

NOTE

ASBESTOS LAWSUITS IN RUSSIA: BRING ONE IF YOU CAN

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I. INTRODUCTION

Once known as a miracle material used by emperors¹ and priests² to entertain the crowds with its nonflammable qualities, asbestos is now known as a toxic material that causes cancer.³ Despite asbestos' ill fame, the market for the toxic material keeps booming, especially in the developing countries and emerging markets.⁴ The health considerations of asbestos exposure tend to be overlooked due to the durability and the cost-effectiveness of the material.⁵ What also tends to be overlooked is the ability of the people whose health has been compromised to recover their damages in court.

This Note explores the realities of asbestos litigation in the Russian Federation. Russia is the world's largest producer of asbestos, producing almost fifty percent of global asbestos output.⁶ Two Russian corporations—UralAsbest and Orenburg Minerals—are responsible for the production of over one million tons of asbestos per year.⁷ Russia exports approximately \$100 million worth of asbestos annually, which makes it one of the key industries in the country.⁸ Russia is also the world's third largest consumer of asbestos-containing products.⁹ In

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¹ *History of Asbestos Use*, MESOTHELIOMA CANCER ALLIANCE, <http://www.mesothelioma.com/asbestos-cancer/asbestos-history.htm> (last visited Jan. 12, 2013). "Legend has it that an early Roman emperor used to marvel at the fact that he could throw his asbestos tablecloth into the fire after meals and it would emerge clean and unscathed." *Id.*

² *Khrizotilovyĭ Asbest—Mify i Real'nost'* [*Chrysotile Asbestos—Myths and Realities*], ECOACCORD.ORG (Mar. 2009), <http://www.ecoaccord.org/pop/doc/asbest.doc>. Another legend has it that around 1300 B.C., Chinese and Indian priests wore clothes made from asbestos threads, in which they could enter into and emerge from the fire without being burnt, to the astonishment of the crowds. *Id.*

³ RICHARD DOLL & JULIAN PETO, HEALTH AND SAFETY COMMISSION, EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985).

⁴ Joseph LaDou, *The Asbestos Cancer Epidemic*, 112(3) ENVTL. HEALTH PERSPECTIVES 285, 288 (Mar. 2004).

⁵ *Id.*

⁶ Roman Shleynov, *The World's Asbestos Behemoth*, THE CENTER FOR PUBLIC INTEGRITY, <http://www.publicintegrity.org/2010/07/21/3447/worlds-asbestos-behemoth> (last modified Feb. 2, 2012).

⁷ *Id.*

⁸ *Khrizotilovyĭ Asbest—Mify i Real'nost'*, *supra* note 2; LaDou, *supra* note 4.

⁹ Shleynov, *supra* note 6.

2007 alone, Russia consumed more than 333,000 tons of asbestos.¹⁰ Not surprisingly, the asbestos industry is strongly backed by the Russian government, and the opposition at the grass-roots level is close to non-existent.¹¹

High rates of production and consumption of asbestos in Russia naturally translate into high rates of asbestos-related illnesses and deaths; the annual asbestos-related death toll reached 10,400 in 2005.¹² Despite this fact, asbestos claims remain un-litigated in Russia. There is no reliable record of any asbestos cases being brought to court,¹³ nor is there any record of asbestos victims having received relief through the court system during the last two decades.¹⁴ The fact that the key dispute resolution forum—the court—remains unused by the victims of asbestos exposure raises a crucial and somewhat overlooked issue: are there particular obstacles that deter potential asbestos litigants from seeking redress via the Russian court system? And, if the answer to this question is in the affirmative, what can be done to overcome these obstacles?

This Note will address both issues. It will argue that the unique combination of socioeconomic and legal factors deters Russian asbestos victims from bringing their claims to court. After a brief discussion of the current global asbestos situation in Part II, Part III will focus on the asbestos situation in Russia. It will discuss current trends in the production, export and usage of the toxic material, as well as the economic, political and social significance of the industry. It will argue that the duopolistic nature of the industry, combined with unfaltering government support and lack of regulatory action, creates an

¹⁰ *Id.*

¹¹ *Asbestos Alert: Russia Says No to Asbestos Ban, Claims Asbestos Is Not Dangerous*, MESOTHELIOMA CANCER ALLIANCE (May 6, 2010), <http://www.mesothelioma.com/news/2010/5/asbestos-alert-russia-says-no-to-asbestos-ban-claims-asbestos-is-not-dangerous.htm>.

¹² *Mesothelioma & Asbestos Worldwide*, ASBESTOS.COM, <http://www.asbestos.com/mesothelioma/related-issues.php> (last modified Sept. 18, 2012).

¹³ Carlos Bianchi et al., *Malignant Mesothelioma in Central and Eastern Europe*, ACTA MEDICA CROATICA 161 (2000). Not only is there no record of any asbestos case being brought to court, there is no official record as to the levels of asbestosis and mesothelioma. *Id.*

¹⁴ ALEKSANDR TRANIN, INSTITUTE OF STATE AND LAW RUSSIAN ACADEMY OF SCIENCES, *ÈKOLOGICHESKI NEBLAGOPOLUCHNYE TERRITORI: PONIATIE, ZAKONODATEL'STVO, PRAKTIKA* [Areas of Ecological Concern: Concepts, Legislation, Practice] (2012), *available at* <http://www.igpran.ru/public/articles/TraninA.2012.pdf>. Indeed, the latency of environmental litigation is staggering—only 1% to 4% of cases are filed in court. *Id.* As Dr. Brinchuk notes, even though the number of environmental violations in Russia is on the rise, the number of cases litigated is decreasing rapidly, which is partly caused by the current state of environmental and procedural law. *Id.*

environment in which tort law becomes the only institution capable of providing relief for asbestos victims.¹⁵ Part IV will analyze the present state of civil litigation in Russia, concentrating on toxic torts, and asbestos claims in particular. It will highlight particular structural obstacles, such as: uncertainty surrounding the nature of recoverable harm and plaintiff's standing; stringent causation requirements; the high cost of litigation; and the issue of limited redress available for potential litigants. Part V will discuss the possible adjustments to the civil process in Russia. It will provide potential avenues for reform to ensure that the victims in Russia are able to avail themselves of the process of justice.

II. ASBESTOS AROUND THE WORLD

A. Asbestos: Health Dangers

The term "asbestos" generally refers to a group of naturally occurring silicate fibrous minerals.¹⁶ Due to their fibrous nature, the minerals can be separated into threads, which are highly resistant to heat, fire and chemical reactions and do not conduct electricity.¹⁷ Due to its qualities, asbestos has been widely used in the building and construction industries, as well as in cementing, shipbuilding and automotive manufacturing.¹⁸

Asbestos fibers are easily inhaled when a person is exposed to the material in its friable form, or when non-friable asbestos-containing material is deconstructed.¹⁹ Such exposure to asbestos fibers can lead to development of asbestosis, lung cancer, mesothelioma,²⁰ pleural plaques, pleural thickening and effusions.²¹ The social groups at risk of asbestos exposure are diverse. Naturally, asbestos miners and mining communities are at the greatest risk from asbestos-related diseases due

¹⁵ David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up and Litigation*, 99 HARV. L. REV. 1693, 1695 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)).

¹⁶ *Asbestos: Elimination of Asbestos-Related Diseases*, WORLD HEALTH ORG. (July 2010), <http://www.who.int/mediacentre/factsheets/fs343/en/index.html>.

¹⁷ *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (May 1, 2009), <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last visited Oct. 17, 2012).

¹⁸ *Id.*

¹⁹ Term "friable asbestos-containing" material refers to the material containing more than one percent of asbestos that, when dry, can be crumbled, pulverized or reduced to powder by hand pressure. National Emission Standard for Asbestos, 40 C.F.R. § 61.141 (2012). "Non-friable" material does not possess these qualities. *Id.*

²⁰ DOLL & PETO, *supra* note 3, at 2-3.

²¹ *Asbestos: Elimination of Asbestos-Related Diseases*, *supra* note 16.

to their continuous exposure to the material in its friable form.²² General industry employees, construction industry employees, and maritime employees are also placed at high risk of exposure when performing renovation or demolition of asbestos-containing objects.²³ There is evidence that family members of workers exposed to asbestos also face an increased risk of developing asbestos-related diseases.²⁴ Considering the fact that the natural deposits of asbestos as well as asbestos-containing products are found around the world,²⁵ it becomes apparent that the health risks associated with asbestos exposure have a global impact.

B. International Regulation of the Asbestos Industry

The health dangers inherent to asbestos exposure present a cross-border issue that could not go unnoticed by the international regulatory agencies and organization. As early as 1986, the International Labor Organization (ILO) presented ILO Asbestos Convention No. 162 (ILO C-162)²⁶ that provided measures to be taken for the prevention, control, and protection of workers against health hazards due to occupational exposure to asbestos.²⁷ The countries that ratified the ILO C-162 are responsible for enacting domestic laws²⁸ that should provide for appropriate penalties to ensure effective compliance with the ILO C-162's provisions, and should be secured by an adequate system of inspection.²⁹ For instance, employers are required to monitor the working environment and keep a record of such monitoring available upon employee's request.³⁰ The ILO C-162 is binding on the states that ratified it.³¹

The ILO C-162 addressed the workers' health concerns associated with the production of asbestos and provided guidance for the

²² Kristina Luus, *Asbestos: Mining Exposure, Health Effects and Policy Implications*, 10(2) MCGILL J. MED. 121, 122 (July 2007).

²³ *OSHA Factsheet: Asbestos*, U.S. DEP'T OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (2002), https://www.osha.gov/OshDoc/data_AsbestosFacts/asbestos-factsheet.pdf.

²⁴ *Asbestos: Health Effects*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects/ (last modified Apr. 1, 2008).

²⁵ *Khrizotilovyĭ Asbest—Mify i Real'nost'*, *supra* note 2.

²⁶ Convention Concerning Safety in the Use of Asbestos, ILO Convention No. 162, *adopted* June 24, 1986, 1539 U.N.T.S. 315 [hereinafter ILO C-162].

²⁷ *The ILO Position on Safety in the Use of Asbestos*, INT'L LABOUR ORG. (Sept. 6, 2010), http://www.ilo.org/safework/WCMS_144446/lang—en/index.htm.

²⁸ ILO C-162, *supra* note 26, art. 3.1.

²⁹ *Id.* arts. 5.1, 5.2.

³⁰ *Id.* art. 20.

³¹ *Id.* art. 24.1.

“controlled use” of the material.³² It was apparent, however, that many countries that did not produce asbestos (and which consequently were not parties to the ILO C-162) nonetheless imported asbestos and other toxic materials without necessarily being informed about the adverse health effects of the materials by the suppliers.³³ Such unrestricted imports resulted in high rates of secondary occupational and non-occupational exposure to the toxic materials.³⁴

To ameliorate the situation, the Rotterdam Convention was established in 1998 and became effective in 2004.³⁵ The aim of the Convention is to ensure the Prior Informed Consent (PIC) of countries importing various hazardous chemicals, and to promote importing countries’ right to know by providing appropriate information about environmental hazards.³⁶ Despite its noble aim, the Rotterdam Convention failed to ameliorate the issue of unrestricted asbestos imports due to one core limitation: as of today, asbestos is not one of the substances covered by the Convention.³⁷ The latest attempt to list asbestos as an Annex III chemical failed in June 2011, when, during the fifth meeting of the Conference of the Parties to Rotterdam Convention, the state parties failed to reach an agreement on the matter.³⁸

C. Current Global Trends in Asbestos Production and Consumption

Notwithstanding a widespread knowledge of the dangers of

³² *Id.* See generally ILO C-162, *supra* note 26.

³³ ROCA POSITION PAPER IN PREPARATION OF THE ROTTERDAM CONVENTION COP 5, ROTTERDAM CONVENTION ALLIANCE (June 8, 2011), *available at* <http://rocalliance.blogspot.com/p/publications.html>.

³⁴ A shocking example of inadvertent exposure to asbestos comes from India, the world’s largest importer of asbestos. Due to lack of regulations, relevant information and public awareness, asbestos dust was added to “Mohan Basmati Rice” bags so as to produce polished “extra white” basmati rice at no additional cost. Consumers who bought the rice were inadvertently exposed to asbestos in its most dangerous form. INT’L BAN ASBESTOS SECRETARIAT, INDIA’S ASBESTOS TIME BOMB 13 (David Allen & Laurie Kazan Allen eds., 2008).

³⁵ ROCA POSITION PAPER IN PREPARATION OF THE ROTTERDAM CONVENTION COP 5, *supra* note 33.

³⁶ *Id.*

³⁷ ROTTERDAM CONVENTION, PROPOSAL TO AMEND ANNEX III TO THE ROTTERDAM CONVENTION TO BE DISCUSSED AT THE SIXTH CONFERENCE OF THE PARTIES (Oct. 25, 2012), *available at* <http://www.pic.int/TheConvention/Chemicals/Recommendedforlisting/tabid/1185/language/en-US/Default.aspx>.

³⁸ U.N. Environment Programme, Food and Agriculture Organization of the United Nations, *Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the Work of its Fifth Meeting*, ¶ 88, U.N. DOC. UNEP/FAO/RC/COP.5/26 (June 24, 2011).

asbestos exposure and subsequent regulatory attempts, people around the globe continue to suffer from asbestos exposure's adverse consequences. The World Health Organization estimates that 107,000 people die every year globally because of occupational exposure to asbestos.³⁹ One of every three deaths caused by occupational cancer is presumably caused by exposure to asbestos.⁴⁰ Some commentators argue that the current situation has reached a state of global epidemic.⁴¹ It is estimated that cancer caused by exposure to asbestos may take the lives of as many as ten million people before asbestos is banned worldwide and the exposure is brought to an end.⁴²

Despite the gloomy forecasts, many countries have already taken steps towards the prevention of asbestos exposure. For example, the United States has a long history of asbestos regulation. As early as the 1970s, the U.S. Consumer Product Safety Commission banned the use of asbestos in wallboard patching compounds and gas fireplaces.⁴³ In 1989, the Environmental Protection Agency (EPA) issued a final rule banning most asbestos-containing products.⁴⁴ This rule, however, was modified by a decision of the United States Court of Appeals for the Fifth Circuit in *Corrosion Proof Fitting v. EPA*,⁴⁵ in which the court held that the EPA failed to present "substantial evidence" to justify the complete ban.⁴⁶ Following the *Corrosion Proof Fitting* decision, only flooring felt, rollboard and specialty paper remained banned.⁴⁷ Despite the EPA's rule overturn, numerous phase-out regulations remained in place.⁴⁸ As a result, the current production and consumption of asbestos in the United States is close to null.⁴⁹

The European Union (EU) followed in the footsteps of the United States. In 1999, the Commission of the European Communities adopted a directive that required all EU members to ban the utilization of

³⁹ *Asbestos: Elimination of Asbestos-Related Diseases*, *supra* note 16.

⁴⁰ CLAUDIO BIANCHI & TOMMASO BIANCHI, GEOGRAPHY OF MESOTHELIOMA: AN OVERVIEW (2004), available at <http://worldasbestosreport.org/conferences/gac/gac2004/PL1-02.php>.

⁴¹ LaDou, *supra* note 4, at 285.

⁴² *Id.*

⁴³ *Asbestos Ban and Phase Out Regulations in the United States*, ENVTL. HEALTH & SAFETY ONLINE, <http://www.ehso.com/cssasbestos/asbestosban.htm> (last updated Feb. 21, 2008).

⁴⁴ *Id.*

⁴⁵ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

⁴⁶ *Id.* at 1207. See also *The Failed EPA Asbestos Ban*, ENVTL. WORKING GRP. (Mar. 4, 2004), <http://www.ewg.org/research/asbestos-think-again/asbestos-still-not-banned>.

⁴⁷ *Asbestos Ban and Phase Out Regulations in the United States*, *supra* note 43.

⁴⁸ *Id.*

⁴⁹ *Id.*

asbestos starting in the year 2005.⁵⁰ In 2003, the Commission adopted an additional directive that imposed limitations on the extraction of asbestos and the manufacture and processing of asbestos products.⁵¹ As a result of these legislative efforts, on January 1, 2005, the effective prohibition of production and distribution of asbestos went into force throughout all member states.⁵² Despite the prohibition, asbestos remains the primary carcinogenic toxin affecting European workers, second only to tobacco as an environmental source of cancer.⁵³

As restrictions were imposed on asbestos consumption in developed countries, new markets mushroomed in developing economies in Asia: India, Pakistan, Indonesia and Thailand have shown increases in sales of asbestos-containing products.⁵⁴ Within the region, only Japan and South Korea have stopped use of the material.⁵⁵

Similar developments have taken place in Africa, Latin America, and Eastern Europe. In Africa, South Africa is one of the few African countries that have recently imposed an absolute ban on asbestos.⁵⁶ Zimbabwe, however, is set to reopen the Shabanie-Mashava mine, which holds such vast amounts of raw asbestos that it contains enough material to last for twenty years of continuous mining.⁵⁷ In Latin America, only Chile has completely banned asbestos,⁵⁸ whereas Brazil remains one of the world's largest producers and consumers of asbestos.⁵⁹ In Eastern Europe, Kyrgyzstan, Kazakhstan, Belarus, and Ukraine are developing their markets for asbestos, while the Russian Federation remains the world's incessant leader in both production and consumption of the toxic material.⁶⁰ Interestingly enough, many of the

⁵⁰ Directive 1999/77/EC, art. 2, 1999 O.J. (L207) 18, 19.

⁵¹ Directive 2003/18/EC, ¶ 9, 2003 O.J. (L 97) 48.

⁵² LAURIE KAZAN-ALLEN, EUROPEAN UNITED LEFT/NORDIC GREEN LEFT, *ASBESTOS: THE HUMAN COST OF CORPORATE GREED* 5 (2006).

⁵³ *Id.* at 6.

⁵⁴ *Id.* at 9.

⁵⁵ *Killing the Future: Asbestos Use in Asia*, WORLDASBESTOSREPORT.ORG, http://worldasbestosreport.org/articles/killing_future/experience.php (last visited Sept. 26, 2012).

⁵⁶ Edmond Furter, *South Africa Bans Use of Asbestos*, SHEQAFRICA.COM (Oct. 22, 2008), <http://sheqaffrica.com/asbestos-banned/>.

⁵⁷ Nadia Persaud, *Zimbabwe Wants to Re-open Asbestos Mines*, ASBESTOS.COM (Jan. 17, 2012), <http://www.asbestos.com/blog/2012/01/17/zimbabwe-asbestos-mines/>.

⁵⁸ KAZAN-ALLEN, *supra* note 52, at 10.

⁵⁹ LaDou, *supra* note 4, at 288.

⁶⁰ *Khrizotilovyĭ Asbest—Mify i Real'nost'*, *supra* note 2; LaDou, *supra* note 4, at 288.

pro-asbestos countries that have ratified ILO C-162⁶¹ continue to purposefully misuse ILO C-162's "controlled use" provisions as an argument against the complete ban of asbestos.⁶²

This brief overview of the global asbestos industry presents a clear picture. The production and consumption of asbestos has not decreased, but rather has simply shifted from developed to developing economies.⁶³ While developed countries, which subject the asbestos industry to heavy administrative regulation, are moving towards a complete *de jure* or *de facto* ban on the production and consumption of asbestos, less developed countries, where the industry is either under-regulated or completely unregulated, continue to produce and consume the toxic material at an increasing rate.⁶⁴ The proposition that "as countries gain in industrial affluence, their hazardous industries migrate to poorer neighboring states"⁶⁵ once again has been proven to be true, this time in the context of the asbestos industry worldwide.

III. ASBESTOS IN RUSSIA

Russia is an example of a country with a booming asbestos market, both in regard to the demand and the supply sides.⁶⁶ Russia leads the planet in asbestos production.⁶⁷ In 2008, Russia produced more than one million tons of asbestos,⁶⁸ almost fifty percent of the world supply, and more than three times that of the next largest producer, China.⁶⁹ Orenburg Minerals is Russia's largest asbestos producer.⁷⁰ It mines

⁶¹ Brazil ratified ILO C-162 in May 1990; Kazakhstan ratified ILO C-162 in April 2011; Russia ratified ILO C-162 in September 2000; Zimbabwe ratified ILO C-162 in April 2003. *Ratifications of C162—Asbestos Convention 1986 (No. 162)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312307 (last visited Dec. 28, 2013).

⁶² KAZAN-ALLEN, *supra* note 52, at 10. Indeed, in 2006, the ILO adopted a Resolution that called for the elimination of future use of asbestos. The 2006 ILO Resolution emphasized that the ILO C-162 should not be used as a justification for continued use of asbestos, even if the countries have enacted the required national laws that regulate the industry. *The ILO Position on Safety in the Use of Asbestos*, *supra* note 27, ¶ 4.

⁶³ LaDou, *supra* note 4, at 287.

⁶⁴ *Id.*

⁶⁵ *Id.* at 289. See also Ken Takahashi & Antti Karjalainen, *A Cross-Country Comparative Overview of the Asbestos Situation in Ten Asian Countries*, 9 INT'L J. OCCUP. ENVTL. HEALTH 244 (2003) (highlighting that wealthy industrialized countries show a steady decrease in asbestos use, whereas poorer developing Asian countries show a significant increase).

⁶⁶ Shleynov, *supra* note 6.

⁶⁷ *Mesothelioma & Asbestos Worldwide*, *supra* note 12.

⁶⁸ *Id.*

⁶⁹ Shleynov, *supra* note 6.

⁷⁰ *Id.*

more than 500,000 tons of chrysotile (i.e., white asbestos) a year, and its deposits hold enough asbestos to sustain this rate of production for at least another fifty years.⁷¹ Another asbestos behemoth is Uralasbest.⁷² It employs 6,600 people and produces forty-five percent of Russia's chrysotile output.⁷³

Not surprisingly, Russia is the world's largest exporter of the toxic mineral.⁷⁴ It exports more asbestos than the next four top exporting countries combined.⁷⁵ In 2004, the total revenues derived from export of asbestos exceeded \$100 million.⁷⁶ Uralasbest exports seventy-eight percent of its commodity output.⁷⁷ The precise export data for Orenburg Minerals is unavailable, but local government officials have reported that Orenburg Minerals has increased its exports by 4.7 times in 2009.⁷⁸

Russia is also one of the world's largest consumers of asbestos.⁷⁹ It is the world's third-largest consumer, trailing only China and India.⁸⁰ In 2007, Russia consumed more than 333,000 tons of asbestos.⁸¹ Russia's asbestos is used in roofing materials, automobile brakes and insulation.⁸² Almost 60,000 miles of the country's water pipes are lined with asbestos cement.⁸³

According to some sources, the annual asbestos-related death toll in Russia reached 10,400 in 2005.⁸⁴ However, the exact data on mesothelioma and asbestosis epidemiology is scarcely known due to the lack of medical track records.⁸⁵ Despite the high death toll and the apparent dangers associated with the use of asbestos, the asbestos mining companies do not appear to have suffered any loss of status.⁸⁶

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Enterprise Today*, URAL ASBEST, <http://www.uralasbest.ru/ve.php?fp=5> (last visited Sept. 23, 2012).

⁷⁴ Shleynov, *supra* note 6.

⁷⁵ *Id.*

⁷⁶ *Khrizotilovyi Asbest—Mify i Real'nost'*, *supra* note 2.

⁷⁷ *Enterprise Today*, *supra* note 73.

⁷⁸ *Aleksei Chernyshëv Provël Zasedanii po Preduprezhdeniiu Negativnogo Vozdeistviia na Ekonomiku Orenburzh'ia* [Aleksey Chernyshov Held Meeting to Prevent Negative Impacts on the Economy of the Orenburg Region], OREN.RU (Apr. 15, 2009) (Russ.), <http://www.oren.ru/news/2478568/>.

⁷⁹ *Mesothelioma & Asbestos Worldwide*, *supra* note 12.

⁸⁰ *Id.*

⁸¹ *Khrizotilovyi Asbest—Mify i Real'nost'*, *supra* note 2.

⁸² *Mesothelioma & Asbestos Worldwide*, *supra* note 12.

⁸³ Shleynov, *supra* note 6.

⁸⁴ *Mesothelioma & Asbestos Worldwide*, *supra* note 12.

⁸⁵ BIANCHI & BIANCHI, *supra* note 40.

⁸⁶ Shleynov, *supra* note 6.

This fact can be partly attributed to the economic significance of the asbestos industry. It is one of the most profitable industries in the Russian economy, generating close to \$800 million per year.⁸⁷ It is also one of the key job-creating industries in Russia.⁸⁸ The significance of the market sector is particularly evident in the Ural region of the country, where asbestos is seen as a “linchpin industry”.⁸⁹ For example, the town of Asbest, a so-called “mono-city,” was founded specifically to staff the UralAsbest mining factory.⁹⁰ Today, more than seventy percent of the town’s population is employed in the asbestos mining industry.⁹¹ Considering the fact that asbestos is the only industry currently developed in that location, banning or even capping the industry is likely to result in significant economic damage to the whole region.⁹²

The effect of the geographical monopoly of asbestos mining companies is further amplified by the duopolistic structure of the industry. UralAsbest and Orenburg Minerals are the only two companies involved in the mining of asbestos in Russia.⁹³ The companies’ explicit cooperative strategy,⁹⁴ combined with the lack of regulatory and administrative oversight, results in the companies’ unlimited bargaining power, which in turn leads to the companies’ complete control of the Russian market for asbestos.⁹⁵

Some commentators argue that the prolificacy of the asbestos industry in Russia is partly due to unwavering government support.⁹⁶ In 2009, Vladimir Putin allegedly promised to support Russian producers of asbestos, especially in times of international political pressure generated by the growing anti-asbestos movement.⁹⁷ A year later,

⁸⁷ *Id.*

⁸⁸ The asbestos mining industry alone employs approximately 400,000 people. *Id.* Many more are employed in the manufacturing of asbestos-containing products. *Id.*

⁸⁹ James P. Gallagher, *Pollution Rampant in Urals Region*, CHICAGO TRIBUNE (Aug. 27, 1995), http://articles.chicagotribune.com/1995-08-27/news/9508270223_1_asbestos-health-hazard-ecological/2.

⁹⁰ Shaun Walker, *A Town Called Asbest*, SLATE (May 5, 2009), http://www.slate.com/articles/news_and_politics/dispatches/2009/05/a_town_called_asbest.html.

⁹¹ *Id.* Ironically, the town’s motto is translated as “Asbest—my city and my destiny.” *Id.*

⁹² Even today, many of the factories operate only two days per week. Thousands of people are already out of work; others are not sure whether they could survive any extra pay cuts to their already meager salaries. Walker, *supra* note 90.

⁹³ *Khrizotilovyi Asbest—Mify i Real'nost'*, *supra* note 2.

⁹⁴ OLGA SOUNTSOVA & SERGEI PERMINOV, RYE, MAN & GOR SECURITIES, URALASBEST: STOCK METRICS, CONSTRUCTION AND DEVELOPMENT 4 (2007).

⁹⁵ Shleynov, *supra* note 6.

⁹⁶ *Id.*

⁹⁷ *Id.*

during the first World Social Security Forum in Moscow, Viktor Ivanov, the head of the Chrysotile Association, stated that “[i]t’s just a PR campaign when they say that asbestos can kill.”⁹⁸ Yevgeny Kovalevsky, a delegate from the Russian Academy of Medical Sciences, informed the public that, for the general population, there are not significant risks, and that he has not seen a single scientific study that shows the need for a ban of asbestos.⁹⁹ As Carl Cranor, a distinguished professor of philosophy and a faculty member of the Environmental Toxicology Graduate Program at the University of California, Riverside suggests, such beliefs in the “safety” of the substance tend to result in “under-regulation” of the industry and under-compensations of the potential litigants.¹⁰⁰ Thus, the legislative and procedural mistakes resulting from such beliefs impose extra costs on the victims suffering from the toxicity of the substance.¹⁰¹

The situation is further complicated by the pro-asbestos propaganda espoused by the Russian asbestos lobbying group, the Chrysotile Association, which is part of an international network that promotes the “controlled” use of the toxic material.¹⁰² The Chrysotile Association’s message is simple and consistent: white asbestos (i.e., chrysotile) is less dangerous than other forms of asbestos and may be safer than the substitute materials.¹⁰³ Russian scientists endorse the message; they state that the EU ban is unnecessary and that a worldwide ban would be a direct attack on Russian industry and jobs.¹⁰⁴ Any opposition to the use of asbestos is simply labeled as “deliberate

⁹⁸ *Asbestos Alert*, *supra* note 11.

⁹⁹ *Id.*

¹⁰⁰ CARL CRANOR, *REGULATING TOXIC SUBSTANCES: A PHILOSOPHY OF SCIENCE AND THE LAW* 8 (1993).

¹⁰¹ *Id.*

¹⁰² Shleynov, *supra* note 6.

¹⁰³ *Id.* The message is pervasive: not only is it espoused and reiterated by the federal and local government, but there are also printed “Asbestos Saves Lives” brochures (in Russian as well as in English). Walker, *supra* note 90. In addition, the Russian Chrysotile Association publishes a periodic newsletter called “Chrysotile Today,” which is designed to explain the benefits of the use of asbestos to the public. Recent front-page stories include: “Yes to Asbestos;” “Affordable Housing: Chrysotile Will Help;” “Support from Above: Vladimir Putin for Domestic Producers;” and “For Asbestos: the Government Will Show Support to Mono-cities.” *Chrysotile Today Newsletter*, CHRYOTILE.RU, ASSOCIATION (Russ.), available at <http://chrysotile.ru/ru/site/index/newspaper> (last updated Sept. 4, 2013).

¹⁰⁴ Rupert Wingfield-Hayes, *Asbestos Industry Still Strong in Russia*, BBC (July 21, 2010), <http://www.bbc.co.uk/news/business-10708279>.

misinformation” and “Western propaganda.”¹⁰⁵

This peculiar combination of factors—the economic significance of the asbestos industry, the strong political support, and the pro-asbestos social propaganda—creates an unbalanced and unregulated playing field where the two companies backed by the government define the rules of the game. In a situation like this, where regulatory action is scarce or nonexistent and the political pressure is strong, tort law is the only social institution that can provide relief for the victims of toxic exposure to asbestos.¹⁰⁶

IV. ASBESTOS LITIGATION IN RUSSIA

Tort law establishes public standards of conduct that must be privately enforced by the injured parties.¹⁰⁷ The threat of courts’ adverse decisions is a major way in which the tort law seeks to control exposure to toxic substances.¹⁰⁸ Since tort law “operates on the basis of private incentives largely immune to political control,”¹⁰⁹ it (at least in theory) provides victims of exposure to a toxic material with an opportunity to obtain relief despite possible contravening political pressures.¹¹⁰

In Russia, the right to bring a claim in the environmental context stems from Article 42 of Russian Constitution of 1993,¹¹¹ which granted Russian constituents “the right to a favorable environment, reliable information about its condition and to compensation for damage caused to his health or property by ecological violations.”¹¹² Even though

¹⁰⁵ UralAsbest’s website states that in Western Europe and a number of other countries, the mass media has created an “atmosphere close to a psychosis” in relation to asbestos, and that even though “the hysteria on [sic] chrysotile-asbestos still grows” it “would be silly [for UralAsbest] to refuse [sic] him [sic] .” V.A. Kochelaev, *Causes and Effects of Antiasbestine [sic] Campaign*, URAL ASBEST, <http://www.uralasbest.ru/ve.php?fp=7> (last visited Sept. 27, 2013). Another mass media source “explains” that anti-asbestos campaigns are initiated and supported by the countries that do not have access to natural deposits of asbestos and which consider asbestos to be “an inconvenient competition” to their well-developed metal and chemical industries. *Asbest—Kachestvennye Razlichia [Asbestos—A Qualitative Difference]*, STROI-MOS.RU (Nov. 2, 2012, 11:52 AM), http://www.stroi-mos.ru/index.php?ukey=news&blog_id=372&PHPSESSID=743137800f0424eea51e0b4096f71a14.

¹⁰⁶ Rosenberg, *supra* note 15, at 1695.

¹⁰⁷ CRANOR, *supra* note 100, at 5.

¹⁰⁸ *Id.*

¹⁰⁹ Rosenberg, *supra* note 15, at 1704.

¹¹⁰ *Id.*

¹¹¹ Elizabeth Barrett Ristroph & Ilya Fedyaev, *Obstacles to Environmental Litigation in Russia and the Potential for Private Actions*, 29(2) ENVIRONS 221, 224 (2006).

¹¹² KONSTITUTSIJA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 42 (Russ.).

Article 42 seems to provide broad relief, neither the Russian government nor Russian citizens have been doing much to vindicate those rights.¹¹³ High litigation costs, minimal damage awards, standing issues, an almost insurmountable burden of proof, and a lack of *stare decisis* all deter victims from bringing their claims to court.¹¹⁴

A. Pre-trial Stage: Recoverable Harm and the Issue of Standing

Probably the greatest deterrent to tort litigation is the uncertainty as to which harm is recoverable by means of the litigation process. Under Article 79 of the 2002 Environmental Protection Statute, “all harm to a person shall be recovered”;¹¹⁵ however, the statute does not provide any working definition of “all harm.”¹¹⁶ Plaintiffs must rely on the Civil Code to determine what “all harm” entails, but they cannot rely on precedent to clarify the Civil Code, since Russia is a civil law state where courts are not bound by the *stare decisis* principle.¹¹⁷ Without prior knowledge of the type of harm for which relief could be granted, it is almost impossible for the potential plaintiffs and their attorneys to estimate the feasibility of the future lawsuit.¹¹⁸ Article 79 of the 2002 Environmental Protection Statute simply fails to provide the necessary information needed for the potential litigant to make an informed decision whether to commence the litigation.

Uncertainty as to the recoverable type of harm is not the only problem potential toxic tort litigants and their families have to deal with during the pre-trial procedure in Russian courts. Another challenge litigants face is the uncertainty surrounding the issue of who has standing to bring a suit. Under Article 3 of the Code of Civil Procedure, only interested parties that are injured (or their guardians) have a right

¹¹³ Ristroph & Fedyaev, *supra* note 111, at 225.

¹¹⁴ *Id.* at 227-43.

¹¹⁵ Zakon RSFSR ob Okhrane Okruzhayusheĭ Sredy [Environmental Protection Statute], ROSSIISKAIA GAZETA [ROS. GAZ.] Jan. 10, 2002.

¹¹⁶ Ristroph & Fedyaev, *supra* note 111, at 226.

¹¹⁷ *Id.*

¹¹⁸ THOMAS WILLGING, FEDERAL JUDICIAL CENTER, TRENDS IN ASBESTOS LITIGATION 13 (1987).

to file a toxic tort claim.¹¹⁹ The statute does not provide for protocol when a person exposed to asbestos dies before the case is filed in court,¹²⁰ technically precluding relatives of the deceased victim from bringing a toxic tort claim due to the lack of standing. Article 3 of the Code of Civil Procedure also fails to address the situation where a plaintiff dies during the trial, making the issue of standing even murkier.¹²¹

B. Burden of Proof: Causation

Even if a plaintiff is able to establish recoverable harm and satisfy the standing requirements, there is still a need to prove the essential elements of a tort claim: duty, breach, causation, and damages.¹²² The causation element presents the greatest challenge by far. The Russian courts are instructed to pay special attention to “causation-in-fact.”¹²³

¹¹⁹ Ristroph & Fedyaev, *supra* note 111, at 227. Before the 2002 law reform, members of the injured family, the prosecutor, the authorized state body, and even non-governmental organizations had standing to bring such a claim without prior authorization by the victim. Federal’nyĭ Zakon RF ob Okhrane Okruzhaiushcheĭ Sredy [Federal Law of the Russian Federation on Environmental Protection], SOBRANIE ZAKONODATEL’STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1991, No. 2060-1, art. 89. The amended statute completely repealed the standing provision, delegating the issue to the Code of Civil Procedure. *See* Federal’nyĭ Zakon RF ob Okhrane Okruzhaiushcheĭ Sredy [Federal Law of the Russian Federation on Environmental Protection], SOBRANIE ZAKONODATEL’STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2002, No. 7-FZ, art. 79 (Federal Law of the Russian Federation on Environmental Protection 2002).

¹²⁰ Federal Law of the Russian Federation on Environmental Protection 2002, *supra* note 119.

¹²¹ Death of a plaintiff during litigation is not an unlikely scenario in the context of asbestos disease claims. For instance, the average life expectancy following the diagnosis of mesothelioma is about one year. *Mesothelioma Life Expectancy*, ASBESTOS.COM, <http://www.asbestos.com/mesothelioma/life-expectancy.php> (last visited Nov. 2, 2012). Given the novelty of asbestos claims in Russia, there is no data available as to the average time of asbestos claim resolution; however, if Chernobyl toxic torts cases are any indication, it may take as long as five years from the moment of filing until recovery. *See, e.g.,* Burdov v. Russia, 2002-III Eur. Ct. H.R. 317.

¹²² Article 56.1 of the Code of Civil Procedure places burden of proof on the party bringing a claim. “Each party must prove the circumstances relied on as grounds for their claims and objections, unless otherwise provided by federal law.” GRAZHDANSKIĬ PROTSYSSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 56.1 (Russ.).

¹²³ Postanovlenie Plenuma Verkhovnogo Suda RF o Praktike Primeneniia Sudami Zakonodatel’sтва ob Otvetstvennosti za Ekologicheskie Pravonarusheniia [of the Russian Federation Supreme Court Plenary Ruling on Practice of Implementation by Courts of Legislation on Responsibility for Environmental Infringements], BIULETEN’ VERKHOVNOGO SUDA RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 1998, No. 15, ¶ 2. Some commentators argue that the attention is misplaced; since the asbestos cases are ultimately based on an individual worker’s personal injuries claim, “they demand individual attention at the point of allocation of damages and, to a lesser extent, in the proof of causation-in-fact.” WILLING, *supra* note 118, at 13.

Although the Code itself is silent on the standard of causation, some legal commentators argue that only the showing of *direct* causation between a defendant's activities and the plaintiff's damages will suffice.¹²⁴ To establish direct causation, the plaintiff must provide each of the following: (1) proof of contamination of a certain area that amounts to violation of permissible levels of harmful substances; (2) a statement of medical examination by authorized medical professional confirming the existence of a health disorder as a result of environmental contamination; and (3) expert testimony showing the causation between the contamination and the health disorder of the injured party.¹²⁵

Establishing causation-in-fact is a troublesome task for a plaintiff.¹²⁶ To make a showing that the actions of the particular defendant were a contributing cause of the plaintiff's specific injuries is burdensome and sometimes an impossible task to complete.¹²⁷ Since asbestos-related diseases may have multiple other, non-asbestos-related causes, the provable exposure to a specific product at a specific worksite might be insubstantial when there may be exposure to other disease-triggering substances.¹²⁸ Moreover, the problem of providing sufficient evidence is further exacerbated where plaintiffs are trying to bring an unconventional cause of action, such as an asbestos claim in Russia. The required evidence, such as epidemiological and medical studies, may not be fully developed¹²⁹ or may be simply unavailable.¹³⁰

¹²⁴ Ristroph & Fedyayev, *supra* note 111, at 235.

¹²⁵ *Id.*

¹²⁶ WILLGING, *supra* note 118, at 11.

¹²⁷ *Id.* at 10.

¹²⁸ *Id.* at 11.

¹²⁹ CRANOR, *supra* note 100, at 79. Although Russian citizens have a statutorily created right to receive frequent, trustworthy, and timely information about factors that affect human health, there is no enforcement mechanism that ensures the timely release of such information by the government and other organizations. See Federal'nyĭ Zakon RF ob Osnovakh Zdorov'ia Grazhdan v Rossiĭskoi Federatsii [Federal Law of the Russian Federation on Principles of Health of the Citizens of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 323-FZ (Russ.); Federal'nyĭ Zakon RF ob Informatsii, Informatsionnykh Tekhnologiiakh i o Zashchite Informatsii [Federal Law of the Russian Federation on Information, Information Technologies, and Information Protection], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 149-FZ, art. 8 (Russ.). Indeed, only a few of the corporate entities and half of the regional agencies responsible for publishing the information actually publish it. Ristroph & Fedyayev, *supra* note 111, at 240 n.135.

Plaintiffs also cannot avail themselves of even a scarce number of precedents due to lack of *stare decisis* in the civil law system.

“[D]isputes over specific causation and the nature and extent of damages are enough to generate triable issues of fact.”¹³¹ The Russian judicial system does not provide the right for a trial by jury in civil cases.¹³² Russian judges, therefore, have complete control over the final disposition on the factual issue.¹³³ As one commentator notes, this makes the complexity of the cases a double-edged sword: “a bright and energetic judge can parse difficult issues and evidence,” while a less patient judge, who is “unwilling to spend the time needed to comprehend complex issues can turn a toxic tort case into a litigation nightmare.”¹³⁴ The Civil Procedure Code further amplifies the uncertainty of the case outcome by directing the judge to evaluate the evidence “on the basis of [the judge’s] own internal convictions.”¹³⁵

C. Award of Damages and Compensation

One of the goals of tort law is to reimburse the plaintiff’s actual harm or loss by awarding damages—monetary payments intended to compensate for a legally recognized wrong.¹³⁶ The plaintiff’s expected payoff from the lawsuit is based not only on the plaintiff’s knowledge of the true damage but also on the plaintiff’s estimate of the court’s error in measuring that damage.¹³⁷ Thus, the expected payoff from pressing a claim is affected by legal rules that specify the basis for computing damages.¹³⁸

Prior to the 2002 reform, the Environmental Protection Statute

¹³⁰ There were at least twenty-seven epidemiological studies conducted in the U.S. between 1980 and 2001 addressing the issues of asbestos exposure and asbestos-related diseases. See AMERICAN ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 30-31 (2001). In contrast, as of 2001, even a record of the actual rates of mesothelioma was unavailable for Russian plaintiffs, due to factual data concealment. See Bianchi et al., *supra* note 13; LaDou, *supra* note 4.

¹³¹ WILLGING, *supra* note 118, at 11.

¹³² The Constitution of the Russian Federation stipulates trial by jury only in a limited number of criminal cases, such as murder, kidnapping, rape, and human trafficking. RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A SURVEY 439 (7th ed. 2009).

¹³³ L. Neal Ellis, Jr., *Introduction*, in TOXIC TORT LITIGATION 10 (D. Alan Rudlin ed., 2007).

¹³⁴ *Id.*

¹³⁵ GRAZHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 67.1 (Russ.).

¹³⁶ WILLIAM P. STATSKY, ESSENTIALS OF TORTS 220 (3d ed. 2012).

¹³⁷ Eric Rasmusen, *Predictable and Unpredictable Error in Tort Awards: The Effect of Plaintiff Self Selection and Signalling*, 15 INT’L REV. L. & ECON. 323, 323 (1995).

¹³⁸ Robert D. Cooter & Daniel L. Rubinfeld, *Trial Courts: An Economic Perspective*, 24 L. & SOC’Y REV. 533, 536 (1990).

provided a non-exhaustive list of recoverable damages, to which plaintiffs and their counsel could refer while estimating the financial feasibility of a potential lawsuit.¹³⁹ The reformed version of the statute, however, disposes of the list and grants the judge the authority to interpret the “harm must be compensated in full” provision.¹⁴⁰ Although Article 15 of the Civil Code attempts to channel the judge’s decision-making by providing a working definition of “damages,”¹⁴¹ it still leaves plenty of room for judges’ discretion.

Even more discretion is allowed with respect to moral damages. Article 1101 of the Civil Code expressly states that:

The amount of the compensation for the moral damage shall be *determined by a court of law* depending on the nature of physical and moral suffering caused to the victim, and also on the degree of guilt of the inflictor of damage in cases when guilt is a ground for the redress of injury.¹⁴²

It is up to the judge to determine the nature of the moral suffering and the degree of guilt involved¹⁴³—categories inherently prone to subjective and arbitrary interpretation. Russian courts tend to disfavor awards for moral damages, and even when they do award such damages, the sum is usually low, anywhere between \$35 and \$3,500.¹⁴⁴

The judicial reluctance to grant meaningful awards, combined with the vast discretion awarded to the judges, creates a high degree of uncertainty as to the amount of the expected payoff.¹⁴⁵ This uncertainty acts as a significant barrier to the development of toxic tort litigation in Russia.¹⁴⁶ Another hurdle is a lack of recognition of punitive damages by Russian legislation.¹⁴⁷ This further reduces the incentive of a

¹³⁹ The recoverable damages included (1) loss of capacity to work; (2) costs of medical treatment; (3) lost professional opportunities; (4) moving costs; (5) lifestyle changes; and (6) moral damages (akin to damages for pain and suffering). See Federal’nyĭ Zakon RF ob Okhrane Okruzhaiushcheĭ Sredu [Federal Law of the Russian Federation on Environmental Protection], SOBRANIE ZAKONODATEL’STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1991, No. 2060-1, art. 89.2.

¹⁴⁰ Ristroph & Fedyaev, *supra* note 111, at 229.

¹⁴¹ *Id.* at 230. Article 15 of the Civil Code defines “damages” as “the expenses, which the person, whose right has been violated, made or will have to make to restore the violated right, the loss or the damage done to his property (the compensatory damage), and . . . missed profit . . .” GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 15 (Russ.).

¹⁴² *Id.* art. 1101(2) (emphasis supplied).

¹⁴³ *Id.*

¹⁴⁴ Ristroph & Fedyaev, *supra* note 111, at 230.

¹⁴⁵ *Id.* at 245.

¹⁴⁶ *Id.*

¹⁴⁷ See Evgeniya Berezkina, *Recent Developments in Russian Corporate Legislation: Will New Norms Secure the Future for Shareholders Agreements?*, 16 COLUM. J. EUR. L. 31, 34 (2009).

plaintiff to engage in litigation, due to the unprofitability of the whole affair.¹⁴⁸

D. Costs of Litigation

“A rationally self-interested person decides whether to press a claim by asking whether the cost of going forward exceeds the expected payoff.”¹⁴⁹ As previously discussed, the payoff side of the equation is highly unpredictable in the context of Russian courts. An analysis of relevant statutes suggests that the same is true for the costs of litigation.

Article 88.1 of the Civil Procedure Code defines two types of expenses in connection with civil litigation: the state fee and the costs of actual litigation.¹⁵⁰ The amount of the state fee depends upon the size and nature of the claim brought, as prescribed by Chapter 25.3 of the Tax Code.¹⁵¹ The state fee is a sunk cost: once paid, it is not reimbursed, regardless of the outcome of the case.¹⁵² In many instances, the state fee is not determined by the nature of the claim, but is calculated as a percentage of the monetary value of the damage claimed:¹⁵³ the greater the damage, the greater the initial monetary outlay for the plaintiff. This fact, combined with the general judicial reluctance to grant substantial damages awards,¹⁵⁴ further tips the scale against pressing a toxic tort claim in the Russian courts.

After the state fee is paid, the plaintiff still needs to cover the costs of litigation. Article 94 of the Civil Procedure Code defines costs of litigation as: money paid to witnesses, experts, specialists, and translators; transportation and living expenses of any third parties involved in the litigation; attorneys’ fees; compensation for the lost time of the opposing party, in the case of a frivolous claim; and any other expense the court may appoint.¹⁵⁵ As with the award of damages, judges are free to employ their personal judgment and beliefs when

¹⁴⁸ Ristroph & Fedyaev, *supra* note 111, at 249.

¹⁴⁹ Cooter & Rubinfeld, *supra* note 138, at 536.

¹⁵⁰ GRAZHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 88.1 (Russ.).

¹⁵¹ NALGOVYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [NK RF] [Tax Code] art. 333.19(1) (Russ.).

¹⁵² *Id.* art. 333.20(1)(6).

¹⁵³ *Id.* arts. 333.19, 333.20.

¹⁵⁴ See Ristroph & Fedyaev, *supra* note 111, at 245.

¹⁵⁵ GRAZHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 94 (Russ.).

rendering case-by-case determinations of “any other expenses.”¹⁵⁶ Thus, plaintiffs are placed in a position of uncertainty and are unable to make an informed decision about whether to press a potential claim.

If a plaintiff wishes to retain a witness, expert, specialist, or a permanent translator, plaintiff must provide monetary compensation based on actual time spent on litigation and the expert’s average salary.¹⁵⁷ If the witness is unemployed, plaintiff still must provide compensation based on actual time spent on litigation and the minimum wage rate.¹⁵⁸ In the context of a toxic tort claim, where expert testimony is legally required to show causation,¹⁵⁹ the plaintiff has to bear this out-of-pocket expense without any estimate of its feasibility. The risk is further amplified by the fact that Russia is a “loser pays” jurisdiction: if the plaintiff loses the case, he or she will have to carry the burden of the litigation expenses of the winning party, as well as their own.¹⁶⁰

Undoubtedly, tort litigation is a costly endeavor in any jurisdiction. Nevertheless, states that allow for contingency fee agreements tend to be more amenable to litigants who have a legal claim but cannot otherwise afford legal services.¹⁶¹ In such jurisdictions, the plaintiff is relieved from the burden of out-of-pocket expenses, since the payment of legal fees is conditioned on the successful outcome of a case and is based on a percentage of the recovery.¹⁶² Russia is not such a jurisdiction. In January 2007, the Constitutional Court of the Russian Federation put an effective prohibition on contingency fees in legal services provision contracts.¹⁶³ Even though contingency fees are ethically permissible,¹⁶⁴ the Court held that the Civil Code’s “performance of certain services” does not encompass “reaching a certain result”; hence, the law does not allow for a success-based fee in

¹⁵⁶ Under Article 98 of the Civil Procedural Code, the loser must cover all the expenses of the winner. *Id.* art. 98. *See also* Ristroph & Fedyaev, *supra* note 111, at 242. If the party does not agree with such decision, the party has a right to appeal the court’s decision on fee distribution to the higher court. *Id.* at 242-43.

¹⁵⁷ GRAZHHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] art. 95.2 (Russ.).

¹⁵⁸ *Id.*

¹⁵⁹ *See* Ristroph & Fedyaev, *supra* note 111, at 235.

¹⁶⁰ GRAZHHDANSKIĬ PROTSESSUAL’NYĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GPK RF] [Civil Procedural Code] arts. 98, 100 (Russ.).

¹⁶¹ THERESE A. CANNON, *ETHICS AND PROFESSIONAL RESPONSIBILITY FOR PARALEGALS* 256 (5th ed. 2008).

¹⁶² *Id.*

¹⁶³ Maria Yaremenko, *Russia, in* *WORLD CLASS ACTIONS: A GUIDE TO GROUP AND REPRESENTATIVE ACTIONS AROUND THE GLOBE* 344 (Paul G. Karlsgodt ed., 2012).

¹⁶⁴ *Id.*

any service provision contract.¹⁶⁵

Regardless of the outcome of the case, the “performance of certain [legal] services” has to be paid for.¹⁶⁶ This steep cost is likely to serve as an additional deterrent for the plaintiff, who is already heavily burdened with costs of state duties, expert testimonies, and evidence production.

One possible way to ameliorate this financial burden is to allow plaintiffs to pool together similar toxic tort claims and to bring a suit as a class. Indeed, in 2009, the Russian legislature amended the Arbitration Procedural Code of 2002 to include an express provision for class action lawsuits.¹⁶⁷ The scope of this procedural form, however, is very limited: it applies only to commercial relations and capital market transaction disputes; class actions are still not available for tort claims pressed in the Russian courts.¹⁶⁸ The unavailability of class action suits means that plaintiffs positioned in a similar situation cannot bring their claims together. As a result, plaintiffs cannot pool their resources and thereby take advantage of the economy of scale to minimize the costs of litigation.

The procedural fellowship, an alternative form of combined action authorized by the Civil Procedure Code, does not produce the same advantages as class action.¹⁶⁹ Even though it allows several plaintiffs to file a common suit against the same defendants, each of the plaintiffs and the defendant must act independently toward each other during the proceedings.¹⁷⁰ Although the parties can be represented by the same attorney and split the attorney’s fees, there is still a need to conduct individual discovery, provide individual evidence, and petition for individual relief based on each party’s unique damages.¹⁷¹

¹⁶⁵ Postanovlenie ot Jan. 23, 2007 [Regulation of Jan. 23, 2007], VESTNIK KONSTITUTIONNOGO SUDA RF [VKS RF] [Bulletin of the Constitutional Court of the Russian Federation] 2007, No. 1-P, ¶ 3.1 (Russ.).

¹⁶⁶ *Id.*

¹⁶⁷ LINKLATERS, COLLECTIVE ACTIONS ACROSS THE GLOBE—A REVIEW 18 (2011). *See also* Federal’nyi Zakon RF o Vnesenii Izmenenii v Otdel’nye Zakonodatel’nye Akty Rossiiskoi Federatsii [Federal Law of the Russian Federation on Amendments to Certain Legislative Acts of Russian Federation] SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2009, No. 205-FZ, art. 46.

¹⁶⁸ *Class Action*, RUSSIAN LAW ONLINE, <http://www.russianlawonline.com/class-actions-russia> (last visited on Sept. 23, 2012).

¹⁶⁹ Ristroph & Fedyav, *supra* note 111, at 248.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

E. Tort Litigation in Russia: Summary

Tort law is the only institution capable of providing relief for the victims of asbestos exposure in Russia, the jurisdiction where two powerful corporations—UralAsbest and Orenburg Minerals—have complete control over the unregulated market for asbestos, and where the market duopoly is further reinforced by strong political and social support.¹⁷² Even though tort litigation is technically available for asbestos victims, the analysis of Russian litigation's realities presents a less optimistic outlook.

Currently in Russia, a potential toxic tort litigant faces a high degree of uncertainty as to the feasibility of a potential lawsuit, as well as high monetary costs of litigation that are unlikely to be offset by the potential damage recovery.¹⁷³ Hence, although a litigant is theoretically able to rely on tort law when seeking redress, a rational litigant represented by a rational attorney is practically prevented from doing so. The resulting conundrum—the situation where the only *theoretically* functional forum for dispute resolution is *practically* not available for the party seeking redress—highlights the need for reforming Russian toxic tort litigation in general, and Russian asbestos litigation in particular.

V. SUGGESTIONS FOR REFORM

The extent to which the underlying structural obstacles preclude effective asbestos litigation in Russia underscores the need for change. Although there is no “one size fits all” solution for how to facilitate and implement this change, the various approaches to asbestos litigation that have evolved globally in the recent past set out a potential framework for much-needed reform.

In many jurisdictions outside Russia, the traditional tort theories have undergone a significant adaptation to accommodate toxic tort claims in general, and asbestos claims in particular.¹⁷⁴ Traditional tort doctrines imposed obstacles to recovery due to their stringent requirements for proof, causation, and injuries; those theories were stretched to accommodate the novel claims based on exposure to toxic substances.¹⁷⁵ These evolutions, supplemented by abundant academic research and discussion, present a wealth of solutions that could serve

¹⁷² See *supra* Part III.

¹⁷³ See *supra* Part IV.

¹⁷⁴ Ellis, *supra* note 133, at 4.

¹⁷⁵ *Id.* at 5.

as guidance on how to improve the state of asbestos litigation in Russia. The following sub-sections address each of the key structural obstacles discussed in Part IV and provide suggestions on how these obstacles could be overcome.

A. Pre-Trial Stage: Expanding Scope of Recoverable Harm and Standing

As a result of law reform in 2002, the Russian legislature has adopted a much narrower approach to standing: only the party who has been actually injured can bring a tort claim.¹⁷⁶ Generally, the limitations created by statutory standing are “founded on concern[s] about the proper-and properly limited-role of the courts in a democratic society.”¹⁷⁷ The overly broad restrictions on access to courts, however, can have negative effects on the operation of society.¹⁷⁸ As in the case of asbestos victims in Russia, the increased barriers preclude equal access to justice and further marginalize citizens who already lack power and resources to avail themselves of the protection of the law.¹⁷⁹

Contrary to the developments in Russia, the current global trend is to reduce the barriers to law enforcement through citizen activism.¹⁸⁰ Courts and legislatures in many countries have started to recognize that citizens and citizen groups can and should play an important role in this process.¹⁸¹ For instance, in Europe, where access to courts is statutorily regulated, parliaments have increasingly granted groups with registered interests the right to participate in legal actions related to those interests.¹⁸² In the United States, the statutory provisions for standing in the context of environmental litigation range from an “adversely affected” person approach to a very broad “any person/any citizen” approach.¹⁸³ Indeed, even if a person who suffered from asbestos exposure dies without filing a suit, the decedent’s estate has standing to

¹⁷⁶ See *supra* Part IV(A).

¹⁷⁷ Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 OKLA. L. REV. 89, 90 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

¹⁷⁸ JOHN E. BONINE, *STANDING TO SUE: THE FIRST STEP IN ACCESS TO JUSTICE* *2 (1999), available at <http://www2.law.mercer.edu/elaw/standingtalk.html>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at *11-*12.

¹⁸¹ *Id.*

¹⁸² *Id.* at *8-*9.

¹⁸³ *Id.* at *8.

bring a wrongful death claim and recover damages.¹⁸⁴ Such widespread access to litigation is more likely to result in equal justice, without impeding any of the democratic values the standing limitations are designed to preserve.¹⁸⁵

In light of these global developments, Russian courts, as well as the legislature, should take note of different available approaches to standing and should strive to strike the right balance between the proper role of the courts and the degree of protection these courts are able to provide.

B. Causation: Improving Access to Required Information

Probably the greatest and most insurmountable obstacle in establishing causation is lack of required information. Although Russian citizens have a statutorily created right to receive frequent, trustworthy, and timely information about factors that affect human health,¹⁸⁶ the nature and extent of such information is undefined, and there is no enforcement mechanism that would ensure the speedy and efficient release of that information by the government and other organizations.¹⁸⁷

Dr. Olaf Hagemeyer of the University of Aachen, Germany, suggests a possible solution for remedying such an informational vacuum.¹⁸⁸ He suggests that, in order to overcome the problem of proving occupational exposure, a central register of all asbestos-exposed

¹⁸⁴ As recently as November 2012, the Virginia Supreme Court held that the estate of a man who, while serving in the Navy, had been exposed to asbestos in a private shipbuilding company was not barred from filing a wrongful death claim against the shipbuilder. *Gibbs v. Newport News Shipbuilding & Drydock Co.*, 733 S.E.2d 648 (Va. 2012). See also Nathan Bass, *Va. SC: Asbestos Victim's Estate Can Sue Shipbuilder*, LEGAL NEWSLINE (Nov. 8, 2012), <http://legalnewsline.com/issues/asbestos/237999-va-sc-asbestos-victims-estate-can-sue-shipbuilder>.

¹⁸⁵ See BONINE, *supra* note 178, at *2.

¹⁸⁶ Federal'nyi Zakon RF ob Osnovakh Zdorov'ia Grazhdan v Rossiiskoĭ Federatsii [Federal Law of the Russian Federation on Principles of Health of the Citizens of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 323-FZ (Russ.).

¹⁸⁷ Although section 8.4.2 of the Information, Information Technologies, and Information Protection Law expressly prohibits the limiting of access to environmental conditions information, the law does not provide for any punitive measure for failure to provide such information. Federal'nyi Zakon RF ob Informatsii, Informatsionnykh Tekhnologiiakh i o Zashchite Informatsii [Federal Law of the Russian Federation on Information, Information Technologies, and Information Protection], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 149-FZ, art. 8 (Russ.). Indeed, only several corporate entities and only half of regional agencies responsible for publishing the information actually publish it. Ristroph & Fedyaev, *supra* note 111, at 240 n.135.

¹⁸⁸ KAZAN-ALLEN, *supra* note 52, at 13.

workers should be compiled.¹⁸⁹ A researcher from Denmark suggests that a compulsory requirement to provide an occupational history during medical examinations would enable doctors to categorize the malignancy as an occupational-linked illness and consequently would improve the statistical record on asbestos-related diseases.¹⁹⁰ Trade unions' campaigns aimed at raising the awareness of asbestos workers, as well as of the population at large, might be a useful tool in achieving this objective: workers' collective bargaining power is likely to provide a sufficient enforcement mechanism to ensure the timely release of the required information.¹⁹¹

An example of effective information collection and sharing comes from the United States. At the federal level, the Occupational Safety and Health Administration (OSHA) is responsible for the health and safety of workers who may be exposed to asbestos in the work place,¹⁹² while the U.S. Environmental Protection Agency (EPA) is responsible for protection of the general public.¹⁹³ At the state level, local Departments of Health provide information about asbestos, as well as keep track of asbestos exposure and abatement.¹⁹⁴ The wealth of information collected by these agencies significantly improves the efficiency of preparation for trial; comparatively, in Russia, it is almost impossible to obtain the required scientific data,¹⁹⁵ while "the exchange of pretrial expert reports is the norm" in almost all of the federal districts in the United States.¹⁹⁶

Another serious obstacle with regard to causation arises from the Russian courts' stringent interpretation of causation-in-fact. The current

¹⁸⁹ *Id.* France is a real-life example of the effectiveness of such a measure. There, the main source of asbestos claims is the list of the manufacturers of products containing asbestos; currently over one thousand such sites have been listed. See LAURA SALVATORI, ALESSANDRO SANTONI & DARREN MICHAELS, ASBESTOS: THE CURRENT SITUATION IN EUROPE 11 (2003), available at http://www.actuaries.org/ASTIN/Colloquia/Berlin/Salvatori_Santoni_Michaels.pdf. This list is updated by decree each month. *Id.*

¹⁹⁰ KAZAN-ALLEN, *supra* note 52, at 14.

¹⁹¹ See FIONA MURIE GLOBAL ASBESTOS CONGRESS, THE TRADE UNION CAMPAIGN FOR A WORLD-WIDE BAN, (2004), available at <http://worldasbestosreport.org/conferences/gac/gac2004/PL7-07.php>.

¹⁹² *Asbestos*, O.S.H.A., <https://www.osha.gov/SLTC/asbestos/index.html> (last visited Dec. 29, 2013).

¹⁹³ *Learn About Asbestos*, EPA, <http://www2.epa.gov/asbestos/learn-about-asbestos#asbestos> (last updated Mar. 14, 2013).

¹⁹⁴ For instance, the New York State Department of Health provides a wealth of information about asbestos for various target audiences, such as homeowners, contractors and workers involved in asbestos abatement. See *Asbestos*, N.Y. STATE DEP'T OF HEALTH, <http://www.health.ny.gov/environmental/indoors/asbestos/index.htm> (last visited Oct. 22, 2013).

¹⁹⁵ See *supra* Part IV(B).

¹⁹⁶ WILLGING, *supra* note 118, at 48.

tendency is to require the showing of the absence of other confounders (i.e., the absence of exposure to other factors that could have caused the same harm).¹⁹⁷ Professor Cranor suggests that the outcomes of tort actions should not depend on such a showing.¹⁹⁸ As Cranor notes, “[O]ne can always invoke unmeasured confounders to explain away observational associations.”¹⁹⁹ The standards of evidence typically required by the scientific community are not the only appropriate ones: less stringent standards might suffice to establish casual connections in toxic tort litigation, without sacrificing the validity of the procedure.²⁰⁰

Indeed, some courts around the world have adjusted the law to reduce the heavy burden of proof. The U.S. courts, realizing the difficulty of proving causation-in-fact, have come to the aid of plaintiffs and have reduced the evidentiary burden by adopting novel theories of liability.²⁰¹ For instance, where there is no way to figure out which defendant caused which of the plaintiff’s injuries, courts might use market share liability “to make each defendant responsible for the same percentage of the damages as the percentage of market share that defendant has” within the industry.²⁰²

This tendency to reduce the evidentiary burden put on plaintiffs is also evident in English and Canadian courts.²⁰³ The current stance is that, where a judge is convinced that defendants who have a substantial connection to the injury are escaping liability because of plaintiffs’ inability to prove causation, the judge should not hesitate to adopt an alternative approach to the burden of proof.²⁰⁴

Availability of information, and courts’ willingness to adapt to the realities of asbestos litigation and to adopt novel approaches when it comes to the burden of proof, are the two key elements that will improve the ability of Russian asbestos victims to avail themselves of the protection of the law.²⁰⁵ As the discussed solutions suggest, it is not the task of the legislature alone. The government, judges, trade unions,

¹⁹⁷ Ristroph & Fedyaev, *supra* note 111, at 235; see also CRANOR, *supra* note 100, at 8.

¹⁹⁸ CRANOR, *supra* note 100, at 8.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 82.

²⁰¹ NEO J. TUYTEL, ASBESTOS LITIGATION IN BRITISH COLUMBIA: CANADA’S FIRST “MASS TOXIC TORT” *21, available at <http://www.courts.state.ny.us/reporter/webdocs/asbestos.htm>. Those courts have advanced at least four theories of liability: market share liability, alternative liability, concert of action, and enterprise liability. *Id.*

²⁰² *What Is “Market Share Liability”?*, ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/what-is-market-share-liability/> (last visited Feb. 2, 2013).

²⁰³ TUYTEL, *supra* note 201, at *50.

²⁰⁴ *Id.* at *52.

²⁰⁵ See *supra* Part V(B).

the medical community, and society at large all have an important stake in facilitating this change.²⁰⁶

C. Ensuring Award of Sufficient Damages

Potential litigants in Russia have to rely on judges' arbitrary decisions about what constitutes a fair redress of the harm suffered.²⁰⁷ As to the moral harm, the litigant should not expect to receive more than \$3,500.²⁰⁸ Punitive damages are *per se* not recognized and are therefore not available as a part of compensation.²⁰⁹

Considering the complete lack of precedent (no asbestos claim has been fully adjudicated in Russia as of yet), the likelihood of a judge with no previous exposure to asbestos litigation accurately gauging the amount of damages seems far-fetched. Even in the United States, where the history of asbestos litigation spans more than forty years,²¹⁰ the courts continuously struggle to define what amounts to an adequate redress.²¹¹ Having neither a precedent nor a workable legal standard to rely upon, a Russian judge is faced with the almost insurmountable task of damage calculation, while the litigant is confronted with uncertainty, translating into reluctance to try the case.

Of course, as in the United States, Australia, and other countries with extensive histories of asbestos litigation, a workable judicial standard will develop as more cases are litigated. For now, the only option for a Russian judge faced with this novel task is to rely on other, better developed areas of law, and to try to forge the most suitable

²⁰⁶ *Id.*

²⁰⁷ See *supra* Part IV(C).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Sheila Doyle Kelley & Allison N. Fihma, *Recent Trends in Asbestos Litigation*, PRODUCT LIABILITY ALERT (SCHNADER HARRISON SEGAL & LEWIS LLP) 1, Oct. 2012, available at http://www.schnader.com/files/Uploads/Documents/Recent%20Trends%20in%20Asbestos%20Litigation_10-2012.pdf.

²¹¹ See, e.g., *id.* at 2-3. As recently as 2012, a judge reduced a \$32 million verdict awarded to a plaintiff to \$8 million. Matter of NYC Asbestos Litig., *Dummitt v. Chesteron*, No. 1090196/10, 2012 WL 3642303 at *24 (N.Y. Sup. Ct. Aug. 20, 2012). The judge noted the recent trend in asbestos cases of awarding lesser damages, citing cases where awards of \$3.5 million, \$4.5 million, \$8 million, and \$6 million were sustained. *Id.* at *23. Clearly, any such point of reference when deciding on the amount of damages is lacking for a Russian judge faced with the task.

standard.²¹²

The necessary adjustments should also be made with regard to redress of moral harm. Although judges in Russia are currently reluctant to award moral damages,²¹³ such a stance toward the issue is not a given. Indeed, many courts around the world have started to expand their definition of the moral harm deserving of redress.²¹⁴ For instance, due to the exceptionally lengthy latency period associated with some exposures, as with asbestos, the courts in the United States permit plaintiffs to proceed on damages theories that were unknown to tort litigation only a decade ago.²¹⁵ Those novel theories include post-traumatic stress disorder, decreased quality of life, and emotional distress.²¹⁶ The inclusion of any number of these novel theories into the definition of “moral harm” as adopted by Russian courts is likely to increase the chance that victims of asbestos exposure in Russia would be able to attain justice via the judicial process.

Similar adjustments are needed in the case of punitive damages. Instead of endorsing a blanket “no punitive damages” rule, Russian courts and legislatures should approach this form of relief as a tool that can punish and deter misconduct the legal system regards as heinous or egregious.²¹⁷ The pursuit of punitive damages by private litigants can function as a partial remedy for weak administrative controls and non-existent regulation of the asbestos market in Russia.²¹⁸ Moreover, the chance of winning punitive damages will give potential asbestos litigants “the financial incentive to invest and risk substantial resources in the investigation and prosecution of corporate wrongdoing” that otherwise goes unpunished.²¹⁹

²¹² A similar problem arose in Australian courts as late as the 1980s when the first asbestos cases were litigated. TIM HAMMOND, SLATER & GORDON LAWYERS, *ASBESTOS LITIGATION IN AUSTRALIA: PAST TRENDS AND FUTURE DIRECTIONS* 1 (2004). Courts there have adopted the approach used for calculation of damages in common law negligence claims: a plaintiff should be awarded a sum of money so as to restore him or her to the position he or she would have been in if there had been no negligence. *Id.* at 3.

²¹³ Ristroph & Fedyaev, *supra* note 111, at 230.

²¹⁴ Ellis, *supra* note 133, at 4-5.

²¹⁵ *Id.* at 5.

²¹⁶ *Id.*

²¹⁷ Symeon Symeonides, *Resolving Punitive-Damages Conflicts*, 5 Y.B. PRIVATE INT'L L. 1, ¶ 2.1 (2003). For instance, courts in the United States have developed stringent tests to ensure that punitive damages are available only in the appropriate circumstances. TUYTEL, *supra* note 201, at 35-36. The tests enunciated by the courts include reckless disregard for the public safety or the rights of others, and flagrant indifference to unreasonable risks of harm. *Id.* at 36. Moreover, the U.S. Supreme Court has placed additional limitations on punitive damages based on Due Process considerations. Symeonides, *supra*, ¶ 3.1.

²¹⁸ *Id.* ¶ 2.5.

²¹⁹ *Id.*

D. Reducing Costs of Litigation

Asbestos litigation is a costly endeavor, for the plaintiff as well as for the defendant. Although there are as yet no numbers to analyze in Russia, the statistics coming from the United States present a vivid picture. By 2000, a total of \$54 billion had been spent on U.S. asbestos litigation.²²⁰ Transactional costs associated with the litigation process have consumed more than half of the total spending.²²¹ The high cost of litigation presents a substantial obstacle for bringing the claim, especially in jurisdictions like the Russian Federation, where neither contingency fee arrangements nor class actions are available as a potential out-of-pocket cost reduction device.²²²

Considering that Russia is a jurisdiction where no significant expansion of the scope of tort liability has taken place, and where the asset pool available to plaintiffs seeking redress is extremely limited, the legitimatization of the contingency fee arrangement might be the very step needed to put the mechanism of tort litigation in motion. For example, in the United States, where asbestos litigation is considered the longest-running mass tort litigation in the country's history,²²³ plaintiffs' lawyers finance virtually all claims through contingency fees.²²⁴ Although contingency fee arrangements are the subject of substantial criticism and debate,²²⁵ they might be an essential first step to encourage asbestos victims in Russia to test the unchartered waters of asbestos litigation, and to secure support and advice of Russian lawyers willing to take on a novel claim.²²⁶

The out-of-pocket costs resulting from the current unavailability of contingency fee arrangements are further amplified by the unavailability of class action suits in the context of asbestos litigation. The procedural form of class action is designed to improve the efficiency and economy

²²⁰ STEPHEN J. CARROLL ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 93 (2005).

²²¹ *Id.* at 95, 103. Defense transactional costs account for approximately thirty-one percent of total spending, while claimants' transactional costs account for approximately twenty-seven percent of total spending.

²²² See *supra* Part IV(D).

²²³ CARROLL ET AL., *supra* note 220, at 21.

²²⁴ Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 68 (2003).

²²⁵ For economic analysis of effectiveness of contingency fees in the context of asbestos litigation, see *id.* For proposed reform on the contingency fee policy, see Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal For Contingency Fee Reform*, 44 EMORY L.J. 173 (1995).

²²⁶ See Ristroph & Fedyaev, *supra* note 111, at 247.

of litigation.²²⁷ In addition to efficiency considerations, the class action serves to facilitate the spreading of litigation costs amongst numerous litigants with similar claims,²²⁸ the very effect that is needed to trigger the inflow of asbestos claims into Russian courts.

As was previously discussed, class actions are not unknown to Russian civil procedure. It is currently used in litigation of commercial transactions and capital market transactions disputes, so Russian judges and lawyers are familiar with this procedural device.²²⁹ The expansion to toxic tort law of the procedural form in its *current* state, however, might not result in the desired outcome. As of this writing, Russian law does not allow an individual plaintiff to opt out of a class.²³⁰ Once a class action suit is filed, an individual claimant who decides not to join the class is not allowed to file a separate claim against the same defendant, either during the litigation process or upon its completion.²³¹ An individual claimant has no choice but to join the class and throw himself or herself upon the mercy of a judge-appointed representative plaintiff, with no guarantee of adequate representation.²³² One commentator notes that, where judges have a wide discretion to appoint representatives, the level of corruption runs high.²³³ This, in turn, may trigger massive abuses of the procedural form,²³⁴ with no actual benefit to asbestos victims.

By developing a better understanding of class action as a tool designed to increase access to justice, rather than simply copying the procedural form without paying attention to its substance, Russian legislation is likely to open the door to legal actions that, otherwise, would have been uneconomical to bring.²³⁵ This reduction of the per-capita cost of such litigation, in turn, is likely to increase individuals' power and willingness to enforce their private rights in court.

²²⁷ ALBA CONTE & HERBERT NEWBERG, 1 NEWBERG ON CLASS ACTIONS § 1:6 n.2 (4th ed. 2002) (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 (1982); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)). The American courts appear to have adopted class action as a useful method of streamlining asbestos litigation, since class action tends to reduce the expenditure of time and money needed to resolve the common important issues arising in asbestos lawsuits. See TUYTEL, *supra* note 201, at *44.

²²⁸ CONTE & NEWBERG, *supra* note 227, § 1:6 n.6, citing *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980).

²²⁹ *Class Action*, *supra* note 168.

²³⁰ J. Vermin, *When America's Meat Is Russia's Poison*, RUSSIAN LAW ONLINE (Oct. 26, 2009), <http://www.russianlawonline.com/content/when-americas-meat-russias-poison>.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

VI. CONCLUSION

The analysis presented in this Note supports the proposition that tort law is the only legal institution currently available that is capable of providing redress to the victims of asbestos exposure in Russia. Despite this fact, various factors—pre-trial hurdles, impossibility of showing of causation in fact, limited damage awards, and high costs of litigation—continue to inhibit the development of asbestos litigation in the Russian Federation. Plaintiffs are put in a hostile litigation environment characterized by high levels of uncertainty and soaring litigation costs.

This Note presented and analyzed several avenues for reform needed to improve the situation, in particular, the expansion of the definitions of recoverable harm and standing; the introduction of compulsory, centralized track records documenting asbestos exposure; and the possibility of punitive damages, as well as contingency fees and class action toxic tort claims. The Note does not purport to suggest that these are either the optimal or the only available solutions. Undoubtedly, more research is needed to find the most appropriate way in which the Russian judicial system should be fine-tuned to accommodate the needs of currently unprotected asbestos victims. Nevertheless, crystallization and concretization of the existing problem is the first step that the Russian government, courts, and society at large need to take, if the ultimate answer is ever to be found.