Life is full of trade-offs, and most choices that we make foreclose a multitude of other possibilities. We elect one presidential candidate over another, fund one program instead of a dozen competitors, and pursue one career out of hundreds of possible occupations. Likewise, money—for the most part—is a zero-sum unit: one extra dollar in Joe Blow’s hands comes at the expense of someone else. In the case of asbestos litigation, that unit is estimated to be approximately $200 billion, and claimants are in no short supply. On the one hand are impaired individuals, who suffer from asbestos-related diseases such as mesothelioma; on the other hand are unimpaired individuals, who have been exposed to asbestos but have yet to develop any significant physical ailments; and partially impaired individuals occupy the space bridging these two extremes. With the skyrocketing number of claims being filed and the diminishing number of solvent asbestos debtors left standing, the problem of fairly allocating funds has become especially pronounced. In large part, the problem has been aggravated by the practices of certain law firms which, in contracting with medical screening companies to search for potential plaintiffs, have created a whole population of unimpaired claimants, not only clogging the courts but siphoning off funds from seriously impaired claimants. Some, such as Shep Hoffman, have discounted the role of morality in such
practices, preferring instead to look at pragmatic concerns. But, given
that those practices are the direct and necessary antecedents of the
current crisis, those who have perpetuated them are not only morally
accountable for the harm that has been done but responsible for its
resolution.

In general, describing the issue in moral or pragmatic terms largely
depends on the way in which the issue is framed. The Mesothelioma
Applied Research Foundation (MARF), for example, describes the
qualitative and quantitative harms of asbestos-related mesothelioma as
being (at least) 100 times as harmful as asbestos-related pleural disease
without lung impairment. As such, they recommend that the Court adopt
a compensation formula for plaintiffs reflective of this disparity. While
such an approach seems logical given that the amount of funds available
for compensation is limited, it establishes a somewhat narrow guideline
for fairness in doling out funds. If, for instance, an unimpaired claimant
was awarded $1,000 and a mesothelioma-afflicted claimant was awarded
$100,000, the latter amount would still be insufficient to cover the
estimated $200,000+ medical expenses of a mesothelioma patient. Thus,
the guidelines for what ought to be considered a fair settlement should not
hinge upon the relative settlements of unimpaired claimants but the
absolute medical harm that is endured.

Admittedly, this may seem like a trivial distinction—after all, if the
absolute medical harm of mesothelioma is in fact 100 times worse than
the medical harm of mild asbestosis, then what’s the difference? The difference is that using a standard of sufficient, compensatory medical damages allows us to make a subtle but crucial distinction: the crux of the problem is not that nonmalignant cases are getting too much money but that malignant cases are not getting enough. Even Mr. Hoffman makes that much apparent when he says “if there were [enough money], these issues would bear no discussion.” In this sense, he is justified in stating that the problems of asbestos litigation “are not moral issues of right and wrong... [but] of pragmatics.” For example, if Manville Trust had an unlimited supply of money, or if there were ample (and solvent) asbestos debtors, it wouldn’t matter if the payout for malignant versus nonmalignant cases was 4 to 1, so long as the amount paid to seriously afflicted plaintiffs, such as those suffering from mesothelioma, was sufficiently large.

But this only addresses half of the issue. While Mr. Hoffman is correct in arguing that there is no moral reason why malignant cases should receive a fixed (or ratio) amount above and beyond nonmalignant cases per se, he still must face up to the fact that “mass filer” lawsuits are responsible for seriously ill patients not receiving sufficient compensation for their suffering. Pragmatic and moral concerns are not mutually exclusive; if they were, morality would have no place in our everyday lives. And if money were unlimited, stealing from banks would also be perfectly legitimate. The ultimate point is that it makes no sense to test morality in
a vacuum. While unimpaired litigants may have a legal right to sue, the
law firms that represent them likely have full knowledge that any
settlement they achieve comes at the direct expense of more serious cases.
Their actions and the consequences of their actions are not separated by
some unscalable wall of events outside of human control; this is not the
case of a butterfly beating its wings in Brazil and causing a tornado in
Kansas. There is both intentionality behind the tactics of mass client
recruitment and probabilistic knowledge that such tactics will eventually
trade-off with the settlement funds of seriously impaired claimants. As
such, these law firms are, at the very least, complicit in the inequitable
distribution of limited funds and, at the most, responsible for aggravating
the suffering of terminally ill patients.

Presumably, the “pragmatic issues” involved with asbestos litigation
are slightly different for personal injury lawyers representing unimpaired
clients and those representing impaired clients. While both face a
dwindling supply of money from which their individual clients can be
awarded, this disproportionately affects impaired clients, as their baseline
medical expenses are so high. But, given that many lawyers work on a
contingency basis, and that settlement money flows increasingly toward
less serious cases, the net result of increased limitation might actually be
to the benefit of personal injury lawyers dealing with unimpaired clients.
In other words, even though the distribution of money is spread thinner
and thinner, certain lawyers (i.e. those representing unimpaired clients)
are still getting more business overall. This creates a strong incentive for this group of lawyers to maintain the status quo.

In particular, law firms who contract with medical screening companies are perhaps the most culpable. While it might seem justified and even noble to screen for lung cancer *en masse*, it is questionable whether this detection actually reduces mortality rates, given that the cancer is already visible on an X-ray. Particularly questionable is the practice of giving out free X-rays on the condition that people sign a retainer agreeing to be represented by a certain attorney if the results turn out positive. At the other extreme, for unimpaired claimants whose X-rays nevertheless indicate asbestos exposure, the actions of personal injury lawyers may needlessly introduce a fear of cancer—which, ironically, may also create a legal basis for compensation. The courts, out of fear that the claimants will develop cancer later in life but be unable to file a second suit or find solvent defendants, may go ahead and award plaintiffs money, even though they show no physical signs of impairment. While it is true that there is a very long latency for diseases such as mesothelioma, the fact of the matter is that most claimants will not develop it. Indeed, only 5 to 10% of the most heavily exposed population will suffer from the disease. As such, probabilistic decisions to award money preemptively, while seeming to err on the side of caution, will rob money from those who did not get to the courthouse first but are actually afflicted with the disease.
One partial solution to the problem would be to dig deeper into deep pockets. Mr. Hoffman suggests as much when he states that “to the extent there are immoral, unscrupulous and unethical parties involved in asbestos litigation, they are first and foremost the perpetrators of our clients’ injuries.” But, for the most part, the original perpetrators—those business officials who knowingly concealed information about the harmful effects of asbestos—are long dead and gone. Some companies, such as Halliburton, have inherited the liabilities of their subsidiaries but were not actually involved in the original asbestos production. Similarly, as the companies directly responsible for asbestos fold under financial pressure and file for bankruptcy, the search for debtors expands farther and farther out, to second and third-tier distributors and contractors. While this may be perfectly legitimate in terms of “joint and several” liability, the moral authority of pointing the finger at corrupt big business has become less powerful while, at the same time, the moral legitimacy of “mass filer” lawsuits has become increasingly suspect. None of this is meant to pardon any business for the role they played—whether large or small—in spreading asbestos; rather, it is meant to highlight the fact that the clear-cut moral opponent Hoffman alludes to is not likely to exist.

In all actuality, it is unlikely that significantly more sources of money will surface, or at least not enough to meet the exponential rate at which lawsuits are being filed. Moreover, it appears that congressional intervention in this arena is unlikely, given that Cheney’s connection with
Halliburton would further the perception of the Bush administration cozing up to big business. As such, the task of determining an equitable distribution of funds is unavoidable, and largely in the hands of personal injury lawyers. Individual clients may be unaware of the larger, more systemic issues involved with lawsuits, but their representing law firms cannot hide behind such ignorance. The problem is one of enforcement. How can an institution that is largely driven by profit exercise voluntary self-restraint? More pointedly, can we expect individual lawyers to refrain from engaging in mass filer lawsuits when it suits their economic interests to perpetuate the status quo? It’s one thing to assign moral responsibility; it’s a whole other ballpark to get someone to claim it.

There are no easy solutions to this problem. The current bottleneck of cases that have been filed over the last year alone is not just some barometer of American litigiousness but of the pervasiveness of practices that some law firms have resorted to in tracking down new clients. Even a cursory search of “asbestos” on any major internet search engine will yield at least one advertisement for a law firm specializing in asbestos litigation. Notably, however, while the overall number of claims filed has increased, the percentage of cancer claims has decreased. If the issue were as simple as law firms making people more generally aware of their legal options, the proportion of cancer claims should have remained constant. But, of course, this was not (and is not) the case: people who are afflicted with serious diseases, such as mesothelioma, are probably fully aware of their
right to seek legal redress, given the grave nature of their illness and its very specific origins, and don’t need a deluge of advertisements to make them aware of their legal options. On the other hand, unimpaired clients are the primary targets in the crosshairs of some personal injury law firms, as they frequently get bundled together with other more seriously-ill clients for larger overall settlements.

So a sizeable amount of lawyers are selfish and greedy—frankly, what else is new? Moral responsibility doesn’t translate into legal responsibility, and, while the actions of some law firms are unethical, they are not illegal. It seems unlikely that any industry-wide voluntary agreement not to conduct mass screenings will be created, although such an initiative would probably be more efficient than idly waiting for tort reform. Sadly, the greatest impetus for action should be the knowledge that the worst is yet to come: when rates of mesothelioma peak in the next fifteen to twenty-five years, it is unclear whether there will be sufficient funds with which to compensate the afflicted individuals.