

# A Letter to the Nation's Trial Judges: Serious Asbestos Cases— How to Protect Cancer Claimants and Wisely Manage Assets

*Victor E. Schwartz*<sup>†</sup>  
*Paul W. Kalish*<sup>††</sup>  
*Phil Goldberg*<sup>†††</sup>

## Abstract

*The authors provide a review of asbestos litigation in the United States in an effort to aid trial judges in handling cases pending before them.*

Dear Trial Judges of America,

This Letter shares some thoughts about how courts can better handle asbestos cases where plaintiffs allege serious harms, such as mesothelioma or other asbestos-related cancers.

## I. Introduction

Six years prior to writing this Letter, we authored *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, which addressed the lesson

---

<sup>†</sup> A.B. (1962) *summa cum laude*, Boston University; J.D. (1965) *magna cum laude*, Columbia University. Victor E. Schwartz is Chairman of the Public Policy Group in the Washington, D.C. office of the law firm of Shook, Hardy & Bacon L.L.P. He co-authors the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz's Torts* (11th ed. 2005). He has served on the Advisory Committees of the American Law Institute's *Restatement of the Law of Torts: Products Liability, Apportionment of Liability, and General Principles* projects.

<sup>††</sup> B.A. (1983) *magna cum laude*, Duke University; J.D. (1986), Northwestern University Law School. Paul W. Kalish is a partner in the law firm of Crowell & Moring LLP in Washington, D.C.

<sup>†††</sup> B.A. (1990), Tufts University; J.D. (2001), The George Washington University School of Law. Phil Goldberg is an attorney in the Public Policy Group in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P.

of the law of unintended consequences.<sup>1</sup> We explained that a number of judges in asbestos cases—with the intent of facilitating and ending large asbestos dockets—were putting aside normal rules of law about discovery, causation, and even the need to show specific harm.<sup>2</sup> Their purpose was to foster settlements, and end what the United States Supreme Court called the “asbestos-litigation crisis.”<sup>3</sup> Unfortunately, this push for “efficiency” led to hundreds of thousands of more filings by claimants with little or no injury.<sup>4</sup> The abandonment of the rule of law led to a greater asbestos “crisis,”<sup>5</sup> resulting in mounting bankruptcies and, consequently, fewer assets left to pay seriously harmed asbestos plaintiffs.<sup>6</sup>

### A. The Rule of Law Is Returning to Asbestos Litigation

We are gratified that our message has been well-received by so many courts. Over the last several years, courts administering asbestos cases have been restoring rules of law, and taking specific steps to rein in the most prevalent abuses in the litigation.<sup>7</sup> In particular, judges have recog-

---

<sup>1</sup> Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

<sup>2</sup> See *id.*; see also Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001).

<sup>3</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>4</sup> See Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 284 (2003).

<sup>5</sup> See Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 BRIEFLY 1, 29 (June 2002), available at <http://www.nlcpi.org/books/pdf/Vol6Number6June2002.pdf>; Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 28-29 (2001).

<sup>6</sup> For example, the Manville Trust is now paying five cents on the dollar for claims; and trusts created through the Celotex and Eagle-Picher bankruptcies have also reduced their payments to claimants. See Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6.

<sup>7</sup> See Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. (forthcoming Jan. 2007); James A.

nized that it is unsound public policy to award damages to plaintiffs who “have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be.”<sup>8</sup> Recently, unimpaired claimants have accounted for up to ninety percent of new asbestos filings.<sup>9</sup> These filings have been directly tied to the use of “plaintiff-lawyers’ arranged mass screenings programs”<sup>10</sup> in areas with high concentrations of workers who may have worked in jobs where they were exposed to even small quantities of asbestos.<sup>11</sup>

Some courts have concluded that unimpaired claimants have no cause of action, because they have not sustained compensable damages.<sup>12</sup> Other

Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey’s Tort Reform Update, Jan. 18, 2006, at 12.

<sup>8</sup> *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 5 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School).

<sup>9</sup> See Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186 (“two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms”); see also Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A15.

<sup>10</sup> *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. 2002).

<sup>11</sup> See *Eagle-Picher Indus. v. Am. Employers’ Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) (“[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs’ attorneys, and many claimants are functionally asymptomatic when suit is filed.”). The practice of mass litigation screenings has come under significant scrutiny. See Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005); Eddie Curran, *Asbestosis Diagnoses Have Come Under Fire From Critics*, MOBILE REG., Apr. 4, 2004, at A1; Eddie Curran, *Diagnosing for Dollars?*, MOBILE REG., Apr. 4, 2004, at A1. Former United States Attorney General Griffin Bell has noted, “[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up.” Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003); see also David Egilman & Susanna Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. OF INDUS. MED. 305 (2004) (noting danger of attorney-directed screenings that fail to provide adequate medical counseling or treatment). Senior United States District Judge John Fullam has said that many X-ray interpreters (called B Readers) hired by plaintiffs’ lawyers are “so biased that their readings [are] simply unreliable.” *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

<sup>12</sup> See *Burns v. Jaquays Min. Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987); *In re Asbestos Litig.*, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 (Del. Super. Ct. 1994), *judgment rev’d on other grounds*, 670 A.2d 1339 (Del. 1995); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Bernier v. Raymark Indus.*,

courts have reached the same public policy goal of not compensating uninjured plaintiffs by administratively dismissing the claims or creating “inactive dockets” to defer the claims of unimpaired plaintiffs unless and until the plaintiff suffers some real objective harm.<sup>13</sup> Starting in 2004, state legislatures in Florida, Georgia, Kansas, Ohio, South Carolina, and Texas entered the fray, enacting medical criteria statutes to achieve the same result.<sup>14</sup> In these situations, the rights of the non-sick to sue are protected, as statutes of limitation do not begin to run unless the person suffers actual harm from asbestos exposure. The courts and legislatures prioritizing claims of the truly sick have appreciated that when tort law is at the “edge,” such as with unimpaired claimants, sound public policy should govern.<sup>15</sup> And when assets are finite, they should be preserved for those who are truly injured.<sup>16</sup>

Courts have also taken steps to allow claims to be determined on their individual merits, which diminishes the incentive for personal injury lawyers to recruit high volumes of unimpaired clients and reduces inappropriate settlement pressure on defendants. For example, some courts have stopped mass trial consolidations, which were used by some judges to clear their asbestos dockets.<sup>17</sup> In addition to fundamental fairness and

---

Inc., 516 A.2d 534 (Me. 1986); *Owens-Illinois v. Armstrong*, 591 A.2d 544 (Md. Ct. Spec. App. 1991); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996).

<sup>13</sup> See Behrens & Goldberg, *supra* note 7; see also Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 264 (2005); Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 6 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541 (1992).

<sup>14</sup> See Behrens & Goldberg, *supra* note 7.

<sup>15</sup> See generally Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14:1 J. BANKR. L. & PRAC. 61, 79-81 (2005). These decisions make more sense in light of what has been learned about the unreliability of the mass litigation screenings used by some plaintiffs’ attorneys to generate claims. See also Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, AEI-Brookings Joint Center for Regulatory Studies (Sept. 2005).

<sup>16</sup> See Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 336 (2002); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 952 (2003).

<sup>17</sup> See *infra* note 194 and accompanying text (discussing Mississippi Supreme Court’s decision in *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004)).

due process problems, trial consolidations that aggregate the claims of the sick and non-sick turned out to be a bit like using a lawn mower to cut down weeds—the practice may have provided a temporary fix, but in the long run it created more problems than it solved.<sup>18</sup> Courts also have begun ending docket management practices that are unfair to defendants, so that claims may properly be evaluated and defended.<sup>19</sup> Finally, some courts have enforced and some state legislatures have enacted venue and *forum non conveniens* restrictions to stop forum shopping.<sup>20</sup> In times past, the mass migration of claims to certain jurisdictions has been a hallmark of asbestos litigation and has dominated the dockets in those courthouses.

An event that has appeared to quicken the decrease of the use of mass screenings as a litigation recruitment tool, as well as mass numbers of unimpaired claims they create, was United States District Court Judge Janis Graham Jack's 2005 ruling in the federal silica multi-district litigation.<sup>21</sup> Judge Jack recommended that thousands of claims on the federal silica docket be dismissed on remand because the diagnoses were fraudulently prepared.<sup>22</sup> "[T]hese diagnoses were driven by neither health

---

In addition, in 2005 and 2006, Georgia, Kansas, and Texas enacted laws that generally preclude the joinder of asbestos cases at trial. See Mark A. Behrens, *States Address Asbestos Litigation Crisis and Curb Silica Litigation Fraud*, TEX. CIV. JUST. LEAGUE J., Summer 2006, at 5, 7.

<sup>18</sup> Helen E. Freedman, *Product Liability Issues in Mass Tort—View from the Bench*, 15 *TOURO L. REV.* 685, 688 (1999) (quoting New York City asbestos judge: "Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases."); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 *ARIZ. L. REV.* 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."); Glenn W. Bailey, *Litigation Is Destroying American Companies*, USA TODAY, Jan. 1, 1994, at 76 ("Judges' efforts to resolve cases all too often have resulted in a perverse incentive—causing more cases and more backlog.").

<sup>19</sup> See *infra* note 196 and accompanying text (discussing improvements in Madison County, Illinois).

<sup>20</sup> See *infra* note 187 and accompanying text (discussing legislative and judicial reforms).

<sup>21</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 567 (S.D. Tex. 2005).

<sup>22</sup> See *id.*; see also Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 *CONN. INS. L.J.* (forthcoming Jan. 2007); Fred Krutz & Jennifer R. Devery, *In the Wake of Silica MDL 1553*, 4:5 Mealey's Litig. Rep.

nor justice,” Judge Jack said in her scathing opinion, “they were manufactured for money.”<sup>23</sup> Since she published her opinion, both the United States Attorney’s Office in Manhattan and the Texas Attorney General have been investigating the screeners in consideration of criminal charges.<sup>24</sup> The United States House Energy & Commerce Subcommittee on Oversight & Investigations also has investigated the filings.<sup>25</sup>

The litigation screen doctors referenced in Judge Jack’s opinion, in addition to “diagnosing” silica claimants, also have facilitated thousands of asbestos claims.<sup>26</sup> The Manville Trust found that at least sixty percent of the silica claimants before Judge Jack had already filed asbestos-related claims with the Trust,<sup>27</sup> even though, as Judge Jack described, “[a] golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis.”<sup>28</sup> As a result, in 2005, the Manville, Eagle-Picher, and Celotex Asbestos Settlement Trusts said they would not accept reports prepared by doctors cited by Judge Jack.<sup>29</sup> Similarly, the Court of Common Pleas of Cuya

---

Silica 10 (2006); Roger Parloff, *A Court Battle Over Silicosis Shines a Harsh Light on Mass Medical Screeners—The Same People Whose Diagnoses Have Cost Asbestos Defendants Billions*, FORTUNE, June 13, 2005.

<sup>23</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635.

<sup>24</sup> Peter Geier, *Silica Cases Drawing Resistance; Fallout From Key Texas Case Continues with Grand Jury, Legislation*, 28:16 NAT’LL.J. 7, Dec. 19-26, 2005; Jonathan D. Glater, *Lawyers Challenged on Asbestos*, N.Y. TIMES, July 20, 2005, at C1; Lynn Brezosky, *Texas Probing Potentially Fraudulent Diagnosis of Lung Disease in Thousands of Lawsuits*, 6/8/06 AP DATASTREAM 23:40:04 (June 8, 2006).

<sup>25</sup> See Julie Criswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3; Press Release, Barton, Whitfield Query Physicians Regarding Silicosis (Aug. 2, 2005).

<sup>26</sup> *Asbestos: Mixed Dust and FELA Issues, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 2, 2005) (statement of Prof. Lester Brickman, Cardozo Law School), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1362&wit\\_id=3963](http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3963).

<sup>27</sup> *Id.*

<sup>28</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 603; see *Asbestos: Mixed Dust and FELA Issues, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 2, 2005) (statement of David Weill, M.D., Associate Professor, Division of Pulmonary and Critical Care Medicine, University of Colorado Health Sciences Center, Denver, Colorado), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1362&wit\\_id=3962](http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3962).

<sup>29</sup> See Announcement by David Austern, President, Claims Resolution Management Corporation (Sept. 12, 2005), available at <http://www.claimsres.com/Home/PDF/905>

hoga County (Cleveland), Ohio has dismissed all asbestos cases where two of the doctors cited in Judge Jack's opinion, Drs. Ray Harron and James Ballard, provided the "diagnosis."<sup>30</sup> The court, thus far, has dismissed 3,755 cases.<sup>31</sup>

The net effect of these developments since our last *Letter to the Nation's Trial Judges* is that gradually, but significantly, the problem of massive numbers of payouts to unimpaired claimants is working towards a fair and balanced resolution in a growing number of states.<sup>32</sup>

## B. Courts Are Re-Focusing Attention on Seriously Injured Claimants

Now, many courts are appropriately focusing more attention on seriously injured asbestos claimants. It is estimated that many such cases will be filed every year for the foreseeable future.<sup>33</sup> These cases present a challenge to any judge and jury. Only individuals devoid of any human feeling could fail to appreciate the misfortune and sadness of a person whose exposure to asbestos caused the development of mesothelioma or some other form of asbestos-related cancer. In adjudicating these claims, however, judges must weigh judicial fairness and the economic consequences of liability when such liability is not legally accurate or proportionate to the harm allegedly caused by the defendant.

---

Suspension Memo.pdf; Letter from William B. Nurre, Executive Director, Eagle-Picher Personal Injury Settlement Trust, to Claimants' Counsel (Oct. 19, 2005), available at <http://www.cpf-inc.com/includes/content/PhysicianNotice.pdf>; Notice of Trust Policy Regarding Acceptance of Medical Reports from John L. Mekus, Executive Director of the Celotex Asbestos Settlement Trust (Oct. 20, 2005), available at [http://www.celotextrust.com/news\\_details.asp?nid=22](http://www.celotextrust.com/news_details.asp?nid=22).

<sup>30</sup> See *In re Cuyahoga County Asbestos Cases*, Special Docket 73958 (Ct. C. P. Cuyahoga County, Ohio Mar. 22, 2006); Peter Geier, *Thousands of Asbestos Cases Dismissed*, 28: 13 NAT'L L.J. 13, Apr. 10, 2006, at 13.

<sup>31</sup> See Peter Geier, *States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload*, 28: 17 NAT'L L.J. 1, May 22, 2006.

<sup>32</sup> See Alison Frankel, *Asbestos Removal; Thanks to a Combination of State Tort Reform, Judicial Rulings, and Public Scrutiny, The Asbestos Docket Has Dropped Dramatically Over the Last Three Years*, AM. LAW., July 2006, available at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1151571920672>.

<sup>33</sup> *Id.*

Careful thought and analysis must be given to assure that those suffering from mesothelioma and other asbestos-related cancers are treated fairly. For example, where one asbestos claimant is initially awarded more than \$200 million<sup>34</sup> and another with similar injuries, exposure histories, and factual circumstances receives less than \$500,000 against similarly situated defendants,<sup>35</sup> the goal of fair and impartial justice is thwarted and undermined. The legal system appears to be both arbitrary and unwise: a casino mentality is substituted for justice.

The same attention also must be paid to protect the rights of the parties, as well as the limited assets remaining to pay current and future asbestos claimants. At this stage in asbestos litigation, at least seventy-eight companies named as asbestos defendants are now in bankruptcy.<sup>36</sup> In accordance with the bankruptcy laws, bankrupt defendants cannot be pursued in asbestos lawsuits; the claims against them are paid by settlement trusts.<sup>37</sup> With the “traditional” asbestos defendants unavailable for litigation, experience has shown that plaintiffs’ lawyers will keep casting their litigation net wider and pull in more and more “peripheral”

---

<sup>34</sup> See Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40.

<sup>35</sup> See, e.g., *Verdict Report*, HARRISMARTIN COLUMNS: ASBESTOS 20, 20-30, May 2006 (reporting verdict for mesothelioma plaintiffs ranging from \$130,000 to \$250 million, with most verdicts in the \$1 million to \$5 million range).

<sup>36</sup> See Current Issues in Asbestos Litigation, ISSUE BRIEF (Am. Acad. of Actuaries, Washington, D.C.), Feb. 2006, at 4.; see also Mark D. Plevin, Paul W. Kalish & Leslie A. Epley, *Where Are They Now, Part Three: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 5:4 MEALEY’S ASBESTOS BANKR. REP. 1 (Nov. 2005).

<sup>37</sup> In the early 1990s, Johns-Manville Corporation was the first major asbestos defendant to use the bankruptcy process to set up a trust fund to pay current and future claimants. See Mark D. Plevin & Paul W. Kalish, *What’s Behind the Recent Wave of Asbestos Bankruptcies*, 16 Mealey’s Litig. Rep.: Asbestos 4 (2001). Through its plan of reorganization, discharge injunction, and supplemental injunction entered pursuant to 11 U.S.C.A. § 105(a), all asbestos-related personal injury claims against Johns-Manville were channeled to a trust, which assumed all of Johns-Manville’s asbestos liability. The asbestos claimants were enjoined from asserting claims against the reorganized Johns-Manville, thereby allowing the company to emerge from bankruptcy without the crushing weight of asbestos liability. Soon thereafter, Congress amended the Bankruptcy Code, 11 U.S.C. § 524(g) (2000) (also known as the Manville Amendments), to codify the trust-injunction-discharge approach used in the Johns-Manville bankruptcy. See Mark D. Plevin et al., *Don’t Bankrupt Asbestos*, LEGAL TIMES, Mar. 19, 2001, at 68.

