

**Commentary****Comparative Notes On The Asbestos Trust Fund**

**By**  
**Andrea Boggio**

*[Editor's Note: In April 2003, Andrea Boggio was awarded a JSD degree from Stanford Law School defending the dissertation "The Puzzle of Mass Torts: A Comparative Study of Asbestos Litigation." The author welcomes comments at [andrea@andreboggio.com](mailto:andrea@andreboggio.com). Copyright 2003 by the author.]*

**I. Introduction**

A Bill proposing the establishment of a Trust Fund for the compensation of asbestos victims is slowly making its way through the law-making process of the U.S. Congress. The Trust Fund will certainly be an exceptional event in the history of the American litigation process. Establishing the Asbestos Trust Fund is not only a great political effort, it presents difficult legal questions on what are the best measures that will provide compensation efficiently and fairly to today and future asbestos victims.

In the last few years I have researched administrative compensatory schemes in three European countries — Belgium, Italy, and England ("researched countries"). European compensatory schemes originate from legal, institutional, and cultural traditions that are very distant from the political circumstances of the United States. Furthermore, European systems rely on public insurance schemes, which are mechanisms very different from trust funds. However, it is worthwhile sharing a few remarks that the comparative analysis suggests, which are meant to be neither policy recommendations nor an academic analysis of the proposed Bill. They are presented here as a source of critical thinking for U.S. policymakers in order for them to be aware of common traits and pitfalls of European compensatory schemes.

**II. Comparative Notes: Compensation Of Asbestos Victims: Growing Claims And The Role Of Public Insurance Schemes**

All researched countries have public compensation schemes for asbestos victims, which are mandatory public insurance schemes for all occupational injuries and illnesses, including any asbestos-related disease ("ARD"). Public insurance schemes may be categorized based on the different ways of defining which occupational diseases are compensated. Three categories are commonly found: (1) the system may adopt a broad definition of occupational disease (United States); (2) the system may be "mixed," i.e. certain diseases are prescribed as occupational by law and are thus presumed to be occupational in origin (Belgium and Italy); or (3) the scheme may have a "pure list system" where only prescribed diseases may be compensated as occupational in origin (England). In "mixed" systems, the claimant who alleges a prescribed (or listed) disease, does not have to prove the causal link between occupational exposure and disease. He/she simply must show the existence of the disease and the occupational exposure in the type of work prescribed in relation to that particular disease.<sup>1</sup> If the claimant seek recovery for a disease that is not listed, he/she must prove exposure to asbestos fibers, that the existence of a disease may be linked to the exposure to asbestos, and that the exposure to asbestos was the proximate cause of the disease.

In all the researched countries, several ARDs are recognized as prescribed diseases by law. Furthermore, the list of ARDs that the scheme compensate tend to be cross-nationally consistent (Table I.) Overall, lung cancers but not non-disabling pleural plaques — although the level of disability required is close to 0% — are compensated. However, the disabling nature of pleural plaques and the link between lung

cancer and asbestos exposure are controversial, and often an area of extensive negotiation between advocates and policymakers, of litigation between claimants and medical boards. In several instances, courts have been eventually asked to solve those issues.

Damages awarded under compulsory insurance schemes are normally limited to economic damages resulting from inability to work, lost wages, and medical expenses. Maximum damages are also normally capped. While medical expenses are fully compensated, the level of awards for lost wages varies from country to country. While Italy, Greece, and Spain grant awards fully compensating lost wages, all other countries compensate only a portion of them.

**A. Requirements For Compensation: Occupational Exposure And Degrees Of Disablement**

To receive compensation, asbestos claimants must show evidence that the ARD is linked to occupational exposure to asbestos — unless the link is presumptively assessed by the law — and that the disease causes a certain level of disablement.

**1. Occupational Exposure**

In all researched countries, administrative schemes provide compensation exclusively to claimants with a history of occupational exposure to asbestos. Thus, non-occupational exposure claimants cannot take advantage of the public insurance schemes for occupational diseases. There are two kinds of non-occupational exposure claims. The first group is represented by claims brought by workers — typically independent contractors and in several instances white-collar employees — who were exposed during the course of an employment that is not covered under the scheme. A second group is represented by claims for exposure to asbestos in the environment, without links to any employment, and is typically brought by housewives and individuals who were exposed while living near an asbestos factory. The data collected show that a great number of victims of non-occupational exposure to asbestos receive no compensation because they do not qualify to claim benefits from the public schemes and have very limited access to courts, mostly because of the difficulties of establishing liability against an asbestos manufacturer.<sup>2</sup>

**2. Level Of Disability**

Some degree of disability is required to be compensated. Thus, unimpaired claimants are never compensated under the compulsory insurance schemes. The percentage of disability required in order to qualify for compensation varies from country to country.<sup>3</sup> The range of disability required in the researched countries varies from 1% to 14%. It is hard to argue, however, that one can distinguish a disablement equal to 1% from being unimpaired. Furthermore, one of the Italian benefits makes an exception to the general rule that some degree of disablement is required to receive compensation. In fact, Italian unimpaired workers who were exposed to asbestos for more than 10 years are entitled to receive a small benefit (1.5% pension multiplier).<sup>4</sup> It is interesting to note that in England, where statistics are available, the majority of claims are for disabilities assessed between 1% and 13%. Of the 2,265 claims assessed in quarter 4 of 2002, 1,300 were at 1% to 13% and “only” 270 were at 95% to 100%.<sup>5</sup>

**B. Growth In The Number Of ARD Claims**

The number of ARD claims is growing in the researched countries and beyond. While growth rates vary, the number of claims brought as both personal injury cases and as claims seeking compensation from compulsory public insurance schemes for occupational disease have grown in the past two decades. Recent statistics show that the number of mesothelioma claims under the English disability scheme increased substantially in 2000-2001 (41% increase).<sup>6</sup> Statistics also indicated that overall the number of accident and disease claims was 4% lower than in the same quarter in 2000, but that the number of newly diagnosed prescribed diseases increased by one fifth from the year 2000. Claims have further increased between 2000 and 2002: while 160 mesotheliomas were diagnosed in the last quarter of 2000,

275 were diagnosed in the last quarter of 2002.<sup>7</sup> In Italy, the National Fund's budget has increased tenfold with respect to the original predictions since the number of claims filed in the last year has greatly exceeded such predictions.<sup>8</sup> In Belgium, the number of mesothelioma cases rose from 25 per year in 1990 to 60 in 1997, 65 in 2000, and 59 in 2002.<sup>9</sup> The data are consistent with the general growth of occupational disease claims in Europe,<sup>10</sup> and with the data in the United States. A 2002 RAND study indicates that, "[o]ver the past decade, the number of claims filed annually against [five major] defendants increased substantially."<sup>11</sup>

Research of occupational diseases reporting data of 13 European countries concludes that between 1990 and 1998, "after a partial decline in certain EU-member countries the number of occupational diseases has grown in 1999 . . . because of progression of justice that gives more visibility to the diseases."<sup>12</sup> An increase of claims frequency was also reported in a 2002 Munich Re Group research report analyzing the impact of the introduction of "mixed" systems on the filing of occupational diseases claims.<sup>13</sup> The study reports an increase in claims frequency in both Belgium (1990-2002) and Italy (1988-2002).<sup>14</sup>

### **C. *Victims Have Extensively Sought Compensation From Public Schemes***

Data show that asbestos victims who have sought compensation because they were affected by an ARD have filed a claim with the compulsory insurance schemes in virtually all cases. In a smaller number of cases — and if litigation were possible — claimants have also sought compensation in court. Furthermore, individuals who are not entitled to file a claim with the insurance scheme have rarely filed lawsuits in courts.<sup>15</sup> Asbestos victims have been fairly successful in claiming benefits from the social insurance schemes. In "mixed" systems, more than 9 out of 10 claims alleging prescribed diseases are successful. Furthermore, the rate of success of claims alleging prescribed diseases is much higher than claims alleging non-prescribed diseases (Table II.) Applied to the asbestos context, the statistics show that ARD claims have a high rate of success (between 90% and 98.6%), a figure very close to the rate that claims filed are settled in the United States. In 2002, RAND found that "relatively few asbestos cases have reached verdict [and that] asbestos trial rate seems substantially lower than the norm."<sup>16</sup>

### **D. *Relationship With Litigation***

There are different basic arrangements of public insurance systems that are based either on (1) different notions of indemnifiable occupational disease, or (2) on whether or not to allow claimants to file both a claim with the public insurance scheme and a personal injury action.

Public insurance schemes for occupational injuries may differ because of the different balance between claims filed with the scheme and litigation in courts. Three models are possible. First — as happens in the United States, France, and Belgium — the public insurance scheme may prevent claimants from commencing litigation for occupational diseases against the (former) employer. Although the law usually provides that the instances of employer's intentional conduct are exempted, asbestos claimants can rarely have a claim against the employer in courts. However, claimants are not prevented from litigating their claims under other theories of law. In the United States, litigation against third-party defendants developed very early under the wings of liability for defective products in order to avoid the limitations of the workers' compensation system.<sup>17</sup> On the other hand, the doors of third-party defendant litigation have been almost invariably closed to Belgian and French claimants.

Under a second model (England), litigation and insurance schemes are simultaneous and parallel avenues for the compensation of different damages. English asbestos victims may claim identical damages from both systems. Although multiple sources of compensation area available, double recovery is not allowed. "[The] benefits [that the IIDB Scheme pays] are deducted in full (for a period) from the plaintiff's damages but the deduction is used to reimburse the Secretary of State."<sup>18</sup> Under this system, the defendant (or the defendant's insurer) applies for a certificate of recoverable damages. The certificate reports "the social benefits payable to the plaintiff during the five years immediately following the accident or until the making of the compensation payment, whichever is earlier."<sup>19</sup> The amount of benefit already awarded to the plaintiff is deducted from the damages and paid to the Secretary of State.<sup>20</sup>

A third arrangement (Italy) provides that litigation in courts and claims with the schemes are simultaneous but separate avenues. Italian claimants may recover lost wages, loss of working capacity, medical expenses, and physical impairment from the national mandatory scheme for occupational disease, and recover all other damages — mostly non-pecuniary damages — in litigation against the employer. In the cases when the claimant is successful in both avenues, the winning plaintiff may only recover damages that were not previously paid from the scheme, and the administration may file an action for indemnity. In several instances, a share of the administrative award has been used to fund the personal injury litigation, thus overcoming the difficulties funding litigation in courts in the absence of contingency fee agreements.

#### ***E. Litigation Within The Scheme***

Claims are adjudicated through an administrative process. The claimant must file an application. Legal representation is never required, nevertheless a small number of claimants seek representation by an attorney. During the process, legal support is often provided by unions and supporting groups. After the application, an administrative panel, comprising both experts and bureaucrats, assesses the level of disability and the occupational nature of the claimant's exposure.<sup>21</sup> The process is usually fairly short: the data show that the average delay between the filing and award is 11 months in Belgium and 3-1/2 years in Italy.<sup>22</sup> Statistics of the delay in England are not available, but the Department for Work and Pensions reports "[t]here can be a considerable delay from the time of claim to the diagnosis and subsequent benefit assessment."<sup>23</sup>

In all the researched countries, claimants have remedies if the application is not granted or if they are dissatisfied with the outcome of the process. In Italy, claimants may commence a civil lawsuit in ordinary courts aiming to declare whether the action taken by the Fund administration was proper or not. Similarly, Belgian claimants may appeal to a special labor tribunal. Finally, in England, disability benefit claimants may appeal to an administrative tribunal for questions of fact and to a Social Security Commissioner (or Commission) for questions of law. In all systems, claimants may challenge the first instance judgments in higher courts. The data show that about 10% of denials turn into appeals. Moreover, in Italy the majority of appeals are successful (i.e. the claimants receive the benefit at the end of the process), and about 50% of them are successful in Belgium.<sup>24</sup> The evidence collected during the interviews suggests that, at least in the case of ARDs, claimants tend to appeal "borderline" cases, i.e., cases that present factual issues that are new or that are ordinarily rejected. Moreover, unions and supporting groups are willing to assist appeals in these kinds of claims because success may often result in the extension of the benefit to new categories of claims.

#### ***F. Funding***

Although several schemes are contributory, i.e., requiring an employer's contributory payment, the systems of the England and other European countries are mostly financed from the general taxation. Public money, in fact, provides most of the funding for compensating the claims and for covering the expenditure of the public bodies that manage the schemes.

#### ***G. Adaptive Arrangements***

European public insurance schemes have proven to be adaptive arrangements. In fact, over the course of the past two decades, the list of compensable diseases has expanded in response to new medical evidence and political circumstances, the level of disability required to get compensation has changed, and the amounts of the recoveries have been adjusted because of the increasing cost of living.

### ***III. Conclusive Remarks***

Comparative analysis may inform difficult legal choices that policymakers face in establishing the Asbestos Trust Fund. The study of three European systems points out four major themes. First, asbestos claimants qualify for compensation at very low levels of disability. Furthermore, Italian claimants receive a small compensation even if unimpaired, as long as they have been exposed for more than 10 years

to asbestos during their employments. Second, the data show that the required level of the disability is lower if compensation from other sources is unlikely. In other words, public insurance schemes of countries where filing asbestos personal injury lawsuits is difficult, require low levels of disability. Thus, where redress in courts is less difficult to pursue, governments were able to require higher level of disability before compensating claimants. On the other hand, where personal injury lawsuits are barred, advocates were very successful in negotiating very low disablement requirements. Third, even though employers are required to make a periodic contribution, the schemes are essentially funded by public money. In fact, the contributions do not cover the costs of the increasing number of claims processed and compensated by the schemes. Fourth, even if compensatory schemes are in place, litigation has flourished both “within” the scheme — challenging the medical assessment and the occupational origin of the ARD — and “outside” the scheme against former employers and, in few instances, against third-party manufacturers — seeking to establish liability in tort in either civil lawsuits (England and Belgium) or by joining ongoing criminal cases (Italy).

**IV. Appendix**

Table I — Prescribed ARD diseases and percentage of disability required in order to qualify for compensation

COUNTRY	PRESCRIBED ARD DISEASES	MINIMUM % OF DISABILITY
BELGIUM	Mesothelioma	1%
	Lung cancer	1%
	Pleural plaques/pleural thickening	1%
	Larynx cancer	1%
ITALY	Mesothelioma	6%
	Lung cancer	6%
	Pleural plaques/pleural thickening	6%
ENGLAND	Mesothelioma	1%
	Lung cancer	1%
	Pleural plaques/pleural thickening	14%

Table II - Percentage of awards for occupational diseases<sup>25</sup>

COUNTRY	% AWARDS FOR PRESCRIBED DISEASES	% OF AWARDS FOR NON-PRESCRIBED DISEASES
Denmark	90 %	10 %
Italy	91,8%	8,2%
France	96,3%	3,6
Belgium	98,4%	1,6%
Portugal	98,6%	1,4 %

**ENDNOTES**

1. Prescribed disease claims in England have a similar regime of proof.
2. In Europe, very few cases have been brought against third-party defendants.
3. In all the researched countries, claimants may seek revision of the award or file a new claim if their conditions eventually deteriorate or they develop a new ARD.
4. Two social benefits are available to Italian asbestos victims: a pension multiplier to those sick and to those exposed to asbestos for more than 10 years whether impaired or not; and the public insurance scheme recovery for occupational diseases.
5. Department for Work and Pensions, Industrial Injuries Disablement Benefit Quarterly Statistics: December 2002, Table 2.2, available at [http://www.dwp.gov.uk/asd/asd1/iidb/iidb\\_quarterly\\_dec02.html](http://www.dwp.gov.uk/asd/asd1/iidb/iidb_quarterly_dec02.html).
6. Department for Work and Pensions, Industrial Injuries Disablement Benefit Statistics — Quarter ending December 31, 2002, available at [http://www.dwp.gov.uk/asd/asd1/iidb/iidb\\_quarterly\\_dec02.html](http://www.dwp.gov.uk/asd/asd1/iidb/iidb_quarterly_dec02.html). The statistics are based on a 100% count of IIDB claims.
7. Department for Work and Pensions, Industrial Injuries Disablement Benefit Quarterly Statistics: December 2002, Table 2.1, available at [http://www.dwp.gov.uk/asd/asd1/iidb/iidb\\_quarterly\\_dec02.html](http://www.dwp.gov.uk/asd/asd1/iidb/iidb_quarterly_dec02.html).
8. The Italian Constitutional Court discusses the discrepancies between predictions and filing rates. Corte Cost., 12 January 2000, n.5 (Italy).
9. FMP data, available at [http://www.alain-destexhe.com/proposition\\_loi\\_fonds\\_amiante.htm](http://www.alain-destexhe.com/proposition_loi_fonds_amiante.htm).
10. Douglas W. Henderson et al., *Asbestos, Asbestos, and Cancer: the Helsinki Criteria for Diagnosis and Attribution*, 23 SCAND. J. WORK ENVIRON. HEALTH 311 (1997); see also Dennis Cauchon, *The Asbestos Epidemic — A Global Crisis*, USA TODAY, Feb. 8, 1999; Maria Albin et al., *Asbestos and Cancer: An Overview of Current Trends in Europe*, 107 ENV. HEALTH PERSP., Suppl.2, 289-98 (1999).
11. Stephen Carroll et al., *Asbestos Litigation Costs and Compensation. An Interim Report 42* (RAND 2002).
12. Danielle De Brucq, *Une Vaste Enquête: “Les Maladies Professionnelles en Europe” “Déclaration, Reconnaissance et Indemnisation,”* in 2 REVUE BELGE DE SÉCURITÉ SOCIALE 367, 383-84 (2001).
13. Münchener Rück, Munich Re Group, *Occupational Diseases. How are they covered under workers' compensation systems?* 18 (2002).
14. The report indicates that the increase took place also in France (from 1993), in Denmark (from 1976), and in Sweden (from 1977).
15. The evidence also shows that most asbestos claimants have sought compensation of ARDs as occupational diseases, and that occupational exposure claims are compensated at a substantially higher rate than non-occupational exposure claims. The analysis of personal injury litigation exceeds the scope of these notes. For further information, Andrea Boggio, *The Puzzle of Mass Torts: A Comparative Study of Asbestos Litigation* (2003)(unpublished J.S.D. dissertation, Stanford University) (on file with the author).
16. Carroll et al., *supra* note 11, at 56 (reporting 527 trial verdicts out of the more than 600,000 claims that have been filed since the beginning of asbestos litigation).

17. In 1973, the Fifth Circuit in *Borel v. Fibreboard Prods., Corp.*, 493 F.2 1076, 1096 (5th Cir. 1973), provided a way around the strict limits on worker liability claims by allowing suits against third-party asbestos manufacturers. Richard Epstein persuasively argued that *Borel* represented a major change in worker compensation to retroactively converting these cases, with their limitations on liabilities, into tort suits that allowed product liability laws to be used as litigation tools against asbestos manufacturers and suppliers. Richard Epstein, *Manville: The Bankruptcy of Product Liability Law*, 6 REG. 15, 44 (1982).
18. HORTON ROGERS, W.V. WINFIELD AND JOLOWICZ ON TORT 779 (15th ed. Sweet and Maxwell 1998).
19. *Id.* The document has to be requested both if the payment is due because of a judgment or as an out-of-court settlement.
20. The deduction is limited to damages that have an equivalent benefit. Thus, damages for loss of earnings, cost of care, and loss of mobility are deductible, but damages for pain and suffering and loss of amenity are not.
21. Administrative decision-makers may have technical expertise to adjudicate the claim or may receive the support of other bodies with greater scientific expertise.
22. *Id.* at 371.
23. Department for Work and Pensions, Industrial Injuries Disablement Benefit Statistics – Quarter ending June 2001, available at <http://www.dss.gov.uk/asd/iidb.pdf>.
24. De Brucq, *supra* note 12, at 373.
25. *Id.* at 372. ■