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COMMENT

**The Uncertain Future of the Class
Action Suit in School Asbestos Litigation**

Joseph M. Pastore III

I. Introduction

Asbestos litigation is a fast growing area of tort law today.¹ Over 150,000 asbestos-related cases were filed by 1991² and it is estimated that 2,000 new cases are filed each month.³ Last year, there were more than 13,000 new federal cases alone.⁴ At least 700,000 public and commercial buildings contain potentially dangerous asbestos.⁵

The problem of asbestos in school facilities has been magnified by the " 'emotionalism, rhetoric and public pressure of parents and teachers,' which has resulted in the 'current level of hysteria.' "⁶ Within the last few years, more than 100 lawsuits have been filed against companies that manufactured

1. See generally Brown, *What Lawyers Must Know About Asbestos*, 73 A.B.A. J 74 (1987) (providing an overview of the significance of asbestos litigation).

2. Blum, *Untangling Asbestos Litigation*, NAT'L L. J., Mar. 18, 1991, at 1, col. 1.

3. Tarnoff, *Asbestos Firms Win Broadest Coverage*, 3 BUS. INS. 1, 93 (1987).

4. See *Untangling Asbestos Litigation*, *supra* note 2, at 30.

5. Florman, *Asbestos: Hindsight is 20/20*, 1987 TECH. REV. 20.

6. Cross, *Asbestos in Schools: A Remonstrance Against Panic*, 11 COLUM. J. ENVTL. L. 73, 88 (1986).

and installed asbestos in schools and other public buildings.⁷ Many school districts have received large damage awards from these suits.⁸ Nevertheless, the need to provide schools with adequate legal redress is still of paramount importance in order to curb the financial burden of asbestos abatement. A possible solution to the crisis faced by the school districts is the use of class action suits.⁹ Commentators have urged and some courts have opted to use the class action in mass tort litigation.¹⁰ If they meet the criteria, the class action suit will allow school districts to pool their resources in seeking damages.¹¹ These suits are attempts by schools to unite in a legal action against the various corporations responsible for the manufacture and installation of asbestos in schools.

This Comment will explore the advantages and disadvantages to schools employing class action suits against the asbestos industry. The Comment will detail the unique situation confronting school districts and the benefits and burdens of the class action suit regarding these circumstances.

II. Background and Historical Development

A. *Effects of Asbestos Exposure*

Asbestos is a common term referring to minerals of the silicate family.¹² The commercially used varieties fall into two distinct mineralogical groups: serpentine and amphiboles.¹³ The serpentines group mainly consists of chrysotile (white as-

7. Oshinsky, *Insurance Coverage For Asbestos-Related Property Damage Claims*, 369 *Ins., Excess, and Reinsurance* (Practicing L. Inst.) 259, 261 (1989).

8. *Id.* For example, in 1986 a \$6,809,000 judgment was entered against an asbestos producer. *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 574 (D.S.C. 1986).

9. FED. R. CIV. P. 23.

10. See Wright & Colussi, *The Successful Use of the Class Action Device in the Management of the Skywalks Mass Tort Litigation*, 52 *UMKC L. REV.* 141 (1984); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 *HARV. L. REV.* 1143 (1983).

11. FED. R. CIV. P. 23.

12. Zurer, *Asbestos: The Fiber that's Panicking America*, 63 *CHEM. AND ENG'G NEWS* 30 (1985).

13. C. KLEIN & C.S. HURBUT, JR., *MANUAL OF MINERALOGY* 426-27 (20th Ed. 1977).

bestos).¹⁴ The amphibole group includes amosite (brown asbestos), crocidolite (blue asbestos),¹⁵ and the rarely used minerals tremolite, actinolite, and anthophyllite.¹⁶ In general, asbestos functions primarily as an insulator and was widely used in construction projects from 1950 until 1972 "when it was banned."¹⁷

In 1964, a study was published which revealed the health hazards associated with asbestos.¹⁸ Dr. Irving J. Selikoff's studies of building trades insulation workers exposed to asbestos revealed a sevenfold increase in the rate of incidence of cancer over the expected rate.¹⁹ The study concluded that asbestos exposure was directly related to the incidence of cancer.²⁰ These diseases damage the lungs or abdomen and are generally fatal.²¹ Tens of thousands of individuals fall ill or die from asbestos-related diseases every year.²²

There exists considerable disagreement over the risks resulting from exposure to asbestos.²³ On one hand, high levels of exposure to asbestos have been clearly linked to various fatal diseases.²⁴ On the other, low level exposure to asbestos has not been shown to pose a significant public health risk.²⁵ Estimates of annual asbestos-related cancer deaths range from as few as four to eight thousand²⁶ to as many as seventy-five

14. *Id.* at 427.

15. *Id.*

16. THE GEOLOGY SOC'Y OF AM., FIBROUS MINERALS, MINING, AND DISEASE, REPORT OF THE COMM. ON GEOLOGY AND PUB. POLICY 3 (1988)(statement of Ann Wylie).

17. Diamond, LIABILITY IN THE AIR: THE THREAT OF INDOOR POLLUTION, 73 A.B.A. J. 78, 82 (1987).

18. Selikoff, Chury, & Hammond, *Asbestos Exposure and Neoplasia*, 188 J.A.M.A. 22 (1964).

19. *Id.* at 24.

20. *Id.* at 25.

21. Zurer, *supra* note 12, at 34.

22. See C. KLEIN & C.S. HURBUT, JR., *supra* note 13, at 999.

23. Zurer, *supra* note 12, at 34.

24. Cross, *Asbestos in Schools: A Remonstrance Against Panic*, 11 COLUM. J. ENVTL. L. 73 (1986).

25. *Id.* at 85.

26. Poll & Peto, *The Causes of Cancer: Quantitative Estimates of Avoidable Risks of Cancer in the United States Today*, 66 J. NAT'L CANCER INST. 1191, 1245 (1981).

thousand.²⁷ As with any hazardous substance, the degree of harm from asbestos will depend on the level of exposure.²⁸ Given the uncertain state of knowledge, many parents and school administrators may have legitimate health concerns about the presence of asbestos in the nation's schools.

B. *Background of Asbestos Litigation*

Asbestos related litigation has exploded in the last several years.²⁹ Over 150,000 asbestos-related cases had been filed by 1990³⁰ and it is estimated that 2,000 new cases are filed each month.³¹ The EPA has recently estimated that the cost of asbestos abatement may rise to over four trillion dollars.³² Included in these statistics are school systems which have increasingly sought legal relief for the costs of asbestos abatement.³³

Asbestos producers and their insurers may be unable to fund future asbestos claims because their financial resources are diminishing.³⁴ This problem is the result of the historic wide-spread use of asbestos and the subsequent voluminous

27. *Id.* at 1307 app. (quoting OSHA *Estimates of the Fraction of Cancer in the United States Related to Occupational Factors* (Sept. 15, 1978)).

28. M. GREEN & N. WALTZMAN, *BUSINESS WAR ON THE LAW* 110 (1979).

29. Labaton, *Judges See a Crisis In Heavy Backlog of Asbestos Cases*, N.Y. Times, Mar. 6, 1991, at 1, col. 4.

30. See *Untangling Asbestos Litigation*, *supra* note 2.

31. Tarnoff, *supra* note 3, at 1.

32. Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L. J. 457 (1989).

33. See generally Brenza, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277 (1987).

34. See BUREAU OF NATIONAL AFFAIRS, INC., *ASBESTOS ABATEMENT: RISKS AND RESPONSIBILITIES* 1 (1987).

Also, California asbestos insurance coverage cases are being watched with great interest and much trepidation by the comprehensive general liability industry. Many recent tentative decisions in these cases may foreshadow a broadening of coverage for insurers in all cases where a toxic substance is either installed in a structure or stored in a manner which contaminates the surrounding environment. If other courts choose to follow the reasoning of these tentative decisions, insurance coverage much broader than that historically contemplated by insurers may be necessary. Campbell and English, *Case Comment of California Asbestos Insurance Coverage Cases*, 24 TORT & INS. L.J. 505 (1989).

litigation.³⁵ As a result of financially draining litigation costs, many manufacturers have sought the protection of Chapter 11.³⁶ For example, in 1982, two major asbestos manufacturers, Johns-Manville Corporation and UNR Industries, filed for Chapter 11 bankruptcy as a result of mounting asbestos related lawsuits.³⁷

The asbestos industry insurance companies are also financially distressed as they face potential liability which could amount to several billion dollars.³⁸ They contend that because of the unpredictable potential for massive liability, they are unable to assess the risk involved with asbestos abatement.³⁹ This uncertainty is reflected in the oppressive premiums placed upon the manufacturers.⁴⁰

35. The number of ongoing asbestos-related property damage litigations weighs heavily upon the legal system, the asbestos producers, and their insurance providers. See Fenton & Sullivan, *Asbestos Property Damage Litigation: CGL Insurance Coverage Issues*, 419 *Hazardous Waste, Toxic Torts and Prod. Liab. Ins. Problems* (Practicing L. Inst.) 253, 255 (1987).

36. Kerlow & Nelson, *Asbestos*, LITIGATION MONITOR, Legal Times, Apr. 7, 1986, at 12, col. 1.

"Congress was obviously aware of the national debate centered upon the Johns-Manville Corporation case when it enacted substantial amendments in 1984. It chose not to restrict access to bankruptcy by business debtors." Aaron, *BANKRUPTCY LAW FUNDAMENTALS* (1989).

37. Kerlow & Nelson, *supra* note 36.

38. *San Francisco Asbestos Insurance Case*, LITIGATION MONITOR, Legal Times, Apr. 7, 1986, at 13, col. 1.

39. Defendants in asbestos-related suits naturally seek indemnification for damage claims under their comprehensive general liability (CGL) policies. Claims for asbestos-related property damage raise several difficult insurance coverage issues. The first question is whether the alleged property damage results from an occurrence or an accident. Insurance companies generally define an occurrence as "an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *Commercial Union Ins. v. Sepco Corp.* 765 F.2d 1543, 1545 (11th Cir. 1985). An accident is undefined; the word "accident" is to be given its common meaning—the meaning which a purchaser of a policy places upon that word when he buys the policy. *Phillips v. Equitable Life Assurance Soc'y of the United States*, 370 F. Supp. 456, 458 (D. Or. 1973). The second question is whether property damage, as defined by the applicable insurance policies, has been sustained. The third question is whether the coverage is triggered by an occurrence or an accident. See Fenton & Sullivan, *supra* note 35, at 253.

40. See P. Gillies, *A REPORT ON THE COST AND AVAILABILITY OF ASBESTOS-RELATED LIABILITY INSURANCE* 2 (1986). Premiums for asbestos abatement contractors generally run from fifteen to twenty percent of the gross contract price.

While lawyers, victims' advocates, judges, and members of the asbestos industry agree that asbestos related litigation is chaotic and out of control, solutions to this growing problem are not readily apparent.⁴¹ As it stands now, asbestos litigation is at a crossroads. Several federal district court judges have united all plaintiffs and defendants on their docket into large class actions.⁴²

Other federal judges are calling for congressional action. A committee headed by Supreme Court Chief Justice Rehnquist recommended that Congress enact legislation to "come to grips with the impending disaster relating to resolution of asbestos personal-injury disputes."⁴³

C. *Background of the Class Action*

The history of the class action suit can be traced to "a procedure invented by Chancery in the seventeenth century."⁴⁴ The device was utilized by the Courts of Chancery to allow an action to be brought by or against a large group of individuals.⁴⁵ Eventually, the American Federal Courts underwent procedural reform in the early twentieth century which brought the same "flexibility achieved by their British counterparts in the previous century."⁴⁶ Two theories of litigative representation have developed: One where a litigant presumably represents the interests of others and proceeds on their behalf, and the other where the litigant representative must obtain consent from the represented.⁴⁷

In order to initiate a class action suit, certification of the

41. *Untangling Asbestos Litigation*, NAT'L L. J., Mar. 18, 1991, at 1, col. 1.

42. *10 Federal Judges Agree on Plan to Consolidate Asbestos Lawsuits*, N.Y. Times, Aug. 11, 1990, at 1, col. 5. Ten federal district court judges with the heaviest caseloads agreed to consolidate tens of thousands of cases clogging dockets around the nation. This agreement is highly unusual, and was reached after a rare private meeting. The judges stated that their agreement would bring about a way for compensating more than 100,000 victims.

43. See *Untangling Asbestos Litigation*, *supra* note 41, at 30, col. 1.

44. Yeazell, *From Group Litigation to Class Action, Part II: The Industrialization of Group Litigation*, 27 UCLA L. REV. 1067 (1980).

45. *Id.* at 1067.

46. *Id.* at 1099.

47. *Id.* at 1068.

class is required.⁴⁸ Certification is perhaps the most critical stage in the life of a class action. The papers, hearings, and discovery inevitably presented by such litigation force the court to analyze the nature of the parties and the issues involved in the case.⁴⁹

There exist several types of class actions which may be certified.⁵⁰ Those which have been most commonly employed by school districts seeking legal redress from the asbestos industry are described below.

An "opt-out" class for compensatory damages is a commonly used class action.⁵¹ The prerequisites of this type of class action under Federal Rules of Civil Procedure section 23(b)(3) are as follows: First, section 23(a) must be satisfied. Section 23(a) requires that the class be so numerous that joinder of all members is impracticable, that there are questions of law or fact common to the class, that the claims or defenses or the representative parties are typical of the claims or defenses of the class, and that the representative parties will fairly and adequately protect the interests of the class as a whole.⁵² Next, an "opt-out" class action suit under 23(b)(3) requires that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy.⁵³

In the situations where 23(b)(3) applies, class action treatment is not clearly called for, but may nevertheless be desirable and convenient.⁵⁴ This class is considered an "opt-

48. FED. R. CIV. P. 23.

49. See *supra* notes 33-39 and accompanying text.

50. See generally *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986).

51. FED. R. CIV. P. 23(b)(3).

52. FED. R. CIV. P. 23(a).

53. FED. R. CIV. P. 23(b)(3). Under 23(b)(3) the court will examine the interests of members of the class in controlling individually the prosecution or defense of separate actions, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and the difficulties likely to be encountered in the management of a class action.

54. *Id.*

out" class because 23(c)(2) requires that parties in the class be given the best practicable notice under the circumstances and the option to be excluded from the class upon request.⁵⁵

The next type of class action that may be employed is one which seeks injunctive relief.⁵⁶ The prerequisites for this class action under the Federal Rule of Civil Procedure section 23(b)(2) are as follows: First, the requirements of 23(a) must be satisfied.⁵⁷ Next, section 23(b)(2) requires that the party (or parties) opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief.⁵⁸ This subdivision does not extend to situations in which the appropriate final relief relates exclusively or predominantly to money damages.⁵⁹

The last type of class action which has been commonly implemented by schools is a mandatory class for punitive damages.⁶⁰ The prerequisites for this type of class action certification under the Federal Rules of Civil Procedure section 23(b)(1)(B) are as follows: First, 23(a) must be satisfied.⁶¹ Second, 23(b)(1)(B) itself must be satisfied; this requires that adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interest of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest.⁶²

III. The Unique Burdens of Asbestos Abatement in Schools

An Environmental Protection Agency (EPA) survey estimates that asbestos is present in 31,000 schools.⁶³ According

55. *Id.*

56. FED. R. CIV. P. 23(b)(2).

57. FED. R. CIV. P. 23(a). *See supra* note 50 and accompanying text.

58. FED. R. CIV. P. 23(b)(2).

59. FED. R. CIV. P. 23(b)(2) advisory committee's note (1966).

60. FED. R. CIV. P. 23(b)(1)(B).

61. FED. R. CIV. P. 23(a). *See supra* note 48 and accompanying text.

62. FED. R. CIV. P. 23(b)(1)(B).

63. Environmental Protection Agency, GUIDANCE FOR CONTROLLING ASBESTOS-CONTAINING MATERIALS IN BUILDINGS, at S-1 (1985) (more commonly known as the

to EPA estimates, the cost of the asbestos removal in schools will be \$3.2 billion over the next thirty years.⁶⁴ The cost breakdown is as follows: Initial inspection and sampling, \$58.2 million; development and implementation of management plans, \$970.8 million; periodic surveillance, \$41.8 million; reinspection, \$34.7 million; special operations and maintenance programs, \$525.4 million; and abatement response actions, \$15.9 billion.⁶⁵ This will be a tremendous financial burden for the affected school districts to bear.⁶⁶

Asbestos has been used extensively in schools in such materials as cement products, fire-proofing textiles, wallboard, ceiling tile, thermal insulation, and a plethora of other building materials.⁶⁷

The health and safety of school children and school employees who study and work in these facilities is one of the stated purposes for asbestos abatement. The Asbestos School Hazard Detection and Control Act⁶⁸ details the various risks

"Purple Book") [hereinafter GUIDANCE].

64. Environmental Protection Agency, 52 Fed. Reg. 15,820, 15,834 (1987) (to be codified at 40 C.F.R. pt. 763)(proposed April 30, 1987).

65. *Id.*

66. Initially, Congress made provisions for public and private schools to obtain interest-free loans to accomplish the abatement mandated by the EPA. 20 U.S.C. §§ 3601-3611 (1988). "However, because of political and budgetary considerations, Congress refrained from making any appropriations for carrying out asbestos abatement remedial action. Instead, Congress directed the United States Attorney General to investigate and report to Congress which parties should bear the ultimate financial and legal responsibility for school asbestos abatement remedial action." *In re Asbestos School Litigation*, 104 F.R.D. at 425 (E.D. Pa. 1984). The Attorney General determined that schools could rely on existing state common law to recover from industry. *Id.* at 426. Yet, the EPA program regulating asbestos in schools is currently the most comprehensive asbestos program. See generally Macbeth, *Effect of the Laws of Toxic and Hazardous Contaminants on Real Estate Development*, 327 Real (Practicing. L. Inst.) 87 (1989).

Also, adding further insult to injury is a \$5,000 per day fine that will be levied against local educational agencies that fail to conduct an inspection or develop a management plan pursuant to the regulations. See generally 52 Fed. Reg. 15,820, 15,827 (1987)(to be codified at 40 C.F.R. pt. 763) (proposed April 30, 1987).

Section 4014(c)(1)(C) provides for the restoration of school buildings to conditions comparable to those existing before abatement activities were undertaken. 20 U.S.C. § 4014(c)(1)(C).

67. GUIDANCE, *supra* note 63, at 2.

68. 20 U.S.C. § 3601(a)(7) (1988).

which uniquely burden school facilities. The act states in pertinent part:

The Congress Finds that:

(1) exposure to asbestos fibers has been identified over a long period of time and by reputable medical and scientific evidence as significantly increasing the incidence of cancer and other severe or fatal diseases, such as asbestosis;

(2) medical evidence has suggested that children may be particularly vulnerable to environmentally induced cancers; . . .

(4) substantial amounts of asbestos, particularly in sprayed form, have been used in school buildings, especially during the period 1946 through 1972;

(5) partial surveys in some States have indicated that (A) in a number of school buildings materials containing asbestos fibers have become damaged or friable, causing asbestos fibers to dislodge into the air, and (B) asbestos concentrations far exceeding normal ambient air levels have been found in school buildings containing such damaged materials;

(6) the presence in school buildings of friable or easily damaged asbestos creates an unwarranted hazard to health of the school children and school employees who are exposed to such materials.⁶⁹

In order to avoid liability associated with asbestos, the school districts must question the reality of any threat by its presence.⁷⁰

Since 1982, the EPA has required school districts to conduct inspections to determine whether their buildings contain asbestos materials.⁷¹ But these requirements did not have a practical effect because no guidelines were established to determine what hazard level is sufficient to justify abatement or

69. *Id.* § 3601(a).

70. Bittle & McAllister, *Contracting For Asbestos Abatement: What You Need To Know*, 57 W. EDUC. L. REP. 1123 (1990).

71. 40 C.F.R. § 763.100(a) (1985).

removal.⁷²

In response, school systems were required by the Asbestos Hazard Emergency Response Act of 1986 (AHERA)⁷³ to begin the removal of asbestos in their facilities by July 1989.⁷⁴ AHERA creates an elaborate enforcement system which includes the power of the EPA to impose penalties and initiate civil suits against the school system and, in some instances, against the school administration.⁷⁵ Further, any person may file a complaint with the Administrator or Governor of the state in order to initiate an investigation and possible enforcement action.⁷⁶

School districts also are confronted with the possibility of negligence actions if they do not appropriately administer the removal of asbestos. Negligence actions may be based upon the selection of asbestos investigators and removal contracts, the choice of response actions, and the implementation of testing protocols.⁷⁷

School systems also face additional burdens related to asbestos hazards. The school district must ensure that short term workers (e.g. telephone repair workers or exterminators) are notified of the location of the asbestos-containing material.⁷⁸ The district must also designate and train a person to ensure that all abatement requirements are properly imple-

72. The Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. § 4011(a)(8) (1988).

73. 15 U.S.C. §§ 2641-2656 (1986).

74. *Id.* Section 2643(i)(1) states that the EPA "administrator shall promulgate regulations which require each local educational agency to develop an asbestos management plan for school buildings under its authority, to begin implementation of such plan within 990 days after October 2, 1986, and to complete implementation of such plan in a timely fashion."

Yet, many school districts had taken abatement procedures even before AHERA. See *Asbestos in Schools: Hearings Held on Adequacy of Federal efforts to Control Asbestos Hazards*, summarized in Andrews, ASBESTOS LITIG. REP. 9026, 9027 (1984).

75. To ensure compliance, Congress empowered the EPA to assess civil penalties for failure to conduct inspections, providing of false information, or failure to develop a management plan for asbestos abatement. A school district may be held liable for \$5,000 per day for noncompliance. 15 U.S.C. § 2647(a) (1986).

76. 15 U.S.C. § 2647(d).

77. *Id.* See generally Billaner, *Asbestos in Your Bedroom: Protection from the Latest Wave of Asbestos Litigation*, 60 N.Y. St. B. J. 12 (Feb. 1988).

78. 40 C.F.R. § 763.84(d), (h).

mented.⁷⁹ Moreover, the district is responsible for inspections, re-inspections, sampling, analyses, assessments, surveillance, labeling,⁸⁰ and record-keeping.⁸¹ In addition, the school system may also have to comply with more stringent state regulations regarding asbestos abatement.⁸²

Finally, asbestos installed in schools may not be a hazardous waste for which removal cost may be recovered⁸³ under Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).⁸⁴ Section 107(a)(2)(B) of CERCLA⁸⁵ creates a private cause of action to recover hazardous substance cleanup costs. The U.S. Court of Appeals for the Ninth Circuit stated in *3550 Stevens Creek Assoc. v. Barclays Bank of Cal.*⁸⁶ that structural asbestos is not waste "disposed of" within the meaning of Section 107(a) of CERCLA.⁸⁷ The court's decision precludes the schools from recovering damages under CERCLA for the costs of asbestos abatement. The court noted that disposals apply only to disposals of "solid waste" consisting of "any garbage, refuse, sludge. . .and other discarded material."⁸⁸ The court ruled that asbestos building materials do not fit into these categories.⁸⁹

79. 15 U.S.C. § 2646(a), (c) (1986).

80. 40 C.F.R. § 763.84 (1988).

81. *Id.* § 763.94(a).

82. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 278 (1st Cir. 1990). The court allowed a Massachusetts state agency to enforce its own asbestos abatement regulations. Although the state provisions increase the regulatory burden on employers, they are not preempted by federal rules because they strengthen rather than threaten the protection created by Congress. *Id.* The First Circuit stated that "[i]f the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is protection of the public." *Id.* at 280. Bittle & McAllister, *Contracting For Asbestos Abatement: What You Need To Know*, 57 W. EDUC. L. REP. 1123 (1990).

83. *3550 Stevens Creek Ass'n. v. Barclays Bank of California*, 915 F.2d 1355, 1363 (9th Cir. 1990).

84. 42 U.S.C. §§ 9601-9675 (1988).

85. *Id.* § 9607(a)(2)(B).

86. 915 F.2d 1355 (9th Cir. 1990).

87. *Id.* at 1363 (interpreting 42 U.S.C. §§ 9607(a)(2)(B)).

88. *Id.* at 1361.

89. *Id.*

IV. Advantages of the Class Action Suit for School Systems Affected

The remainder of this Comment will address the advantages and disadvantages of school systems affected by asbestos employing the class action suit to seek legal redress for the costs related to the asbestos abatement process. As detailed above, the plight of school districts burdened by asbestos is distinct from other asbestos plaintiffs. The class action suit may be a viable mechanism which enables the schools to gain legal redress for their unique problems. The implementation of class action suits by schools, however, is not without pitfalls.

A. In re School Asbestos Litigation

*In re School Asbestos Litigation*⁹⁰ is the preeminent authority on the use of class action suits in school district asbestos litigation. This class action involved a wide spectrum of private and public schools on a national scope. Appeals from the case are still being entertained,⁹¹ however, the litigation demonstrates the various benefits and burdens of the class action suit for schools affected by asbestos.

In *In re School Asbestos Litigation*,⁹² over 14,000 school districts across the nation⁹³ were represented in a class action seeking certification for compensatory and punitive damages and injunctive relief against asbestos manufacturers.⁹⁴

In re School Asbestos Litigation was the result of action by Congress in response to investigations by the EPA into the hazards of asbestos in schools.⁹⁵ Several school districts were forced by AHERA and EPA regulations to implement asbes-

90. 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

91. *See generally In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990).

92. *In re School Asbestos Litigation*, 104 F.R.D. 422 (E.D.Pa. 1984).

93. *Id.* at 428.

94. A class action suit permits one or more representatives of a class to sue or be sued in a representative capacity for the class. A class could be defined by similarly situated claims of relief against the tortfeasor. FED. R. CIV. P. 23. *See supra* notes 44-60 and accompanying text.

95. *In re Asbestos School Litigation*, 104 F.R.D. at 425 (1986).

tos abatement procedures.⁹⁶ Consequently, school districts sought legal relief in order to compensate for the enormous costs of asbestos removal. The school systems' claims were based upon theories of negligence, strict liability, intentional tort, breach of warranty, concert of action, and civil conspiracy.⁹⁷ The plaintiffs sought certification of a class of essentially all public and private school districts in the nation to recover the costs incurred in undertaking asbestos abatement removal.⁹⁸

The representative plaintiffs were four public school districts: the School District of Barnwell, South Carolina, which is located in the District of South Carolina; the School District of Lancaster, Pennsylvania, the Manheim Township School District, and the Lampeter-Strasburg School District, all of which are located in the Eastern District of Pennsylvania.⁹⁹ The defendants in these actions are members of the asbestos manufacturing industry.¹⁰⁰ They include all the major

96. *Id.* For example, under 15 U.S.C. § 2643(i)(1), "the [EPA] Administrator shall promulgate regulations which require each local educational agency to develop an asbestos management plan for school buildings under its authority, to begin implementation of such plan within 990 days after October 22, 1986, and to complete implementation of such plan in a timely fashion." 15 U.S.C. § 2643(i)(1) (1988).

97. *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3rd Cir.), *cert. denied*, 479 U.S. 852 (1986).

98. *Id.*

99. *In re School Asbestos Litigation*, 104 F.R.D. at 424 (E.D. Pa. 1984).

100. These included: Lake Asbestos of Quebec, Ltd., the Celotex Corp., Raymark Industries, Inc., Union Carbide Corp., Asbestospray Corp., Sprayo-Flake Co., National Gypsum Co., Sprayed Insulation, Inc., Asbestos Fibres, Inc., Dana Corp., U.S. Gypsum, U.S. Mineral Products Co., Sprayon Insulation & Acoustics, Inc., Sprayon Research Corp., Keene Corp., Worben Co., Inc., Wilkin Insulation Co., W.R. Grace & Co., Owens-Corning Fiberglas Corp., Standard Insulations, Inc., North American Asbestos Corp., Bell Asbestos Mines, Ltd., Asbestos Corporation Ltd., Southern Textile Corp., Owens-Illinois, Inc., Turner & Newall Ltd., the Flintkote Co., Fibreboard Corp., GAF Corp., Uniroyal, Inc., Cape Asbestos, Pfizer, Inc., Kaiser Cement Corp., Bes-Tex, Inc., Georgia-Pacific Corp., J.W. Roberts, Ltd., Proko Industries, Inc., Rock Wool Mfg., Co., Inc., Empire Ace Insulation Mfg., Corp., Eagle-Picher Industries, Inc., Forty-Eight Insulations, Inc., Combustion Engineering Inc., Lac d'Aminante du Quebec, Ltee., Carey-Canada, Inc., Brinco Mining, Ltd., formerly known as Cassiar Resource, Ltd., Turner Asbestos Fibres, Ltd., C. Tennant & Sons, Huxley Development Corp., Asten Group, Inc., H.K. Porter Co., Nicholet Industries, Armstrong Contracting & Supply Corp., Benjamin Foster Co., Pittsburgh Corning Corp., Armstrong World Indus., Inc., Worben Co., Inc.

producers of friable asbestos construction and insulation products of the type found in public and private schools throughout the nation and the principal suppliers of raw asbestos.¹⁰¹

All of the schools involved sought certification of two types of class actions.¹⁰² Additionally, some schools and asbestos producers favored certification of a third type of class action.¹⁰³ All of the school districts sought a class action for compensatory damages under section 23(b)(3) of the Federal Rules of Civil Procedure.¹⁰⁴ This type of class action allowed the school districts to seek damages incurred in the removal of asbestos and restoration of their facilities.¹⁰⁵

The next type of class certification which was desired by the schools involved injunctive relief under section 23(b)(2).¹⁰⁶ Additionally, the schools sought to proceed with a remedial action to recover restitution for expenditures already incurred in ameliorating asbestos hazards.¹⁰⁷

The last type of class action was sought by only some schools and some asbestos producers.¹⁰⁸ They desired certification of a mandatory class for punitive damages under the Federal Rules of Civil Procedure section 23(b)(1)(B).¹⁰⁹ This form of class action would force all school districts that seek

Johns-Manville Corporation was excluded from the suit because of pending bankruptcy proceedings. 104 F.R.D. at 425 (E.D.Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

101. See P. Gillies, A REPORT ON THE COST AND AVAILABILITY OF ASBESTOS-RELATED LIABILITY INSURANCE 2 (1986). Premiums for asbestos abatement contractors generally run from fifteen to twenty percent of the gross contract price.

102. *In re Asbestos School Litigation*, 104 F.R.D. at 426.

103. *Id.* at 426-27.

104. *In re School Asbestos Litigation*, 789 F.2d at 999; *see supra* notes 51-55 and accompanying text.

105. *In re Asbestos School Litigation*, 104 F.R.D. at 438; *see supra* notes 51-56 and accompanying text.

106. *In re Asbestos School Litigation*, 104 F.R.D. at 438; *see supra* notes 56-59 and accompanying text.

107. *In re Asbestos School Litigation*, 104 F.R.D. at 438.

108. *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

109. *In re Asbestos School Litigation*, 104 F.R.D. at 438 (E.D. Pa. 1984) 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *see Fed. R. Civ. P. 23* and *supra* text accompanying notes 60-62.

relief for the willful misconduct of the asbestos producers to participate in this suit.

The questions presented in *In re School Asbestos Litigation*¹¹⁰ were whether or not a class action was the appropriate legal mechanism to be applied in school litigation against asbestos producers, and, if appropriate, which type of class action should be applied by the court.¹¹¹

The United States Court of Appeals for the Third Circuit held that an opt-out class for compensatory damages under the Federal Rules of Civil Procedure section 23(b)(3) was properly certified by the district court.¹¹² The court found that this class action was beneficial to both the school districts and the judicial system because it minimized litigation while allowing school systems to pool their resources. A class requires "numerosity, existence of questions of law or fact common to the class, typicality of claims or defense, and adequacy of representation."¹¹³ The court concluded that an opt-out class of school districts did meet these criteria.¹¹⁴

The only serious challenge to these criteria was whether any "question of law or fact common to the class" existed.¹¹⁵ The Third Circuit found that common factual issues did exist. These included the "health hazards of asbestos, the defendants' knowledge of those dangers, the failure to warn or test, and the defendants' concert of action or conspiracy. . . ."¹¹⁶ The court concluded that the "threshold of commonality"¹¹⁷ need not be high but that there simply must exist significant intertwining of issues.¹¹⁸

Next, the Third Circuit ruled that injunctive relief in the form of remedial action and restitution for expenditures already incurred was actually an action for money damages and

110. 789 F.2d 996.

111. *Id.*

112. *Id.* at 1009.

113. *Id.* at 1002.

114. *Id.* at 1002-03.

115. *Id.* at 1009.

116. *Id.*

117. *Id.* at 1010.

118. *Id.*

denied certification as a class action under section 23(b)(2).¹¹⁹ This class may be certified when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief. . . ."¹²⁰ This class does not apply, however, when "the appropriate final relief relates exclusively or predominantly to money damages."¹²¹

Certification was also denied for a mandatory class for punitive damages¹²² under the Federal Rules of Civil Procedure section 23(b)(1)(B).¹²³ The Appellate Court found that neither the record nor the court's findings were adequate to support the mandatory class and that such a class may not accomplish the objectives for which it was created.¹²⁴ The Third Circuit held that certification would be unfair to other parties and perhaps to the school districts themselves.¹²⁵

Under this classification, a nation-wide class would have been created in which school districts could have sought damages for willful and wanton misconduct by asbestos producers.¹²⁶ This class was supported by several asbestos producers because they wished to have all punitive payments limited to this litigation.¹²⁷ Several school districts did not support this class certification because they believed their recovery would be diminished when divided among all the plaintiffs.¹²⁸

Clearly, *In re School Asbestos Litigation*¹²⁹ indicates the acceptability and the feasibility of certification and litigation of class action suits by school districts. This case establishes a

119. *Id.* at 999.

120. *Id.* at 1008.

121. *Id.*

122. *Id.* at 1002.

123. See *supra* notes 60-62 and accompanying text.

124. *In re School Asbestos Litigation*, 789 F.2d at 1005 (3d Cir. 1986).

125. *Id.*

126. Such damages may be based upon the scientific knowledge available to the asbestos manufacturers when they were producing the substance. If they did know of the dangers and did not act, they may have exposed themselves to tremendous punitive damages. See RESTATEMENT (SECOND) OF TORTS § 908 (1977).

127. *In re Asbestos School Litigation*, 104 F.R.D. at 426, 435-6.

128. *Id.* at 434.

129. 789 F.2d 996.

precedent for future litigation of a similar nature.

B. *Acceptability of Mass Tort Actions*

The volume of asbestos litigation poses a serious problem for tort law, which has traditionally provided for a "one-on-one" adjudication of claims.¹³⁰ In *In re School Asbestos Litigation*,¹³¹ the court found that there is a growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment.¹³² The court found that part of the previous reluctance to apply the class action to mass torts was rooted in the notion that plaintiffs have the right to choose their counsel and forum.¹³³ The court concluded that this factor had little, if any relevance, to the situation in *In re School Asbestos Litigation* because those claims were for property damage, and school districts are not likely to have strong emotional ties to the litigation.¹³⁴

Several other recent cases have addressed the issue of class action suits in mass-tort situations. These cases indicate that such actions are becoming increasingly acceptable and viable. In *In re "Agent Orange" Product Liability Litigation*¹³⁵ the court held that a class action is a proper method for adjudicating the claims of Vietnam veterans against the manufacturers of the chemical "Agent Orange".¹³⁶ In *In re Federal Skywalk Cases*¹³⁷ the court certified a class action of plaintiffs who were injured in the collapse of a Kansas City skywalk.

Several cases address the issue of class action suits in asbestos-related litigation. In *Jenkins v. Raymark Industries*,¹³⁸ the court certified a mass-tort class of plaintiffs with asbestos-

130. *In re Asbestos Litigation*, 829 F.2d 1233, 1235 (3d Cir. 1987).

131. 789 F.2d 996.

132. *Id.* at 1008. See Wright & Colussi, *supra* note 10.

133. 789 F.2d 996, 1009 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). See also *In re Northern Dist. of Cal., Dalkon Shield, etc.*, 693 F.2d 847, 851 (8th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

134. 789 F.2d at 1009.

135. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

136. *Id.* at 721.

137. 680 F.2d 1175, 1188 (8th Cir. 1982).

138. 782 F.2d 468 (5th Cir. 1986).

related claims. The court stated that the purpose of the class action is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion."¹³⁹ The court found that the asbestos claims satisfied this requirement.¹⁴⁰

In *In re Asbestos Litigation*,¹⁴¹ the Fifth Circuit certified a large class action for asbestos-related damages. The court concluded that "the formidable number of asbestos suits has prompted efforts to adapt the procedural framework of the existing tort system to the pressing demands of this massive litigation."¹⁴²

C. *The Race to the Courthouse*

Because of the recent increase in asbestos-related class action suits,¹⁴³ schools should quickly initiate their suits. There are several reasons why the schools should act swiftly. First, several federal judges have attempted to join all asbestos claims into large class actions.¹⁴⁴ Some attorneys estimate that 60,000 to 70,000 state asbestos cases also have yet to be addressed.¹⁴⁵ It appears that some state judges have indicated that they are also interested in consolidating such asbestos cases.¹⁴⁶ This consolidation trend further indicates that schools may be compelled to form class actions with non-school plaintiffs if they do not form their sole school system plaintiff class actions.

Because school districts are burdened with distinct and

139. *Id.* at 471 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982)).

140. *Id.* at 471.

141. 829 F.2d 1233 (5th Cir. 1987).

142. *Id.* at 1235.

143. *Judge Folds Asbestos Suits Into National Class Action*, N.Y. Times, July 17, 1990 at D1, col. 6.

144. *Id.* On July 29, 1991, 26,000 pending asbestos cases in the Eastern District of Pennsylvania were consolidated by the Judicial Panel on Multidistrict Litigation. *State Courts the Unknown Asbestos Factor*, NAT'L L.J., Aug. 12, 1991, at 6, col. 1.

145. *State Courts the Unknown Asbestos Factor*, NAT'L L.J., Aug. 12, 1991, at 6, col. 1.

146. *Id.*

difficult problems related to asbestos abatement,¹⁴⁷ it is in their interest to adjudicate their claims as a group, separate from other asbestos plaintiffs. The needs of the school districts must be addressed specifically, and not "lumped" together with all plaintiffs who may not have such significant and costly problems.

The court in *In re School Asbestos Litigation*¹⁴⁸ determined that the use of a 23(b)(3) class action for compensatory damages offers some hope of reducing the expenditure of time and money necessary to resolve the common issues in school district asbestos litigation suits.¹⁴⁹ This type of class action does not force school systems to participate in unwanted litigation.

Second, as detailed above,¹⁵⁰ the financial stability of the asbestos industry and its insurance companies demonstrates the need for school district class actions. If there is not enough money to fund all damage claims, it may be argued that schools should be given first opportunity to receive this money. A separate class action may be the most viable method of receiving these funds. The court in *In re School Asbestos Litigation* found that a 23(b)(3) class action for compensatory damages did not provide school districts with an unfair advantage in the pursuit of the asbestos producers' financial resources.¹⁵¹

It must be noted, however, that the court in *In re School Asbestos Litigation* found no evidence to indicate that the asbestos defendants' available assets would be insufficient to pay all claims.¹⁵² It is becoming more apparent, however, that these funds are quickly being depleted.¹⁵³

147. See *infra* notes 63-67 and accompanying text.

148. *In re School Asbestos Litigation*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

149. See *supra* notes 51-55 and accompanying text.

150. See *supra* notes 29-43 and accompanying text.

151. See *supra* notes 51-55 and accompanying text.

152. *In re School Asbestos Litigation*, 789 F.2d at 1003.

153. *Untangling Asbestos Litigation*, NAT'L L.J., Mar. 18, 1991, at 1, col. 1.

There have been several recent verdicts. In the Brooklyn Navy Yard case, a jury on January 23, 1991 awarded \$30.6 million to 52 plaintiffs. *In re New York Asbestos Litigation*, TS 90-9999. In Houston on January 30, 1991, a jury ordered five defend-

Third, the present Rule 23 added subdivision (c)(3), which prescribes that a judgment in a class action will include all the members of the class.¹⁵⁴ This indicates that judgment rendered on a class will be binding on all members of the class whether or not they actually intervene or participate in the suit. This subdivision could be used to force schools to accept the results of general asbestos class actions if the respective court determines that the school was, in fact, a member of that class. Rule 23 now meets the standard established by the Supreme Court in *Hansberry v. Lee*¹⁵⁵ to the effect that persons not parties to a class action may be bound by a judgment whenever the procedure adopted "fairly insures the protection of the interests of absent parties who are to be bound by it."¹⁵⁶

D. The Class Action may be the best method for receiving punitive damages

The implementation of class action suits by school districts is also important because it addresses the burgeoning and controversial issue of the use of punitive damages in mass-tort class action suits.¹⁵⁷ "The doctrine of punitive damages was developed during a time when litigation was strictly a two-party affair. . . ."¹⁵⁸ "The issue of punitive damages presents an especially difficult problem in the mass-tort context; in a system which relies primarily upon a case by case method of adjudication, the courts have no opportunity to weigh the punitive damages against a course of conduct that affects all of the claimants."¹⁵⁹

As a result of our system of one-on-one litigation, a na-

ants to pay \$40 million to 274 plaintiffs. *Chatam v. Armstrong Contracting & Supply Inc.* 85-018513 (Dist. Ct., Harris Co.).

154. FED R. Civ. P. 23(c)(3).

155. 311 U.S. 32 (1940).

156. *Id.* at 42.

157. Tobin, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457 (1989).

158. *Id.* at 462.

159. *Id.* at 458.

tional manufacturer of asbestos potentially faces thousands of claims.¹⁶⁰ If punitive damages are awarded to each individual plaintiff, the defendant is punished repeatedly for having engaged in a single course of conduct.¹⁶¹ In addition, plaintiffs may benefit from a single adjudication of punitive damages because this insures that punitive damage funds will not be eradicated prior to their adjudication.¹⁶²

Many commentators argue that mandatory class action suits eliminate the problems of overkill and windfall.¹⁶³ In other words, the class action prevents a string of large judgments against a defendant and it also precludes an abnormally large damage award to a single individual. Also, the commentators contend that the mandatory class allows all injured plaintiffs to recover punitive damages in shares proportionate to their compensatory recovery.¹⁶⁴ No single recovery will constitute a windfall because plaintiffs will only recover damage awards when other similarly situated plaintiffs recover awards as well.¹⁶⁵

Recent case law also supports the imposition of punitive damages in class action suits. The court in *Racich v. Celotex Corp.*¹⁶⁶ held that punitive damages could be awarded in products liability suits based upon exposure to asbestos products. The court found that imposing punitive damages in this action did not violate excessive fines or cruel and unusual punishment clauses of the eighth amendment.¹⁶⁷

The court in *In re School Asbestos Litigation* refused to grant certification of a mandatory class for punitive damages.¹⁶⁸ This type of class action would have forced all concerned school districts to litigate their punitive damage claims at one time. The court in *In re School Asbestos Litigation*

160. *Id.* at 462.

161. *Id.* at 469.

162. *Id.* at 466-67.

163. *Id.* at 466.

164. *Id.* at 466.

165. *Id.* at 462-63.

166. 887 F.2d 393 (2d Cir. 1989).

167. *Id.* at 397.

168. 789 F.2d 996, 1006-07 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

cited *In re Federal Skywalk Cases*¹⁶⁹ in which the dissenting opinion called for a limit to the number of times a defendant may be punished for a single wrong.¹⁷⁰ However, the appellate court in *In re School Asbestos Litigation* decided that these concerns did not warrant the certification of a mandatory class for punitive damages.¹⁷¹

Yet, the Third Circuit in *In re School Asbestos Litigation* did address the merits of granting punitive damages in asbestos-related cases.¹⁷² The court weighed the benefits derived from the continued imposition of punitive damages against the economic consequences of such an action.¹⁷³ It found that while punitive damages can be granted in asbestos related cases, they should be limited because they significantly diminish the funds available for future compensatory awards.¹⁷⁴

V. Disadvantages of the Class Action Suit

A. *The Benefits of Individual Law Suits*

A class action may not be in the best interest of the affected school districts.¹⁷⁵ The court in *In re School Asbestos Litigation* reasoned that if a limit to the funds available for asbestos damages exists, the school districts may be prejudiced in their opportunity to share in the available funds.¹⁷⁶ The thousands of other claimants who seek punitive damages from the asbestos defendants need not operate within the confines of a mandatory class procedure and they may be able to obtain damage awards more quickly.¹⁷⁷ These arguments must be analyzed with the realization that many courts favor consolidation of asbestos suits.¹⁷⁸

169. 680 F.2d 1175 (8th Cir. 1982).

170. *Id.* at 1188.

171. *In re School Asbestos Litigation*, 789 F.2d at 1002-08 and text accompanying notes 120-25.

172. 789 F.2d at 1008.

173. *Id.* at 1004-08.

174. *Id.* at 1005.

175. *See supra* notes 122-25 and accompanying text.

176. 789 F.2d at 1005.

177. *Id.* at 1006.

178. *Ten Federal Judges Agree on Plan To Consolidate Asbestos Lawsuits*, N.Y.

In addition, the possibility that a class action might be used to adjudicate the claims arising out of a mass tort is unattractive to those who contend that the device is inconsistent with the time-honored practice in personal injury cases.¹⁷⁹ Others argue that use of this procedure may encourage the unseemly solicitation of legal business.¹⁸⁰ Also, the alleged tortfeasor's defenses may depend on facts peculiar to each plaintiff, creating a risk that they may be submerged by the overall magnitude of the litigation or that individual issues actually predominate so that a class action really would not be economical or expeditious.¹⁸¹

B. *The Disadvantages of Awarding Punitive Damages in Class Action Suits*

Courts may be hesitant to grant the school districts punitive damages before any other aggrieved party is awarded compensatory damages.¹⁸² Clearly, "if school boards are allowed punitive damages against such manufacturers, compensation may ultimately come out of the pockets of victims of asbestos-related diseases."¹⁸³

In *In re School Asbestos Litigation*, the Third Circuit found that a mandatory class for punitive damages was not warranted because the class was underinclusive.¹⁸⁴ The court noted that school districts make up only a portion of the asbestos-related litigation and allowing school districts a mandatory class may injure other parties.¹⁸⁵ It contrasted the situation in *In re "Agent Orange" Product Liability Litigation*.¹⁸⁶ The court in that case held that "the court had control

Times, Aug. 11, 1990, at 1, col. 5.

179. WRIGHT, MILLER & KANE, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 2d § 1783 (1969).

180. *Id.*

181. *Id.*

182. *In re School Asbestos Litigation*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

183. Brenza, *Asbestos in Schools and the Economic Loss Doctrine*, 54 U. CHI. L. REV. 277, 279 (1987).

184. *In re School Asbestos Litigation*, 789 F.2d at 1006.

185. *Id.*

186. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.),

over all those affected and could hope to carry out the basic premise of class action parity for all victims and reduction of litigation expenses for all parties."¹⁸⁷

In addition, the court in *In re School Asbestos Litigation* held that it is not conclusive that individual law suits for punitive damages would, as a practical matter, exclude future recovery of punitive damages by other school districts or other claimants.¹⁸⁸ Moreover, the court concluded that there was no indication that the asbestos producers must have the punitive damages resolved in this one suit or face financial ruin.¹⁸⁹

VI. Conclusion

Clearly, the law of asbestos litigation must evolve. Asbestos is too dangerous to ignore and yet too expensive to clean up. The class action suit may be a method with which this change can be adequately facilitated. Moreover, school systems have a tremendous stake in the evolution of these laws and the procedural devices used to manipulate such laws.

The United States Third Circuit Court of Appeals clearly wished to aid the school districts and, to some extent, did provide a remedy by certifying an opt-out class for compensatory relief. Yet, even if these schools receive these damage awards, they still may require additional funding to mitigate the cost of asbestos abatement. If an efficient vehicle through which school districts can maintain actions for punitive damages cannot be found, other forms of funding may be required.

The federal government may be one answer. The need for government underwriting of insurance costs may be necessary.¹⁹⁰ This would provide additional monies for damage awards and settlement resolutions. Another solution may be increases in government funding for school district clean up efforts. While the funds allocated now are substantial, they

cert. denied, 465 U.S. 1067 (1984).

187. *In re School Asbestos Litigation*, 789 F.2d 1005.

188. *Id.* at 1005-06.

189. *Id.*

190. See Comment, *Asbestos Abatement (The Insurance Crisis): A Solution is Still Up in the Ambient Air*, 38 SYRACUSE L. REV. 1343, 1346 (1987).

are not satisfactory.¹⁹¹ Lastly, the courts may have to allow mandatory class actions for aggrieved parties such as school districts. If there is not enough money to compensate all parties, then perhaps certain specific groups, such as schools, should be allowed to and required to litigate for these funds as a unit.

191. *Id.* at 1346.