Dalkon Shield Claims Resolution Facility: A Contraceptive for Corporate Irresponsibility?

I. INTRODUCTION

Several issues in mass tort litigation have surfaced in recent years to focus attention on the inability of the traditional court system to adequately handle the special demands associated with the mass tort. A particular problem is presented by the mass tort caused by the widespread sale or use of a dangerous or defective product. This is illustrated by both the asbestos and the Dalkon Shield cases. While each instance of mass tort litigation is unique, some of the issues that arise in handling such litigation are common. The litigants may number in the thousands and the damage may be measured by billions of dollars. Some of the problems facing parties potentially involved in such litigation are issues of fairness to all parties, full resolution of pertinent issues, and logistical ifficulties in bringing suit.[1] While the class action has promise of being a more efficient method of handling the special problems arising in multiple-incident cases,[2] recent court developments may have restricted its use and availability to the widespread plaintiffs of mass tort.[3] The need remains to find a fair solution that protects the rights of all litigants. Coupled with the concern for fair adjudication of the rights of people affected by the issues in multiple-incident cases is the concern that the corporations involved in the production of dangerous or defective products be held accountable in a serious and effective manner.[4]

The need for a new approach to the problem of mass tort litigation has been demonstrated by the asbestos cases; recent studies indicate that over the course of thirty years asbestos will account for as many as 265,000 cancer deaths.[5] Agent Orange,[6] DES,[7] and MER/29[8] are all additional examples of where the nature of the damage inflicted by a mass-marketed product affected thousands of people. The resulting litigation

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1. Sheila L. Birnbaum, *Case Management of Mass Tort Litigation, in* PREPARATION AND TRIAL OF A TOXIC TORT CASE 1990 (PLI Litig. Admin. Practice Course Handbook Series No. 387, 1990).

2. *See generally* Irvin R.M. Panzer & Thomas E. Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 TORT INS. L.J. 560 (1986).

3. *Id.*

4. *See generally* Miles W. Lord, *Corporate Irresponsibility: The Sin With No Sinners*, 9 HAMLINE L. REV. 53 (1985).

5. Harry H. Wellington, *The Thirtieth Cleveland-Marshall Fund Lecture: Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375, 376 (1984-1985).

6. *See generally In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

7. *See generally* Payton v. Abbott Labs., 83 F.R.D. 382 (D. Mass. 1979).

8. *See generally* RALPH A. FINE, THE GREAT DRUG DECEPTION: THE SHOCKING STORY OF MER/29 AND THE FOLKS WHO GAVE YOU THALIDOMIDE (1972).

has threatened to swamp the courts, raising the specter of interminable delays, repetitious discovery proceedings, inconsistent damage awards, ever-increasing legal fees, and the very real possibility that successive awards to plaintiffs could bankrupt the company and leave the later claimants without any funds for the satisfaction of their judgments. It was in this context that the Claims Resolution Facility was developed as an alternative method of resolving the asbestos litigation while preserving the ability of plaintiffs to achieve satisfaction of their claims.

This Note will examine the Claims Resolution Facility as it is being used to resolve the thousands of Dalkon Shield cases. A relatively new technique in the resolution of mass tort litigation, it was initially proposed by Dean Wellington in his capacity as moderator of a group consisting of major asbestos producers, insurance companies, and plaintiff's lawyers.[9]

II. THE CLAIMS RESOLUTION FACILITY IN ASBESTOS CASES

The special nature of the injury caused by exposure to asbestos illustrated the need for a novel approach to the settlement of the resulting litigation. Asbestos is a toxic mineral compound whose fibers can cause either lung cancer or asbestosis in workers and others who have been exposed over time.[10] The diseases have a very long latency period - in fact, the diseases may not be apparent for up to forty years.[11] The nature of the injury[12] and its long latency period create special problems for litigation.

Because of the long period of time between exposure and the manifestation of the symptoms, it is often difficult to identify the manufacturer responsible for the resulting injury. Consequently, plaintiffs have taken the course of suing all relevant asbestos manufacturers under joint and several liability.[13] The cases alleging personal injury have usually been brought in strict product liability, with the additional claim that the manufacturer either knew or should have known of the dangers associated with exposure to asbestos, and that its failure to warn the public left it liable for punitive damages as well.[14] This approach was

9. Wellington, *supra* note 5, at 375. Mr. Wellington is Dean and Sterling Professor of Law at Yale University.

10. *Id.* at 376.

11. *Id.*

12. Exposure to both asbestos and cigarette smoke can cause cancer; when there is combined exposure the synergistic effects produce much higher rates of cancer than exposure to either carcinogen alone. This factor has heightened the difficulty in accurately determining causation.

13. Wellington, *supra* note 5.

14. *Id.*

successfully utilized in *Borel v. Fiberboard Paper Products.*[15]

Dean Wellington cites studies which report that by the end of 1982 "approximately 400 million dollars has been paid . . . in *total compensation* for asbestos-related injury."[16] He noted that the costs of settlement over the next thirty years as the cases continue to be filed will grow to a possible $87 billion.[17] One study estimated that in addition to the settlement costs, estimated defense costs will total in the billions over the next thirty years.[18] Although these numbers are staggering, the special nature of asbestos litigation makes these projections especially noteworthy. Because each suit typically names a large number of defendants as jointly and severally liable, and each asbestos producer typically has not only its own defense team but is represented by its insurers, the sheer number of parties involved results in a duplication of time, efforts and expenses.[19] Clearly, some coordination of defense was necessary in order to proceed efficiently.

Dean Wellington relates the difficulties he encountered in securing cooperation between disparate insurers and producers in order to ascertain the amount to be contributed to the establishment of a fund capable of settling the thousands of asbestos claims already filed.[20] Because the period of exposure was typically protracted, it was difficult to ascertain what producer was responsible for the offending asbestos. Moreover, insurers had written policies whose coverage varied significantly; some only covered damages due to injury and disease caused by an "occurrence" (defined as an accident or exposure) during the policy period. Problems with such coverage were inevitable; in many cases the manifestation of the injury arose 15 to 40 years later. Many insurers disputed that prolonged exposure was even an "occurrence."[21]

Some insurers insisted that coverage was triggered only by the manifestation of the symptoms - meaning that the policies issued during the latency period did not cover the injury.[22] Others insisted that coverage was triggered by exposure and that any policies issued after exposure provided no coverage.[23]

After extensive and often acrimonious discussions, the Wellington group was able to agree on insurance coverage satisfactory to the parties.

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15. 493 F.2d 1076 (5th Cir. 1973).
16. Wellington, *supra* note 5, at 377.
17. *Id.*
18. *Id.*
19. Wellington, *supra* note 5, at 378.
20. *Id.* at 379-81. Twenty-four thousand claims had already been filed by 1985.
21. *Id.* at 381.
22. *Id.*
23. *Id.*

This resulted in the establishment of the Asbestos Claims Facility.[24] The Facility is an independent nonprofit organization, composed of the asbestos producers and their insurers, that "will administer and arrange for . . . evaluation, settlement, or defense of all asbestos-related claims against [the members of the Facility]."[25] The members are the insurers and producers who subscribed to the agreement hammered out by the Wellington group. When a claim is settled, the cost is allocated to all the members. If a settlement offer is rejected, the claimant has two options: the claimant may elect good faith negotiation, followed, if necessary, by binding private settlement through arbitration; or he may elect negotiation, followed by non-binding arbitration, and if necessary, by formal litigation.[26] It was the hope of Dean Wellington that the procedures outlined by his group would result in substantial savings to the insurers and producers and would also result in more of the award going directly to the injured plaintiff.[27]

Due to the nature of the injuries associated with asbestos exposure and the fact that it is often difficult to ascertain years later just when the exposure occurred, the problems which arose in settling the asbestos claims are significantly different than the problems encountered in the Dalkon Shield cases. The Asbestos Claims Facility may have been the only hope to unite the various producers and insurers, all of whom were eager to involve as many other parties as possible in the establishment of a fund out of which the claims would be paid. However, the issues in the resolution of the Dalkon Shield claims are different: only one manufacturer is involved; physicians specifically prescribed the Dalkon Shield, eliminating problems of identifying the source of the injury; the date of exposure can be accurately pinpointed, and the manifestation of the symptoms can be confidently traced. So why was a Claims Resolution Facility needed to address the claims brought by those injured by the Dalkon Shield?

III. THE DALKON SHIELD AND THE CLAIMS FACILITY

A. Background

The Dalkon Shield is a small plastic intrauterine contraceptive

24. *Id.* at 387.
25. *Id.*
26. *Id.* at 388.
27. *Id.* at 389.

device.[28] The shield is a small oval approximately the size of a dime, with small protrusions and a tailstring intended to assist in checking for proper placement and for use as an aid in removal. The tailstring in the Dalkon Shield differed from the single filament strands of other IUDs in that it was a multi-filament strand enclosed in a nylon sheath, unsealed at each end.[29] This tailstring was later discovered to have a "wicking" tendency, drawing bacteria into the sterile environment of the uterus, causing infection.[30]

In 1970, A.H. Robins purchased the rights to the Dalkon Shield from the inventors, making several modifications to the device. Without any clinical testing on the modifications, Robins began to market the Shield on an international scale, intensively advertising the device to both medical and lay communities.[31] In 1971, A.H. Robins first received warning of the dangerous "wicking" tendency of the multi-filament string, but the director of pharmaceutical research decided that no changes would be made in the product.[32] In 1972, Robins received notice from one of its clinical investigators of the danger of septic abortions in shield users who might become pregnant.[33] The clinical investigator advised the removal of the shield once a diagnosis of pregnancy was made.[34] Robins ignored the recommendation.

In the following two years Robins received 22 reports of users who had suffered spontaneous septic abortions, one resulting in a woman's death, while using the device. Despite knowledge of the danger involved, Robins sent literature to the medical community specifically stating that it was safe to leave the shield in place once a diagnosis of pregnancy was made.[35]

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28. The Dalkon Shield was initially designed by Dr. Hugh Davis, an associate professor of obstetrics and gynecology at Johns Hopkins University. Dr. Davis formed a small company in 1968 to market the device and at that time began a one-year test study at a family planning clinic. According to Dr. Davis, the shield had a very successful pregnancy rate of 1.1% during that test period. Dr. Davis published his results in the American Journal of Obstetrics and Gynecology, neglecting to mention, however, that he had a financial interest in the device. He reported that the shield produced excellent results and that it was a "superior" IUD. Palmer v. Robins, 684 P.2d 187, 195 (Colo. 1984).

29. *Id.*

30. Leslie E. Tick, Note, *Beyond the Dalkon Shield: Proving Causation Against IUD Manufacturers For PID-Related Injury*, 13 GOLDEN GATE U. L. REV. 639, 642-43 n.21 (1983).

31. Palmer v. Robins, 684 P.2d 187, 195 (Colo. 1984).

32. *Id.* at 196.

33. *Id.* Robins had knowledge that the Shield's reported pregnancy rate of 1.1% was actually closer to 6%. This information was not included in the advertising for the Dalkon Shield.

34. *Id.*

35. *Id.* This conduct is relevant to claims for punitive damages in the resulting lawsuits.

B. Litigation

In 1975, a woman who had become pregnant while using the device filed a suit against Robins for the injuries she sustained.[36] Relying on the literature of the Robins company, her physician decided to leave the shield in place. Because of the "wicking" tendency of the string, the woman suffered a spontaneous septic abortion, an involuntary miscarriage caused by a blood-borne bacterial infection centered in the uterine area. As described by the court in *Palmer*, she:

> subsequently went into septic shock, a condition resulting from a massive infection with a concomitant fall in blood pressure to a dangerously low level. She also developed a blood disorder which impeded natural blood clotting ability. In order to save her life, it was necessary to perform a total hysterectomy in which her uterus, fallopian tubes and ovaries were removed.[37]

The jury awarded Palmer $6,000 in compensatory damages and $6,200,000 in punitive damages. Both awards were upheld on appeal.[38]

Over the next few years, A.H. Robins faced an increasing number of suits across the country; at one time Robins was faced with two hundred suits filed in the Northern District of California alone.[39] By mid-1974 Robins finally withdrew the Dalkon Shield from the market; however, the device was not effectively recalled until 10 years later, in 1984.[40]

Faced with such volumes of litigation, the courts tried different procedures for efficiently handling all the claims. Many courts consolidated pre-trial proceedings under the direction of the Judicial Panel on Multi-District Litigation,[41] hoping that such action might reduce the difficulties of efficient disposition of the mounting Dalkon Shield case load. After accepting the transfer of a number of such cases, the Panel concluded that as much had been achieved as possible in reducing pre-trial proceedings, and it began to vacate later transfer orders, returning the

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36. *Id.* at 197.

37. *Id.*

38. *Id.* at 198.

39. *In re* Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

40. *In re* A.H. Robins Co., 880 F.2d 709, 711 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989).

41. *See, e.g., In re* A.H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig., 406 F. Supp. 540 (J.P.M.L. 1975); 419 F. Supp. 710 (D.ML 1976); 438 F. Supp. 942 (D.ML 1977). (The Judicial Panel on Multidistrict Litigation transferred three cases to the District of Kansas under the consolidated name of *In re* A.H. Robins Co., "Dalkon Shield," Etc., no. 211, since the action appeared to share common factual questions.)

cases for further proceedings to the respective transferor courts. In the words of the Court of Appeals for the Fourth Circuit,

> [w]hile these proceedings before the Judicial Panel had aided the problems of discovery in the Dalkon Shield cases, they did nothing to relieve the clogging of court calendars by the constantly increasing stream of Dalkon Shield cases to be tried nor did they reduce substantially the trial time of the cases. It was manifest that other measures were required if this overloading of the courts with Dalkon Shield cases was to be relieved.[42]

In another attempt to streamline the course of handling so many suits, Judge Miles Lord of the Minnesota District Court consolidated a large number of Dalkon Shield suits and appointed a lead counsel to handle discovery. Judge Lord appointed two masters to sift through all the material discovered and all material that developed in their own independent investigations. These masters were to report to the court and to the counsel on all relevant material contained in the files of Robins and its insurer, Aetna. The lead counsel then catalogued all the material that resulted from this expedited discovery.[43]

The suits before Judge Lord were settled for $38 million and consequently, no further proceedings were necessary. However, the material discovered by the lead counsel was made available to counsel of other Dalkon Shield cases.[44]

Another attempt to handle the overwhelming volume of Dalkon Shield cases was the use of the class action. This approach was initially unsuccessful.[45] In *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*,[46] the Ninth Circuit vacated and remanded the District Court ruling allowing class certification, stating that:

> The few issues that might be tried on a class basis in this case, balanced against issues [such as causation and damages] that must be tried individually, indicate that the time saved by a class action may be relatively insignificant. A few verdicts followed by settlements might be equally efficacious.[47]

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42. *In re* A.H. Robins Co., 880 F.2d 709, 712 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989).

43. *Id.*

44. *Id.*

45. *See, e.g.*, Rosenfeld v. A.H. Robins Co., 63 A.D.2d 11 (N.Y. App. Div. 1978), *appeal dismissed*, 385 N.E.2d 1301 (N.Y. 1978); *In re* Northern Dist. of California "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

46. 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

47. *Id.* at 856.

This seems to suggest the possibility of certification of the class in order to achieve settlement of the claims. A continuing concern of the attorneys representing the plaintiffs in the increasing volume of Dalkon Shield cases was that the later plaintiffs to win awards might be disadvantaged by the exhaustion of funds available to pay the awards.[48] This "limited fund" concept had been argued as necessitating the certification of the class for punitive damages under Fed. R. Civ. P. 23(b)(1)(B). At the time of the attempt to certify the class in *In re Northern District of California, "Dalkon Shield" IUD Products Liability Litigation*,[49] there were 1,573 suits involving claims for compensatory damages of well over $500 million, while the net worth of A.H. Robins was only $300 million. This raised the "unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress."[50]

Yet another attempt to certify a class occurred as the result of an action filed in the Eastern District Court of Virginia by A.H. Robins itself in 1984. Robins, under the "limited fund" concept,[51] sought to certify a nationwide class action of the claims for punitive damages in all pending Dalkon Shield cases.[52] Certification was denied. The District Judge construed the California decision as having held that the Rule 23(a) requirements of commonality, typicality, and adequate representation were not met, and that such a decision, under the principles of collateral estoppel, barred this request for certification.[53]

One more attempt at certifying a class for the maintenance of the Dalkon Shield suits was proposed, again asserting that A.H. Robins was insolvent and that the value of the outstanding claims exceeded the value of the company, thereby exposing later claimants to economic prejudice at the hands of more timely filed claims. The action sought a gross judgment, the proceeds of which would be equitably distributed among the Dalkon Shield claimants under an alternative dispute resolution process.[54] Robins opposed the certification and denied insolvency. However, soon

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48. *See* Emily Couric, *Bankruptcy: The A.H. Robins Saga*, 72 A.B.A. J. 56 (1986).

49. *In re* Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981).

50. *Id.* at 1191.

51. Sharon Youdelmen, Note, *Strategic Bankruptcies: Class Actions, Classification and the Dalkon Shield Cases*, 7 CARDOZO L. REV. 817 (1986). The author notes that Robins' attempt to impose a class action on its claimants is quite likely to be imitated in the future by besieged corporations. The author explains that this is because the limited fund class action provides the corporation with all of the protections of bankruptcy, while imposing few of the costs.

52. *In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1113 (E.D. Va. 1985).

53. *In re* A.H. Robins Co., 880 F.2d 709, 715 (4th Cir. 1989).

54. This request resembled what was later instituted as the Claims Facility.

afterward, Robins filed Chapter 11 proceedings. Since the Chapter 11 filing, the motion for class certification has remained dormant.[55]

At this point in 1985, an average of seventy cases per week were being filed against Robins, seeking both compensatory and punitive damages.[56] Very large awards were being returned against Robins; the verdict in one case amounted to over $9 million.[57] Such results led plaintiffs to become very apprehensive of the ability of Robins to meet the liabilities being asserted in the pending cases. Future suits sought to include Robins' insurer, Aetna, as a "deep pocket" defendant with the capability of satisfying the claims asserted.[58] These suits bore no fruit, as they were unable to show that Aetna was a joint tortfeasor with Robins.[59]

However, in 1984, Aetna and Robins agreed to a compromise settlement in which Aetna agreed to provide additional coverage above Aetna's claimed limit of $300 million. Disagreement remained over the amount of remaining liability, if any, under Aetna's policy for the payment of judgments against the Dalkon Shield claims.[60] By the time A.H. Robins filed for reorganization on August 21, 1985, it had settled 9,238 claims for approximately $530 million and still faced over 5,000 claims pending in state and federal courts.[61]

After A.H. Robins' request for certification of the class had been denied in 1984, it filed a petition for reorganization under Chapter 11 of the Bankruptcy Code.[62] As part of the bankruptcy proceedings, the parties had been developing a plan of reorganization.[63] A fundamental

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55. *In re* A.H. Robins Co., 880 F.2d 709, 715 (4th Cir. 1989).

56. *In re* A.H. Robins Co., 89 B.R. 555, 557 (E.D. Va. 1988).

57. Tetuan v. A.H. Robins, Co., 738 P.2d 1210 (1987). The court upheld an award of $1.7 million in compensatory damages and $7.5 million in punitive damages, owing to the clear evidence that officers of A.H. Robins not only knew of the dangerous "wicking" tendencies of the Dalkon Shield, but concealed the evidence by attempting to destroy documents relating to their awareness of the "wicking" problem.

58. *See In re* A.H. Robins Co., 880 F.2d 709, 715 (4th Cir. 1989); Bast v. A.H. Robins Co., 616 F. Supp. 333 (E.D. Wis. 1985).

59. *See In re* A.H. Robins Co., 880 F.2d 709, 716 (4th Cir. 1989).

60. *Id.*

61. *Id.* at 717.

62. *In re* A.H. Robins Co., No. 85-01307-R, 89 B.R. 555 (E.D. Va. 1988). Because Chapter 11 reorganization is voluntary, there is no insolvency requirement, and the debtor may continue in a reorganization plan providing for the payment of funds to various classes of creditors.

63. Chapter 11 Reorganization allows the debtor to discharge his debts based on a plan of reorganization in which creditors, either by consent or through the operation of protective provisions, accept less than the full amount of their debts. In reorganization, the debtor's business continues in a modified form and the creditors receive payments from the future earnings of the reorganized business. John P. Burns ET AL., Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 808 (Charles D. Maguire, Jr. & Laurin Blumenthal eds., 1983).

step involved the estimation of unliquidated claims against A.H. Robins.[64] The value of the unliquidated claims was set at $2.475 billion by District Judge Merhige. He informed all the parties that no plan of reorganization would be considered which failed to provide this amount for the full payment of all Dalkon Shield claims.[65] In April 1986, lawyers for the claimants filed a class action against Aetna as a joint tortfeasor.[66]

At this time, American Home Products Corporation made an offer of merger with A.H. Robins which would provide the sum required by the District Judge. In order to insure itself against all Dalkon Shield liability, American Home Products made its offer contingent upon a settlement of all Dalkon Shield claims against all parties. At this point, it became clear that the negotiations for settlement of the suits against Robins and Aetna had to be merged with the proceedings of reorganization under Chapter 11.[67] The procedure adopted to achieve this merger involved the establishment of a trust fund to consist of $2.475 billion, funded primarily by the payment of American Home in connection with its acquisition of A.H. Robins.[68] Because the liability of Robins in the Dalkon Shield litigation was direct and that of Aetna was only as a possible joint tortfeasor, the contribution of Aetna was considerably less. Aetna provided $75 million and four policies of insurance, totaling $250 million to be used if the funds in the trust were insufficient to meet the payment of the outstanding claims. Under the terms of the agreement, all claims of the Dalkon Shield claimants against both Robins and Aetna were to be converted into claims solely against the trust fund. Robins, Aetna, and American Home were to be absolutely released from all liability.[69]

C. *The Trust Fund and The Claims Resolution Facility*

Under the terms of the agreement, the trust fund was to be administered by five trustees, who were to create the Claims Resolution

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64. *See* Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983); David Kaufman, Note, *Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy*, 35 STAN. L. REV. 153 (1982) (stating that the process of estimation of unliquidated claims provided by the Bankruptcy Code is a lengthy procedure).

65. *In re* A.H. Robins Co., 880 F.2d 709, 720 (4th Cir. 1989).

66. The suit was brought by seven individual claimants, suing on their own behalf and as class representatives of all injuries to Dalkon Shield claimants. The suit sought recovery from Robins' insurer on the theory that the conduct of Aetna, while acting as an insurer of Robins, was such as to render itself liable as a joint tortfeasor for any injuries sustained by persons while using the device. During consideration whether to give final certification to the class, the parties entered into a settlement of the action conditioned on certification of the class. *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).

67. *Id.* at 710.

68. *Id.*

69. *Id.* at 722.

Facility which would resolve the liability due each claimant. During the bankruptcy proceedings, notice had been sent to all claimants throughout the world that they must file claims in the bankruptcy proceeding, or their claims against Robins would be barred.[70] As a result, several hundred thousand claims were filed.[71] The purpose of the Facility was to evaluate each claim on the basis of detailed questionnaires and medical information submitted by each claimant. The Facility would then award an amount to each individual claimant sufficient to settle the claim. Originally, the plan called for the Facility to attempt to resolve the issue of liability in each individual case by negotiation between the Facility, the claimant, and her attorney (if she had one). If the resolution of the claim could not be accomplished through negotiation, the claimant would be granted the option of having the claim resolved through either binding arbitration or by a jury trial. It was stipulated that should any claimant elect to resolve her claim by suit, venue of such trial would be unchanged by the Chapter 11 case, and the right to a jury trial would be preserved.[72]

One important factor in the agreement was the issue of punitive damages. Whereas early claimants had received in excess of $6 million, the Plan provided that:

> [a]ny portion of any Dalkon Shield Claim that is a Claim for punitive damages is a Disallowed Claim; provided, however, that holders of Dalkon Shield Claims subject to the Claims Resolution Facility are entitled to receive from the Claimants Trust any sums payable in lieu of punitive damages pursuant to the Claims Resolution Facility.[73]

The trustees were charged with the responsibility of evaluating claims and expediting recovery. As outlined by Bankruptcy Judge Blackwell N. Shelley:

> It is the responsibility of the Trustees to ascertain the fair value of the injuries and make an equitable settlement according to the option procedures created in the Claims Resolution Facility Agreement. This Court charges them with the additional responsibility to distribute the funds in the Trust to worthy claimants as soon as possible.[74]

The Plan, as it developed, established four options, each of which

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70. *In re* A.H. Robins Co., 880 F.2d 779, 780 (4th Cir. 1989).

71. *In re* A.H. Robins Co., 862 F.2d 1092, 1093 (4th Cir. 1989).

72. *In re* A.H. Robins Co., 880 F.2d 709, 722 (4th Cir. 1989).

73. *Id.* at 722 n.16.

74. "*Judges React*," CLAIMS RESOL. REP. (Dalkon Shield Claimants Trust, Richmond, Va.), No. 3, at 1 (quoting Bankruptcy Judge Blackwell N. Shelley's reaction to the Supreme Court's decision not to review the Reorganization Plan or the related Breland Class Action).

detailed the level of injury and nature of the proof necessary to establish a recovery. Claims submitted without any medical records to prove use of the Dalkon Shield, or those which indicated relatively minor injuries, are classified as Option One claims. These claims are not evaluated and recovery under Option One is limited to $750. Furthermore, a claimant who selects Option One will not be allowed to select any other option at a later date.[75]

Option Two claims are subjected to limited review. This Option is for claimants who can establish that they used the Dalkon Shield and suffered an injury. Proof is required through submission of medical records. Under Option Two, it is expected that a claimant will recover greater payments than those in Option One.[76] Option Three provides the best hope of recovery for injuries which can be traced to the Dalkon Shield. Claimants must submit detailed questionnaires and medical records, which are subjected to a full review. Payments are intended to be consistent with those for similar injuries which were achieved through litigation. If the settlement amount offered by the Facility under Option Three is deemed insufficient by the claimant, she may proceed to mediation, followed by arbitration or trial. However, once a claimant chooses to proceed under Option Three, she forfeits her opportunity to seek review under Options One and Two.[77] A fourth Option is available to those who might become injured later, or whose existing injuries worsen. When such a claim becomes active, the claimant will then select one of the other options available. In addition, the trust has established a special program for reconstructive surgery and *in vitro* fertilization for women whose use of the Dalkon Shield has left them permanently injured.[78]

D. Is the Claims Resolution Facility the Right Answer?

By producing a dangerously defective IUD, A.H. Robins subjected hundreds of thousands of women to risks of spontaneous abortions, massive infections, sterility, and in some cases, death.[79] By failing to recall the Dalkon Shield for 14 years, A.H. Robins increased the scope of the injuries, and subjected itself and the court system to litigation that threatened to overwhelm the resources of both the company and the

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75. "*Your Options*," CLAIMS RESOL. REP., (Dalkon Shield Claimants Trust, Richmond, Va.) No. 1, at 4.

76. *Id.*

77. *Id.*

78. *Id.*

79. CHICAGO DAILY L.J., Nov. 6, 1989, at 1.

courts. Attempts at class certification were unsuccessful and eventually the Claims Resolution Facility was developed in an attempt to settle the hundreds of thousands of suits still pending. But does this method of dispute resolution offer a real solution to the problem of the mass tort?

The purpose of the tort system is to redress wrongs by awarding an amount in damages to one injured by the acts of another. In cases of recklessly negligent conduct, punitive damages are seen as a way of punishing the wrongdoer and deterring wrongful conduct,[80] "especially where that conduct results in 'foreseeably avoidable and all too often catastrophic injuries from defective products.'"[81] One authority has noted that punitive damages in products litigation takes on a greater role, serving as a societal curb on manufacturers' conduct by exposing and punishing misdeed, with the additional effect of eliminating unfair profit gained at the expense of the injured.[82] However, the Claims Resolution Facility has eliminated the possibility of punitive damages. By filing Chapter 11, at a time when it was not bankrupt,[83] A.H. Robins was able to limit its liability to a specified amount. The aims of the traditional tort system have been altered and instead, a process has been substituted which offers protection to the producer of the dangerous product while attempting to address the injuries of the consumers who relied on it. Is this an improvement?

First, one must decide what factors indicate success. Is it the continued viability of the company or is it the easing of the overwhelming numbers of court cases on the dockets of an already stressed court system? One prominent plaintiffs' attorney has suggested that the needs of the women have been left unaddressed in the attempt to allow A.H. Robins a chance to regroup and recover from the devastating consequences of marketing the defective IUD.[84] For example, although the Supreme Court resolved the last challenge to the settlement in October 1989, resolution of the Option Three claims has been distressingly slow. The Trust reported that by April 15, 1990 it had made offers to over 800 of the 1,700 claimants who at that time had elected Option Two; conversely,

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80. "Punitive damages . . . remain as the most effective remedy of consumer protection against defectively designed mass produced articles. They provide motive for private individuals to enforce rules of law and enable them to recoup the expense of doing so." Tetuan v. A.H. Robins, 738 P.2d 1210, 1239 (Kan. 1987) (quoting Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383 (Cal. Ct. App. 1981)).

81. Laura Greenberg, Note, *Punitive Damages in Mass-Marketed Products Litigation*, 14 LOY. L.A. L. REV. 405, 407 (1981).

82. *Id.* at 407-08 (citing Igoe, *Punitive Damages in Products Liability*, 34 J. MO. B. 394, 405 (1978)).

83. *See In Re* A.H. Robins Co., No. 85-01307-R, 89 B.R. 555 (E.D. Va. 1988).

84. Telephone interview with Thomas Brandi, attorney, Bianco, Brandi & Jones (Nov. 1990).

of the 1,600 claimants who had elected Option Three, as of April 15, only three had received offers by that date.[85]

The Claims Resolution Facility has emerged as an unusual form of alternative dispute resolution. While the Plan calls for mediation upon the receipt of an unsatisfactory offer, in reality, claimants have no opportunity of mediation. Once an offer has been made, a claimant may elect to accept the offer or reject it, in which case a settlement conference will be scheduled. After the settlement conference has been scheduled, the claim receives another in-depth review. The amounts offered to the claimants have occasionally been reduced at this point, or they may actually increase.[86] The settlement conference is an informal session at which the representative of the Trust will explain the basis for the offer; however, negotiation is not permitted. Claimants must schedule settlement conferences if the offer is rejected, but they need not attend.[87]

After claimants have scheduled settlement conferences, they must wait 90 days before becoming eligible to choose binding arbitration or litigation.[88] Once a claim proceeds to either binding arbitration or litigation, a claimant is still bound by the holdback provision contained in the Administrative Order issued by Judge Merhige.[89] Under the terms of the Order, claimants who proceed to arbitration or litigation and receive an award or judgment greater than the offer tendered by the Trust, may still

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85. *Option 2 & 3 Settlement Awarded*, CLAIMS RESOL. REP. (Dalkon Shield Claimants Trust, Richmond, Va.), May 1990, at 1.

86. Telephone interview with Laura Taylor, Coordinator, Dalkon Shield Claimants Trust (February 7, 1992).

87. *"I'd Like to Know,"* CLAIMS RESOL. REP. (Dalkon Shield Claimants Trust, Richmond, Va.), March 1991, at 3.

88. *Id.*

89. *In re* A.H. Robins Co., Chapter 11, No. 85-01307-R, U.S. Bank. Ct. (E.D. Va. 1991).

> No levy against the Trustees, the Trust or its assets may be made as a result of any Arbitration or Litigation. Until further order of this Court, in order to assure the continued availability of funds to pay all valid Dalkon Shield Personal Injury Claims and in order to further the other proper purposes of the Plan, Trust and CRF, in satisfaction of all awards or judgments (including awards or judgments of costs, fees or disbursements) obtained as a result of Arbitration or Litigation, the Trust shall:
>
> > a. pay initially only that portion of such an award or judgment which does not exceed the greater of $10,000 or the final settlement offer made by the Trust under Option 3 . . . ; and
> >
> > b. after the payment in full of all valid, timely Dalkon Shield Personal Injury Claims which are settled under Options 1 or 2 or under Option 3, . . . or at such time as the Trustees are satisfied that all valid, timely Dalkon Shield Personal Injury Claims can be fully paid, next pay pro rata from any Trust assets available for that purpose the unpaid balances of all Arbitration awards and Litigation judgments.

only receive the greater of $10,000 or the Trust's initial offer. The remainder of the award or judgment will be paid pro rata along with all other unpaid arbitration awards and judgments in litigation only after the Trustees are certain that there will be enough money available to make adequate settlement offers to all other claimants.[90]

In consequence, many women with serious injuries and sterility, who have received what they consider to be inadequate offers from the Trust, are still waiting for a final resolution of their claims,[91] and are likely to wait even longer. The Claims Resolution Facility is now estimating that all Option Three claims should have received offers by July of 1995.[92] Compounding the problem for many women who have rejected settlement offers are the long delays in the scheduling of settlement conferences. The Claims Resolution Facility will only schedule conferences when there are sufficient numbers of claimants in a geographical area to warrant the conference. This has resulted in unconscionable delays. Women who suffered hysterectomies and filed claims over ten years ago have, in some instances, not even been scheduled for settlement conferences yet.[93]

While the parties have been struggling with issues of class certification and establishment of the trust fund, more than five years have elapsed with no money awarded to thousands of women who suffered the most grievous injuries. Many women have had to endure not only the physical injuries resulting from the use of the Dalkon Shield, but severe emotional scarring resulting from the loss of their reproductive capacity. Many victims pursued litigation in the hope of recovering enough money to allow reconstructive surgery, or to seek the counseling needed to deal with such a grievous loss.[94]

It will be difficult to assess the actual effectiveness of the Claims Resolution Facility in addressing the rights of these women as the offers made to claimants are confidential. It is possible that their rights would have been better protected by continuing to seek redress in the traditional tort system.[95] However, this consideration is offset by the possibility that exhaustion of funds due to high awards to early litigants could have totally

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90. *Judges Approve Order,* CLAIMS RESOL. REP. (Dalkon Shield Claimants Trust, Richmond, Va.), August 1991, at 1.

91. Telephone interview with Thomas Brandi, attorney, Bianco, Brandi & Jones (January 31, 1992).

92. Telephone interview with Laura Taylor, Coordinator, Dalkon Shield Claimants Trust (February 11, 1992).

93. Telephone interview with Thomas Brandi, attorney, Bianco, Brandi & Jones (January 31, 1992).

94. *Id.*

95. In fact, thousands of women injured by the Dalkon Shield have decided to head back into court after rejecting the settlement offers tendered by the Facility. A hearing has been scheduled for January 7, 1992 before District Judge Merhige. *See* Laura Myers, *"Dalkon Shield Users Heading Back To Court,"* THE RECORDER, Nov. 14, 1991, at 2.

disadvantaged those who filed later. The establishment of the trust fund clearly protects these later filers.

Another criticism leveled at the establishment of the Claims Resolution Facility is that by removing the threat of punitive damages and by setting caps on awards, companies, such as A.H. Robins, have lost the inherent incentive to produce reliable products;[96] the awards for injuries could be borne simply as a cost of doing business.

After the lengthy hearings for the Dalkon Shield litigation before Judge Miles Lord, he wrote:

> [w]ithin our capitalist system there are many temptations to take shortcuts, which on a short-range basis, will mean instant profits but will also bring about disastrous consequences for humanity in the long-run . . . It is the very nature of the corporate structure, and the nature of the legal system that regulates that corporate structure, which causes some corporations to commit acts that no individual ever would do personally. The fact that a corporation has no conscience, the fact that group action allows individuals to sublimate their individual responsibility to the mob psychology, and the fact that some individuals in lesser positions must accomodate the management's wishes, all contribute to acts of wrongdoing that no individual would do personally.[97]

This observation strongly suggests that any procedure that removes the institutional restraints on corporate irresponsibility might tend to increase societal risk. The avoidance of punitive damages might conceivably make the cost of injuries bearable as costs of doing business.

It is imporant to recognize the role played by the tort system in focusing the issues to be resolved in the settlement procedure. As a result of all the earlier litigation many relevant facts were uncovered in the discovery procedures: facts that created the pressure on A.H. Robins to acknowledge the validity of the thousands of outstanding claims. The very fact that the court system was swamped with claims, accompanied by media attention, led to the willingness of A.H. Robins to finally consent to settlement procedures.

In the final analysis, the evaluation of the effectiveness and desirability of the Claims Resolution Facility must await the determination of the Option Three and Option Four Claims. If these review procedures do in fact award substantial amounts to the women who suffered grievous injuries, it would do much to lessen the criticisms leveled at the Facility to the effect that the rights of the victims have been ignored in the attempt to protect the rights of A.H. Robins.

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96. *See supra* note 94.

97. Lord, *supra* note 4.

IV. CONCLUSION

The use of the Claims Facility in both the asbestos cases and the Dalkon Shield cases followed intense litigation which produced some very high awards. In both instances, the companies involved, when faced with ever-increasing numbers of suits, sought the protection offered by bankruptcy proceedings. In both instances, the traditional court system appeared to be overwhelmed by the sheer volume of the cases. The Claims Facility appeared to offer a solution which would allow all claimants to recover for their injuries while removing the congestion created by thousands of cases litigating essentially the same issues. The Facility offers several advantages to victims of a mass tort. It assures all victims of at least some monetary recovery while eliminating the need to have an attorney and pay the attendant fees; it offers a less stress-filled opportunity to achieve recovery than does litigation;[98] it allows recovery even for those unable to fully prove injuries.

But there are sacrifices associated with the use of the Claims Facility that must be recognized. The Facility only emerges as a useful option after many litigants have blazed a trail through the court system, proving the legitimacy of the damage caused by the product, and revealing the potential for thousands more claims to be filed. In establishing the Facility, the court must estimate the value of the outstanding claims and of those yet to be filed. This figure may severely underestimate the amount of money needed to settle, as has happened in the asbestos cases, leaving later victims in no better position than they would have endured under the traditional tort recovery. Additionally, claimants may need the advocacy skills of attorneys when their cases pose different issues. Claimants may be traumatized by the extent of their injuries and be unable to handle their cases on their own, despite the best efforts of the designers of the Claims

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98. Miles W. Lord, *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 HAMLINE L. REV. 7, 9 (1985). On February 29, 1984, District Judge Miles Lord issued a reprimand to the corporate officers of A.H. Robins following the litigation in his court. He charged the officers and attorneys for A.H. Robins with corporate dishonesty and irresponsibility and violation of moral and ethical principles. He wrote:

> [i]f one poor young man were by some act of his, without authority or consent, to inflict such damage upon one woman, he would be jailed for a good portion for the rest of his life. And yet your company, without warning to women, invaded their bodies by millions and caused them injuries by the thousands. And when the time came for these women to make their claim against your company, you attacked their characters, you inquired into their sexual practices and into the identity of their sex partners. You exposed these women and ruined families and reputations and careers in order to intimidate those who would raise their voices against you. You introduced issues that had no relationship whatsoever to the fact that you planted in the bodies of these women instruments of death, mutilation, and of disease.

Facility. Finally, although most Option Three claims must still be settled, it seems apparent that without the added award for punitive damages, recoveries will necessarily be much lower under the Facility than in the courts.

There are no easy answers. The Claims Facility appears to have preserved the ability of those injured by the marketing of a dangerously defective product to achieve at least some recovery. The real significance may only emerge after all Option Three claims have been settled. If awards are made which are commensurate with earlier awards and with the injury suffered, the Claims Facility may be a truly beneficial innovation and a boon to the tort system.

But for those who see the threat of huge awards and the imposition of punitive damages as the best curb on corporate irresponsibility, the Facility poses a dangerous alternative that shields a corporation from the full extent of its liability, allowing business as usual once a sum has been set aside to satisfy the claims. In 1984, Chief Judge Lord, while addressing the corporate officers of A.H. Robins, expressed the fear that the only lesson to be learned from the behavior of A.H. Robins to date was "that it pays to delay compensating victims, and to intimidate, harass and shame your victims, the injured parties."[99] Perhaps if that is still the lesson to be learned after more than 17 years of litigation and settlement efforts arising from the injuries caused by the Dalkon Shield.

Peggy McCollum

99. *Id.* at 11.