting minor asbestos injury claims such as asbestos exposure requiring

196. *See* Creswell, *supra* note 175 (noting the decrease in litigation costs for asbestos defendants under an administrative compensation schedule).

197. *See supra* Part III.A (discussing the FAIR Act and its failure due to political and business criticisms).

198. *See supra* Part II (discussing the inadequacy of consolidation and medical criteria statutes in solving the asbestos litigation crisis).

199. Creswell, *supra* note 175.

200. Although medical criteria statutes ultimately do not properly adjudicate asbestos claims for other reasons, the provisions within them establishing jurisdictional barriers should be included within a state administered scheduled compensation plan. For an example of jurisdictional barriers enacted under medical criteria statutes, see FLA. STAT. ANN. § 774.205 (Westlaw 2011); GA. CODE ANN. § 51-14-9(a) (Westlaw 2011).

medical monitoring and difficulty in breathing. By establishing guidelines for minor asbestos injuries, as opposed to simply excluding such claims, states can weed out meritless claims while still providing recovery for minor and major asbestos injuries. The inclusion of minor asbestos injury claims in a compensation schedule also reduces the need for plaintiffs to migrate claims to other jurisdictions. Through significant exposure and medical evidence requirements, states can limit meritless claims and ensure their compensation fund's solvency.

The effect of scheduled compensation on workers' compensation covering asbestos injuries is another major concern. Critics of the FAIR Act claimed that a federal compensation fund encouraged plaintiffs to double dip into both the fund and workers' compensation systems, which allows workers' compensation coverage for asbestos injuries.[201] This concern is important after *Rando* because the Louisiana Supreme Court allowed recovery in *only* workers' compensation for individuals stricken with asbestosis.[202] Workers' compensation systems, however, are generally administered at the state level.[203] Therefore, while the FAIR Act did not prevent double dipping in state workers' compensation schemes, state legislatures can certainly prevent double dipping between a state's workers' compensation system and compensation fund.

States can prevent double dipping by enacting exclusivity clauses similar to the clauses found in most workers' compensation statutes. By mirroring the exclusivity clauses found in workers' compensation statutes, state legislatures can enact exclusivity clauses barring recovery from the compensation fund when a claimant has already recovered under a state's workers' compensation scheme.[204] In addition, exclusivity clauses should

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201. *See Current Issues in Asbestos Litigation*, ISSUE BRIEF (Am. Acad. of Actuaries, Washington, D.C.) Feb. 2006, at 8 (noting the Academy's letter to Senators Specter and Leahy regarding the risk of double dipping by plaintiffs in the Fair Act's compensation fund and workers' compensation programs).

202. *See* Rando v. Anco Insulations Inc., 16 So. 3d 1065, 1080 (La. 2009) (noting that the 1952 Occupation Disease Amendment only provided recovery for injuries related to asbestosis).

203. *See* Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 FORDHAM L. REV. 469, 493 (1993) (noting that workers' compensation for most Americans is a state law and explaining the traditional role of workers' compensation at the state level); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 524 (1981) (noting that workers' compensation rewards are subject to the state's police power).

204. For an example of an exclusivity clause under worker's compensation, see LA. REV. STAT. § 23:1032 (2010).

bar recovery in workers' compensation for claims adjudicated under a scheduled compensation plan. Because states can exert control over their workers' compensation system and asbestos compensation fund, state-administered scheduled compensation can adequately address the workers' compensation concerns of the FAIR Act's critics.

Most importantly, scheduled compensation, unlike medical criteria statutes, promotes self-sufficiency in adjudicating asbestos claims. While medical criteria statutes do not adjudicate the majority of asbestos cases,[205] scheduled compensation quickly determines the merits of *all* claims and grants the necessary compensation for claims showing a cognizable asbestos injury.[206] By providing an efficient means of adjudicating minor and major asbestos injuries within a jurisdiction, scheduled compensation reduces the need for plaintiffs to seek out other jurisdictions to adjudicate their claims. Therefore, state-administered scheduled compensation actually *reduces* asbestos litigation as opposed to shifting asbestos litigation into other jurisdictions. Thus, scheduled compensation not only efficiently solves jurisdictions' asbestos litigation problems, but it also achieves this end without sacrificing the judicial efficiency of other states.

The massive amount of claims currently pending in the court system, as well as a possible rash of claims prior to a scheduled compensation plan's enactment, require compensation plans to achieve two necessary ends. First, scheduled compensation plans must subrogate previously filed claims into scheduled compensation. Second, jurisdictions must establish scheduled compensation as the sole remedy for all future asbestos injury claims. One method that can achieve these ends is to retroactively apply a scheduled compensation plan to previously filed claims. Unfortunately, states with medical criteria statutes have held retroactivity unconstitutional.[207] This does not mean, however, that retroactivity clauses cannot work in a scheduled compensation system. In decisions that overturned retroactivity provisions in medical criteria statutes, courts in Georgia and Florida specifically addressed cases where a lack of prima facie evidence under the medical criteria statute retroactively dismissed or shifted asbestos

205. *See supra* Part II.B (discussing the inability of medical criteria statutes to adequately adjudicate claims).

206. The term "cognizable asbestos injury" includes not only physical asbestos injuries such as mesothelioma and asbestosis but also economic asbestos injuries such as medical costs requiring medical monitoring damages.

207. *See supra* note 154 (outlining the decisions of courts in Florida, Georgia, and Ohio on the retroactive application of medical criteria statutes).

claims onto an inactive docket.[208] Retroactivity clauses in a scheduled compensation plan, however, do not retroactively dismiss or impede a claim's adjudication. Instead, retroactivity preserves and shifts claims into an administrative adjudication scheme. Therefore, courts may not strike down retroactivity, because scheduled compensation gives plaintiffs a lower burden of proof and does not retroactively dismiss claims for minor asbestos injuries. Furthermore, if courts do strike down retroactive application, legislation making scheduled compensation the sole remedy for all future asbestos injury claims still offers a proper solution for future asbestos litigation in a jurisdiction. When combined with legislation making scheduled compensation the sole remedy for asbestos injuries, retroactivity clauses adequately shift pending and future claims into the compensation schedule.

While retroactivity concerns pose difficulties for scheduled compensation, Louisiana law likely enables the retroactive application of a scheduled compensation plan. The Louisiana Civil Code addresses the retroactive application of procedural and substantive laws.[209] The Civil Code retroactively applies procedural laws while allowing retroactive application of substantive laws when intended by the legislature.[210] Scheduled compensation makes procedural and substantive changes to asbestos recovery. As a result, scheduled compensation can apply retroactively, provided that the Louisiana legislature establishes a clear intent to retroactively apply the substantive portions of a scheduled compensation plan.

3. The Louisiana Scheduled Asbestos Compensation Plan

The final hurdle for state administered scheduled compensation is the establishment of the compensation fund and its procedural framework. Although the idea of a state administered compensation fund may seem foreign to many, states already administer compensation plans in other litigation arenas. For example, the Louisiana Medical Malpractice Act establishes a statutory recovery cap with payment through a Patients' Compensation Fund.[211] The Medical Malpractice Act also provides

208. *Id.*

209. *See* LA. CIV. CODE ANN. art. 6 (2010) ("In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.").

210. *See supra* note 154.

211. LA. REV. STAT. ANN. § 40:1299.44 (2010) (establishing a Patient's Compensation Fund for victims of medical malpractice in Louisiana).

guidelines for collecting contributions to the fund and establishes procedural mechanisms for resolving medical malpractice suits.[212] Under the statute, plaintiffs' claims are first adjudicated by a medical review panel.[213] The medical review panel's determination is not a final adjudication, and plaintiffs may file an action in the court system after the review panel renders its decision.[214] The medical review panel's decision is not binding on the trial court, but it is submitted to the trial court as expert testimony.[215]

The Louisiana Medical Malpractice Act provides a sound procedural framework for a state-administered asbestos scheduled compensation plan. Of course, the framework provided by the Medical Malpractice Act must be slightly modified to achieve the goals of scheduled compensation. Like the Medical Malpractice Act, Louisiana's scheduled compensation system should adjudicate all asbestos claims through an administrative asbestos review panel. In an asbestos review panel, claimants will need to assert only prima facie medical evidence of a legally cognizable asbestos injury.[216] However, the asbestos review panel, unlike medical review panels, will operate in a nonadversarial setting, and its determination will be binding upon claimants.[217] Because the Louisiana Constitution provides the right to an appeal for all decisions affecting the rights and property of individuals, asbestos review panel decisions should be appealable to a state court.[218] The

212. LA. REV. STAT. ANN. § 40:1299.44(A)(5) (2010) (establishing procedures for collecting funds from contributors to the Patient's Compensation Fund).

213. LA. REV. STAT. ANN. § 40:1299.47 (2010). Medical Review Panels are the first step in the adjudication of a medical malpractice action in Louisiana. Malpractice claims must first go through the medical review panel, and claims filed in court prior to a determination by the medical review panel are dismissed as untimely. The Medical Review Panels consist of three healthcare professionals and are chaired by a nonvoting attorney member. *Id.*

214. *Id.*

215. LA. REV. STAT. ANN. § 40.1299.47(H) (2010) ("Any report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive[.]").

216. LA. REV. STAT. ANN. § 40.1299.47 (2010). In medical review panels, plaintiffs are required to prove (1) the standard of care of their treating physician, (2) a breach of the standard of care, and (3) causation between the breach and the plaintiff's injury. Under a Louisiana scheduled compensation plan, a legally cognizable asbestos injury would include all physical and economic injuries caused by asbestos exposure.

217. *Id.* Medical Review Panels are adversarial in nature, and plaintiffs and defendants present evidence regarding the standard of care and breach of that standard by the healthcare physician.

218. LA. CONST. art. I, § 19.

panel's decisions, however, should be given deference by the appellate court in order to limit the number of appeals filed.

While the Medical Malpractice Act provides a sound procedural framework for a Louisiana scheduled compensation system, the FAIR Act provides the necessary substantive basis for a Louisiana system through its nonadversarial and no-fault method. By combining the procedural framework of the Medical Malpractice Act with the substantive provisions of the FAIR Act, Louisiana can establish a fair scheduled compensation system that adequately compensates plaintiffs while limiting the litigation costs of asbestos defendants and the state.

V. CONCLUSION

The impending consequences of the *Rando* decision require legislative action. The combination of the federal government's failure to enact asbestos litigation reform and the negative impacts of other jurisdictions' solutions leaves the responsibility of combating asbestos litigation squarely on the shoulders of the Louisiana legislature. This problem provides Louisiana the opportunity to be at the forefront of combating asbestos litigation at the state level. Louisiana and other states must answer this call by enacting a scheduled compensation system that adopts the suggestions provided in this Comment to efficiently adjudicate asbestos claims. Louisiana has the opportunity to create a scheduled compensation model that is fair to plaintiffs, defendants, attorneys, and the court system. Therefore, the Louisiana legislature must enact a scheduled compensation plan to combat asbestos litigation's stranglehold on the judicial system.

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