ASBESTOS: THE NEXT LIABILITY EXPLOSION?

*FRED BARON, PROFESSOR THEODORE EISENBERG, VICTOR SCHWARTZ, & MARK BEHRENS**

MR. MARK BEHRENS: We have an incredible panel today to address asbestos litigation issues. I am going to introduce the panelists very briefly in the order in which they will speak.

Our first speaker is going to be Fred Baron. Fred may be the most recognized national lawyer in the plaintiffs' bar, certainly in the field of asbestos. He is King of asbestos litigation in Texas, and is widely recognized as a trailblazer in the mass tort area. "In the field of toxic torts," one reporter wrote, "if the frontier were the American West, Fred would have been driving the first wagons onto the plains." He is the immediate past president of the Association of Trial Lawyers of America, and has been listed by the *National Law Journal* as one of the 100 most influential lawyers in the United States.

Our next speaker will be Victor Schwartz. Victor is a senior partner at Shook, Hardy and Bacon, L.L.P., where he chairs our firm's Public Policy Group. Victor is co-author of the leading torts casebook in the United States, *Prosser, Wade and Schwartz's Torts*, which is now in its tenth edition. He is a former law dean and professor. He also has been listed by the *National Law Journal* as one of the 100 most influential lawyers in America. Victor is counsel to the American Tort Reform Association and counsel to the Coalition for Asbestos Justice. The Coalition is a nonprofit group formed in 2000 by major property and casualty insurers to address and improve the asbestos litigation environment.

The last speaker will be Ted Eisenberg. Ted is the Henry Allen Mark Professor of Law at Cornell Law School. He is one of the leading experts in the nation in empirical legal research. Ted has written two casebooks, one on civil rights and one on bankruptcy – an important issue in the asbestos litigation environment. He is also a former clerk to United Supreme Court Chief Justice Earl Warren.

MR. FRED BARON: I represent people. They are ordinary, everyday people who go to work and do what they are told, and unbeknownst to them, were for years exposed on a daily basis to an extremely hazardous material, asbestos. Each of the people I represent has been diagnosed with some form of an asbestos-related disease. I represent people who come to my office complaining: "Wait a minute, I just went to work. Nobody told me asbestos was there on the job; if they had told me about it, I would have done something to protect myself. Unlike tobacco, I am not addicted to asbestos. I would have avoided it because I do not want to have the problems that I am now having." That is what I routinely hear.

My job as a lawyer for victims is to find a way to deal with their individual problems. So, when I look at the issue of asbestos litigation, I view it as a sad human tragedy because even a cursory review of the history of asbestos-related diseases, clearly shows that by at least the turn of the last century, in the United Kingdom, and certainly, by the '20s, and if you want to stretch it, the '30s and '40s, in the U.S., there was no question but that exposure to asbestos could cause fatal diseases.

Asbestos, though, is different than most other hazards that kill you because it takes a very long time to happen. When you are exposed to asbestos — and particularly nowadays, when exposures are not particularly heavy, it can take 30 or 40 years for the disease to manifest. There are two types of diseases: malignant and non-malignant. In most of the asbestos malignancies, life expectancy is less than a year. Non-malignant disease, some believe that non-malignant asbestos diseases are worse because they always progress, they are irreversible, and they can be terminal if you do not die of something else first.

So, again, my job as a plaintiff's lawyer is to help each individual family that is faced with the reality of asbestos related injuries. Of course, the issues, such as fair allocation of assets and other similar issues are indeed very significant problems that I have to be concerned about. But like so many of you in the Federalist Society, I believe in the efficacy of state law. I particularly believe in the importance of state common law, interpreted by in the state courts. I believe that people who work hard, pay their taxes and are good citizens have an absolute right to use the state courts to adjudicate whatever claims they have, legitimate or otherwise.

I would like to try to debunk some of the myths that seem to surround asbestos litigation. Myth 1: plaintiffs' lawyers notoriously go out with x-ray vans, find people who work in factories, and develop large numbers of clients. Quite honestly, I am offended when somebody criticizes me for providing free medical services to a person who is working in a factory and who has been exposed to asbestos. If you are an executive at a company, you are probably going to get a free physical every year, and it is probably going to be the best doctor in the city. But if you are working in some industrial facility, maybe a petroleum plant in Brazoria County, Texas, you are not likely to have ready access to free medical examinations by specialists.

Hundreds and hundreds of people who have developed cancer have first learned that they had cancer, hopefully early enough to save their life, as a result of x-ray screenings that were provided either by their union or by plaintiff's counsel. I am offended when people tell me that, "it's terrible that you are giving free medical treatment to working people who end up filing suits." I do not buy that argument. When a victim is diagnosed with a disease and somebody is legally responsible under state law, there should be no barrier to that individual filing a suit to reclaim their rights.

Myth 2: unimpaired asbestos claimants are flooding the courts. Let me stop for a minute before I discuss this issue. I have a genetic defect: I went to law school. That defect causes all kinds of problems, as so many of us know, but it particularly binds those of us who have it to the doctrine that we were taught in our torts course in our first year: "If someone does something negligently and causes injury to another person, that person is entitled to seek recompense in court." I can't remember anything in the law anywhere that says "if

someone does something negligently and causes impairment to somebody, only then can that person can seek recompense."

It is like somebody is trying to re-write the law only as it applies to asbestos injuries. Many of us know that people who are involved in automobile accidents often develop a sore neck. Maybe that is a minor injury but we all agree that the injured party is absolutely entitled to recover whatever medical expenses and other damages from that injury. There is no requirement that the injured party lose work. There is no requirement of total disability. So why is it now that some of our great scholars are telling us that asbestos injury cases, unlike auto injury cases, should not be filed unless the plaintiff is impaired? There is absolutely no such requirement under any state law. Yes, I do represent people who are at the beginning stages of non-malignant asbestos-related diseases who are not yet impaired. These people should have the same rights as anyone who is involved in an automobile accident to file a claim for recompense. Juries evaluate those cases all the time.

Myth 3: new non-traditional companies are being wrongfully added to the litigation. Who are these "new defendants?" Obviously the old defendants were the manufacturers of asbestos, who manufactured this horrible material and put it onto the stream of commerce. It is a fact that more people ultimately died from asbestos-related disease as a result of working in the shipyards in World War II, than died in the United States Navy during the War.

In the early stages of asbestos litigation, it was easy for us to just sue only the manufacturers because they were clearly liable. They never warned anybody; they never told anybody of the deadly hazards that they had internally identified. But, unfortunately most of these companies have sought protection under Chapter 11 of the bankruptcy code. I would emphasize that Chapter 11 reorganization has been the route that most of these manufacturers have taken—Johns Manville today, as you probably know, is owned by Berkshire Hathaway and employs more people than it did when it went into bankruptcy in 1982. In these reorganizations, companies put up some money and their stock into a trust for victims and re-enter the open market—so nobody is losing jobs in asbestos-related bankruptcies. So as counsel for victims it is our job to look for other defendants who are legally responsible under the laws of the state that are applicable.

I do not see any great problem with us doing that. That is what we are paid to do. When somebody comes in my office and says, "I have got an asbestos-related disease and I want to sue somebody for my losses because I want to be sure my family is taken care of," it is my job to identify defendants who are legally liable under the laws of the applicable jurisdiction. If they are not legally liable, the odds are that they will get out of the case.

Myth 4: any exposed person can file a case even if they are not ill: If my client cannot prove that he has an asbestos-related disease, we are going to lose the case. It is totally false to believe that claimants are people that just come in off the street and say, "I was exposed to asbestos," and then file a lawsuit. In all 50 states, it is required that the plaintiff produce qualified medical testimony that he has an asbestos-related disease before a case can get past summary judgment.

In summary, I am a believer that the state laws work and that it should remain intact and not be operated under a different set of values for asbestos victims who have worked hard all of their lives and are now merely trying to redeem their rights, as they are entitled to under our Constitution.

Myth 5: the courts are hopelessly clogged with asbestos cases. Although commentators speculate about clogged courts, the best source of empirical data on this issue is a journal that is published every year that tracks each of the state and federal court trials in asbestos cases every year. Let me give you some quick statistics. During the year 2001, there were 61 asbestos trials in all 50 states in all the state and federal courts. The year before, there were 55 trials. The year before that, there were 52. Last year, about 35,000 claims settled. The year before that, it was about the same number. Does this system work? Are the courts clogged? Any system that produces 35,000 settlements without the necessity for a trial, and only 60 trials per year in all of the state and federal courts in the United States, is, in my judgment, working very well.

So, what is the pressing problem with this litigation? The problem is simply that there are too many victims of asbestos disease and too great a need to find adequate resources for the victims. The asbestos defendants and the insurance companies who insure them do not like that fact and the unfortunate truth that they cannot see light at the end of the tunnel. I sympathize with that; if I was representing a large company that had a significant asbestos liability, I would be concerned, too.

But, by and large, the position papers that have been sent out by industry advocates have been dramatically misleading—and when I say "sent out" I mean it literally—in Texas. I started getting calls from judges telling me that they were getting inundated with literature, mailed, *ex parte*, from lawyers for the asbestos defendants, telling them how they should do their jobs as judges, which, needless to say, they found offensive. I was amazed that somebody would have the chutzpa to send out such *ex parte* communications to judges telling them how to do their jobs. But, it is still happening. I believe the spin meisters on K Street in Washington, D.C. have made more money from asbestos litigation than probably any other faction of this whole industry. Every year, K Street hucksters promise that they can deliver restrictive legislation. Their clients want a fix. And every year they are promised a strong public relations campaign to make it look like all the plaintiffs are not sick, that the courts are clogged, and there is a major crisis in asbestos litigation.

If you are a client of these PR and lobby firms, I have got to tell you, before you fall for that song and dance and before you write your checks, take a look at history. Asbestos legislation was first proposed in 1979 by Millicent Fenwick, a House member from Manville, New Jersey. She tried her best to create what was then called the White Lung Act, not unlike the recently passed Black Lung Bill for coal miners. By the way, the coalminers' bill was estimated to cost $300 million a year at the time of its passage. By the early '80s, its actual cost was over a billion dollars per year. By now, it is a couple of billion dollars a

year. Congress would not legislate asbestos then and certainly in this atmosphere, with tight budgets and deficit spending, it will not do it now. After 20 plus years of repeated efforts to get restrictive legislation, and 20 plus years of failure, I think it is very unlikely that anything will happen on Capitol Hill regarding an asbestos litigation "fix."

So, what has been the fallback position of the industry advocates? Try to pollute the jury pool through national public relations campaigns complaining about how the system is being manipulated by uninjured victims and greedy lawyers. Trust me, if the system were indeed being manipulated, the state courts would have straightened it out by now. Occasionally there are some aberrant verdicts and there are indeed some cases where people get a large sum of money when they really do not have a significant injury. But, in my judgment, those represent only two, three, four, perhaps five individual cases every year of the tens of thousands that are resolved each year. Any system that delivers 99.99 percent appropriateness is a pretty damned good system. In reality those big verdicts for people who do not seem to be particularly injured that you hear about all the time almost always get reversed. Anecdotal cases should not be the basis to formulate public policy.

In conclusion, the thought that I would leave you with is that before you start drawing conclusions about how asbestos litigation actually works (or doesn't) to compensate victims—and particularly the myths that I have identified—take a closer look at the facts, and take a closer look at what really happens. When you look under the covers, you are going to see something very different than has been presented by those who have a private rather than public agenda.

Thank you.

MR. VICTOR SCHWARTZ: In the mid '70s, I did plaintiffs work and I was a law professor. It was not simply because I did plaintiffs work that I agreed with Fred Baron. Fred Baron was a pioneer in asbestos litigation. He helped uncover documents that showed that some companies knew of great dangers. Unlike cigarettes, the plaintiffs knew absolutely nothing about the risks. And unlike cigarettes, the plaintiffs were not engaged in some self-indulgent behavior like smoking. They were working. These were cases that had a lot of meaning, and the defendants had done a lot of wrong. He was a pioneer in this litigation, and I agreed with him 100 percent.

But today, I believe things are quite different. Most of the plaintiffs are not sick – I will discuss that in detail in a moment — and many of the defendants have little or no relationship with the actual injury. There is a crisis, and the crisis is affecting everybody in America. At least 55 companies have gone into bankruptcy, most of them very recently. Every time another company goes into bankruptcy, it increases the likelihood that another company will fail because greater liability is being imposed on fewer and fewer companies. The way the law works — and those of you who are lawyers know — the concept called joint liability means those defendants who survive, even if they are just a little bit at fault, pay for those who have already fallen.

The asbestos litigation crisis affects workers. It is true that Manville reorganized itself. But a lot of jobs have gone overseas, and I predict many more will follow because of the number of companies going into bankruptcy. It is not an automatic transfer of one job to another. People who own stock in a company like Eagle-Picher, which was a so-called widows and orphans stock, saw their stock open at $46 a share, and drop to less than 20 cents. Maybe Eagle-Picher was involved in cases that were very serious and the company had knowledge, but companies today that are getting impacted have little or no involvement.

I counsel Morgan Stanley, J.P. Morgan, and Prudential. The number one thing that they are talking to me about is asbestos. It is a crisis that affects the most victims. If Dickey Scruggs were here, he would talk about victims and people who are really injured. Steve Kazan and other plaintiffs' lawyers feel that the system today is hurting those who are really sick.

What has caused the current problem? Some of it is shoddy practices. Fred practices well, but there are people who send the trucks out. There are photographs of them. They go into neighborhoods with working-class people, taking x-rays, hoping to find cases. It is open solicitation. This occurs most often in some areas that Mr. Scruggs calls "magic jurisdictions." I call them "judicial hellholes." They are the same thing.

In these jurisdictions, an x-ray with very little scrutiny can be introduced into evidence. A doctor testifies. The doctor has never really seen the patient, and the doctor is not testifying in a way that would seem scientifically credible to many of us.

In some of these hellhole jurisdictions, plaintiffs that have completely different claims are aggregated together. Some people who are really sick are grouped with people who are not sick. The result: When the cases are settled, the people who are really sick often get less and the people who are not sick get more. The plaintiffs' lawyers do quite well. That is their business. But false consolidation of cases is unsound.

In many jurisdictions, the hellholes, the identification of the defendant has become unimportant. A fundamental of American law — who did this to somebody? — is ignored. If I go back to when Fred started his practice, the asbestos defendants primarily included maybe 50 companies. Now there are estimates that between 2,000 and 6,000 companies are involved in the litigation. Why all of a sudden are they being sued? If they were wrong, if they were guilty, if they had done bad things, why is it that all of a sudden in 2002 they are being brought into the litigation? I think the question answers itself.

If judges do not scrutinize identification testimony, if judges let cases go to juries without careful identification, that web is going to spread further and further. We will be here five years from now, and there will be many more bankruptcies of premier companies that supply a lot of jobs.

Judges will not, in some of these hellhole jurisdictions, let defense attorneys take depositions of plaintiffs, to find out if they are sick. Is something wrong with these plaintiffs? Where were they exposed? How much were they exposed? This is Civil Procedure 101 and Torts 101, but the rules are ignored.

Judges do this sometimes for very benign and good reasons. If you were working as a judge and all of a sudden, 10,000 cases were dumped on your lap, what would you want

done with them? The very thing that Fred talked about: settle them. The cases settle because defendants must be concerned with what will happen to them if they do not settle. That is the engine for settlement. The decision to settle is not necessarily based on the merits.

If five people in Mississippi who are unimpaired, who say from the stand that they can do everything that every one of us do and maybe more, get $25 million apiece, and you ran a company and somebody else came along and said they wanted to settle a case, what would you do? Settlement does not mean that the system is working well. The few outrageous verdicts drive cases to be settled at figures that are exorbitant.

I think the crisis can be solved, and I do not think the solution is complicated. Judges just have to be judges, and the hellholes have to close. The courts have to stop dragnet joinders of people, false consolidations. They have to apply sound medical procedures. They have to require that plaintiffs adequately identify defendants. They have to be responsible gatekeepers for sound science and make sure that shoddy science is out and good science is in. They need to permit proper discovery. But, more needs to be done.

The Supreme Court of the United States recently agreed to hear an asbestos case called *Norfolk & Western Railway Co. v. Freeman Ayers et al*. The case involves a law called the Federal Employers' Liability Act ("FELA"), which governs suits by railroad employees against their employer railroads. The Court has a chance to say whether people who make a base claim of emotional distress ought to be given money under FELA. The Court also has a chance to say whether joint liability is going to continue to be imposed in FELA cases, creating a domino effect and additional bankruptcies.

Judge Jack Weinstein of the Eastern District of New York also has the Manville trust in front of him. In the next six months, he is going to decide whether people who are unimpaired are going to continue to be paid. By unimpaired — and Fred will disagree with me about the definition of impairment — I mean people who the American College of Thoracic Surgeons say are unimpaired.

In addition, there are judicial rulings on punitive damages that can help; they can hurt too. The federal MDL Panel, Judge Weiner of the Eastern District of Pennsylvania, has put an end to multiple punitive damages in federal asbestos cases. I think this is a sound ruling. No one today is going to make asbestos-containing products and expose people. Deterrence and punishment has had its impact.

Other courts have taken steps to solve key problems in the asbestos litigation. Judicial rulings in a few jurisdictions – Boston, Massachusetts; Baltimore, Maryland; and Chicago, Illinois, — have set up pleural registries so that people who are unimpaired can have their right to sue preserved until they may develop an impairment.

If I were still a plaintiff's lawyer, I would face a dilemma that Fred faces in some states. If you do not bring the case now, the plaintiffs' rights can expire under statutes of limitations, and then they get nothing when they are really sick. It is a dilemma, but I think there is a solution to the dilemma. That is, if under objective criteria the person is unimpaired, they should have their claim preserved until they get sick. Pleural registries, or inactive dockets, can solve that problem.

Asbestos litigation is not like somebody injured in an auto accident, who cannot move his neck and has some actual illness or something wrong with him. Many asbestos cases involve somebody who doctors say can function fine. Judges in the jurisdictions that have implemented a pleural registry say the system works very well. Judges can impose that system themselves, as some have done.

Congress can help, too. A proposal may come before Congress to try to set objective medical criteria to separate the claims of the truly sick from the unimpaired, and to set forth fair venue rules. The venue rules would allow someone to sue in the state they live in or were exposed. It bothers me that there is a need for such venue rules. But, those rules are needed because some plaintiffs lawyers can selectively pick certain hellholes in which to sue. As a result, about 33 percent more asbestos cases are brought in Holmes County, Mississippi, than people who live there. So, venue rules would be set. But I agree with Fred on this. The Congress of the United States has never been one that has been particularly friendly to situations that might create balance in litigation.

These are just some thoughts. Asbestos litigation is a problem. Maybe plaintiffs and defendants in this area will find some agreement. There are some plaintiffs who have agreed with us that the litigation is a crisis, and it does need to be resolved. The solutions are not overly complicated.

PROFESSOR THEODORE EISENBERG: I am an empiricist. Most of my scholarship counts things, and I find asbestos a little frustrating in that some of the best studies on asbestos done by, for example, the Rand Institute for Civil Justice, say how difficult it is to know what is going on in the asbestos world. There seems to be agreement that there is something going on that is very significant.

Our legal system is simply deficient in the way it gathers data because I do not think anyone really knows the number of asbestos cases, or the number of future asbestos cases, or the number of settlements. And, asbestos is one of the most studied areas. I think the implications for other mass torts, or the mass torts of the future, are a little discouraging because it may be that we are ten years into a crisis before we even know what is going on. As some of you may know, the Administrative Office of U.S. Courts created a category for asbestos in the late '70s or early '80s, but we do not know what was happening before then, and only for asbestos do we know now. We do not even know the number of cases in other mass tort areas.

The other sort of plea I would have for empirical analysis is not just case counting, but there are a lot of reference to the golden jurisdictions and hellholes. Those claims often seem to me to turn out, when pressed, to be unwarranted. I would urge people who are saying that there are places that are either wonderful or terrible for plaintiffs, or either wonderful or terrible for defendants, to actually fund or do the work that is involved to find out whether shoddy practices are going on, whether doctors have to meet with patients to claim that they are ill, and whether

courts are mindlessly aggregating cases they should not be aggregating. These practices may well be going on. But persuasive studies that policymakers might want to base decisions on are rare in the tort reform area, and I would encourage people — both defendants and plaintiffs — to fund the studies that would actually let us know what is going on.

If I could generalize a little bit from the asbestos experience, it is perhaps surprising to some of you, but maybe not to others, that the best studies we have of claiming rates, ligitiousness by Americans, suggest that Americans in general are quite unlitigious. They are very reluctant to seek claims; and they are very reluctant to consult lawyers; they are very reluctant to file claims. The one major exception historically has been automobile accident cases.

We seem to have this sort of machine in place through insurance and other things that lead people to file, perhaps, more automobile claims than actually occur, as in the New York City bus analogy. But automobile accidents are very distinctive. One of the interesting aspects of asbestos is, I suspect, claiming rates in asbestos are quite high compared to other areas of tort. That is a combination of circumstances. One, the litigation is very well-known now. Two, perhaps there are lawyers out looking for claimants. Three, lots of people were exposed to asbestos. Four, you now have highly skilled and reasonably well-funded attorneys willing to take these cases.

What we have in asbestos is an illustration that in some sense is truly frightening. And that is, what if we actually sought to achieve justice for everyone who was harmed? What if everyone exposed to asbestos, or if not impaired in the sense of being able perform life functions, impaired in that under state law they are entitled to recover something — the vast majority of asbestos victims — filed a claim? We see a system that to some people is just broken down. At least to most neutral observers, it is in need of serious study, if not reform.

What if we really had a system where victims — not just of asbestos but of everything — systematically abandoned their low rates of litigation and really did file and try to seek justice? I think the asbestos crisis gives us a little bit of a hint that we just cannot afford that system. We cannot afford mass justice for every tort that occurs in society, and asbestos may be this frightening window on what happens when we become serious about providing mass justice. I am not sure if it should be frightening, but we should be prepared to recognize that full compensation for all harms is not easily attained, nor perhaps do we really want to attain it as a society.

What solutions have been proposed for asbestos? There, it seems to me, I have one comment and one set of skepticisms. It is sort of interesting to me that the legislative solutions are written off — "It's not going to happen," or, I guess from Mr. Baron and Mr. Schwartz, we get "Perhaps it shouldn't happen; the judges can handle it." It seems to me that the judges handling the litigation provide an interesting angle on how we feel about, for want of a better term, judicial activism—if people do come in with what is a traditional claim under state law and we have creative solutions that may well be the right solutions. If the judge says, "You have a valid claim under state law, but you're not as sick as this other guy, so I am going to move this claim ahead of yours and you are not going to get paid anything." That may be the right answer from the point of view of justice and economic efficiency. But it is hard to see how judges have the authority to do that.

If the traditional tort law of a state is that if you have got a claim within the meaning of Texas law, you come to court and you get paid, I do not think there is anything in Texas law that says the sickest get paid first. I do not think there is anything in Texas law that says the judge gets to decide which of the suits that get filed get treated better, more quickly, or more efficiently than others. The more creative judges, like Judge Weinstein, have been highly criticized for their creativity.

If we were writing on a slate in which we think that judicial creativity is the answer to the asbestos crisis, we ought to at least pause to think that somewhere down the line, someone is going to say that those judges are activists. That is because they have ignored the law of the state or imposed their own vision of justice, when the people speaking through their legislature or through the common law really have a different set of rules. As I said, it may be that the just result is the one that says what perhaps even Victor is proposing. But we ought to recognize that judges who do that are probably going to pay a price in reputation with at least some groups.

This leads one to ask the question, why is legislation not on the table here? Perhaps people are just more realistic and it just cannot happen. Why not? Well, one reason, it seems to me, is a fairly common pattern, and that is the legislature and perhaps also the executive really like having the courts — and if not just the courts, juries especially — as the fall guys.

It is really very convenient to say "It's terribly complicated; we will leave it to the courts, and business, you should really be upset with those judges and those juries because they are the ones that caused that problem. If we could just have good judges and juries, everything would be okay." And the legislature and the executive remain stunningly silent on what is recognized as a widespread social problem. I think the political economy of asbestos plays out the way a lot of things do.

The other branches like the courts as fall guys. The courts cannot stand up for themselves; they are very weak at defending themselves; they have a lot less lobbying power. And juries are the weakest of all. They are not repeat players and they do not have offices. Very few people stand in the shoes of jurors and try to represent them in the national scene, which leads me to join the skepticism — or Victor's saying prescriptively, perhaps a legislative solution is not needed; Mr. Baron is saying we are not going to get one. I think I agree; we are probably not going to get one.

Then, I take a step back. What would legislation look like if we could get it? Suppose we could push a button and say, "You will legislate." It seems to me that asbestos raises an enormous set of problems. Just to highlight one, that is the problem of long-range planning.

Let us say serious asbestos litigation was born in the 1970s and blossomed in the 1980s. You can say, "Well, I have a crystal ball and I can see that in 2002, we may be less than halfway through cycling the asbestos claims through; let's sit

down in 1982 and plan for 20 years in the future." If you really have a major social problem that requires 20 years of foresight, I think that is pretty close to hopeless because I do not know anyone who can plan well 20 years ahead.

We can barely do it — and I am not sure we do it so well — for social security, where things seem to be almost purely numerical. Social security does not have all the issues that asbestos litigation has. So, if you think of your own life, what did things look like five years ago compared to today? Did you have any idea 20 years ago where you would be today? Do you want to sit down and project what should be solved for society 20 years from now? To the extent that we have long-range planning needs for major social problems, that is the nature of asbestos, I guess.

Long-range planning needs for social problems — I guess I am skeptical that even if we could get the legislators to act, they would come up with anything that would be much better than the solutions that Mr. Baron and Mr. Schwartz propose, that are not quite the same. So, I guess that is a note of pessimism on which to end.

Thank you.

* This transcript is from the proceeding of a Federalist Society panel discussion held on June 18, 2002 at the National Press Club. The panelists were:
Fred Baron, Baron & Budd, P.C.
Professor Theodore Eisenberg, Cornell Law School
Victor Schwartz, Shook, Hardy and Bacon, L.L.P.
Mark Behrens, Shook, Hardy and Bacon, L.L.P., *Moderator*