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SOME PROPOSALS FOR COURTS INTERESTED
IN HELPING SICK CLAIMANTS AND SOLVING
SERIOUS PROBLEMS IN ASBESTOS LITIGATION

Mark A. Behrens

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TABLE OF CONTENTS

I.	AN OVERVIEW OF ASBESTOS LITIGATION TODAY: HOW DID WE GET HERE?.....	336
II.	WHY THE ORIGINAL ESTIMATES ABOUT THE LITIGATION WERE SO FAR OFF THE MARK: FILINGS BY THE UNIMPAIRED OR MILDLY IMPAIRED ARE EXPLODING	342
III.	REFORMS THAT WOULD HELP PRESERVE ASSETS FOR SICK CLAIMANTS	344
	A. <i>Reforms to Stem the Flood of Unimpaired Claims</i>	344
	1. No Injury; No Recovery	345
	2. Inactive Dockets	346
	B. <i>End Mass Joinder or Mass Trials</i>	349
	C. <i>Stop Multiple Punitive Damages Abuse</i>	352
IV.	CONCLUSION	358

Asbestos litigation has been around for over two decades. Recently, however, the litigation environment has changed significantly. For instance, earlier in the litigation, most of the individuals who filed asbestos claims had substantial exposures and were sick.¹ The people they were suing were large manufacturers of asbestos-containing products, such as Johns-Manville Corp.² Now, the vast majority of all new asbestos-related claims—as much as ninety percent, according to some reports—are filed

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¹See JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 30 (Rand Inst. For Civil Justice 1984) (stating that only four percent of asbestos claims closed in 1980-1982 lacked a manifest asbestos-related injury).

²See *id.* at vii (stating that asbestos claims closed in 1980-1982 "were concentrated on a few defendants. Sixteen corporations were named as defendants on at least half of all suits. Another 15 or so are involved in one-quarter to one-half of the suits Plaintiffs on closed claims sued an average of 15 defendants.").

by individuals who have little or no physical impairment.' Many of the early defendants are in bankruptcy or out of business.⁴ People involved in the litigation know there is an "asbestos-litigation crisis."⁵ Many in the public are relearning.⁶

Courts should be concerned about the current trends in asbestos litigation, particularly as they affect sick claimants. Claims by unimpaired individuals, fueled by aggressive client drives by personal injury lawyers,⁷ are pouring into the civil justice system at an unprecedented rate. Litigation costs and bulk settlements associated with these claims are

³See JENNIFER L. BIGGS ET AL., OVERVIEW OF ASBESTOS ISSUES AND TRENDS, 1 (December 2001), available at <http://www.actuary.org/mono.htm> (estimating that more than ninety percent of current claimants are alleging nonmalignant injuries); see also Quenna Sook Kim, *G-1 Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12, available at 2001 WL-WSJ 2850312 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people.").

⁴See John Rooney, *Evolution, No End Seen for Asbestos Litigation*, CHICAGO DAILY L. BULLETIN 4, Apr. 21, 2001.

⁵*Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

⁶See Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1, available at 2002 WL 18538000; Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 95; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1, available at 2001 WL 28937452 ("The wave of new litigation and a surge in the number of people reporting exposure are a blunt reminder that the asbestos problem, a largely forgotten product liability mess of the 1980s, has not gone away."); Amy Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, FIN. TIMES, May 14, 2002, at 15.

⁷For a thorough discussion of this process, see Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. (2001) (forthcoming) (on file with the Baylor Law Review); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 748 (E. & S.D.N.Y. 1991) (working in conjunction with unions, plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque."); *Eagle-Picher Indus., Inc. 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."); Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154, available at 2002 WL 2190334; Eric Roston, *The Asbestos Pit*, TIME, Mar. 11, 2002, at Y9, available at 2002 WL 8385920; Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, available at 2001 WL 30366341 ("To uncarth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

rapidly depleting scarce resources that should go to those most in need of compensation—"the sick and dying, their widows and survivors."⁸

To date, at least fifty-six companies have been driven into bankruptcy.⁹ More are likely to follow.¹⁰ This is creating pressure on so-called "peripheral defendants," companies that are being dragged into the litigation to make up for the "traditional defendants" that are no longer around to pay their full share. These peripheral companies only have attenuated connections to asbestos, but they provide fresh "deep pockets," and that is why they have become targets of litigation.¹¹

The cost of all this litigation is staggering. Ratings agency A.M. Best estimates that asbestos litigation has already cost American companies over \$21.6 billion,¹² and predicts that the litigation may wind up costing another \$43.4 billion during the next twenty years.¹³ The consulting firm of Tillinghast-Towers Perrin predicts that the total cost of asbestos litigation in the United States will ultimately reach \$200 billion.¹⁴

⁸*In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom., *Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000), cert. denied sub nom., *Patenaude v. Owens-Illinois, Inc.*, 531 U.S. 1011 (2000)); see also Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683 ("According to a letter Manville trustees sent to [Senior United States District] Judge Weinstein on Dec. 5 [2001], a 'disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."); Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sicker See Payouts Shrink*, WALL ST. J., Apr. 25, 2001, at A1, available at 2002 WL-WSJ 3392934.

⁹See BIGGS ET AL., *supra* note 3, at 17 (listing fifty-two asbestos-related bankruptcies. Two subsidiaries of RHI Refractories Holding Co. (Harbison-Walker Refractories Co. and North American Refractories Co.), Kaiser Aluminum Corp. and Porter-Hayden Co. filed for Chapter 11 reorganization after the monograph was issued); see also Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, Vol. 16, No. 15 MEALEY'S ASBESTOS BANKR. REP. 34 (Aug. 2001).

¹⁰See *Asbestos Liability System Needs Immediate Overhaul*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFITS MGMT., Apr. 9, 2001, at 18, available at 2001 WL 13149753; Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4, available at 2000 WL-WSJ 26620724.

¹¹See Susan Warren, *Asbestos Suits Target Makers Of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, available at 2000 WL-WSJ 3025073.

¹²See Christopher Oster, *Some Insurers Face Shortfall in Reserves For Costly Claims Related to Asbestos*, WALL ST. J., May 7, 2001, at A4, available at 2001 WL-WSJ 2862651.

¹³See *id.*

¹⁴Tillinghast-Towers Perrin *Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost \$200 Billion*, June 13, 2001, available at <http://www.towers.com> (last visited May 7, 2002).

Unfortunately, the courts themselves share some of the blame for the ever-growing "elephantine mass of asbestos cases."¹⁵ "Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims."¹⁶ These courts were well-intentioned. They wanted to put money in the hands of the sick as fast as possible, which meant lowering some key legal barriers.¹⁷ They also sought to reduce extremely high transaction costs.¹⁸ In addition, they had the practical problem of trying to contain bulging court dockets—a pressure that continues and must seem almost overwhelming in certain areas of the country with extremely heavy asbestos caseloads.

In attempting to make things better, however, these courts actually have made the litigation much worse.¹⁹ As Professor Francis McGovern of Duke Law School has written:

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates

¹⁵Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

¹⁶Paul F. Rothstein, *What Courts Can Do In the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 8 (2001).

¹⁷For example, many courts abandoned the traditional "time of injury" rule to start statutes of limitations running, replacing it with a "discovery rule." See, e.g., *Bendix Corp. v. Stagg*, 486 A.2d 1150, 1153 (Del. 1984). "A discovery rule favors plaintiffs because the statute of limitations only begins to run once the claimant discovers, or in the exercise of reasonable care should have discovered, both the harm that is the subject of the action and the cause of the harm." S. Rep. No. 105-32, at 38 (1997). Some courts also imposed "super strict" liability for failure to warn. See *Johnson v. Raybestos-Manhattan, Inc.*, 740 P.2d 548, 550 (Haw. 1987); *Carter v. Johns-Manville Sales Corp.*, 557 F. Supp. 1317, 1319 (E.D. Tex. 1983). Two other cases, *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539 (N.J. 1982), and *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986), were later overruled by legislation. See N.J. REV. STAT. § 2A:58C-3(3) (1987); LA. REV. STAT. ANN. § 2800.56(1) (1991).

¹⁸It has been estimated that transaction costs represent as much as seventy percent of all monies expended in asbestos litigation. See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 749 (E. & S.D.N.Y. 1991).

¹⁹See 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).

and low transaction costs. If you build a superhighway, there will be a traffic jam."²⁰

The law of unintended consequences has become the rule in asbestos litigation.²¹

Courts should take a fresh look at the asbestos litigation and work to solve the problems of today, particularly the serious problems caused by the huge number of claims filed by the unimpaired or very mildly impaired. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants.

... [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.²²

This Article provides an overview of the asbestos litigation problem. It describes how the litigation has morphed and grown into a colossus that nobody could have foreseen even just a few years ago. The Article explains that the recent explosion of filings by unimpaired claimants has

²⁰Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997); see also Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger the mass tort filings become.").

²¹See Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts—View From the Bench*, 15 TOURO L. REV. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases."); Glenn W. Bailey, *Litigation is destroying American companies*, USA TODAY (MAG.), Jan. 1, 1994 at 76, available at 1994 WL 13637753 ("Judges' efforts to resolve [asbestos] cases all too often have resulted in a perverse incentive—causing more cases and more backlog.") (Mr. Bailey was the CEO of Keene Corp. which filed for Chapter 11 protection in 1993 as a result of asbestos liability it acquired primarily from its 1968 purchase of a small manufacturer of acoustical ceilings, ventilation systems, and thermal insulation products).

²²Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), modified in part, 13 F.3d 58, cert. denied sub nom., Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993).

been the "wild card" that has caused earlier estimates of the litigation to be so far off the mark. The Article describes how these claims are jeopardizing recoveries for sick claimants and clogging the court system to the detriment of these and other tort claimants. The Article then proposes some solutions that courts should adopt to preserve assets needed to compensate sick claimants, now and in the future. In urging courts to take steps to address the asbestos litigation problem, this Article does not argue that claimants suffering from serious asbestos-related diseases should be denied compensation. To the contrary, absent some change in the way asbestos claims are resolved, claimants who are truly sick may not receive adequate or timely compensation. Changing the current asbestos compensation system would be pro-claimant.²³

I. AN OVERVIEW OF ASBESTOS LITIGATION TODAY: HOW DID WE GET HERE?

When asbestos product liability lawsuits emerged almost thirty years ago,²⁴ nobody could have predicted that courts at the beginning of the Twenty-first Century would be dealing with a worsening litigation crisis. In fact, many believed that by now we would be able to see some light at the end of the long litigation tunnel.

"Because of the increased awareness of dangers and new government regulations, use of new asbestos essentially ceased in the United States in the early 1970's [sic]."²⁵ Moreover, it was known that asbestos-related

²³See generally Trisha L. Howard, *Plaintiff's Lawyers Seek Limit on Asbestos Lawsuits by People with Nonmalignant Illnesses*, ST. LOUIS POST-DISPATCH, Dec. 11, 2001, Metro. available at 2001 WL 4499314 (explaining that lawyers representing plaintiffs with malignancies believe steps should be taken to "preserve the integrity of these [defendant] companies and their assets for people who are truly sick."); *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 MEALEY'S LITIG. REP.: ASBESTOS 39 (Mar. 1, 2002) (quoting mass tort personal injury lawyer Victor Schwartz as stating that "flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."); Sherrid, *supra* note 7 (quoting plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases are taking awards that could go to legitimate claimants, such as mesothelioma victims).

²⁴See generally *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

²⁵*In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 737 (E. & S.D.N.Y. 1991). Almost immediately after its creation in 1970, the Occupational Safety and Health Administration ("OSHA") promulgated an initial regulation limiting asbestos exposure. See 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit asbestos exposure even further and to require special handling of asbestos products. See 36 Fed. Reg. 23207 (Dec. 7, 1971) (emergency temporary standard); 37 Fed. Reg. 11318 (June 7, 1972)

disease generally becomes manifest "15 to 40 years" after exposure.²⁶ Therefore, many predicted that the litigation would be a serious, but declining problem. Unfortunately, this is not the case.²⁷

Thirty years have now passed, and as the statistics show, the number of asbestos filings is going up, not down. The number of pending cases nationwide doubled between 1993 and 1999, from 100,000 cases to more than 200,000 cases.²⁸ Up to 700,000 more cases are expected to be filed by the year 2050.²⁹ The number of future claimants could be as high as 3.5 million.³⁰

In the year 2000 alone, approximately sixty thousand claims were filed against the Manville Personal Injury Settlement Trust, an asbestos compensation fund created after Johns-Manville Corp. declared bankruptcy in 1982. The year 2000 avalanche represented the greatest number of claims filed against the Manville Trust since 1989, the Trust's first full year of operation. Despite the large number of claim filings in 2000, the Trust expected to see fifty percent more claims filed in 2001 than the previous high-water mark set just one year earlier.³¹ To deal with the rise

(final standard). OSHA's asbestos regulations became progressively more restrictive, effectively precluding the use of asbestos in most commercial applications.

²⁶KAKALIK ET AL., *supra* note 1, at 5.

²⁷See *Tillinghast-Towers Perrin Estimates Claims Associated With U.S. Asbestos Exposure Will Ultimately Cost \$200 Billion*, June 13, 2001, available at <http://www.towers.com> (last visited May 7, 2002) ("Although most thought that the claims would have trailed off by now, the number of plaintiff filings has increased dramatically, with 50,000 to 60,000 claims filed against some defendants in the last year, compared to averages near 20,000 in the early to mid 1990s."):

²⁸See *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter *Prof. Edley Testimony*].

²⁹See *Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, vol. 14, no. 10 MEALEY'S LITIG. REP.: ASBESTOS 22 (June 18, 1999).

³⁰See *Judicial Conference Ad Hoc Committee on Asbestos Litigation, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 5* (Mar. 1991) in vol. 6, no. 4 MEALEY'S LITIG. REP.: ASBESTOS (Mar. 15, 1991) [hereinafter *Judicial Conference Report*] (stating that "it is estimated that as many as 3.5 million workers are exposed to some extent to asbestos fibers, as are many more in the general population."):

³¹See *Manville Personal Injury Settlement Trust: State of the Trust, 3rd Quarter, 2001*, available at <http://www.mantrust.org> (last visited May 7, 2002) ("During the first nine months of 2001, the Trust received 69,500 new claims, compared to 44,800 received during the comparable nine-month period last year and 59,200 claims filed during all of 2000."):

in claims, the Manville trustees decided in July of 2001 to lower payments to claimants.³²

The Manville Trust is a good indicator of trends in asbestos litigation. W.R. Grace & Co. reported in 2001 that the pace of asbestos claims being filed against the company had skyrocketed. Eighty-one percent more claims were filed against the company in 2000 than in 1999. In the fourth quarter of 2000, the number of claims filed against W.R. Grace "more than doubled over the year-earlier period, and the rate continued to accelerate in the first quarter" of 2001.³³ The chairman of Federal-Mogul, which manufactures engine bearings, pistons, gaskets and seals for auto makers and the spare-parts market, recently said that his company decided to declare bankruptcy "based on the fact that [its] asbestos liabilities weren't going to diminish. In fact, they were going to grow."³⁴

As a result of the asbestos lawsuit explosion, resources needed to compensate truly injured people are steadily being depleted. Recent awards to unimpaired or mildly impaired claimants illustrate this problem. For example, in March of 2001, a Texas jury awarded twenty-two plaintiffs \$35 million for "future physical impairment" and "future medical costs although it is likely that these claimants will never become seriously ill."³⁵ In October of 2001, a Mississippi jury awarded \$150 million to six plaintiffs "who are not now sick from asbestos and may never become so."³⁶ The plaintiffs were awarded \$25 million apiece because their exposure to asbestos-containing products in the workplace, often decades ago, allegedly places them "at risk" for developing an illness at some point in the future.³⁷ In November of 2001, another Texas jury awarded \$3 million to three plaintiffs who were exposed to asbestos at an aluminum plant.³⁸ "Their attorney said the verdict was reached even though two

³²See Kim, *supra* note 8.

³³Susan Warren, *W.R. Grace Seeks Bankruptcy Protection In the Face of Asbestos-Related Litigation*, WALL ST. J., Apr. 3, 2001, at B8, available at 2001 WL-WSJ 2859018.

³⁴Mitchell Pacelle, *Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars*, WALL ST. J., Oct. 2, 2001, at B11, available at 2001 WL-WSJ 2877281.

³⁵*Texas Jury Awards \$3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001); *Two Asbestos Defendants Hit With \$35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

³⁶Patti Waldmeir, *The Need for Damage Limitation*, FIN. TIMES (London), Nov. 15, 2001, at 16.

³⁷Margaret Cronin Fisk, *Jury awards six asbestos plaintiffs \$25 million each*, NAT'L L.J., Nov. 12, 2001, at B1.

³⁸See *Texas Jury Awards \$3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001).

plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure."³⁹

The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future. As stated, at least fifty-six companies have been driven into bankruptcy.⁴⁰ Each of these bankruptcies puts "mounting and cumulative" financial pressure on the "remaining defendants, whose resources are limited."⁴¹ Indeed, it is clear that the bankruptcy "process is accelerating" due to this "piling on" effect.⁴²

For instance, in 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. declared bankruptcy. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. In the first quarter of 2002, RHI Refractories Holding Co., the world's leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for two of its U.S. subsidiaries (Harbison-Walker Refractories Co. and North American Refractories Co.) as a result of asbestos liability claims.⁴³ Mounting asbestos litigation also led Porter-Hayden Co. and Kaiser Aluminum Corp. to file for Chapter 11 reorganization in early 2002.⁴⁴ Other companies also are likely to seek the protection of the bankruptcy courts.⁴⁵

These bankruptcies have strong ripple effects throughout the entire business community. When companies like Johns-Manville, W.R. Grace, GAF, Owens Corning, and other "traditional defendants" seek the protection of the bankruptcy courts to deal with mounting numbers of

³⁹*Id.*

⁴⁰See *supra* note 9.

⁴¹Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) [hereinafter *Edley & Weiler*].

⁴²See *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied, 532 U.S. 1066 (2001).

⁴³See William Hall, *Asbestos Claims Force RHI to Seek Protection for US Arm*, FIN. TIMES-FT.COM, Jan. 8, 2002; Alexei Barrionuevo, *Halliburton's Asbestos Liability May Gain Clarity as Harbison Files for Chapter 11*, WALL ST. J., Feb. 15, 2002, at A2, available at 2002 WL-WSJ 3386190.

⁴⁴See Robert Guy Matthews, *Kaiser Aluminum Files for Bankruptcy Under Chapter 11*, WALL ST. J., Feb. 13, 2002, at A4, available at 2002 WL-WSJ 3385837; Peter Geier, *Porter Hayden Bankrupt*, THE DAILY RECORD (Baltimore, Md.) Mar. 19, 2002, available at <http://www.mddailyrecord.com> (last visited May 7, 2002).

⁴⁵See Kim, *supra* note 8; Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Vol. 16, No. 6 MEALEY'S LITIG. REP.: ASBESTOS (Apr. 20, 2001).

claims, experience shows that the plaintiffs' personal injury bar simply will cast its litigation net wider and bring in "peripheral defendants."⁴⁶ These defendants are diverse, ranging from oil companies, to automobile manufacturers, to utilities, to hospitals and colleges.⁴⁷ Many are household names, such as Ford Motor Co., Campbell Soup Co., AT&T Corp., and 3M Co., the maker of Scotch® tape and Post-it® notes.⁴⁸ Some may have participated in the chain of distribution of the sale of an asbestos-containing product; others are premises liability defendants.⁴⁹ Involvement in asbestos litigation can have devastating consequences for these companies.

For example, on December 7, 2001, Halliburton Co. saw its market value slashed almost in half—*dropping almost \$3.8 billion in a single afternoon*—after Wall Street analysts became concerned that the company may be dragged more deeply into asbestos litigation.⁵⁰ As one analyst explained, investors became concerned that three recent adverse verdicts against the oilfield services and engineering company raised the "specter of lawsuits spiraling out of control, much like those at other asbestos defendants."⁵¹ Days later, both Moody's Investor Service and Standard & Poor's cut Halliburton's long-term bond rating amid uncertainty surrounding Halliburton's asbestos exposure.⁵² Dow Chemical Co. lost one-third of its market value in a little over a month after analyst became

⁴⁶*In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 747-48 (E. & S.D.N.Y. 1991) (stating that "[a] newer generation of peripheral defendants are becoming ensnared in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries"—even though "[t]he extent of liability, possible defenses and value of the claims against these new defendants is unknown . . .").

⁴⁷See Rooney, *supra* note 4, at 4; Warren, *supra* note 11.

⁴⁸See Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, available at 2001 WL-WSJ 2856111.

⁴⁹See Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, available at 2001 WL-WSJ 2859560 ("[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."); Editorial, *The Job-Eating Asbestos Blob*, WALL ST. J., Jan. 23, 2002, at A22, available at 2002 WL-WSJ 3383766.

⁵⁰See Susan Warren, *Halliburton Stock Falls Nearly 43% After Recent Asbestos Verdicts*, WALL ST. J., Dec. 10, 2001, at B2, available at 2001 WL-WSJ 29680262.

⁵¹*Id.*

⁵²See *Halliburton Co.: Contract in China is Won; Credit Rating Is Cut By S&P*, WALL ST. J., Dec. 12, 2001, at B4, available at 2001 WL-WSJ 29680465; *Halliburton Co.: Downgrade From Moody's Reflects Doubts on Claims*, WALL ST. J., Dec. 17, 2001, at A4, available at 2001 WL-WSJ 29680831; see also Susan Warren & Alexei Barrionuevo, *Halliburton Shares Fall on New Worries About Asbestos Suits*, WALL ST. J., Jan. 7, 2002, at A20, available at 2002 WL-WSJ 3382138.

concerned about asbestos claims against Dow's Union Carbide unit.⁵³ 3M Co. lost thirteen percent of its market value during the same time period due to lawsuits involving respirators (breathing masks).⁵⁴ Georgia-Pacific Corp.'s stock fell thirty-seven percent because of anticipated asbestos claims.⁵⁵ Together, these companies saw "\$25 billion in market value evaporate in just six weeks."⁵⁶

The spread of asbestos cases can be charted simply by looking at the number of defendants brought into the litigation. In early mid-1980s, approximately 300 defendants had been named in asbestos cases.⁵⁷ Now, more than 2000 companies or individuals have been named as asbestos defendants in courts across the country, and the number of defendants is growing.⁵⁸ Some of these "peripheral defendants" have themselves begun to declare bankruptcy.⁵⁹

The combination of forces at work in the asbestos litigation has set off a chain reaction, or domino effect: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation. This process will

⁵³See Alexei Barrionuevo, *Halliburton Vows to Continue Fight on Asbestos Cases*, WALL ST. J., Jan. 15, 2002, at B2, available at 2002 WL-WSJ 3382925; Steve Maich, *Asbestos 'Nightmare' Hits U.S. Firms*, NAT'L POST ONLINE, Jan. 18, 2002 (on file with the Baylor Law Review); see also Kortney Stringer, *Halliburton to Organize Structure as Two Separate Business Units*, WALL ST. J., Mar. 20, 2002, at A4, available at 2002 WL-WSJ 3389270.

⁵⁴See Maich, *supra* note 53. The cases allege that 3M respirators, which were labeled for non-toxic use, did not completely protect the plaintiffs from asbestos related illnesses.

⁵⁵See Chad Terhune, *Georgia-Pacific Says Asbestos Charge Will Result in Net Loss for Fourth Period*, WALL ST. J., Jan. 25, 2002, at A5, available at 2002 WL-WSJ 3383988.

⁵⁶Steve Maich, *supra* note 53; see also Christopher Bowe, *Asbestos Casts Shadow Over US Corporations*, FIN. TIMES - FT.COM, Jan. 18, 2002.

⁵⁷KAKALIK ET AL., *supra* note 1, at vii.

⁵⁸See Douglas McLeod, *Asbestos Continues to Bite Industry*, BUS. INS., Jan. 8, 2001, at 1, available at 2001 WL 5100719.

⁵⁹See *Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims*, Vol. 15, No. 23 MEALEY'S LITIG. REP.: ASBESTOS 7 (Jan. 5, 2001).

continue to play out on a broad scale for many years unless something is done to solve the problem.

II. WHY THE ORIGINAL ESTIMATES ABOUT THE LITIGATION WERE SO FAR OFF THE MARK: FILINGS BY THE UNIMPAIRED OR MILDLY IMPAIRED ARE EXPLODING

The reason the original estimates of the litigation have been so far off the mark is that nobody could have predicted the enormous number of unimpaired or mildly impaired individuals who would file asbestos claims. Today, the vast majority of new asbestos claims are filed by unimpaired claimants, defined as "people 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."⁶⁰ Individuals who have little or no physical impairment now account for as much as ninety percent of all new asbestos-related filings.⁶¹ The United States Supreme Court has said that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment."⁶²

Various factors are driving the avalanche of filings by unimpaired claimants. One reason is that some courts have relaxed the traditional rule that a plaintiff cannot recover in tort without a present, physical injury.⁶³ They have done so in two ways. First, courts are increasingly willing to recognize as an "injury" internal changes in plaintiffs that in some cases can only be seen on an x-ray and may never impair the claimant's health.

⁶⁰Prof. Edley Testimony, *supra* note 28, at 5.

⁶¹*See supra* note 3.

⁶²*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Edley & Weiler, *supra* note 41, at 393).

⁶³*See* Schwartz & Lorber, *supra* note 19, at 253 (citing REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 2 (Feb. 15, 1999)) (John Aldock, Esq., participant in Dec. 8, 1998 Mass Torts Working Group Conference commented that "The ordinary tort-law requirement that a claim be supported by an injury has been lost in asbestos. . . . Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured."). One federal district court judge studied the merits of asbestos claims by appointing his own medical experts to evaluate claimants in sixty-five pending cases. Although all the plaintiffs claimed some asbestos-related condition, the court-appointed experts found that in fact only fifteen percent had asbestosis, twenty percent had asymptomatic pleural plaques, and sixty-five percent had no asbestos-related conditions at all. *See* Hon. Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 39 (1991).

The "injury" that is often attributed to unimpaired plaintiffs is pleural thickening. Essentially, this means that the plaintiffs have some spots, or markers on their lungs, but may never become sick as a result of their exposure to asbestos. Second, some courts have been willing to recognize claims by plaintiffs who have been exposed to asbestos, but are not sick and may never develop a physical illness—examples are fear of future injury and medical monitoring claims.⁶⁴

The erosion of the traditional tort law physical injury rule, however, provides only a partial explanation for the increase in filings by unimpaired claimants. It does not answer the question why unimpaired claimants are choosing to bring their claims before they are actually injured. One explanation for the "file now" trend is that many claimants may feel compelled to file for remedial compensation because of fears that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable.⁶⁵ As one court has observed, some unimpaired claimants file claims "because they are aware of the latent and progressive nature of asbestos-related disease and because they fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability."⁶⁶ Another reason may be that plaintiffs are aware that many asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later.⁶⁷ Finally, some plaintiffs and

⁶⁴*See* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 S.C. L. REV. (forthcoming Summer 2002) (manuscript at 2, on file with the Baylor Law Review); *see also* Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1070 (1999); Mark A. Behrens & Phillip R. Anderson, *State Supreme Courts Retreat From Medical Monitoring Causes of Action*, Vol. 20, No. 5 PROD. LIAB. L. & STRATEGY at 1, (L.J. Newsletters, 2001).

⁶⁵Dr. Louis Sullivan, the former Secretary of the U.S. Department of Health and Human Services, testified before Congress that there are "mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 1999 Leg., 106th Cong. 4 (July 1, 1999) (statement of Dr. Louis Sullivan), available at 1999 WL 20009757.

⁶⁶*In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991).

⁶⁷At a recent conference one New York state trial court judge on an unofficial basis expressed concern that if changes are made to address the problem of payments to the unimpaired at this time, the resources may not exist to compensate those individuals if and when they develop an asbestos-related illness in the future. But, if changes are not made now to curb payments to the unimpaired, then it is virtually certain that the resources will not exist to

their lawyers may be aware of the huge awards being given to other unimpaired plaintiffs, and may think "why wait for an injury to manifest itself if I can receive compensation now?"⁶⁸

While the various causes for the "file now" trend may be understandable, claims by the unimpaired clog the court system, causing unwelcome delays for asbestos claimants with fatal diseases, such as mesothelioma, and older claimants, which is frequently the case.⁶⁹ Such claims also delay justice for other people seeking recovery through the courts. Perhaps most troubling, "the[] presence [of unimpaired claimants] on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."⁷⁰ Claims brought by plaintiffs with no serious physical impairments are at the heart of the current asbestos litigation problem.

III. REFORMS THAT WOULD HELP PRESERVE ASSETS FOR SICK CLAIMANTS

A. Reforms to Stem the Flood of Unimpaired Claims

The solution to the asbestos problem, if there is to be one, will most likely have to come from the courts, particularly the state courts. The United States Supreme Court made it clear in *Anchem Products, Inc. v. Windsor*⁷¹ and *Ortiz v. Fibreboard Corp.*⁷² that the Court will not approve mass settlements of asbestos cases under the Federal Rules of Civil Procedure. The Court properly interpreted Rule 23 of the Federal Rules of Civil Procedure, but its decisions nevertheless mean that the class action device is not available to resolve large numbers of asbestos cases.

compensate those individuals if they get sick in the future. Continued payments to the unimpaired will bring about the very situation that trial judge understandably wishes to avoid.

⁶⁸See Victor Schwartz, *Some Lawyers Ask, Why Wait for Injury? Sue Now!*, USA TODAY, July 15, 1999, at A17.

⁶⁹See KAKALIK ET AL., *supra* note 1, at vi.

⁷⁰Edley & Weiler, *supra* note 41, at 393. Senior United States District Court Judge Charles R. Weiner, who oversees the federal asbestos multidistrict proceedings, has explained that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re Asbestos Prods. Liab. Litig.* (No. VI), No. Civ. A. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996).

⁷¹521 U.S. 591 (1997).

⁷²527 U.S. 815 (1999).

Furthermore, Congress has failed to enact legislation to address the problem, despite calls for action from the Supreme Court,⁷³ federal appellate courts,⁷⁴ and the Judicial Conference of the United States.⁷⁵ While federal legislation is certainly needed, asbestos claimants and defendants no longer have the luxury of waiting for such a speculative remedy. The solution must start where the problem started—with the state courts.⁷⁶

To date, however, only a handful of courts have been willing to take steps to stem the flood of unimpaired claims or address the reasons people feel compelled to file them. Below are some success stories by courts that have moved in the right direction.

1. No Injury; No Recovery

The Supreme Court of Pennsylvania has held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action.⁷⁷ Further, the court has held that the discovery of pleural plaques or a nonmalignant, asbestos-related lung pathology "does not trigger the statute of limitations with respect to an action for a later, separately diagnosed disease of lung cancer."⁷⁸ Furthermore, "because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not

⁷³See *Anchem*, 521 U.S. at 628-29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure."); *Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); see also *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. (Weis, J., dissenting)).

⁷⁴See *Dunn*, 1 F.3d at 1399 (Weis, J., dissenting) ("Unquestionably, a national solution is needed."); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (quoting *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985); *id.* at 338 (Garza, J., concurring) ("I implore Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved . . . [in] the asbestos litigation crisis.").

⁷⁵See Judicial Conference Report, *supra* note 30, at 3 (concluding that federal legislation is needed to solve the asbestos litigation problem).

⁷⁶See Edley & Weiler, *supra* note 41, at 401 ("The fact that the legislative ideal is probably unattainable only reinforces the responsibility of courts to address the crisis with imagination and urgency.").

⁷⁷See *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (upholding *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993)).

⁷⁸*Id.*

recoverable."⁷⁹ The court's decision relieves the pressure on individuals to file unripe claims simply to avoid statute of limitations issues later on. The court's ruling also helps preserve assets for the seriously ill by ensuring that they will not have to compete with the unimpaired to obtain compensation.

2. Inactive Dockets

Other courts have addressed the statute of limitations issue and the problems posed by unimpaired claimants by creating inactive dockets, also known as deferral registries or pleural registries.⁸⁰ Under these plans, individuals who cannot meet certain objective medical criteria are placed on an inactive docket with statute of limitations being tolled, and all discovery stayed. Claimants are moved to the active civil docket when they present credible medical evidence of impairment.

Inactive docket plans have several obvious benefits. First, sick claimants are able to have their claims heard faster; they can move "to the front of the line" and not be forced to wait until earlier-filed unimpaired claims are resolved.⁸¹ This can be especially important if the claimant has a fatal disease or is an older person.⁸² Second, inactive docket programs help unimpaired individuals by protecting their claims from being time-barred should an asbestos-related disease later develop. This would address a primary engine driving the filing of many claims by unimpaired claimants.⁸³ Third, because there is no discovery or pressure to settle inactive claims, inactive dockets conserve scarce financial resources that are needed to compensate sick claimants⁸⁴—resources that are now spent

litigating "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."⁸⁵ Fourth, inactive dockets reduce the specter of more employers being driven into bankruptcy, and can help slow the spread of the litigation to "peripheral" defendants.⁸⁶

Some inactive docket plans have existed for many years; they have proven to be fair and effective.⁸⁷ For example, the Massachusetts inactive asbestos docket was created in September of 1986 through an amendment to an order creating a statewide consolidated asbestos docket.⁸⁸ The docket was envisioned as a mechanism by which plaintiffs who had been diagnosed with asbestos-related pleural diseases could toll all applicable statutes of limitations regarding their claims, or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy. While on the inactive docket, cases are exempt from discovery.⁸⁹

An inactive docket was established in the Circuit Court for Cook County (Chicago), Illinois in March of 1991 under the leadership of Judge Dean M. Traftlet.⁹⁰ In creating that system, Judge Traftlet recognized that asbestos litigation posed serious problems for plaintiffs and defendants: unimpaired individuals were filing claims out of fear that the statute of limitations would expire before their disease progressed to a stage that was

J., concurring in part and dissenting in part) ("[O]f each asbestos litigation dollar, 61 cents is consumed in transaction costs . . . Only 39 cents were paid to the asbestos victims.") (citations omitted).

⁷⁹*Id.* at 238.

⁸⁰See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 553 (1992); 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 (2001).

⁸¹See Judicial Conference Report, *supra* note 30, at 10 (stating that average duration of asbestos cases exceeds other types of cases).

⁸²See KAKALIK ET AL., *supra* note 1, at vi.

⁸³See *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 970 (1988) ("Removing time limitations on the filing of toxic substances cases will prune from the civil dockets a substantial body of cases that are either premature or needless.")

⁸⁴See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822 n.1 (1999) ("[T]ransaction costs exceed the victims' recovery by nearly two to one . . ."); *id.* at 867 (Breyer, J., dissenting) ("[O]f each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims."); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 632 (1997) (Breyer,

⁸⁵Schuck, *supra* note 80, at 555.

⁸⁶See Warren, *supra* note 11; Editorial, *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A14, available at 2001 WL-WSJ 2868353.

⁸⁷See *Inactive Asbestos Dockets: Are they Easing the Flow of Litigation?*, Columns-Asbestos Raising the Bar in Asbestos Litig. 2 (Feb. 2002) (discussing various inactive docket plans and reporting that state judges who oversee asbestos dockets in states with inactive dockets find the plans fair and effective).

⁸⁸See Commonwealth of Massachusetts, Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986.

⁸⁹Similarly, pleural cases originally filed in the consolidated docket may be transferred to the inactive docket on plaintiffs' motion, and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. See *id.*

⁹⁰See *In re Asbestos Cases, Order to Establish Registry For Certain Asbestos Matters* (Cir. Ct., Cook Cty., Ill. May 26, 1991). The Cook County inactive docket plan has been a success. When Judge Traftlet took over the assignment of handling Cook County's asbestos docket in 1984, there were 8000 cases pending. Today there are about 875 pending active cases, while another approximately 1200 cases are on the pleural registry. See Rooney, *supra* note 4.

medically recognized as impaired, while defendants expended substantial sums in appearing in and defending against such claims.⁹¹

Under the Cook County Plan, each claimant must file an Asbestos Personal Injury Information sheet.⁹² All cases alleging an asbestos-related cancer or mesothelioma may proceed directly to the active docket. All claims registered by persons who claim a history of asbestos exposure and demonstrate objective asbestos-related physical findings (such as pleural plaques), but who either do not meet the minimum criteria for impairment as defined in the Order, or who have not manifested a cancer certified as asbestos-related as described in the Order, are placed on the registry. These claimants remain on the registry until removed in accordance with the procedures specified in the Order.⁹³ While on the registry, claims are exempt from discovery, and "shall not 'age' for any purpose."⁹⁴

The Circuit Court for Baltimore City established an inactive docket in 1992.⁹⁵ Under the Order, every claim is initially placed on the inactive docket, though certain claims are eligible for immediate removal.⁹⁶ For a claim alleged to be eligible for removal from the inactive docket either immediately upon filing or subsequently due to changed circumstances, claimant's counsel is required to file a Request for Removal, and documentation necessary to show that the claim meets the "minimum criteria for removal," as defined within the Order.⁹⁷ If the court orders a claim removed from the inactive docket, the Clerk of the Court is directed

⁹¹See *In re Asbestos Cases* at 2-3.

⁹²All claims must be filed individually; the Order prohibits claims on behalf of groups of classes of claimants. See *id.* at 15. Additionally, the docket is closed to out-of-county plaintiffs. See Laura Duncan, *Deferred Asbestos Docket Closed to Out-of-County Plaintiffs*, CHICAGO DAILY L. BULL. 1, July 9, 1992.

⁹³Cases may be removed in two ways, one essentially permitting dismissal of an action and the other designed to encompass a change in claimant's medical condition. First, a claimant may be voluntarily removed from the Registry upon filing of a certificate by counsel stating that the claimant is withdrawing his or her claims. See *In re Asbestos Cases* at 10. The tolling of pertinent timeliness provisions thereafter ceases. See *id.* A case may also be removed pursuant to the filing of a Request for Removal, along with accompanying documents and medical certifications establishing impairment. See *id.* Defendants have the opportunity to object to removal, with the court making the ultimate removal determination. See *id.* at 12. Once removal has been approved, the claimant proceeds to file a complaint on the active docket. See *id.*

⁹⁴*Id.* at 14-15.

⁹⁵See *In re Asbestos Pers. Injury and Wrongful Death Asbestos Cases, Order Establishing An Inactive Docket For Asbestos Pers. Injury Cases*, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

⁹⁶*Id.* at 8.

⁹⁷*Id.*

to place the court on the active civil docket for Baltimore City, or transfer the matter to the appropriate jurisdiction.

Other courts have taken a similar path, establishing a "gatekeeper" system that utilizes objective medical criteria to filter out claims by the medically unimpaired. For example, the Court of Common Pleas of Cuyahoga County, Ohio, recently established a case management order providing that all upcoming discovery and trial preparation in the Cleveland area asbestos litigation will focus on groups of plaintiffs whose claims seek redress for functional impairment due to asbestos exposure.⁹⁸ The court's order reflects the intent to allow the claims of plaintiffs who are functionally impaired to be decided before the claims of the unimpaired, thus helping to preserve assets needed to compensate the truly sick.⁹⁹

At the federal level, Senior United States District Judge Charles R. Weiner, who oversees the federal multidistrict asbestos litigation that has been consolidated in the Eastern District of Pennsylvania ("the federal MDL Panel"), has recently ordered that all cases initiated through a mass screening shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.¹⁰⁰

B. End Mass Joinder or Mass Trials

In contrast to the success stories described above, some courts continue to utilize procedural mechanisms that encourage the filing of large numbers of asbestos claims, particularly claims by the unimpaired. Perhaps the most troubling of these practices has been the use of mass joinder or mass trials of claims, including the joinder of claims by the truly sick with the unimpaired. For example, people who have serious illnesses, such as mesothelioma or lung cancer, are lumped in with persons who have nothing wrong with them under any reasonable medical criteria. Apples (e.g., mesothelioma claims) and mixed with bananas (i.e., the unimpaired).

When courts join weak cases with other cases, or when courts force settlements of weak cases by allowing the claims of the truly sick to be leveraged, the plaintiffs who are not sick use the plaintiffs who are seriously ill to "inflate the value of those claims."¹⁰¹ Mass trial procedures

⁹⁸*In re Cuyahoga Cty. Asbestos Cases, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1* (as amended Jan. 4, 2002).

⁹⁹*Id.* at 1.

¹⁰⁰See *In re Asbestos Prods. Liab. Litig.* (No. VI), (E.D. Pa. Jan. 16, 2002).

¹⁰¹Prof. Edley Testimony, *supra* note 28, at 11.

not only threaten the due process rights of defendants, they also result in impaired claimants receiving smaller awards than if their cases were decided individually.¹⁰² As Professor Christopher Edley of Harvard Law School has explained: "[L]oading a large number of [impaired and unimpaired] claims together produces a bet-the-company risk for the defendants, making settlement more likely."¹⁰³ In the settlement, then, the high potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.¹⁰⁴

Mass trial procedures also add to the asbestos litigation "traffic jam" by encouraging the filing of weak claims.¹⁰⁵ One of the most notable mass consolidations was *Cosey v. E.D. Bullard Co.*, a Mississippi state court case.¹⁰⁶ Plaintiffs' counsel joined almost 1000 plaintiffs nationwide in the original 1995 complaint in Jefferson County Circuit Court; by the end of 1998, the eighth amended complaint included 1738 plaintiffs.¹⁰⁷ In May of 1998, a trial of twelve plaintiffs, including several with no demonstrable injury, resulted in a verdict of \$48.5 million in compensatory damages (with punitive damages to be decided separately).¹⁰⁸ The judge pressured the defendants to settle on draconian terms. According to sworn affidavits, the judge told the defendants that if they failed to settle, he would try the remaining 1700 cases immediately before the same jury, with an instruction to find the defendants liable. Counsel for the defendants

¹⁰²See Hon. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 507 (1994) (stating that "Those with serious cancer diseases want their cases pressed first and most strongly. Clients with generally less serious asbestosis and pleural-plaque symptoms do not want to wait, even though their damage is less severe. All these cases cannot be tried at once. Mixing the cases for trial and settlement may result in a lower recovery for the more seriously injured, but it will generally result in a quicker fee for counsel.") (citations omitted).

¹⁰³Prof. Edley Testimony, *supra* note 28, at 11.

¹⁰⁴*Id.* at 6-7.

¹⁰⁵McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, *supra* note 20 at 606; see also John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1011 (1995) (arguing that aggregation of asbestos cases has resulted in the presence of a large proportion of claims filed by unimpaired claimants).

¹⁰⁶Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County, June 12, 1998).

¹⁰⁷*Id.*

¹⁰⁸See *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 13 (July 1, 1999) (statement of William N. Eskridge Jr., Professor, Yale Law School) (citing defense motion for recusal of trial judge, accompanying affidavits, and attempted appeal to Mississippi Supreme Court).

allegedly said the plan sounded "like this side of hell."¹⁰⁹ The judge allegedly corrected him, saying: "No counsel, that is hell."¹¹⁰ Efforts to secure the judge's recusal were rebuffed with threats of discipline against the defense attorneys. The cases were forced to settle.¹¹¹

Another example of mass litigation abuse is occurring right now in West Virginia. In 1999, the West Virginia Supreme Court established a Mass Litigation Panel to use "mass trials" to dispose of the more than 25,000 asbestos cases pending in that state.¹¹² According to the court's plan, all pending asbestos cases were to be resolved by July of 2002.¹¹³ Three railroad companies and an underwriting company who are defendants in the actions and facing over 5000 pending cases objected, arguing that litigating so many cases in such a short amount of time would effectively prevent them from interviewing the plaintiffs or having the plaintiffs examined by doctors.¹¹⁴ The companies filed a federal lawsuit against the West Virginia Supreme Court, claiming that the Mass Litigation Panel violates their due process rights. Despite the lawsuit filed by the defendants, however, Judge Martin Gaughan, the judge overseeing the mass litigation of the West Virginia asbestos claims, recently entered a order scheduling mass trials in three groups for "all asbestos-related cases pending between the parties," with the trial set to begin on September 23, 2002.¹¹⁵

Notably, of the 5000 cases that have been filed against the three railroads in West Virginia, 4400 have been brought by plaintiffs "who do not work, live or pay taxes in West Virginia."¹¹⁶ Moreover, fifty-seven percent of the cases pending against the railroads nationwide have been filed in West Virginia.¹¹⁷ The high percentage of cases filed by out-of-state

¹⁰⁹*Id.* at 13-14 (citing Affidavit of Daniel P. Myer, ¶¶ 17-11 (attached to defendants' recusal motion)).

¹¹⁰*Id.*

¹¹¹See *id.*; see also Parloff, *supra* note 7.

¹¹²See W. VA. TRIAL CT. R. 26.01 (2002).

¹¹³See Michelle Saxton *Railroads File Lawsuit Against W. Va. Supreme Court*, ASSOC. PRESS NEWSWIRE, Nov. 29, 2001.

¹¹⁴See *id.*

¹¹⁵See *In re W. Va. Asbestos Pers. Injury Litig. "Trial Scheduling Order"*, Cir. Ct. Kanawha Cty., W. Va. (Feb. 26, 2002).

¹¹⁶Dennis O'Brien, *Norfolk Southern Sues W. Va. Over Asbestos Ruling*, VIRGINIAN-PILOT & LEDGER-STAR, Nov. 30, 2001, at D1, available at 2001 WL 2628222.

¹¹⁷See *id.* The situation in West Virginia has become so unfair that the United States Supreme Court has decided to review the matter. See *Norfolk & W. Ry. Co. v. Ayers*, 122 S. Ct.

plaintiffs suggests that "efficient" handling of asbestos claims does not help courts dispose of cases, it merely attracts more cases.¹¹⁸

In other litigation that does not involve asbestos, most judges would not consolidate or join cases involving plaintiffs with completely different types of injuries (or no injury at all). Such mass trial procedures are inappropriate from a legal standpoint and unsound as a matter of public policy. Asbestos cases should be treated the same as any other personal injury case.

C. Stop Multiple Punitive Damages Abuse

Punitive damage awards play another important role in speeding corporate defendants down the path to bankruptcy, threatening the availability of funds needed to compensate sick plaintiffs.¹¹⁹ Such awards provide a "windfall recovery" to plaintiffs;¹²⁰ they are not normal civil damages, but are awarded "over and above compensatory damages."¹²¹

Plaintiffs' lawyers seek punitive damages in virtually every asbestos case they file.¹²² It is not uncommon for them to hit the jackpot at trial, particularly in Texas.¹²³ Here are some examples of punitive damages awards handed out in Texas in 2001:

1434 (2002) (mem.); see also Mark A. Behrens, *When the Walking Well Sue*, NACI L. J., Apr. 29, 2002, at A12.

¹¹⁸See Victor E. Schwartz, *supra* note 64.

¹¹⁹See *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990) ("If no change occurs in our tort or constitutional law, the time will arrive when ... [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims ..."); *Bishop v. Gen. Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996) ("Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs."); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 914 (Ill. App. Ct. 1982) (Sullivan, J., concurring) ("[I] cannot be denied that the spectre of the destruction of companies, and even individuals, as a result of punitive damage awards is a threatening, present reality.");

¹²⁰*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (Brennan, J., dissenting).

¹²¹*In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000); see Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003, 1004 (1999).

¹²²See *The Asbestos Litigation Crisis in Federal and State Courts, Hearings Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong. 136 (July 1, 1999) (statement of William W. Schwarzer, Senior United States District Judge for the Northern District of California and Director, Federal Judicial Center).

¹²³Jury awards of punitive damages do not necessarily reflect final judgments. Many punitive damages awards are later reduced or overturned on appeal. Texas, for example, has enacted statutory limits on punitive damages awards. In Texas, punitive damages are limited to

- A jury awarded \$130 million, including \$60 million in punitive damages, in a products liability personal injury and wrongful death lawsuit involving five asbestos claimants.¹²⁴
- Another jury awarded \$55.5 million to a man with mesothelioma caused by asbestos; the award included \$21 million in compensatory damages to the plaintiff, \$5.5 million for his wife, and \$14 million for the couple's children, as well as \$15 million in punitive damages (later reduced to \$2.75 million).¹²⁵
- One more jury awarded \$11.1 million, including \$3 million in punitive damages against two asbestos defendants.¹²⁶
- A jury awarded \$5.25 million, including \$3 million in punitive damages, for the death of a former steam mechanic who died from asbestos-related mesothelioma.¹²⁷
- Another jury awarded \$175,000 in punitive damages for the mesothelioma death of a plaintiff exposed to asbestos at several workplaces.¹²⁸
- One jury found an insulation maker liable for \$3 million in compensatory damages and \$15 million in punitive damages in the case of a single plaintiff diagnosed with asbestosis.¹²⁹

Punitive damage awards "threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants."¹³⁰ This is true even in cases that are settled out of court, because of the leveraging effect punitive damages have at the settlement table.¹³¹ As Senior United States Circuit Judge Weis has explained:

the greater of \$200,000 or two times economic damages plus amount equal to noneconomic damages up to \$750,000. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2001).

¹²⁴*Texas Jury Awards \$130 Million to Five Plaintiffs in Asbestos Suit*, 23 No. 19 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 27, 2001).

¹²⁵*Meso Victim and Family Awarded \$55 Million By Texas Jury*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 4 (Sept. 13, 2001).

¹²⁶*Texas Jury Hits Two Asbestos Defendants With \$11 Million Verdict*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 13, 2001).

¹²⁷*Texas Jury Awards Mechanic's Family \$5 Million in Meso Death Case*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 5 (Sept. 13, 2001).

¹²⁸*Texas Widow Awarded \$725,000 in Meso Death*, 23 No. 16 ANDREWS ASBESTOS LITIG. REP. 3 (Aug. 16, 2001).

¹²⁹*Texas Jury Finds Insulation Maker Liable For \$18 Million*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

¹³⁰Judicial Conference Report, *supra* note 30, at 32.

¹³¹Yale law professor George Priest has observed:

[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.¹¹³

Multiple punitive damages also frustrate the settlement of cases and delay recoveries for sick claimants.¹¹⁴

Recently, these various factors led the United States Court of Appeals for the Third Circuit to conclude: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . ."¹¹⁵ "Balancing the benefits to be derived from continued imposition of punitive damages against the social and economic consequences of such a course of action, it appears that the continued imposition of punitive damages simply cannot be justified."¹¹⁵ Wasting

[T]he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation.

George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996); see also Steven Hayward, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings 8* (Pac. Res. Inst. Pub. Pol'y Feb. 1996), available at <http://www.pacificresearch.org> (last visited May 10, 2002) (concluding that "[b]oth the uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or even frivolous cases.").

¹¹³Dunn v. Hovic, 1 F.3d 1371, 1398 (3d Cir. 1993) (Virgin Islands) (Weis, J., dissenting).

¹¹⁴See William W. Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW. 116 (Oct. 1991) ("Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution of the damage claims of many thousands of injured plaintiffs.").

¹¹⁵*In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

¹¹⁶Hon. R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 DICK. L. REV. 265, 296 (1983).

limited and diminishing assets in this way "is a tragedy of major proportions."¹¹⁶

Some courts have begun to address these problems by curbing punitive damages abuse in asbestos cases. For example, the Third Circuit Court of Appeals recently approved a decision by the federal MDL Panel to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial.¹¹⁷ The circuit court, quoting liberally from a 1991 Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, said that its decision was based on "compelling" public policy:

Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not [sic] permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages.¹¹⁸

In blunt terms, the Third Circuit concluded its opinion by strongly urging state courts to adopt similar measures to preserve assets for sick asbestos claimants.¹¹⁹

Fortunately, some state courts are acting in this area. They have severed, deferred, or stayed indefinitely punitive damage claims. For example, Judge Marshal A. Levin has stayed all punitive damage awards in Baltimore City asbestos cases until compensatory claims are satisfied.¹²⁰ In reaching his decision, Judge Levin observed that it "is manifestly unjust for

¹¹⁶Judicial Conference Report, *supra* note 30, at 29; see also H.R. Rep. No. 106-782, at 19 (2000) (bankruptcies by asbestos defendants harm "shareholders, employees, and communities affected, as well as future claimants who now must look elsewhere for compensation.").

¹¹⁷*In re Collins*, 233 F.3d at 812.

¹¹⁸*Id.* (quoting Judicial Conference Report, *supra* note 30, at 32).

¹¹⁹See *id.* ("It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.").

¹²⁰*Abate v. A.C. & S., Inc.*, No. 89236704, slip op. at 26 (Md. Cir. Ct. Dec. 9, 1992); *Keene Corp. v. Levin*, 623 A.2d 662, 663 (Md. App. 1993) (noting that Judge Levin deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages are paid.").

a judicial system to allow relief based chiefly on the lottery of when a human being happens to become ill."¹⁴¹ He based his ruling on a concern that future claimants would not be able to collect awards for compensatory damages:

There is a very real threat that the unrestricted and simultaneous payment of punitive damages and compensatory damages will inevitably bankrupt all of the defendants in the asbestos litigation. . . .

... [T]his court is deeply concerned about the fact that the simultaneous payment of punitive damages and compensatory damages will hurt crucially those claimants who are found to be entitled to fair compensation in the future. . . .

... The stark fact is that unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages.¹⁴²

Similarly, in Northampton County (Bethlehem and Easton), Pennsylvania, Administrative Judge Jack Panella has recognized that while punitive damages "serve both retributive and deterrent functions . . . the deterrent function will not be directly served in current asbestos litigation since asbestos is no longer . . . manufactured."¹⁴³ Judge Panella acknowledged that additional punitive damage awards might have a deterrent effect upon future similar conduct, but, given the "onslaught of bankruptcies of asbestos producers," he believed that asbestos litigation had sufficiently instructed the manufacturers of other products that selling dangerous products "is not a profitable industry."¹⁴⁴ He has therefore severed all punitive damages claims from discovery, pre-trial motions, and trial in his court.¹⁴⁵ Under Judge Panella's ruling, discovery relevant to

¹⁴¹ *Abate*, No. 89236704, slip op. at 25.

¹⁴² *Id.* at 23-26.

¹⁴³ *In re Asbestos Litig.*, No. C0048AB200100003, slip Order at 6 (Pa. Ct. Com. Pl. Jan. 11, 2001).

¹⁴⁴ *Id.* at 6-7. Judge Panella also opined that severance of punitive damage awards would lead to more focused trials and more realistic settlement negotiations. *Id.* at 7-8.

¹⁴⁵ *Id.* at 1.

punitive damages claims cannot even begin until a plaintiff obtains a favorable jury verdict on his or her compensatory damages claim.¹⁴⁶

In nearby Philadelphia, a three judge panel has severed and deferred all pending and future punitive damage claims in the Philadelphia Court of Common Pleas.¹⁴⁷ In its 1986 order, the court explained:

If punitive damages are allowed in the face [of] so many . . . defendants filing for bankruptcy, it is very possible that some plaintiffs will get the windfall of punitive damages while others find that the money is gone by the time their cases come to trial. . . .

For these reasons, it is appropriate to wait [and] see what happens before punishing defendants that certainly have [been] punished to some extent already.¹⁴⁸

In New York, at least some judges have severed and indefinitely deferred punitive damage claims in asbestos cases.¹⁴⁹

As these courts have appreciated, no constitutionally justifiable or sound public policy goal is served by repeated punitive damages awards in asbestos cases.¹⁵⁰ Other courts should follow the leadership of these courts and act now to preserve funds needed to compensate the truly sick.¹⁵¹

¹⁴⁶ *Id.* Although Judge Panella allowed punitive damages claims to survive, he acknowledged that no punitive damage award has been allowed in Pennsylvania in an asbestos case since 1985. *Id.* at 4.

¹⁴⁷ See *Yancey v. Raymark Indus., Inc.*, No. 1186 (832), Asbestos Order No. 0001, slip op. at 5 (Pa. Com. Pl. Oct. 1986) (on file with the Baylor Law Review); see also *Third Circuit Rehears Dunn Arguments en Banc*, Vol. 8, No. 1 MEALEY'S LITIG. REP.: ASBESTOS 20 (Feb. 5, 1993), (reporting that the "Philadelphia Court of Common Pleas has a basic 'standing order' that all punitives are to be stayed . . .").

¹⁴⁸ See *Yancey*, No. 1186 (832), Asbestos Order No. 0001, slip op. at 10.

¹⁴⁹ See *\$64.65 Million Awarded in Four Asbestos Cases*, Vol. 4, No. 3 MEALEY'S LITIG. REP.: TOXIC TORTS 16 (Dec. 15, 1995) (reporting on the New York case of *Falloon v. Westinghouse Electric* in which the trial court severed and deferred punitive damages indefinitely).

¹⁵⁰ See Walter Dellinger III & Victor Schwartz, *Asbestos Litigation Today—A Discussion of Recent Trends*, COLUMNS ASBESTOS RAISING THE BAR IN ASBESTOS LITIG. 5 (Jan. 2002) (statement of Walter E. Dellinger, III. Mr. Dellinger, a partner with O'Melveny & Meyers LLP in Washington, D.C., is the Douglas B. Maggs Professor of Law at Duke University Law School. He served as Solicitor General of the United States under President Clinton.).

¹⁵¹ See Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137, 158 (2001).

IV. CONCLUSION

The current asbestos litigation environment encourages the filing of weak or meritless claims; it often undercompensates individuals who are sick and overcompensates those who are not. In addition, the litigation frequently wrecks havoc on any company that becomes involved, now matter how attenuated its exposure. It is time for the courts to engage in a fresh examination of the litigation and study how recent trends may affect individuals who are or may become sick. Past rulings may have been appropriate and sound at the time they were rendered but need to be reconsidered in light of major changes in the nature and substance of asbestos litigation.

In light of those changes, courts should act now to preserve assets for the truly sick. Courts should address the serious problems resulting from filings by the unimpaired or mildly impaired, and the inappropriate mass joinder of claims. They should also stop the drain of critical resources caused by multiple punitive damages awards. By doing so, courts can: (1) help preserve scarce and depleting assets for those in need and who deserve compensation the most; (2) reduce delays in the court system caused by the growing flood of claims; (3) protect the due process rights of defendants; (4) reduce pressure on the remaining solvent "traditional defendants," and (5) slow the spread of the litigation with respect to "peripheral defendants." Forward-thinking courts that work to accomplish these key objectives can send a much needed signal to other courts that steps need to be taken now to preserve assets for sick claimants and curb asbestos litigation abuse. The faster the reforms advocated in this article are implemented, the more people will be helped by them.