

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

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## 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

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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-

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<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

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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

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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

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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.

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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"

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<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.



defendants—companies that may be “far removed from the scene of any putative wrongdoing.”<sup>38</sup> In fact, more than 8500 defendants<sup>39</sup> are “ensnared in the litigation,”<sup>40</sup> up from 300 named defendants in 1982.<sup>41</sup>

Plaintiffs’ attorneys acknowledge that asbestos litigation has become an “endless search for a solvent bystander.”<sup>42</sup> Defendants are named more for their “deep pockets” than for any actual culpability. When the rights of defendants who have little or no connection to a plaintiff are ignored, the legal system breaks down.

This Letter suggests ways in which the judicial system can handle claims alleging mesothelioma and other asbestos-cancer claimants in a fair and just manner without exhausting assets available to pay future asbestos claimants. Broader legislative solutions may be possible.<sup>43</sup> The United States Congress has been considering important proposals,<sup>44</sup> but the duty of America’s courts is to focus on the “now,” not to rely on Congress to solve the problem. As esteemed Senior Judge Joseph F. Weis, Jr. of the United States Court of Appeals for the Third Circuit

<sup>38</sup> Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14; see also CONGR. BUDGET OFFICE, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (stating that asbestos suits have expanded “from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities.”); Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1.

<sup>39</sup> Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, COLUMNS—RAISING THE BAR IN ASBESTOS LITIG., Aug. 2004, at 5.

<sup>40</sup> *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E.D.N.Y. 1991).

<sup>41</sup> See VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (James S. Kakalik ed., RAND Inst. for Civil Justice 1984).

<sup>42</sup> *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep.: Asbestos 5 (Mar. 1, 2002).

<sup>43</sup> See Jan Amundson, *How a Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and the American Economy*, 44 S. TEX. L. REV. 925 (2003); Victor E. Schwartz et al., *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy For Meaningful Progress*, 44 S. TEX. L. REV. 839 (2003).

<sup>44</sup> See, Patrick M. Hanlon, *The Proposed Federal Asbestos Trust Fund*, SK040 ALI-ABA 479 (2004).

understood, each court has a responsibility to assure that asbestos cases are heard fairly. Specifically, "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."<sup>45</sup> Indeed, there are specific issues that have arisen in asbestos litigation that America's judges can and must address in order to assure that seriously injured asbestos claimants and defendants are treated fairly and that assets to compensate more deserving claimants are not wasted. Some courts have begun to do so. This Letter will show that these measures are fair and reasonable and do not require radical changes in existing law.

## **II. Adhere to the Fundamental Principles of Tort Law**

### **A. There Must Be a Legal Basis or Duty for the Civil Action**

Increasingly, courts are wrestling with the legal relationship between asbestos cancer claimants and the peripheral defendants who have little or no connection to their claims. As in any tort case, before a defendant may be liable in asbestos litigation, a plaintiff must meet her burden of proving that the defendant owed her a legal duty.<sup>46</sup> Duty questions involve "policy-laden" judgments in which "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit."<sup>47</sup> Examples of the types of duty issues courts have been facing recently can be found in cases involving secondary exposure to workers' family members and those claiming liability against insurers for failure to warn.

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<sup>45</sup> *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1991).

<sup>46</sup> *See Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976).

<sup>47</sup> *DeAngelis v. Lutheran Med. Center*, 449 N.E.2d 406, 407-08 (N.Y. 1983).

## 1. Secondary Exposure

Some spouses and children of workers who may have been exposed to asbestos at home have since developed serious asbestos-related diseases. Their claims can be heart-wrenching, particularly when the children are now in their thirties and forties with families of their own. In assessing which defendants are appropriate targets in this type of litigation, the highest courts in three states have considered whether the workers' employers have a duty and, therefore, potential liability for such off-site exposures to non-employees. In Georgia and New York, the high courts held that such plaintiffs did not have a cause of action against the premises owners because the plaintiffs could not satisfy the necessary element of duty of care.<sup>48</sup> The courts concluded that finding such a duty would upset traditional tort law, be unworkable in practice, and result in unsound public policy.<sup>49</sup> A mid-level appellate court in Texas and a Tennessee trial court have concurred.<sup>50</sup> The Supreme Court of New Jersey, perhaps swayed by compassion for the plaintiff, tried to stake a compromise position by holding that defendants can owe such a duty, but only when a duty is owed to the worker and the risk to the nonworker is foreseeable.<sup>51</sup>

The Georgia and New York rulings are more in line with traditional tort law. In 2005, New York's highest court held in *In re New York City Asbestos Litigation* that an employer does not owe a duty of care to the spouse of an employee who is harmed as a result of "take home"

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<sup>48</sup> See *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005); *In re New York City Asbestos Litig.* 840 N.E.2d 115 (N.Y. 2005); see also *Satterfield v. Breeding Insulation Co.*, No. L-14000, 2006 WL 901725, at \*1 (Tenn. Cir. Ct. Mar. 21, 2006); *Exxon Mobil Corp. v. Altimore*, No. 14-04-01133-CV, 2006 WL 2165725, at \*1 (Tex. Ct. App. Aug. 1, 2006).

<sup>49</sup> See *Williams*, 608 S.E.2d at 208-10; *New York City Asbestos Litig.*, 840 N.E.2d at 116-23.

<sup>50</sup> See *Exxon Mobil Corp. v. Altimore*, No. 14-04-011330CV, 2006 WL 2165725 (Tex. App.-Houston (14th Dist.) Aug. 1, 2006); *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

<sup>51</sup> See *Olivo v. Owens-Illinois*, 895 A.2d 1143, 1146-51 (N.J. 2006); see also *Condon v. Union Oil Co. of California*, No. A102069, 2004 WL 1932847, at \*1 (Cal. Ct. App. Aug. 31, 2004) (unpublished); *Zimko v. Am. Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005).

exposure to asbestos that is carried on an employee's work clothes.<sup>52</sup> The plaintiff's husband worked at the Port Authority for thirty-six years and allegedly handled asbestos-containing products in various Port Authority sites.<sup>53</sup> He frequently took his dirty work clothes home to wash, rather than leaving them at work.<sup>54</sup> As a result, his wife often handled his asbestos-soiled clothing and was later diagnosed with mesothelioma.<sup>55</sup> The New York court held that no duty of care existed because there was no relationship between the defendant and the plaintiff.<sup>56</sup>

The court concluded that two factors guided its decision-making.<sup>57</sup> First, it stated that the husband was in a better position than the premises owner to protect against the risk of harm.<sup>58</sup> Second, the court expressed skepticism that a new duty rule to cover family members could be crafted to avoid open-ended liability in that

[c]ourts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.<sup>59</sup>

This same logic led the Georgia Supreme Court to reach a similar conclusion in *CSX Transportation, Inc. v. Williams*.<sup>60</sup> The court held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's

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<sup>52</sup> See *New York City Asbestos Litig.*, 840 N.E.2d at 122.

<sup>53</sup> *Id.* at 116.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 116-17.

<sup>56</sup> *Id.* at 122.

<sup>57</sup> *Id.* at 119-20.

<sup>58</sup> See *id.* at 120.

<sup>59</sup> *Id.* at 119 (stating that "[f]oreseeability does not define duty—it merely determines the scope of the duty once it is determined to exist" (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001))).

<sup>60</sup> *Williams*, 608 S.E.2d at 210.

asbestos-tainted work clothing at locations away from the workplace.”<sup>61</sup> The plaintiffs claimed that they were exposed at home to airborne asbestos emitted from the clothing worn by CSX employees and, consequently, contracted asbestos-related diseases.<sup>62</sup> The court, in ruling that no duty of care existed for any of these plaintiffs, reasoned that the corporate defendant did not, itself, spread asbestos beyond the work place.<sup>63</sup> Furthermore, the court declined to rely simply on the potential foreseeability of the plaintiffs’ harms “as a basis for extending the employer’s duty beyond the workplace.”<sup>64</sup>

The Texas appellate court, in *Exxon Mobil Corp. v. Altimore*,<sup>65</sup> and Tennessee trial court, in *Satterfield v. Breeding Insulation Co.*,<sup>66</sup> followed the same rationale. In Texas, the case involved pre-1972 exposure, before OSHA “prohibited employers from allowing workers who had been exposed to asbestos to wear their work clothes home.”<sup>67</sup> The court held that only after 1972 did “the risk to [the plaintiff] of contracting a serious illness . . . become foreseeable, triggering, for the first time a duty to protect [the plaintiff] and those persons similarly situated.”<sup>68</sup> The Tennessee court left to the “legislature as to whether it is wise to establish [such a] duty.”<sup>69</sup>

## 2. Duty to Warn

Plaintiffs in a handful of jurisdictions have attempted to impose a duty on insurers to warn the employees of their policyholders—and even a duty to warn the whole world—of the hazards of asbestos. These plaintiffs have alleged that by virtue of having issued policies to asbestos manufacturers,

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 208.

<sup>63</sup> *See id.* at 208-10.

<sup>64</sup> *Id.* at 209.

<sup>65</sup> No. 14-04-011330CV, 2006 WL 2165725 (Tex. App.-Houston (14th Dist.) Aug. 1, 2006).

<sup>66</sup> No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

<sup>67</sup> *Altimore*, 2006 WL 2165725, at \*7.

<sup>68</sup> *Id.*

<sup>69</sup> *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

as well as other companies that used or sold asbestos-containing products, insurers acquired knowledge about the hazards of asbestos that they should have shared with the public.

Recently, courts in Ohio have rejected the notion that insurers owe such a duty to warn. As an Ohio appeals court explained in *Bugg v. American Standard, Inc.*, “negligence liability premised on failure to act arises only where a ‘special relationship’ exists between the parties.”<sup>70</sup> No such relationship exists between individuals exposed to a company’s asbestos and that company’s insurer.<sup>71</sup> In *Bugg*, plaintiffs named as defendants various insurance companies who wrote property and casualty policies for manufacturers, distributors, and premises owners who were also named defendants in the litigation. Plaintiffs argued that the insurers had a duty to voluntarily undertake to protect plaintiffs and other members of the public from the dangers of asbestos, citing the Good Samaritan Doctrine.<sup>72</sup> In addition, the plaintiffs claimed that through “inaction and acquiescence,” insurers increased the risk of harm and, therefore, could be held liable under the tort of negligent undertaking. The court rejected those arguments, holding that the insurers “owed no duty to protect the [plaintiffs] from the hazards of asbestos, despite their alleged knowledge of the risks.”<sup>73</sup> The court further stated that affirmative conduct by the insurers, including conduct that made conditions worse for the plaintiffs, as well as plaintiffs’ reliance on defendants’ conduct or representations, are required for a viable negligent undertaking claim.<sup>74</sup>

In *Bope v. A.W. Chesterton Co.*,<sup>75</sup> the same Ohio appeals court affirmed its holding in *Bugg*, stating that claims by individuals against insurers for negligence and fraud suffer from a “gaping hole.”<sup>76</sup> In *Bugg*, the court stated “[t]he duty element of a negligence claim and the reliance

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<sup>70</sup> No. 84829, 2005 WL 1245043, at \*2 (Ct. App. Cuyahoga County, Ohio May 26, 2005) (unpublished).

<sup>71</sup> *Bugg*, 2005 WL 1245043, at \*2.

<sup>72</sup> *Id.* at \*1-2 (citing RESTATEMENT (SECOND) OF TORTS § 324A (1965), plaintiffs suggested that an insurer be subject to liability under the Good Samaritan Doctrine for voluntarily assuming a duty of care).

<sup>73</sup> *Id.* at \*2.

<sup>74</sup> *Id.* at \*6 (dismissing a cause of action for spoliation of evidence).

<sup>75</sup> No. 85215, 2005 WL 2562913, at \*1 (Ct. App. Cuyahoga County, Ohio Oct. 13, 2005) (unpublished).

<sup>76</sup> *Bope*, 2005 WL 2562913, at \*2.

element of a fraud claim share a common characteristic . . . . In order to prove duty and/or reliance, [plaintiffs] must demonstrate a relationship between themselves and the [insurers].”<sup>77</sup> The court continued, “absent this relationship, there is no duty on behalf of [the insurers] . . . it is legally impossible for [plaintiffs] to justifiably rely on the [insurers’] representations or concealments.”<sup>78</sup>

These cases represent the proper judicial response to the duty issue, even when presented with sympathetic plaintiffs. Applying these rules of responsibility will not necessarily leave a claimant stranded. Rather, it will point the personal injury lawyers in a direction of finding a responsible party who should be subject to the rule of law.

## B. The Causation Requirement

It has become increasingly important in asbestos litigation that courts pay heed to issues of both general and specific causation.<sup>79</sup> General causation exists when a substance can cause an injury or condition in the general population.<sup>80</sup> Specific causation exists when the substance is the cause of a specific person’s injury.<sup>81</sup> Unlike with most litigation, plaintiffs’ lawyers are not selective and do not name only those defendant companies that could have caused the harm. They typically name scores of defendants, regardless of their actual connection to a plaintiff’s alleged injury. In addition, most defendants named now are “peripheral” defendants who, even giving the plaintiffs’ lawyers the benefit of the doubt, are several steps removed from any actual wrongdoing that caused the claimed harm. Therefore, it is important that courts not make causation assumptions.

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See, e.g., Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714-15 (Tex. 1997) (stating that in toxic tort cases, a plaintiff has a burden of showing both general causation—that the substance, which the plaintiff was allegedly exposed to can generally cause the condition claimed, and specific causation—that the specific exposure was a substantial cause of the specific harm).

<sup>80</sup> *Id.* at 714.

<sup>81</sup> *Id.*; *see also Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265, 270 (Tex. Ct. App. 2006) (“Proving one type of causation does not necessarily prove the other, and both are needed in situations where direct, reliable medical testing for specific causation has not taken place.”).

Consequently, for issues relating to both general and specific causation, courts should (1) require that plaintiffs provide credible allegations against each defendant early in the litigation, (2) exercise their judicial responsibility to require the application of well-grounded science in causation arguments, and (3) adhere to their obligation to assure that plaintiffs prove their allegations by a preponderance of the evidence.

## 1. General Causation

In asbestos litigation, as in all toxic tort cases, scientific and medical issues related to general causation are not cut and dry. Litigation can become a battle of experts. In assessing the admissibility and weight accorded to experts' testimonies, the applicable authority arises from the holdings of both *Frye v. United States*<sup>82</sup> and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>83</sup> Pursuant to these holdings, courts should act as "gatekeepers" and be guided by epidemiological studies on plaintiffs' work histories and defendants' activities.<sup>84</sup> Epidemiology is the study of the pattern of diseases in the human population, which is generally done by determining the relevant risk of developing a condition as the result of being exposed to a particular substance.<sup>85</sup> Accordingly, epidemiologists help determine the likelihood that a disease, which can occur from several sources, may be linked to the allegations against a particular defendant.

Over the last twenty years, courts have emphasized the importance of epidemiology in toxic tort cases. Consider the following comments from court rulings:

"[E]pidemiology is the best evidence of general causation in a toxic tort case."<sup>86</sup>

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<sup>82</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>83</sup> 509 U.S. 579 (1993).

<sup>84</sup> See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 27 (2003).

<sup>85</sup> For a good general discussion of the principles of epidemiology and its use in the courtroom, see MARCIA ANGEL, M.D., SCIENCE ON TRIAL 99-106 (1996); BERT BLACK., EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 77 (1997).

<sup>86</sup> *Norris v. Baxter Healthcare Corp.*, 397 F.3d at 878, 882 (10th Cir. 2005) (citing to seventeen epidemiology studies discounting any link between breast implants and connective tissue disease).



“[T]he existence or non-existence of relevant epidemiology can be a significant factor in proving general causation in toxic tort cases.”<sup>87</sup>

“Epidemiological studies are the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease.”<sup>88</sup>

“[I]n a [benzene] case such as this, the most conclusive type of evidence of causation is epidemiological evidence.”<sup>89</sup>

“The most important evidence relied upon by scientists to determine whether an agent (such as breast implants) cause [sic] disease is controlled epidemiologic studies.”<sup>90</sup>

Epidemiologists typically compare an “exposed” group against a “control” group to determine if those exposed to the toxic material are more likely to get the disease than those in the control group. Results are usually reported as a relative risk, or “odds ratio,” regarding the likelihood that a particular group of people could contract the disease.<sup>91</sup> Epidemiological studies can be particularly necessary where the underlying biological mechanisms of disease are not well understood, such as with asbestos and mesothelioma. For instance, mesothelioma while it may be unusual, can occur “naturally” without any asbestos exposure; there are no medical or biological “markers” that would prove causation.<sup>92</sup> In cases involving individuals who worked as insulators, asbestos manufacturing workers,

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<sup>87</sup> Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1403 (D. Or. 1996).

<sup>88</sup> Conde v. Velsicol Chem. Corp., 804 F. Supp. 972, 1025-26 (S.D. Ohio 1992).

<sup>89</sup> Chambers v. Exxon Corp., 81 F. Supp. 2d 661, 664 (M.D. La. 2000).

<sup>90</sup> *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1224 (D. Colo. 1998).

<sup>91</sup> An “odds ratio” of 1.0 reflects no increase in risk in the exposed population, whereas odds ratios generally of 2.0 or higher are interpreted as showing a doubling of the risk over what would be expected in the general population. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 349, 384 (2d ed 2000); see also Merrell Dow Pharma. v. Havner, 653 S.W.2d 706, 716-17, 19 (Tex. 1997). The term “relative risk” is employed for cohort studies, whereas “odds ratio” is usually used in case control studies.

<sup>92</sup> See, e.g., Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 44 n.19 (2003) (stating that approximately twenty percent of malignant mesotheliomas have been attributed to causes other than exposure to asbestos) (citing Carbone et al., *The Pathogenesis of Mesothelioma*, 29 SEMINARS IN ONCOLOGY 2 (2002); Britton, *The Epidemiology of Mesothelioma*, 29 SEMINARS IN ONCOLOGY 18 (2002)).

or shipyard workers, the odds ratios of exposure to mesothelioma consist of a range from 5.0 to 10.0 or higher.<sup>93</sup> These ratios indicate a strong causal relationship between mesothelioma and workers in jobs with high lifetime exposures. Odds ratios for contracting mesothelioma among other workers and non-workers may be significantly less. If these ratios cluster around 1.0, the studies do not support a link between the exposures and mesothelioma. Specifically, teachers, farmers, office workers, accountants, and vehicle mechanics have been investigated in regard to mesothelioma, and those jobs have shown to have no relationship with the disease.<sup>94</sup>

Epidemiological studies can also be helpful in assessing whether there exist risks of disease associated with a particular asbestos exposure, given the type of asbestos fibers, the length of the fibers, and the concentration of the fibers in the air. For example, short fibers—those shorter than five microns—are much less potent than long fibers. Some short fibers may have no potency at all. On the other hand, some experts claim that it may only take one fiber to cause certain asbestos-related ailments, including mesothelioma. In comparing the last claim to epidemiological studies, an Ohio federal court judge held in *Bartel v. John Crane, Inc.* “that every breath [the plaintiff] took which contained asbestos could have been a substantial factor in causing his disease, is not supported by the medical literature.”<sup>95</sup>

Where significant and clear epidemiology exists, as in *Bartel*, courts have begun scrutinizing and, when appropriate, rejecting expert opinions that contradict those studies.<sup>96</sup> In August 2006, Judge Robert Colville

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<sup>93</sup> See Kay Teschke, *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88 CAN. J. PUB. HEALTH 163, 165 (1997).

<sup>94</sup> See *id.*; see also Michael Goodman, *Mesothelioma and Lung Cancer Among Motor Vehicle Mechanics: A Meta-Analysis*, 48 ANNALS. OCCUP. HYG. 309 (2004).

<sup>95</sup> *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004).

<sup>96</sup> See, e.g., *Allen v. Pa. Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (numerous reputable epidemiology studies contradicted plaintiffs' theory); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316 (11th Cir. 1999) (plaintiffs' "proffered conclusions . . . were out of sync with the conclusions in the overwhelming majority of the epidemiological studies presented to the court"); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885-86 (10th Cir. 2005) ("This is not a case where there is no epidemiology. It is a case where the body of epidemiology largely finds no association between silicone breast implants and immune system diseases. . . . We are unable to find a single case in which a differential diagnosis that is flatly contrary to all of the available epidemiological evidence

of the Court of Common Pleas in Allegheny County, Pennsylvania held that an expert's testimony stating the plaintiff contracted asbestos-related disease from automobile repair work was "novel and unsupported" by generally accepted epidemiological studies.<sup>97</sup> In Wayne County, New York, Judge Raymond E. Cornelius observed that an expert's opinion as to the cause of the plaintiff mesothelioma "may not be based upon a generally accepted methodology" and ordered a hearing to determine if the expert report was generally accepted within the scientific community.<sup>98</sup> In Texas, Judge Mark Davidson, who administers the state's asbestos docket, held a three-day hearing on causation and excluded one expert because there was no epidemiological study supporting the expert's position that workers who work around friction products have a relatively higher risk of developing asbestos-related diseases.<sup>99</sup> Judge Davidson also barred from all asbestos cases in Texas another expert, because epidemiology did not support his theories on potential diseases caused by chrysotile asbestos.<sup>100</sup> Recently, the Mississippi Court of Appeals affirmed the exclusion of two plaintiffs' experts, because they had no basis for testifying that mesothelioma could occur at any dose or that plaintiffs experienced a sufficient dose to fear future cancer.<sup>101</sup>

## 2. Specific Causation Issues

Specific causation in asbestos litigation is complicated by the fact that "a plaintiff injured by asbestos fibers often does not know exactly when

is both admissible and sufficient to defeat a defendant's motion for summary judgment."); *Chambers v. Exxon Corp.*, 81 F. Supp. 2d 661, 665 (M.D. La. 2000) (causation claim contradicted by "a number of scientifically performed studies which demonstrate no association" between benzene and chronic myelogenous leukemia).

<sup>97</sup> *In re Toxic Substances Cases*, No. A.D. 03-319, 2006 WL 2404008, at \*16 (Pa. Comm. Pl. Aug. 17, 2006).

<sup>98</sup> *DeMeyer v. Advantage Auto*, 797 N.Y.S.2d 743, 749 (N.Y. App. Div. 2005).

<sup>99</sup> *See In re Asbestos Litig.*, Cause No. 2004-03964, slip op. at 4 (D. Ct. Harris County, Tex. Jan. 20, 2004), available at <http://www.justex.net/JustexDocuments/1/Rule%2013%20Asbestosis/Havner%20Ruling%20-%20January%2020%202005.pdf>.

<sup>100</sup> *See id.* at 6. *But see In re Asbestos Litig.*, 900 A.2d 120, 156 (Del. Super. May 9, 2006) (holding that occupation-specific epidemiology is not required to support scientific conclusions); *Berger v. Amchem Prods.*, 818 N.Y.S.2d 754, 762 (N.Y. Sup. Ct. 2006) (holding that epidemiological evidence is not necessary to establish causation).

<sup>101</sup> *See Brooks v. Stone Architecture, P.A.*, 934 So. 2d 350, 355-56 (Miss. Ct. App. 2006).

or where he was injured; therefore, [plaintiff] is unable to describe the details of how such injury occurred.”<sup>102</sup> Unlike some environmental contamination cases, there is no defined incident of exposure and the latency period can take several decades. This is partly why “most plaintiffs sue every known manufacturer of asbestos products, notwithstanding the plaintiff’s marginal contact with a particular defendant’s product.”<sup>103</sup> In some cases, especially where the plaintiffs are sympathetic, courts have relaxed specific causation requirements to allow a case to go to trial or to encourage settlement. Many legal observers consider the ability to recover absent proof of causation to be a key cause of the recent expansion of claims alleging asbestos-related injuries.<sup>104</sup>

The generally accepted standard for specific causation under the Restatement (Second) of Torts is whether the defendant or defendant’s product was a “substantial cause” of a plaintiff’s injury.<sup>105</sup> The inverse is also true: when a defendant could not have been a *substantial factor* in producing the claimed injury, then the defendant should be dismissed—even when the defendant’s conduct could have been a “negligible” or “insubstantial” cause of the injury.<sup>106</sup>

In asbestos litigation, this issue often arises when a plaintiff alleges exposure to asbestos from multiple sources. In these instances, courts are required to compare exposures to determine whether, relative to the

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<sup>102</sup> Thacker v. UNR Indus., 603 N.E.2d 449, 456 (Ill. 1992).

<sup>103</sup> Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986); see also Steven B. Hantler, *Toward Greater Judicial Leadership on Asbestos Litigation*, 41 CIV. JUST. F. 1, 6-8 (Apr. 2003) (discussing courts that have relaxed specific causation requirements for cancer claimants).

<sup>104</sup> See Lohrmann, 782 F.2d at 1162 (observing that “during the course of discovery some of the defendants are dismissed on motions for summary judgment because there has been no evidence of any contact with any of such defendants’ asbestos-containing products. Other defendants may be required to go to trial but succeed at the directed verdict stage”).

<sup>105</sup> See RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965). The term “substantial cause” is sometimes referred to as a “substantial contributing cause” or a “substantial factor in.”

<sup>106</sup> *Id.* § 433 cmt. d (“There are frequently a number of events each of which is not only a necessary antecedent to the other’s harm, but is also recognizable as having an appreciable effect in bringing it about. Of these the actor’s conduct is only one. Some other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor’s negligence insignificant and, therefore, to prevent it from being a substantial factor.”).

other exposures, a particular source was a substantial or insubstantial cause of a plaintiff's injury.<sup>107</sup> Where clear evidence exists of long-term, substantial exposure to asbestos from one or more sources, an incidental exposure to asbestos should not be deemed a substantial cause of the plaintiff's disease.<sup>108</sup>

To address this concern, many courts have adopted the "frequency, regularity, proximity test" most associated with *Lohrmann v. Pittsburgh Corning Corp.*<sup>109</sup> In *Lohrmann*, the court held that when a plaintiff alleges multiple sources of exposure to asbestos, the plaintiff must present evidence: (1) of exposure to a "specific product" attributable to the defendant, (2) "on a regular basis over some extended period of time," (3) "in proximity to where the plaintiff actually worked," (4) such that it is probable that the exposure to the defendant's product caused plaintiff's injuries.<sup>110</sup> The plaintiff testified that he had been exposed to asbestos from many sources on almost a daily basis for thirty-nine years. He also said that he had been exposed to asbestos-containing products of a company called Unarco on "ten to fifteen occasions between one and eight hours duration."<sup>111</sup> The court held that, given the other overwhelming exposures, the Unarco exposure did not satisfy this test and dismissed the claims in favor of Unarco on summary judgment.<sup>112</sup> The court said that this "reasonable" rule was needed in asbestos litigation because of the pattern of naming scores of defendants and the "unusual nature" of some asbestos-related diseases, such as asbestosis, which can take "years of exposure" to produce.<sup>113</sup>

Recently, the Arkansas Supreme Court applied the "frequency, regularity, proximity test" to a mesothelioma plaintiff. The plaintiff had

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<sup>107</sup> *See id.*

<sup>108</sup> *See id.* § 433 cmt. a ("The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . rather than in the so-called 'philosophical sense' which includes everyone of the great number of events without which any happening would not have occurred.").

<sup>109</sup> 782 F.2d 1156 (4th Cir. 1986).

<sup>110</sup> *Lohrmann*, 782 F.2d at 1162-63.

<sup>111</sup> *Id.* at 1163.

<sup>112</sup> *Id.* at 1162.

<sup>113</sup> *Id.*

a long and varied exposure history from a career in construction. In addition to naming defendants allegedly associated with those exposures, the plaintiff also named the manufacturer of asbestos-containing brake pads that he once repaired on his own car.<sup>114</sup> The state's high court ruled that competent medical evidence "does not support the conclusion that a one-time exposure to asbestos-containing brakes was a substantial cause of the plaintiff's mesothelioma."<sup>115</sup>

The frequency, regularity, and proximity test is now the "most frequently used test for causation in asbestos cases"<sup>116</sup> and has been adopted by numerous courts, including several state supreme courts, state appellate courts, and federal circuits.<sup>117</sup> In one case reviewed by the United States Court of Appeals for the Sixth Circuit, *Lindstrom v. A-C Product Liability Trust*,<sup>118</sup> the court applied the frequency, regularity, and proximity test and found that the plaintiff did not establish any exposure to the products of most of the named defendants.

The frequency, regularity, and proximity test offers a rational method for eliminating inconsequential *exposure* cases consisting of one-time or infrequent exposures. Courts are sometimes faced, however, with cases where the exposure may be frequent, regular, and proximate, but still so low that the lifetime dose cannot be considered a real contribution to disease. All urban dwellers, for instance, are exposed regularly to asbestos fibers in urban air; yet, it is widely recognized that such exposures do not cause or contribute to asbestos disease. In occupational or environmental asbestos cases, it should not be sufficient simply to say the plaintiff was around some kind of asbestos on a regular basis. Courts should insist that experts demonstrate, through competent evidence and dose quantifications, that the lifetime exposures achieved a dose consistent with what the epidemiology studies tell us is required to cause disease.

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<sup>114</sup> *Chavers v. Gen. Motors Corp.*, 79 S.W.3d 361 (Ark. 2002).

<sup>115</sup> *Id.* at 370.

<sup>116</sup> *Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991).

<sup>117</sup> See *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982); *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1303 (8th Cir. 1982); *Thacker v. UNR Indus.*, 603 N.E.2d 449, 457 (Ill. 1992); *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (Miss. 2005) (stating that the frequency, regularity, and proximity test "is the correct test to be applied in asbestos litigation").

<sup>118</sup> 424 F.3d 488 (6th Cir. 2005).

Issues of specific causation also arise in lung cancer cases, where courts must distinguish between cancers caused by asbestos exposure and those caused by other activities, such as smoking. As a Texas appeals court recently explained in *Mobil Oil Corp. v. Bailey*,<sup>119</sup> the plaintiff must “offer competent evidence that asbestos exposure, more likely than not, caused [plaintiff’s] lung cancer, and also to negate with reasonable certainty [plaintiff’s] heavy smoking history as the other plausible cause of his lung cancer.”<sup>120</sup> In *Bailey*, the appeals court reversed a trial court’s decision to admit expert testimonies asserting a synergistic effect of smoking and asbestos exposure in causing lung cancer and that asbestos can cause lung cancer absent asbestosis.<sup>121</sup> The court said that the experts failed to show that their testimonies were relevant and reliable, as they did not explain the bases underlying their reliance on the studies submitted into evidence, nor what part or parts of those studies had general acceptance in the current scientific community.<sup>122</sup> The court added, “[c]areful exploration and explication of what is reliable scientific methodology in a given context is necessary.”<sup>123</sup>

When courts apply threshold standards for causation, even though other exposures or products could have caused the alleged disease, the courts wisely try to assure that only defendants whose products could have been a substantial cause of plaintiffs’ injuries should have to bare the costs of the litigation and proceed, if necessary, to trial.

### III. Empower Jurors to Make Informed Decisions

For cases that go to trial, it has become increasingly important in asbestos litigation that jurors be informed of how their decisions will affect compensation and which parties will be liable for monetary dam-

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<sup>119</sup> 187 S.W.3d 265 (Tex. App. 2006).

<sup>120</sup> *Bailey*, 187 S.W.2d at 271.

<sup>121</sup> *Id.* at 275.

<sup>122</sup> *Id.* at 271-72.

<sup>123</sup> *Id.* at 274 (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 719 (Tex. 1997)).

ages. Particularly with regard to asbestos litigation, courts have found that juries should be advised of the impact of joint and several liability rules, the compensation paid to plaintiffs by collateral sources, and the other potential sources of exposure. Otherwise, these courts have found a jury's intent in assessing damages and liability can be undermined, particularly when such knowledge goes directly to assessing the relevant facts.

Often in asbestos cases, jurors only see a small portion of the entire picture. The proliferation of asbestos-related bankruptcies among the "traditional" asbestos defendants means that even though they may have the most culpability for the alleged harm, they are not named in the litigation. Additionally, most defendants settle before trial and plaintiffs' lawyers tend to leave only one or two deep pocket defendants for trial, which forces peripheral defendants, who likely bear a lesser degree of culpability, to pay the share of these other companies, creating a snowball effect that could lead to more bankruptcies at a faster rate.<sup>124</sup>

Giving juries access to this information is bolstered by the public's faith in the jury system. An American Bar Association poll shows that more than two-thirds of the American public consider juries to be the most important part of the judicial system.<sup>125</sup> Juries can and should be trusted to reach fair and reasonable decisions with enhanced knowledge; they also could help rein in the "elephantine mass"<sup>126</sup> of asbestos litigation.

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<sup>124</sup> See *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy"); see also Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) (Each time a defendant declares bankruptcy, "mounting and cumulative financial pressure" is placed on "remaining defendants"). The RAND Institute for Civil Justice found that following 1976, the year of the first bankruptcy attributed to asbestos litigation, there were nineteen bankruptcies in the 1980s, seventeen in the 1990s, and thirty-six asbestos-related bankruptcies from 2000 to mid-2004. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxvii (RAND Inst. for Civil Justice 2005) [hereinafter RAND Rep.]; see also Ronald Barliant et al., *From Free-Fall to Free-for-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441 (2004); Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. TEX. L. REV. 883 (2003).

<sup>125</sup> See AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 6-7 (1998).

<sup>126</sup> *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).



## A. The Effect of Joint and Several Liability

Joint and several liability requires that a defendant be responsible for an entire award, even when a jury determines that the defendant should only be partially responsible, even less than five percent, for that award.<sup>127</sup> The original public policy rationale for joint and several liability is that a partially responsible defendant should carry the entire economic burden of a plaintiff's damages, rather than let that burden fall to the injured plaintiff. In fact, it was once the majority rule in the United States. In modern times, however, most states have scaled back the impact of joint and several liability for three reasons. First, it tends to lead to unpredictable, often arbitrary, awards. Second, it may subvert the intent of the jury in assessing culpability. Third, it contradicts the fundamental legal principle that a party should only pay for the fair share of the damages it caused.<sup>128</sup>

Where joint and several liability laws still apply, it is not often that a jury is informed of the impact that the law will have on its verdict. Juries typically believe that, for example, a peripheral "defendant will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder."<sup>129</sup> Such "blindfold rules,"<sup>130</sup> even if well-intended, may set a "trap for the uninformed jury."<sup>131</sup> The jury may not realize that "[i]n reality, this deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault."<sup>132</sup>

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<sup>127</sup> See *Coney v. J.L.G. Indus.*, 454 N.E.2d 197 (Ill. 1983) (describing joint and several liability).

<sup>128</sup> See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000) (stating that "[t]he clear trend over the past several decades has been a move away from pure joint and several liability"). As of this writing, about forty states have either abolished or modified their joint and several liability rules. See Steven B. Hantler et al., *Is the "Crisis" in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1147-51 (2005).

<sup>129</sup> Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 471 (1992).

<sup>130</sup> See Jordan H. Leibman et al., *The Effects of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L.J. 349 (1998).

<sup>131</sup> *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987).

<sup>132</sup> See Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 471 (1992).

Several state supreme courts have specifically addressed this concern and now inform juries of the practical impact that the state's joint and several liability rules will have on the jury's apportionment of damages. They have found that it is "better to equip jurors with knowledge of the effect of their findings than to let them speculate in ignorance, 'and thus, subvert the whole judicial process.'"<sup>133</sup> A leading proponent of this rule is the Supreme Court of Hawaii, which ruled in a drunk driving case, *Kaeo v. Davis*,<sup>134</sup> that "an explanation of the operation of the doctrine of joint and several liability . . . may be necessary to enable the jury to make its findings on each issue."<sup>135</sup> Otherwise, jurors might speculate, possibly incorrectly, about how their decisions would be carried out: "it would be 'better for courts to be the vehicle by which the operation of the law is explained.'"<sup>136</sup> Informing the jurors about the effects of the state's joint and several liability laws in *Kaeo* made a significant difference in the jury's determination. When the case was re-tried, a defendant found to be one percent liable in the first trial, but susceptible to paying a much greater portion of the award, was determined to have no liability at all in the second trial.

In a recent asbestos case, San Francisco Superior Court Judge Stephen Allen Dombrink, in response to a defense motion, gave a simple and straightforward instruction to the jury on the effect of joint and several liability.<sup>137</sup> The jury was told that, under California law, any finding of a proportionate share of liability for economic damages would result in

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<sup>133</sup> *Id.*; see also *Reese v. Werts Corp.*, 379 N.W.2d 1 (Iowa 1985) (holding that the trial court should have instructed the jury on the effects of its verdict on the plaintiff's recovery); *Decelles v. State*, 795 P.2d 419, 419-21 (Mont. 1990) ("We think Montana juries can and should be trusted with the information about the consequences of their verdict."); *Coryell v. Town of Pinedale*, 745 P.2d 883, 884, 886 (Wyo. 1987) (holding that statute provided that the court must "inform the jury of the consequences of its verdict").

<sup>134</sup> 719 P.2d 387 (Haw. 1986).

<sup>135</sup> *Kaeo*, 719 P.2d at 396.

<sup>136</sup> *Id.*; see also 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE AND PROCEDURE: CIVIL 2D § 2509 (2d ed. 1994) ("[T]here is always the danger that the jury will guess wrong about the law, and may shape its answers to the special verdicts, contrary to its actual beliefs, in a mistaken attempt to ensure the results it deems desirable.").

<sup>137</sup> See *Horr v. Allied Packing*, No. RG-03-104401, slip op. at \*2 (Super. Ct. Alameda County, Cal. Feb. 13, 2006).

the defendant being responsible for the full amount of economic damages.<sup>138</sup> Judge Dombink, much like the other jurists discussed above, had faith that juries are responsible enough to handle this knowledge.<sup>139</sup> The proliferation of asbestos-related bankruptcies means that the issue of joint liability may be an important factor in more cases.<sup>140</sup>

## B. Collateral Sources Should Be Admissible

Given the mature state of asbestos litigation today, jurors also should be told of collateral sources that have compensated a particular plaintiff for the asbestos-related harm at issue in the litigation.<sup>141</sup> In states that enforce a collateral source rule, the damages a jury awards a plaintiff are not reduced by the amount of compensation or benefits that the plaintiff received from sources other than the defendant, even when the plaintiff did not use her own assets to help create those sources of funding.<sup>142</sup> Given the mass numbers of defendants typically named in the litigation,

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<sup>138</sup> *Id.* (The court approved the following jury instruction: "If you find Dentsply liable for any percentage of fault, Dentsply will be responsible to pay for its proportionate share of non-economic damages you may award. With respect to economic damages, Dentsply will [be] responsible for the full amount of those damages less a proportionate share of any settlements that may have been made by other defendants.").

<sup>139</sup> *See id.* ("The proposed instruction will aid the jury in determining the proper amount of damages and making the proper allocation of the ratio of settlement percentages as between the economic and noneconomic damages.").

<sup>140</sup> *See generally* Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203 (2003).

<sup>141</sup> *See* Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J. L. & PUB. POL'Y 57, 59 (2005); *see also* RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979). The concept of the collateral source rule was born in *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854), in which a schooner and a steamship both carrying cargo collided on Lake Huron. The schooner sank, but was insured and the owner filed a claim. The insurer concluded that abandoning the sinking schooner was reasonable, and paid the claim. Later, in a law suit between the two, Steamship owner argued that the insurance pay-off relieved it of liability.

<sup>142</sup> The collateral source rule "ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss." John Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

the total number of settlements can add up to a significant amount of damages awarded. The main arguments for hiding collateral sources from a jury's consideration are two-fold: a "wrongdoer" should not benefit from the fact that a plaintiff has been paid by another source, and a defendant should not benefit when a plaintiff has been prudent, for example, by buying health insurance.

As a practical matter, when juries are not aware of collateral sources, they are likely to award plaintiffs the entire amount of the bills, not just the portion the plaintiff paid out of pocket. Such windfall recoveries may not be appropriate when a plaintiff did not purchase her collateral sources, such as when the benefits are provided by workers' compensation, government benefits, or employer programs.<sup>143</sup> A well-respected commentator, John Fleming, has called the collateral source rule "one of the oddities of American" tort law.<sup>144</sup> The Florida Supreme Court also observed that the public policy weaknesses of the collateral source rule have caused a number of courts to reduce its reach or eliminate it altogether.<sup>145</sup>

A North Carolina appellate court in *Schenk v. HNA Holdings, Inc.*<sup>146</sup> reviewed the impact of the collateral source rule on modern asbestos litigation. In affirming the trial court's decision to offset plaintiffs' verdict awards by amounts collected through workers' compensation benefits and prior settlements, the court explained: "the weight of both authority and reason is to the effect that any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the *total recovery* in any action for the *same injury or damage*."<sup>147</sup> Otherwise, the judicial system would no longer serve its role as a compensatory mechanism, but one more domina-

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<sup>143</sup> There has been substantial criticism of the collateral source rule. See, e.g., 2 AM. L. INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 161, 161-82 (Reporters' Study, 1991) (recommending abolition of collateral source rule, except with respect to life insurance); Richard C. Maxwell, *The Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962) (questioning the benefits of the collateral source rule).

<sup>144</sup> Fleming, *supra* note 142, at 1478.

<sup>145</sup> See *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514, 515-16 (Fla. 1984).

<sup>146</sup> 613 S.E.2d 503 (N.C. Ct. App. 2005).

<sup>147</sup> *Id.* at 509.

ted by punishing those “at fault.”<sup>148</sup> This case exemplified the rationale that compensatory claims based on punishing a defendant are inappropriate and should not be used as a mask for punitive damages.<sup>149</sup> In modern asbestos cases, the “punitive” purpose of denying collateral source payments is no longer served at all, because most defendants are only peripherally responsible for the alleged injuries.

This rationale is furthered in cases alleging exposure to asbestos contained in products, which still represents a majority of the asbestos claims. The doctrine of strict products liability is distinct from fault; courts have held that an “innocent” defendant can be liable, even when he “exercised all possible care in the preparation and sale of his product.”<sup>150</sup> Not surprisingly, many states have amended the collateral source rule either by authorizing admission of evidence regarding collateral sources for compensation, or by reducing the award by the amount of those benefits.<sup>151</sup> As these states have recognized, when the rationale for a rule crumbles, so too should the rule.

In asbestos cases, juries should be able to consider all collateral sources for compensation, including payments from (1) bankruptcy trusts of the traditional defendants; (2) the scores of settlements that most plaintiffs collect from defendants before trial; and (3) benefits paid by

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<sup>148</sup> See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 25.22, 1345 (1957) (“It may be said that the defendant deserves being made to pay in full because of the moral quality of his act. Now there can be no question here of who should fairly bear a loss, as between an innocent and a guilty party, for by hypothesis the innocent man’s loss has been made whole and we are discussing a further payment beyond that. There may be mixed with this feeling of desert a desire to deter dangerous conduct, but that merits separate treatment. What is left under this head, then, springs from a feeling of indignation or resentment and a desire to punish as such. Surely, there is no place for such a notion in any philosophy of social insurance. It has no acknowledged place even in tort liability based on fault, for the theory of damages here is purely compensatory.” (citation omitted)).

<sup>149</sup> See *Schenk*, 613 S.E.2d at 508-09.

<sup>150</sup> Victor E. Schwartz, *Tort Law Reform: Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569, 572 (1986) (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

<sup>151</sup> See Marshall & Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL’Y 57, 61 n.39 (2005) (identifying numerous state legislative initiatives abolishing or scaling back the collateral source rule).

government and worker programs. Allowing jurors to consider such sources can be particularly important in states where joint and several liability still applies, as jurors may want to spare defendants from providing windfall benefits for harm they did not cause. In this way, juries can assist in rationing the remaining litigation dollars available to asbestos claimants, while still preventing those plaintiffs from bearing the costs for their own medical bills, as well as other enumerated costs associated with their claimed injuries.<sup>152</sup>

### C. Allow Evidence of Alternative Sources of Exposure

As discussed above, parties who may have significant culpability in an asbestos case are frequently not in the litigation when the case reaches trial. These parties may be dropped from the litigation due to settlement, are excused by operation of bankruptcy or workers' compensation laws, or are otherwise unavailable. If the existing defendants cannot introduce basic evidence of causation related to these other companies' potential responsibility, the jury will be asked to make culpability decisions out of ignorance. The results will likely be inaccurate and unfair, particularly when a plaintiff seeks punitive damages against a less culpable defendant.

Consider the example of an insulator who contracts mesothelioma after years of working at the same plant. He may not be able to sue his employer under the workers' compensation laws, or the manufacturers of the insulation used, because they have declared bankruptcy and have settlement trusts paying asbestos claims. In some states, without those defendants in the litigation, the remaining defendants may not be able to introduce the plaintiff's historical workplace exposures or culpability of the primary manufacturers.

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<sup>152</sup> Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523 (1991) (Informing the jury in this manner recognizes the jurors' fundamental role as "the judge of the facts."); *see also* *Whiteley v. OKKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983) ("[T]he determination of damages is traditionally a jury function. . . . The jury must have much discretion to fix the damages deemed proper to fairly compensate the plaintiff.").

This is the rule in Illinois, but strangely, only for asbestos cases.<sup>153</sup> In *Lipke v. Celotex Corp.*, a worker sued twenty-seven asbestos manufacturers for injuries sustained from alleged exposure to asbestos-containing products.<sup>154</sup> All but one of the manufacturers settled before the trial began.<sup>155</sup> The remaining defendant owned a minor asbestos operation.<sup>156</sup> At trial, the company tried introducing evidence of the plaintiff's exposure to other asbestos products, but the court precluded any evidence showing that other companies contributed to the injury, stating "there can be more than one proximate cause of an injury," and "the fact that plaintiff used a variety of asbestos products does not relieve defendant of liability for his injuries."<sup>157</sup> Further, the court held that the rule applies even in situations where a plaintiff's exposure to the particular defendant's products were minimal when compared with other, more significant exposures.<sup>158</sup>

*Lipke* has not been well-received in other states. In Maryland, for example, *ACandS, Inc. v. Asner*<sup>159</sup> involved a situation similar to *Lipke*, yet, the Maryland high court held that all evidence of asbestos exposure by third parties should not be summarily excluded:

Whether evidence of exposure to the asbestos-containing products of non-parties is relevant is controlled by the purpose for which such evidence is being offered. Such evidence is not *per se* irrelevant. Consequently, it would

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<sup>153</sup> See *Lipke v. Celotex Corp.*, 505 N.E.2d 1213 (Ill. App. Ct. 1987); see also *Spain v. Owens Corning Fiberglass Corp.*, 710 N.E.2d 528, 534 (Ill. App. Ct. 1999) (recognizing *Leonardi's* rejection of the *Lipke* rule in medical malpractice cases); *Leonardi v. Loyola Univ. of Chicago*, 633 N.E.2d 809, 812 (Ill. App. Ct. 1993) (rejecting the *Lipke* rule in medical malpractice cases).

<sup>154</sup> *Lipke*, 505 N.E.2d at 1213.

<sup>155</sup> See *id.* at 1215-16.

<sup>156</sup> *Id.* at 1216.

<sup>157</sup> *Id.* at 1221.

<sup>158</sup> *Id.* at 1220-21. Illinois courts expanded this ruling in *Kochan v. Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 688 (Ill. App. Ct. 1993), where an Illinois appellate court held that even if causation itself is disputed, the *Lipke* rule applies to exclude evidence of exposure to other products. The court noted that evidence suggesting that other companies might be responsible for the injury would "confuse the jury, with the possible result that a defendant could be unjustly relieved of liability." *Kochan*, 610 N.E.2d at 689.

<sup>159</sup> 686 A.2d 250 (Md. 1996).

be a rare case in which a court could impose a blanket ban on such evidence in advance of trial, inasmuch as the evidentiary setting in which the evidence would be offered ordinarily would be unknown.<sup>160</sup>

As the Maryland high court's decision acknowledges, a plaintiff's exposure history beyond the alleged exposure to a single defendant's products may be relevant to the case, namely, when the defense is "based on the negligible effect of a claimant's exposure to the defendant's product, or on the negligible effect of the asbestos content of a defendant's product or both."<sup>161</sup> "[T]he degree of exposure to a non-party's product and the extent of the asbestos content of the non-party's product may be relevant to demonstrating the non-substantial nature of the exposure to, or of the asbestos content of, the defendant's product."<sup>162</sup>

As the court clearly appreciated, an outright ban on allowing the jury to hear evidence of the plaintiff's exposures to asbestos only invites prejudice and uninformed decisions into the jury box. A far better approach would be to allow courts the discretion to admit this evidence. The fact that there may be multiple proximate causes of an injury does not lead to the exclusion of any one of them. If a drunk driver, a poorly maintained county road, and an allegedly defective automobile combine to cause an accident, the plaintiff cannot pick one cause and have all evidence related to the other causes excluded. Courts, such as the one in *Lipke*, fashion separate rules for asbestos litigation that do not agree with tort law.

#### **IV. Assure Awards Are Reasonable, Not Windfalls**

When a case is tried to verdict, courts should take a holistic view of awards in asbestos litigation in an effort to make the awards reasonable and predictable. As many courts have already recognized, windfall awards should be ended. Courts taking this step have recognized that a priority must be placed on fairly compensating plaintiffs while, at the same time, preserving the remaining resources for future claimants.

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<sup>160</sup> *Asner*, 686 A.2d at 259.

<sup>161</sup> *Id.* at 260.

<sup>162</sup> *Id.*



## A. Punitive Damages in Asbestos Litigation

The purpose of punitive damages generally is to punish specific wrongdoers, deter them from committing wrongful acts again, and deter others in similar situations from committing wrongful behavior.<sup>163</sup> They are awarded “over and above compensatory damages.”<sup>164</sup> Therefore, punitive damages provide a “windfall recovery” to the individual plaintiffs.<sup>165</sup>

The late United States District Judge Charles Weiner, who administered the federal asbestos multi-district litigation (MDL) docket until his passing in 2005, held that it is unsound public policy to award punitive damages in current asbestos cases. In fact, he ordered punitive damages to be permanently set aside in the federal asbestos MDL until compensatory damages could be determined.<sup>166</sup> He recognized<sup>167</sup> that punitive damages “threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of [peripheral] defendants.”<sup>168</sup> In addition, most traditional asbestos companies have already declared for bankruptcy protection, thus, the burden of paying punitive damages falls to the peripheral defendants who

<sup>163</sup> See *Browning-Ferris Indus. of Vt. v. Kelco Disposal Inc.*, 492 U.S. 257, 297 (1989) (O'Connor, J., concurring in part and dissenting in part) (observing that punitive damages have been awarded “to further the aims of the criminal law: to punish reprehensible conduct and to deter its future occurrence”) (citation omitted).

<sup>164</sup> *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).

<sup>165</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (Brennan, J., dissenting); see also *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs.*, 473 N.W.2d 612, 619 (Iowa 1991) (“[P]unitive damages are not intended to be compensatory and . . . a plaintiff is the fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it.” (citing *Berenger v. Frink*, 314 N.W.2d 388, 391 (Iowa 1982))).

<sup>166</sup> See *Collins*, 233 F.3d at 812 (upholding Judge Weiner’s order).

<sup>167</sup> See, e.g., Pam Smith, *Asbestos Plaintiff Wins \$10M in Punitives*, THE RECORDER, July 19, 2006 (reporting on an asbestos plaintiff who received \$1.6 million in compensatory damages and \$10 million in punitive damages and citing plaintiff’s lawyers as stating that usually when punitive damages are permissible, defendants settle the cases to avoid such high awards).

<sup>168</sup> 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* 32 (Mar. 1991) [hereinafter *Judicial Conf. Rep.*].

have generally not engaged in conscious, flagrant wrongdoing. The domino effect of inappropriate punitive damage awards occurs even in cases that are settled out of court, due to the leveraging effect punitive damages have at the settlement table.<sup>169</sup> Few companies, particularly peripheral defendants, are willing to risk a \$250 million verdict, as in the 2003 Madison County case discussed earlier, where the plaintiff won \$200 million in punitive damages.<sup>170</sup> The problem is exacerbated when punitive damages are repeatedly assessed against a company in different trials for the same or similar underlying conduct.<sup>171</sup>

The United States Court of Appeals for the Third Circuit approved Judge Weiner's order:<sup>172</sup>

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.<sup>173</sup>

The Third Circuit also urged state courts to similarly set aside punitive damages so that funds could be preserved for those who continue to develop impairment from asbestos-related exposures.<sup>174</sup>

Some state courts have taken similar actions. Judge Marshal A. Levin in Baltimore City has stayed punitive damages awards until compensatory

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<sup>169</sup> See *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting) (noting the importance of the potential for punitive damages in settlement negotiations); see also George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 830 (1996) ("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.").

<sup>170</sup> See Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40.

<sup>171</sup> See William W. Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW 116 (Oct. 1991) (noting that a discontinuance of successive punitive damages against a defendant for similar conduct would remove an impediment to settlement negotiations in mass tort litigation).

<sup>172</sup> *Collins*, 233 F.3d at 812.

<sup>173</sup> *Id.* (quoting *Judicial Conf. Rep.*, *supra* note 168, at 32).

<sup>174</sup> See *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.").

claims can be satisfied: “unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages.”<sup>175</sup> In Philadelphia, punitive damages claims in asbestos cases have been deferred:

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.<sup>176</sup>

In New York, the court hearing *Falloon v. Westinghouse Electric* has deferred punitive damages in asbestos cases indefinitely.<sup>177</sup> Administrative Judge Jack Panella, who presides over asbestos cases in Northampton County, Pennsylvania, has severed discovery related to or consideration of punitive damages until after verdict.<sup>178</sup> Finally, Florida has enacted legislation to ban punitive damages “in any civil action alleging an asbestos or silica claim.”<sup>179</sup>

Given the scope and maturity of asbestos litigation, courts should follow these pioneers.<sup>180</sup> As these courts have recognized, it is more important, at this point, “to give priority to compensatory claims over exemplary punitive damage windfalls.”<sup>181</sup>

<sup>175</sup> See *Abate v. ACandS, Inc.*, No. 89236704, slip op. at \*23-26 (Cir. Ct. Balt. City, Md. Dec. 9, 1992).

<sup>176</sup> See *Yancey*, No. 1186 (832), Asbestos Order No. 0001, slip op. at \*10.

<sup>177</sup> See *\$64.65 Million Awarded in Four Asbestos Cases*, 4:18 MEALEY’S EMERGING TOXIC TORTS 14 (Dec. 15, 1995) (reporting on the case).

<sup>178</sup> *In re Asbestos Litig.*, No. C0048AB200100003, slip Order at 6, \*1 (Pa. Ct. Com. Pl. Jan. 11, 2001).

<sup>179</sup> FLA. STAT. ANN. § 774.207(1) (2006).

<sup>180</sup> For lengthier discussions on this issue, 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, 352-357 (2002); 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). Mr. Behrens is a partner at Shook, Hardy & Bacon in the same group with two of this Letter’s authors and provided research assistance for the discussion on punitive damages.

<sup>181</sup> *Collins*, 233 F.3d at 812.

## B. Erratic Verdicts for Mesothelioma and Cancer Plaintiffs

In addition to curbing punitive damages in asbestos litigation, courts should use their post-verdict authorities to reduce windfall non-economic compensatory awards in mesothelioma and other asbestos-related cases. The authors of this article are firm believers in the tort system, and if a plaintiff suffering from mesothelioma or other asbestos-related cancer proves that her cancer was legally caused by a defendant, then the plaintiff is entitled to a fair and reasonable verdict, including non-economic compensation damages for pain and suffering. The authors also understand that mesothelioma and cancer cases involve highly sympathetic plaintiffs where awards may reflect a compassionate desire to provide for a plaintiff notwithstanding compensation norms for similarly situated asbestos and non-asbestos plaintiffs. Courts need to address the fact that verdicts in mesothelioma cases have been highly erratic, with some mesothelioma awards for hundreds of millions of dollars as opposed to other awards for less than a few hundred thousand dollars.<sup>182</sup> When verdicts vary so widely, particularly without reasonable relationship to the harm, the integrity of the judicial system is compromised, and resources for future mesothelioma and cancer claimants are squandered.

For these reasons, since the early 1980s some trial judges have been calling for more predictability for damage awards in asbestos litigation. For example, Pennsylvania trial court Judge Richard Klein bemoaned that “asbestos litigation often resembles the [Atlantic City] casinos sixty miles east of Philadelphia more than a courtroom procedure.”<sup>183</sup> United States District Judge Jack Weinstein has made similar observations, stating that asbestos cases take on “aspects of a lottery” where some plaintiffs who “have established, to a high degree of probability, a substantial amount of fault” do not recover, while others recover “huge sums”

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<sup>182</sup> See *Blue v. Johns-Manville Corp.*, No. 4001 (127), 1983 WL 265457, at \*36 (Pa. Ct. C.P. Oct. 12, 1983) (stating that in asbestos litigation, “[r]esults of jury verdicts are capricious and uncertain”); *Jury Enters \$16.4 Million Verdict for 3 LIRR Mechanists*, HARRISMARTIN COLUMNS: ASBESTOS, May 2006, at 8 (reporting that in a retrial of an \$800,000 verdict, the new jury awarded the same plaintiffs \$16.4 million).

<sup>183</sup> *Blue*, 1983 WL 265457, at \*36.

despite “substantially lower probabilities of liability.”<sup>184</sup> Such disparity can still be seen today; a review of a recent Verdict Report in Harris-Martin’s asbestos reporter shows verdicts for mesothelioma plaintiffs ranging from \$130,000 to \$250 million, with most verdicts in the \$1 million to \$10 million range.<sup>185</sup>

Judges should be more pro-active in leveling out these verdicts by using their authority to determine whether remittitur or additur, when allowed by the state, are appropriate.<sup>186</sup> Asbestos verdicts that are objectively unreasonable should be adjusted to be within the normal range. Comparisons can be made to other similarly situated asbestos plaintiffs in that jurisdiction or in other parts of the country, as well as to verdicts in other products liability cases. In the event a judge wishes to use her authority to increase a verdict, care must be taken to make sure that a lower verdict is not a jury’s way of deciding that the defendant’s conduct was not wrongful. The core principle is one of even-handedness, and not one of allowing limited assets to be wasted on inflated verdicts, which in turn, lead to inflated settlements. Predictable verdicts would change a system of roulette justice to one guided by the rule of law.

One mechanism that courts can use for facilitating reasonable verdicts is to assure that juries are not inappropriately influenced by what has been called “guilt” evidence—acts of certain companies, particularly those no longer in the litigation, but used by plaintiffs’ lawyers to inflame the passions and prejudices of the juries. During trial and in closing arguments, plaintiffs’ lawyers will push juries to punish defendants through extraordinary high and sometimes unreasonable pain and suffering awards.<sup>187</sup> As these plaintiffs’ lawyers well understand, “[c]ourts have

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<sup>184</sup> Daniel Wise, *Verdicts of \$31 Million in Asbestos Lawsuits Weinstein Terms Process of Handling Claims “A National Scandal.” 64 Cases Completed*, Jan. 25, 1991, N.Y.L.J. Jan. 15, 1991 at col. 5.

<sup>185</sup> *Verdict Report*, COLUMNS: ASBESTOS, *supra* note 35, at 20-30.

<sup>186</sup> See, e.g., FLA. STAT. § 768.74 (2006) (“In any action to which this part applies wherein the trier of fact determines that liability exists on the part of the defendant and a verdict is rendered which awards money damages to the plaintiff, it shall be the responsibility of the court, upon proper motion, to review the amount of such award to determine if such amount is excessive or inadequate in light of the facts and circumstances which were presented to the trier of fact.”).

<sup>187</sup> See generally Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into “Punishment,”* 54 S.C. L. REV. 47 (2002).

usually been content to say that pain and suffering damages should amount to 'fair compensation' or 'reasonable amount,' without any more definite guide."<sup>188</sup> When juries are improperly influenced, the fundamental purpose of pain and suffering awards—to compensate the plaintiff—is upended.<sup>189</sup> The defendant is "punished," but the award is not subject to the extensive legal controls that help assure that real punitive damages awards do not cross the constitutional line or the limits that states have enacted to deal with damages in asbestos litigation.<sup>190</sup> This abuse is exacerbated when the punishment quotient in the pain and suffering award is directed at a company no longer in the litigation.

Much consideration has been given lately to finding ways to prohibit juries from considering penal or "guilt" evidence when determining an award for pain and suffering. One solution is for courts to instruct jurors that the law requires them to consider only what is necessary to compensate the plaintiff for pain and suffering. They are not to consider alleged wrongdoing, misconduct, or guilt; they are not to consider evidence of the defendant's wealth or any other evidence that is offered for the purpose of punishment. An additional solution is to require courts to subject pain and suffering awards to a much more stringent post-verdict review. Rather than undertake a cursory subjective review of whether the award "shocks the conscience," the trial court should analyze several factors before entering a final judgment to assure that the jury did not include

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<sup>188</sup> Randall J. Bovberg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 912 (1989).

<sup>189</sup> See Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 VA. L. REV. 1401 (2004) ("Without rational criteria for measuring damages for pain and suffering, awarding such damages undermines the tort law's rationality and predictability—two essential values of the rule of law.").

<sup>190</sup> The United States Supreme Court has held that due process places an outer limit beyond which punitive damages may not go. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 455-56 (1993) (stating in a plurality opinion that "grossly excessive" punitive damages awards violate due process); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (acknowledging that excessive punitive damages awards could violate the Due Process Clause of the Fourteenth Amendment). The Court has offered guideposts for lower courts to use in deciding whether a punitive damages award is unconstitutionally excessive. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (holding punitive damages of \$145 million was excessive and violates the Due Process Clause of the Fourteenth Amendment); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (stating that punitive damages award against BMW was grossly excessive).

any of the aforementioned prohibited factors. In 2004, Ohio enacted legislation to require courts to undertake this review,<sup>191</sup> but courts need not wait for such directive. They are fully empowered to perform such a review within the confines of the common law.

## V. Put a Stop to Those Who Try to Game the United States Judicial System

In addition to faithfully applying all of the elements of the underlying torts and informing juries of determinative information, courts should avoid attempts by some attorneys to game the judicial system and end procedural shortcuts, both of which have marred asbestos litigation over the past fifteen to twenty years. As discussed earlier, many courts have taken these steps to help reduce incentives for mass filing by unimpaired claimants. These reforms are working because they are fair and reasonable. As the courts turn their attention to adjudicating cases brought by mesothelioma and other cancer claimants, who clearly are more deserving plaintiffs than those who are unimpaired, it is just as important that judges adhere to the rule of law by deciding claims in proper jurisdictions and on their individual merits.

### A. Venue and Forum *Non Conveniens* Rules

Just as with unimpaired cases, personal injury lawyers have focused their cancer and mesothelioma filings in a handful of jurisdictions, often without regard to whether the jurisdiction has any connection to the plaintiff, or the defendants, or even the alleged exposures. Mississippi plaintiffs' lawyer Richard Scruggs calls these places "magic jurisdictions," because of their courts' traditions for disproportionately high settlements and verdicts.<sup>192</sup>

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<sup>191</sup> See OHIO REV. CODE ANN. §2315.19 (West 2004).

<sup>192</sup> For example, in one case, an Indiana plaintiff with mesothelioma filed a claim against U.S. Steel in Madison County, Illinois, for injuries allegedly sustained from asbestos exposure at a U.S. Steel plant in Indiana. The plaintiff had no significant connection to Illinois, much less to Madison County. Nevertheless, his trial resulted in a \$250 million verdict. See Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40.

What I call the “magic jurisdiction,” . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re [s]tate [c]ourt judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant . . . .<sup>193</sup>

In recent years, the American Tort Reform Foundation (ATRF) has studied these jurisdictions and issued “Judicial Hellholes” reports to show how courts in these jurisdictions routinely apply procedures and laws in unfair ways against civil defendants.<sup>194</sup> As the group has explained, these courts ignore the fundamental principle of the American judicial system that all parties are due “equal justice under the law.” ATRF has called the practice of traveling to these jurisdictions “litigation tourism.”<sup>195</sup>

In that regard, throughout the past thirty years asbestos claims have shown a remarkable ability to migrate from state to state and jurisdiction to jurisdiction, depending on which courts the personal injury lawyers felt would give them the greatest chance of major and oversized damage recoveries. For example, the RAND Institute for Civil Justice found that from 1970 through 1987 California bore 31% of asbestos claims that were filed, but only 5% from 1988 to 1992, 2% from 1993 to 1997, and 2% from 1998 to 2000.<sup>196</sup> Texas trended in the reverse direction, accounting for only 3% of initial asbestos claims filed from 1970 to 1987, 12% from 1988 to 1992, an astounding 44% from 1993 to 1997, and 19% from 1998 to 2000.<sup>197</sup>

According to the most recent RAND statistics, eleven states now see the most asbestos filings: Texas (19%), Mississippi (18%), New York (12%), Ohio (12%), Maryland (7%), West Virginia (5%), Florida (4%),

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<sup>193</sup> *Judicial Hellholes 2005*, REPORT (Am. Tort Reform Assoc., Wash. D.C.), at 2, available <http://www.atra.org/reports/hellholes/report.pdf>; see also Richard Scruggs, *Tobacco Lawyers’ Roundtable: A Report from the Front Lines*, 51 DEPAULL. REV. 543, 545 (2001).

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 46 (“[P]laintiffs’ attorneys become the ‘travel agents’ for the ‘litigation tourist’ industry, filing claims in jurisdictions with little or no connection to their clients’ claims.”).

<sup>196</sup> See RAND Rep., *supra* note 124, at 62.

<sup>197</sup> See *id.*



Pennsylvania (3%), California (2%), Illinois (1%), and New Jersey (1%).<sup>198</sup> Perhaps not coincidentally, the ATRF “Judicial Hellholes” report has identified hellholes in Texas, Mississippi, West Virginia, Florida, Pennsylvania, California, and Illinois.<sup>199</sup>

To stop rampant and improper forum shopping to these and other jurisdictions, states have been enacting venue and *forum non conveniens* restrictions to minimize the opportunity for out-of-state claims to dominate local courts. Specifically, legislatures in many states that have been home to “Judicial Hellholes” have enacted such reforms.<sup>200</sup> These reforms generally require claimants to file where they or the defendants reside, or where the alleged injury occurred.

In addition, courts are paying more attention to existing venue and *forum non conveniens* laws. For example, in *Dawdy v. Union Pacific Railway Co.*,<sup>201</sup> the Illinois Supreme Court held that a foreign plaintiff’s forum choice deserves less deference than those who live in the jurisdictions. Also, in *Gridley v. State Farm Mutual Automobile Insurance Co.*,<sup>202</sup> the Illinois high court directed that a Louisiana man’s case be dismissed on *forum non conveniens* grounds. Illinois has been home to three of the most significant Judicial Hellholes: Madison, St. Clair and Cook Counties. In Madison County, the court recently put a new judge in charge of overseeing asbestos litigation. In this eloquent opinion, he explained why out-of-state mesothelioma and cancer cases should be heard only in their proper jurisdictions:

As much as this judge, or any judge with any compassion whatsoever, would like to do anything to assist such a litigant, with expedited schedules and to accommodate him in any way possible, such accommodation must be

<sup>198</sup> *See id.*

<sup>199</sup> *See id.*

<sup>200</sup> *See* ALA. CODE § 6-3-7 (2005); ARK. CODE ANN. § 16-55-213 (2005) (amended by H.B. 1038 (Ark. 2003)); GA. CODE ANN. §§ 51-14-8, 51-14-9 (2005) (amended by H.B. 416 (Ga. 2005)); MISS. CODE ANN. § 11-11-3 (2005) (amended by H.B. 19 (Miss. 2002) and H.B. 13 (Miss. 2004)); MO. REV. STAT. § 508.010 (2005) (amended by H.B. 393 (2005)); S.C. CODE ANN. § 15-7-100 (2005) (amended by H.B. 3008 (S.C. 2005)); W. VA. CODE 56-1-1(c) (2005) (amended by S.B. 213 (W. Va. 2003)) (limited by *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006)).

<sup>201</sup> 797 N.E.2d 687, 694 (Ill. 2003).

<sup>202</sup> 840 N.E.2d 269, 280 (Ill. 2005).

reasonable in following the law. The court must consider, not only how many jury trials actually occur out of this docket; but, also what would happen if every case or even a similar percentage of these cases to all other types of civil jury lawsuits were to go to trial. . . .

If large numbers of these cases did actually go to trial, then this docket would no longer be the “cash cow.” Such circumstances would place an astronomical burden upon the citizens of Madison County to serve as jurors; would require more trial judges, courtrooms, clerks, bailiffs and other necessary accommodations than could be handled. It is one thing to make such efforts to accommodate the citizens of Madison County and others whose cases bear some connection or reason to be here.

But when, as in the case being considered, there is no connection with the county or with this state, the trial judge would probably be required to apply Louisiana law (another factor not only of difficulty to the trial judge but a consideration of local problems being decided locally); the treating physicians are all from Louisiana; there is a similar asbestos docket with expedited trial settings for persons similarly situated to the plaintiff herein; the distance from the home forum and the area of exposure is in excess of 700 miles and this county has such an immense docket; the case should be transferred.<sup>203</sup>

In addition, the Ohio Supreme Court in 2005 amended its Rules of Civil Procedure that apply to venue restrictions. It stated that the proper venue in an asbestos action is where all exposed plaintiffs reside, all exposed plaintiffs were exposed, or where the defendant has its principal place of business.<sup>204</sup> In the last several years, the Mississippi Supreme Court also has addressed forum shopping on several occasions.<sup>205</sup>

In short, both courts and legislatures have been trying to prevent plaintiffs from taking claims out of jurisdictions that may apply the rule of law, and file them in states that have not adopted the types of solutions discussed in this Letter. These efforts will only be successful, given the migratory nature of asbestos claims, if other states enact similar reforms. This is true even in states where forum shopping is currently not a problem.

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<sup>203</sup> *Palmer v. Riley Stoker Corp.*, No. 04-L-167, slip op. at 6 (Cir. Ct. Madison County, Ill. Oct. 4, 2004).

<sup>204</sup> See OHIO R. CIV. P. 3(B)(11).

<sup>205</sup> See, e.g., *Culbert v. Johnson & Johnson*, 883 So. 2d 550 (Miss. 2004) (transferring in-state cases to the proper county and dismissing out-of-state plaintiffs).

## B. Procedural Fairness

Courts also should continue addressing practices and procedures that are particularly unfair to plaintiffs and defendants. As consolidation and other reforms have shown with unimpaired claimants, when cases are administered more even-handedly the courts and the parties are better able to evaluate individual claims.

Consider the Mississippi example of *Harold's Auto Parts, Inc. v. Mangialardi*.<sup>206</sup> It was not unusual for courts to allow plaintiffs to file lawsuits based solely on generalized charges. In asbestos litigation, where dozens of defendants are named, the information often is so generalized that the plaintiff's filing does not explain all of the defendants' connections to the plaintiff's alleged exposure. Defendants may spend tens of thousands of dollars in legal fees before knowing whether they are legitimate defendants in a case, or instead a defendant may make a settlement for a couple thousands dollars regardless of merit. This process exhausts assets for plaintiffs who need and deserve them.

The Mississippi high court in *Mangialardi* took issue with the plaintiffs' lawyers' failure to disclose information important to any defendant's ability to understand the nature of the allegations, stating that the complaints provided "virtually no helpful information" with respect to each individual's claim.<sup>207</sup> The court then ordered each plaintiff to submit to the trial court such basic information as the name of the defendant(s) "against whom each plaintiff makes a claim, and the time period and location of exposure."<sup>208</sup>

In July 2005, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions.<sup>209</sup> Most recently, in August 2006, the Michigan Supreme Court

<sup>206</sup> 889 So. 2d 493 (Miss. 2004).

<sup>207</sup> *See id.* at 494.

<sup>208</sup> *Id.* at 495; *see also* Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393, 403-04 (2005).

<sup>209</sup> *See* OHIO R. CIV. P. 42(A)(2) ("In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court

adopted an administrative order that precludes the “bundling” of asbestos-related cases for trial.<sup>210</sup> The order states, “[i]t is the opinion of this Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery.”<sup>211</sup>

Courts should follow the lead of these courts and allow the merits of the cases, not the process, to determine issues of compensation and liability.

## VI. Conclusion

The overwhelming number of asbestos claims has caused many courts and some state legislatures to change the laws, rules, and procedures that apply to how asbestos-related claims have been processed and heard. Some initiatives have worked, while others have had disastrous, unintended consequences that have exacerbated the scope of the litigation and caused inaccurate, highly skewed litigation results. As the litigation begins to focus again on those with actual physical injury, judges throughout the United States should learn from the past decade or two, and weigh the judicial fairness and impact of their decisions. Careful thought and analysis must be given to assure that individuals suffering from mesothelioma and cancer are treated fairly, without exhausting all of these peripheral defendants’ dwindling assets, which are the only private assets available to pay the remaining asbestos claimants. While Congress may debate the problem, judges can go a long way to solve it now.

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may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person’s household.”)

<sup>210</sup> See Prohibition on “Bundling” Cases, Admin. Order No. 2006-6 (Mich. Aug. 9, 2006).

<sup>211</sup> *Id.*