

A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next

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Abstract

In 2000, this author published an article in this journal asking the country's trial judges to take note that the focus on efficiency in asbestos liability cases was hurting victims as well as the courts. As a follow up, this Article examines the major accomplishments in asbestos litigation over the past decade. Although there have been significant improvements in this arena, there are still problems creating injustices for those involved. The author explores the current issues in asbestos litigation and offers suggestions to attain just and equitable results in the future.

I. Introduction

A dozen years ago this author published an article in the *American Journal of Trial Advocacy* titled, "A Letter to the Nation's Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases."¹ At that time, asbestos litigation had reached crisis proportions.² During the 1990s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.³ The

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¹ 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).

² E.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing the "asbestos-litigation crisis"); see also Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 390 (1993).

³ See *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 62 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School).

vast majority of asbestos claimants in that era had little or no actual physical impairment.⁴ Mass screenings arranged by personal injury law firms and their agents drove the litigation.⁵ As a result of the avalanche of claims, “[t]he pace of bankruptcies accelerated.”⁶ Plaintiffs’ lawyers began to target premises owners and other more “peripheral”—but still solvent—defendants.⁷ A former plaintiffs’ lawyer described the asbestos litigation as an “endless search for a solvent bystander.”⁸

In my year 2000 “Letter to the Nation’s Trial Judges” article, I explained that some courts had unintentionally fueled the crisis by taking procedural shortcuts in an effort to get out from under the crush of claims.⁹ Many of the asbestos cases would have been dismissed had they

⁴ See CONGRESSIONAL BUDGET OFFICE, *THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER* vii (Oct. 2003) (“In suits over exposure to asbestos, too much money and court time are being devoted to people who do not yet show any signs of physical impairment.”); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 823 (2002) (“By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.”); see also Christopher J. O’Malley, Note, *Breaking Asbestos Litigation’s Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1105 (2008) (“Most individuals with pleural plaques experience no lung impairment, no restrictions on movement, and usually do not experience any symptoms at all.”).

⁵ See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 68 (2003); see also Robert J. Samuelson, Editorial, *Asbestos Fraud*, WASH. POST, Nov. 20, 2002, at A25 (criticizing trial lawyers who recruit plaintiffs through advertisements and mass X-ray screenings).

⁶ David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL’Y 589, 598 (2008).

⁷ See Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”); Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, abstract available at 2001 WLNR 1993314 (explaining that “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing”).

⁸ ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 MEALEY’S LITIG. REP.: ASBESTOS 19 (Mar. 2002) (quoting Richard Scruggs).

⁹ See Schwartz & Lorber, *supra* note 1, at 258-60; see also Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 334 (2002) (“Unfortunately, the courts themselves share some of the blame for the ever-growing ‘elephantine mass of asbestos cases.’” (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999))).

been treated like other personal injury claims, but some courts put aside normal rules of discovery and procedure in the push for efficiency.¹⁰ The approach backfired. Instead of decreasing dockets, these measures created incentives for personal injury lawyers to file more claims.¹¹ Professor Francis McGovern of Duke University School of Law recognized,

[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.¹²

The law of unintended adverse consequences was at work in asbestos litigation.¹³ The problem, as lawyers for the truly sick, policy makers, and judges recognized, was that mass filings by unimpaired claimants were creating judicial backlogs and exhausting defendants' resources.¹⁴ In 2000, the original "Letter to the Nation's Trial Judges" article called upon judges to restore the rule of law to asbestos cases and to stop promoting efficiency over fairness and sound public policy.¹⁵

¹⁰ See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 8 (2001) ("Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims.").

¹¹ See 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, 537 (2001) ("[H]indsight has shown that making it easier to file asbestos claims has simply invited plaintiffs' lawyers to file thousands of additional claims.").

¹² Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997); see also Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more and larger the mass tort filings become.").

¹³ See Helen E. Freedman, *Product Liability Issues in Mass Torts—View From the Bench*, 15 TOURO L. REV. 685, 688 (1999) (advising, by a judge overseeing New York City asbestos litigation, that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases").

¹⁴ See *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) ("The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating.").

¹⁵ Schwartz & Lorber, *supra* note 1, at 271-72.

Many trial judges responded positively to the suggestions proposed in that article and others like it.¹⁶ Fundamental tort law principles were restored and sound public policy was implemented in many jurisdictions. The overall asbestos litigation environment improved as a result, sometimes assisted by state legislatures.¹⁷

This Article examines some of the major accomplishments of the nation's trial judges in the asbestos litigation over roughly the last decade. This Article also shows where old problems may not be totally solved and offers approaches to prevent some problems from resurfacing. Finally, and most importantly, this Article focuses on current and future problems and explains how trial courts can help reach sound and just results in asbestos cases.

II. Asbestos Litigation Today

Now entering its fourth decade,¹⁸ the asbestos litigation is the nation's "longest running mass tort."¹⁹ The litigation marches on because lawyers who bring asbestos cases have found ways to adapt. According to the Towers Watson consulting firm, annual incurred losses by United States property and casualty insurers "increased for two consecutive years."²⁰

¹⁶ See Victor E. Schwartz et al., *A Letter to the Nation's Trial Judges: Serious Asbestos Cases—How to Protect Cancer Claimants and Wisely Manage Assets*, 30 AM. J. TRIAL ADVOC. 295, 296 (2006) ("We are gratified that our message has been well-received by so many courts.").

¹⁷ See Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477, 503-04 (2006); James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned A Corner?*, 20:23 MEALEY'S LITIG. REP.: ASBESTOS 19 (Jan. 2006); Patti Waldmeir & Francesco Guerrera, *Asbestos Litigation Declines in Face of US Legal Reforms*, FIN. TIMES, July 24, 2006, at 2; Paul Davies, *Plaintiffs' Lawsuits Against Companies Sharply Decline*, WALL ST. J., Aug. 26, 2006, at A1.

¹⁸ The modern history of asbestos litigation may be traced to *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973), where the court found asbestos manufacturers strictly liable for injuries to industrial insulation workers exposed to their products.

¹⁹ Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 511 (2008).

²⁰ STEVE LIN ET AL., SUMMARY OF U.S. PROPERTY & CASUALTY INSURERS' ASBESTOS RESERVES AT YEAR-END 2010 1 (Towers Watson 2011) ("The [P&C insurance] industry recognized an additional \$2.6 billion in losses during [2010], 34% higher than the \$1.9 billion incurred during 2009.").

In 2011, a number of insurers substantially increased reserves, “citing more litigation and more severe payouts because of those lawsuits.”²¹ “The upshot? Asbestos claims and payments are not going away, and no one knows when the bend will turn.”²²

The impact of asbestos cases on the economy is staggering. When the original “Letter to the Nation’s Trial Judges” on asbestos litigation was published in 2000, approximately twenty-five companies had been forced into bankruptcy due to asbestos-related liabilities.²³ By 2006, that number grew to eighty-five companies.²⁴ By the end of 2011, at least ninety-six companies with asbestos-related liabilities had declared bankruptcy.²⁵ These bankruptcies had devastating impacts on the companies’ employees, retirees, shareholders, and communities.²⁶

Through the bankruptcy process, entities that played a significant role in causing claimants’ asbestos-related injuries have channeled their asbestos liabilities into trusts, insulating themselves from those claims in perpetuity.²⁷ Over sixty trusts have been established to collectively form a \$36.8 billion privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil

²¹ Ben Berkowitz, *Travelers Latest to Add to Asbestos Reserves*, INS. J., Oct. 19, 2011, <http://www.insurancejournal.com/news/national/2011/10/19/220721.htm>.

²² Ben Berkowitz, *Analysis: New Asbestos Charges Point to Reserve Woes*, REUTERS, July 28, 2011, <http://www.reuters.com/article/2011/07/28/us-insurance-asbestos-idUSTRE76R4CW20110728>.

²³ See *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 67-68 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School); see also Mark D. Plevin & Paul W. Kalish, *Where Are They Now? A History of the Companies that Have Sought Bankruptcy Protection Due to Asbestos Claims*, 16:15 MEALEY’S ASBESTOS BANKR. REP. 19 (Sept. 2001).

²⁴ See Martha Neil, *Backing Away from the Abyss*, A.B.A. J., Sept. 2006, at 26, 29.

²⁵ See LLOYD DIXON ET AL., ASBESTOS BANKRUPTCY TRUSTS: AN OVERVIEW OF TRUST STRUCTURE AND ACTIVITY WITH DETAILED REPORTS ON THE LARGEST TRUSTS 25 (RAND Corp. 2010); see also LLOYD DIXON & GEOFFREY MCGOVERN, ASBESTOS BANKRUPTCY TRUSTS AND TORT COMPENSATION xi (RAND Corp. 2011); Mark D. Plevin et al., *Where Are they Now, Part Six: An Update on Developments In Asbestos-Related Bankruptcy Cases*, 11:7 MEALEY’S ASBESTOS BANKR. REP. 24 (Feb. 2012).

²⁶ See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 NORTON J. BANKR. L. & PRAC. 51, 52 (2003).

²⁷ See William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 NORTON J. BANKR. L. & PRAC. 257, 257 (2008).

tort system.²⁸ The interface between the tort and trust systems is the primary battleground on which future asbestos litigation policy will be fought. This challenging, but not unsolvable, issue is addressed in this “Letter.”

Let us begin with accomplishments.

III. Areas of Significant Accomplishments in Asbestos Litigation

A. Mass Filings in the Tort System by the Non-Sick Have Ended

In the year 2000, when my first “Letter to the Nation’s Trial Judges” asbestos article was published, unimpaired claimants, diagnosed largely through plaintiff-lawyer-arranged mass screenings, filed a substantial majority of claims.²⁹ By 2002, approximately 730,000 asbestos claims had been filed.³⁰ In the year 2003, it was estimated that over one million workers had undergone attorney-sponsored screenings.³¹ Cardozo School of Law Professor Lester Brickman, an expert on the litigation, has said, “the ‘asbestos litigation crisis’ would never have arisen” if not for the claims filed by the unimpaired.³²

²⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 3 (2011).

²⁹ 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.”); see also *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”).

³⁰ STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiv (RAND Corp. 2005).

³¹ See Brickman, *supra* note 5.

³² Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 273 (2001); see also Roger Parloff, *The \$200 Billion Miscarriage of Justice Asbestos Lawyers Are Pitting Plaintiffs Who Aren’t Sick Against Companies that Never Made the Stuff—and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 158.

A sharp split developed among plaintiffs' lawyers with respect to the unimpaired claimant filings. Lawyers who primarily represented clients with asbestos-related cancer agreed that it was unsound public policy to pay people who were not sick.³³ For example, mesothelioma lawyer Steve Kazan of Northern California explained,

The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs' attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them.³⁴

Other attorneys who primarily represented large numbers of unimpaired claimants thought those persons should be compensated. Trial court judges, and sometimes state legislators, were the final referees.

A number of courts chose to implement inactive asbestos dockets (also called "deferred dockets" or "pleural registries").³⁵ These docket man-

³³ See Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 2:9 MEALEY'S TORT REFORM UPDATE 16 (Apr. 2005).

³⁴ *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Steven Kazan); see also Mathew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, available at 2002 WLNR 2149929 ("Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.").

³⁵ See CARROLL ET AL., *supra* note 30, at xxi; see also *In re USG Corp.*, 290 B.R. 223, 226 n.3 (Bankr. D. Del. 2003) ("The practical benefits of dealing with the sickest claimants . . . have led to the adoption of deferred claims registries in various jurisdictions."); Freedman, *supra* note 19, at 513; ("Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired."); Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 507-08 (2009) (noting that inactive asbestos dockets were adopted in "Cleveland, Ohio (March 2006); Minnesota (June 2005) (coordinated litigation); St. Clair County, Illinois (February 2005); Portsmouth, Virginia (August 2004) (applicable to cases filed by the Law Offices of Peter T. Nicholl); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City, New York (December 2002); and Seattle, Washington (December 2002). . . . Baltimore City, Maryland (December 1992); Cook County (Chicago), Illinois (March 1991); and Massachusetts (coordinated litigation) (September 1986).")

agement plans give priority to the sick by suspending the claims of the unimpaired.³⁶ Claimants may petition for removal to the active trial docket by presenting the court with credible medical evidence of impairment.³⁷ Several state legislatures enacted similar reforms, requiring asbestos (and silica) claimants to present objective evidence of physical impairment in order to bring or proceed with a claim.³⁸ In other states, courts held that unimpaired claimants do not have legally compensable claims.³⁹ As the Supreme Judicial Court of Maine explained, “[t]here is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury.”⁴⁰

Some remnants of past tort liability for people who are not sick remain, including claims for medical monitoring. In 1997, the United States Supreme Court,⁴¹ and a substantial majority of subsequent state

³⁶ See *In re* Report of the Advisory Group, 1993 WL 30497, at *51 (D. Me. Feb. 1, 1993) (“[P]laintiffs need not engage in the expense of trial for what are still minimal damages, but are protected in their right to recover if their symptoms later worsen.”). Claims on the inactive docket are exempt from discovery.

³⁷ See generally John E. Parker, *Understanding Asbestos-Related Medical Criteria*, 18:10 MEALEY’S LITIG. REP.: ASBESTOS 25 (June 2003) (explaining the medical criteria used by physicians to evaluate the presence and severity of asbestos disorders).

³⁸ E.g., OHIO REV. CODE ANN. § 2307.92(B) (West, Westlaw through 2011 legislation) (“No person shall bring or maintain a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing . . . that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person’s exposure to asbestos is a substantial contributing factor to the medical condition.”). “Medical criteria procedures for asbestos cases were enacted in Ohio in 2004, Texas and Florida in 2005, Kansas and South Carolina in 2006, and Georgia in 2007,” as well as in Oklahoma in 2009. See Behrens, *supra* note 35, at 506; OKLA. STAT. ANN. tit. 76, § 60 (West, Westlaw through 2012 Second Legis. Sess.).

³⁹ See *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990); *In re* Mass. Asbestos Cases, 639 F. Supp. 1, 2-3 (D. Mass. 1985); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. Ct. App. 1987); *In re* Asbestos Litig. Leary Trial Group, No. 87C-09-24, 1994 WL 721763, at *5 (Del. Super. Ct. June 14, 1994), *rev’d on other grounds sub nom.* *Mancari v. A.C. & S., Inc.*, 670 A.2d 1339 (Del. 1995) (unpublished table decision); *Bernier v. Raymark Indus.*, 516 A.2d 534, 542 (Me. 1986); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. Spec. App. 1991), *aff’d in part, rev’d in part on other grounds*, 604 A.2d 47 (Md. 1992); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996).

⁴⁰ *Bernier*, 516 A.2d at 542.

⁴¹ See *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 438-39 (1997) (rejecting medical monitoring for asymptomatic Federal Employees’ Liability Act plaintiffs).

courts, rejected medical monitoring claims—in part, because these claims exhaust assets needed to pay sick claimants in the future, and because it is extraordinarily difficult to determine who is sufficiently at risk to warrant monitoring.⁴² Unfortunately, a few courts that have allowed medical monitoring have done so without any gate-keeping process, allowing such claims without any assurance that a recovery will actually be used for medical monitoring.⁴³ Further, some courts have allowed medical monitoring claims without carefully considering whether monitoring would do any good to assure both a discovery of an illness and a cure.⁴⁴ Medical monitoring claims, while attractive in their packaging, are empty in their merits.⁴⁵ A fundamental bedrock of the tort system should be to limit actions to preserve assets for people who are really injured.⁴⁶

The nation's trial judges must continue to focus the resources of the courts and litigants on claims brought by people who are truly sick with serious illnesses, such as mesothelioma, and must never go back to the days of encouraging claims to be filed that are either unripe (because the person has no present physical impairment) or frivolous (because the person will never develop any actual impairment). History has shown that such litigation adversely impacts both the truly sick and the employer community because it accelerates the bankruptcy process and threatens payments to legitimate claimants.

⁴² See Herbert L. Zarov et al., *A Medical Monitoring Claim for Asymptomatic Plaintiffs: Should Illinois Take the Plunge?*, 12 DEPAUL J. HEALTH CARE L. 1, 2 (2009) (“[M]ost courts addressing the issue since Buckley have rejected claims for medical monitoring absent physical injury.”); Mark A. Behrens, *Fifth Consecutive State High Court Rejects Medical Monitoring*, 8:1 ENGAGE: THE J. OF THE FEDERALIST SOCIETY’S PRAC. GROUPS, Feb. 3, 2007, at 131.

⁴³ See Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1063-71 (1999).

⁴⁴ See *id.*; see also Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135, 144 (2007).

⁴⁵ See Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 369-74 (2005).

⁴⁶ See Henderson & Twerski, *supra* note 4, at 817-18.

B. Screening the Screeners and Elimination of Fraudulent Evidence

As early as 2003, Professor Lester Brickman excoriated the asbestos litigation industry as a “massive client recruitment effort” fueled by “specious evidence.”⁴⁷ *U.S. News & World Report* described the recruitment process:

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: “Find out if YOU have MILLION DOLLAR LUNGS!”⁴⁸

At about the same time, others also began to scrutinize the practice of litigation screenings. For example, former United States Attorney General Griffin Bell said that mass screenings conducted by plaintiffs’ lawyers and their agents had “driven the flow of new asbestos claims by healthy plaintiffs.”⁴⁹ An American Bar Association Commission on Asbestos Litigation confirmed that claims filed by plaintiffs with non-malignant conditions generally arose from for-profit screening companies.⁵⁰ The Commission reported that litigation-screening companies were finding X-ray evidence consistent with asbestos exposure at a “startlingly high” rate, often exceeding 50% and sometimes reaching 90%.⁵¹

⁴⁷ Brickman, *supra* note 5, at 168.

⁴⁸ Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36.

⁴⁹ Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003).

⁵⁰ See ABA COMM’N ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES 8 (2003), available at http://www.abanet.org/leadership/full_report.pdf (recommending a “Standard for Non-Malignant Asbestos-Related Disease Claims”). The Commission, with the help of the American Medical Association, consulted prominent occupational medicine and pulmonary disease physicians to craft legal standards for asbestos-related impairment. *Id.* In February 2003, the ABA’s House of Delegates adopted the Commission’s proposal for the enactment of federal medical criteria legislation for nonmalignant asbestos-related claims. *Id.*

⁵¹ *Id.*

Shortly thereafter, researchers at Johns Hopkins University compared the X-ray interpretations of B Readers employed by plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays' origins.⁵² The study found that, while the B Readers hired by plaintiffs' counsel claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less than 5% of the same X-rays—a difference the researchers said was “too great to be attributed to inter-observer variability.”⁵³ In 2005, Senior United States District Court Judge John Fullam said that many B Readers hired by plaintiffs' lawyers “were so biased that their readings were simply unreliable.”⁵⁴

Judicial scrutiny of screening methodology was significantly advanced by a landmark decision in June of 2005 by the manager of the federal silica multi-district litigation (MDL 1553), United States District Court Judge Janis Graham Jack for the Southern District of Texas.⁵⁵ After holding *Daubert* hearings, Judge Jack declared that all but one of 10,000 cases aggregated for pretrial purposes under MDL 1553 were based on “fatally unreliable” diagnoses.⁵⁶ Judge Jack found that the claims “were driven by neither health nor justice: they were manufactured for money.”⁵⁷ The broad media reporting of Judge Jack's findings sparked criminal and congressional inquiries.⁵⁸

Commentators have described Judge Jack's opinion as “a critical turning point in mass tort litigation because for the first time it allowed

⁵² See Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843, 843 (Aug. 2004).

⁵³ *Id.*

⁵⁴ *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

⁵⁵ See *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 597-603 (S.D. Tex. 2005); see generally STEPHEN J. CARROLL ET AL., *THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA* (RAND Corp. 2009) (analyzing Judge Jack's decision in MDL 1553 and how the abuse in diagnosing silica injuries was discovered).

⁵⁶ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 675.

⁵⁷ *Id.* at 635.

⁵⁸ See Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3; Jonathan D. Glater, *Civil Suits over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5.

a comprehensive examination of the mass tort scheme—a look behind the curtain of secrecy that had guarded the ‘forensic identification of diseases’ or as it is more commonly known, litigation screening.”⁵⁹ The Director of the Federal Judicial Center, Senior United States District Court Judge Barbara Rothstein for the Western District of Washington, has said, “[o]ne of the most important things is I think judges are now alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case.”⁶⁰

The findings of Judge Jack “apply with at least equal force to non-malignant asbestos litigation: the medical reports are ‘mostly manufactured for money.’”⁶¹ As Judge Jack acknowledged, “[t]he screening companies were established initially to meet law firm demand for asbestos cases.”⁶² Another commentator explained,

Although her opinion dealt with silica litigation, Judge Jack’s findings significantly affect asbestos reform. By conducting Daubert hearings and court depositions that exposed the prevalence of fraud in silica litigation, Judge Jack exposed the prevalence of fraud in asbestos litigation as well. As a result, it is reasonable to conclude that the number of asbestos claims compensated through the tort system was greatly inflated due to fraud.⁶³

⁵⁹ David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 261 (2007) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 822 (1999)).

⁶⁰ Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 SW. U. L. REV. 733, 739 (2008).

⁶¹ Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513, 524 (2007); see also Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289, 297 (2006).

⁶² *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 597 (S.D. Tex. 2005).

⁶³ Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 163 (2009); see also Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 529 (2007) (stating “[t]he clearest examples [of fraud and abuse] come from lawyer-sponsored screening programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims”); Task Force on Contingent Fees of the American Bar Association’s Tort Trial & Insurance Practice Section, *Contingent Fees in Mass Tort Litigation*, 42 TORT TRIAL & INS. PRAC. L.J. 105, 153 (Fall 2006) (summarizing remarks of Mississippi defense attorney Danny Mulholland by noting that “[t]he rate of fraudulent asbestos claims is very high”).

Defendants have successfully excluded physicians that were the subject of Judge Jack's opinion as well as some other high-volume asbestos plaintiffs' litigation physicians,⁶⁴ including most recently in the Marion County Complex Litigation Docket in Indianapolis, Indiana. There are pockets, however, where suspect nonmalignant claims continue to be pressed, particularly in Wayne County (Detroit), Michigan.⁶⁵

Courts confronting nonmalignant filings generated as a result of screenings should join the enlightened view started by Judge Jack—a view now shared by many asbestos judges that have taken steps to improve the asbestos litigation environment. From both a legal and policy perspective, this approach is far superior to one that abdicates the proper judicial gate-keeping role regarding the admissibility of expert evidence because of its powerful effect in court.

C. Unfair Trial Consolidations Have Been Curbed

The days of mass asbestos trials have essentially ended because courts today appreciate that such consolidations are unfair and may fuel the filing of more claims. A number of courts have adopted reforms in this area.⁶⁶ “For instance, the Mississippi Supreme Court has severed several multi-plaintiff asbestos-related cases.”⁶⁷ “The Michigan Supreme Court adopted an administrative order precluding the ‘bundling’ of asbestos-related cases for trial,”⁶⁸ and the Delaware Superior Court has prohibited

⁶⁴ See Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update*, 26 T.M. COOLEY L. REV. 721, 734-36 (2009).

⁶⁵ See *id.* at 735-47.

⁶⁶ See, e.g., OHIO R. CIV. P. 42(A)(2) (“In tort actions involving an asbestos claim, . . . [f]or purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person’s household.”).

⁶⁷ Behrens, *supra* note 35, at 510-11 (citing *Alexander v. A.C. & S, Inc.*, 947 So. 2d 891, 893 (Miss. 2007); *Albert v. Allied Glove Corp.*, 944 So. 2d 1, 4 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853, 857-59 (Miss. 2005); *Ill. Cent. R.R. v. Gregory*, 912 So. 2d 829, 836-37 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151, 158-60 (Miss. 2005); *Harold’s Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493, 495 (Miss. 2004)).

⁶⁸ *Id.* at 511 (citing Prohibition on “Bundling” Cases, Admin. Order No. 2006-6 (Mich. Aug. 9, 2006)); see also Editorial, *Unbundling Asbestos*, WALL ST. J., Aug. 21, 2006, at A10 (supporting the administrative ban on “bundling”).

“the joinder of asbestos plaintiffs with different claims.”⁶⁹ In February 2012, the Philadelphia Court of Common Pleas’ Complex Litigation Center, which handles cases alleging asbestos-related injuries in Pennsylvania, made significant changes to its procedures governing mass tort cases, including procedures with respect to consolidated trials. Specifically, General Court Regulation No. 2012-01 significantly limits consolidation of mass tort cases absent an agreement of all the parties.⁷⁰ Texas, Kansas, and Georgia enacted laws that generally preclude the joinder of asbestos cases at trial.⁷¹

D. Judges Have Wisely Retreated from Imposing Super Strict Liability

In the late 1980s, both the New Jersey Supreme Court in *Beshada v. Johns-Mansville Products Corp.*⁷² and the Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.*⁷³ held that asbestos plaintiffs could recover damages without showing that the defendant knew or should have known about an asbestos risk. Fortunately, legislative

⁶⁹ See *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1).

⁷⁰ See *In re Mass Tort and Asbestos Programs*, General Court Regulation No. 2012-01, at 2-3 (Pa. Ct. Com. Pl. Phila. County Feb. 15, 2012).

⁷¹ See GA. CODE ANN. § 51-14-11 (2009) (“A trial court may consolidate for trial any number and type of asbestos claims or silica claims with the consent of all the parties. In the absence of such consent, the trial court may consolidate for trial only asbestos claims or silica claims relating to the same exposed person and members of his or her household.”); KAN. STAT. ANN. § 60-4902(j) (West, Westlaw through 2012 Reg. Sess.) (“A court may consolidate for trial any number and type of silica or asbestos claims with the consent of all the parties. In the absence of such consent, the court may consolidate for trial only claims relating to the exposed person and members of such person’s past or present household.”); TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (West, Westlaw through 2011 Reg. Sess.) (“Unless all parties agree otherwise, claims relating to more than one exposed person may not be joined for a single trial.”).

⁷² 447 A.2d 539, 549 (N.J. 1982) (holding that asbestos defendants in strict liability cases cannot assert “state of the art” defense to failure to warn claims).

⁷³ 484 So. 2d 110, 113-14 (La. 1986) (ruling on certified question in an asbestos case that, when the plaintiff proves a product is “unreasonably dangerous per se,” the manufacturer may be held liable even if it did not know and reasonably could not have known of the danger).

intervention eventually overruled these decisions and most courts did not follow them.⁷⁴ Super strict liability does not belong in tort law.⁷⁵

The advent of the *Restatement (Third) of Torts: Products Liability* attempted to put an end to super strict liability, making clear that fault is the basis for both design defect and failure to warn claims.⁷⁶ Nevertheless, elements of super strict liability can still be found in existing case law in non-asbestos cases.⁷⁷

While a caution to the nation's trial judges not to resurrect super strict liability may seem academic, it is not. Asbestos litigation often and increasingly involves defendants who were quite remote from the asbestos scene. If courts permit cases of this type to proceed, it is essential for plaintiffs to show that the defendant knew about asbestos risks or should have known of a significant asbestos risk. Simply assuming that a defendant knew of a risk creates super strict liability that is inappropriate in the tort system, especially in light of damages that are an inherent part of that area of jurisprudence.

IV. Areas in Asbestos Litigation Where Improvements Are Needed

As this Article indicates, much progress has been made over the past decade in asbestos cases. Most claimants now are actually sick. The “no injury” plaintiff has been put on a “waiting list” in case he or she becomes

⁷⁴ See LA. REV. STAT. ANN. § 9:2800.59(A)(2) (2009) (“Notwithstanding R.S. 9:2800.56, a manufacturer of a product shall not be liable . . . if the manufacturer proves that, at the time the product left his control: . . . He did not know and in light of then-existing reasonably available scientific and technological knowledge, could not have known of the alternative design”); N.J. STAT. ANN. § 2A:58C-3 (West, Westlaw through 2012 legislation) (providing that state of the art is an absolute defense in products liability actions).

⁷⁵ See generally Victor E. Schwartz & Rochelle M. Tedesco, *The Re-Emergence of “Super Strict” Liability: Slaying the Dragon Again*, 71 U. CIN. L. REV. 917, 917-18 (2003) (“A decade ago, American courts reached a consensus that ‘Super Strict liability’ was an unwise and unsound predicate for imposing liability in products liability cases.”).

⁷⁶ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b), (c) (1998).

⁷⁷ See *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1340 (Wash. 1991) (en banc) (foreseeability is not an element of a warning's defect claim).

ill in the future, but the never-ending problem of managing limited assets in asbestos cases is serious and continuing. There is still much that trial judges should do to assure that the litigation proceeds in a fair and just manner.

A. Create Transparency Between the Tort and Bankruptcy Trust Systems to Prevent Fraud and Wisely Manage Assets

A recent, major development in asbestos litigation relates to the many trusts set up in bankruptcy to pay personal injury claims against former asbestos defendants and the impact of those trusts on civil tort litigation. As explained, almost 100 companies have filed for bankruptcy as a result of asbestos-related liabilities. Out of those proceedings, over sixty trusts have been established to collectively form a \$36.8 billion privately funded asbestos personal injury compensation system outside the tort system.⁷⁸ “Trust outlays have grown rapidly since 2005”⁷⁹ Because of the number of trusts now operating, the ability of plaintiffs to recover from multiple trusts, and the higher payment levels of more recently formed trusts, it has been suggested that “[f]or the first time ever, trust recoveries may fully compensate asbestos claimants.”⁸⁰

There is a need for greater transparency between the tort and trust systems. The absence of such transparency creates an incentive for claimants to take inconsistent or conflicting positions across trust filings and with respect to allegations made in civil tort claims.⁸¹ For example,

⁷⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 28.

⁷⁹ DIXON & MCGOVERN, *supra* note 25.

⁸⁰ Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating It Too?*, 21:21 MEALEY'S LITIG. REP.: ASBESTOS 19 (Dec. 2006). For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts. See Charles E. Bates et al., *The Naming Game*, 24:15 MEALEY'S LITIG. REP.: ASBESTOS 18 (Sept. 2009). Additionally, asbestos plaintiffs “could receive as much as \$1.6 million.” Charles E. Bates et al., *The Claiming Game*, 25:1 MEALEY'S LITIG. REP.: ASBESTOS 19 (Feb. 2010).

⁸¹ H.R. Rep. No. 112-687 (2012) (Furthering Asbestos Claim Transparency Act (FACT) Act of 2012); *How Fraud and Abuse in the Asbestos Compensation System Affect Victims, Jobs, the Economy, and the Legal System: Hearing Before the*

in the Ohio case of *Kananian v. Lorillard Tobacco Co.*,⁸² a Cleveland judge barred a California-based asbestos plaintiffs' law firm and one of its lawyers from appearing in his court due to their alleged dishonesty in litigating a mesothelioma case.⁸³ The judge's decision drew national attention for highlighting the inconsistencies between the allegations made in the civil action and those submitted to several asbestos bankruptcy trust.⁸⁴ "*Kananian* is not an isolated incident; the [United States House Judiciary] Committee received testimony [in 2012] detailing several additional examples of fraud, abuse, and inconsistent claiming in other jurisdictions. . . ."⁸⁵

Fraud on trusts hurts legitimate claimants by depleting resources available to pay their claims in full. Solvent defendants in the tort system also have an interest in obtaining reliable information regarding all exposures during a plaintiff's lifetime. This may help ensure that defendants are held responsible only for their fair share of the liability, whether through proper allocation of fault at trial or by proving that the now bankrupt entity was the sole proximate cause of the harm.

A number of courts have already taken positive action in this area. For example, many courts have held that claim forms submitted to bankruptcy trusts and supporting factual information such as medical records submitted in support of trust claims are discoverable in civil

Subcomm. on the Constitution, H. Comm. on the Judiciary, 112th Cong. 88-89 (2011) (statement of James L. Stengel, Esq., Senior Partner, Litigation, Orrick, Herrington & Sutcliffe LLP).

⁸² No. CV 442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 18, 2007) (order and opinion revoking pro hac vice privileges and overruling a motion to dismiss).

⁸³ *Ohio Judge Bars California Firm from His Court*, NAT'L L.J., Jan. 22, 2007, at 3.

⁸⁴ Editorial, *Cuyahoga Comeuppance*, WALL ST. J., Jan. 22, 2007, at A14; see also Kimberley A. Strassel, Opinion, *Trusts Busted*, WALL ST. J., Dec. 5, 2006, at A18 ("[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos off ships in Japan. And a fourth claim said that he'd worked with 'tools of asbestos' before the war. Meanwhile, a second law firm, Brayton Purcell, submitted two more claims to two further trusts, with still different stories. . . . [Brayton Purcell then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.").

⁸⁵ H.R. Rep. No. 112-687, *supra* note 81, at 12.

litigation.⁸⁶ Several jurisdictions have gone even further by establishing standing case management orders governing all asbestos cases filed within a county or a state, requiring plaintiffs to disclose certain bankruptcy-related information as a matter of course. For example, the most recent case management order governing all asbestos personal injury litigation in West Virginia provides, among other things,

[n]o later than one hundred twenty (120) days prior to the date set for trial for the asbestos action, a claimant shall provide to all parties a statement of any and all existing claims that may exist against asbestos trusts. In addition, the statement shall also disclose when a claim was or will be made, and whether there has been any request for deferral, delay, suspension or tolling of the asbestos trust claims process. The statement must contain an Affidavit of the Plaintiff or Plaintiff's counsel that the statement is based upon a good faith investigation of all potential claims against asbestos trusts.

. . . . As to any claims already asserted against asbestos trusts, the claimant shall produce final executed proofs of claim together with any supporting materials used to support such claim against the asbestos trusts, all trust claims and claims material, and all documents or information relevant or related to such claims asserted against the asbestos trusts, including but not limited to, work histories, depositions, and the testimony of the claimant and others as well as medical documentation.⁸⁷

⁸⁶ *Shepherd v. Pneumo-Abex, LLC*, MDL No. 875, 2010 WL 3431633 at *1-2 (E.D. Pa. Aug. 30, 2010) (order); *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875 (Lyman v. Union Carbide Corp., Civil Action No. 09-62999; Utterback v. Hexion Specialty Chems., Inc., Civil Action No. 09-62944; Broderick v. Abex Corp., Civil Action No. 09-62886; Smith v. Ford Motor Co., Civil Action No. 09-69125; Getto v. Aircraft Breaking Sys. Corp., Civil Action No. 09-65346) (E.D. Pa. Sept. 18, 2009) (order requiring plaintiffs to produce documentation related to asbestos bankruptcy settlement trusts); *Volkswagen of Am., Inc. v. Superior Court of San Francisco*, 43 Cal. Rptr. 3d 723, 726-27 (Cal. Ct. App. 1st Dist. 2006); *Casper v. Dow Chem. Co.*, No. 49D02-9801-MI-001-295 (Ind. Super. Ct. Marion County Oct. 5, 2005) (order); *Alvey v. 999 Quebec, Inc.*, No. 04CV200183 (Mo. Cir. Ct. Jackson County Mar. 19, 2007) (order); *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Amchem Prods., Inc.)*, No. 2005/1583 (N.Y. Sup. Ct. Erie County Jan. 18, 2008) (decision and order); *In re Eighth Judicial Dist. Asbestos Litig. (Malcolm v. A.W. Chesterton Co.)*, No. 2002-10666 (N.Y. Sup. Ct. Buffalo City Dec. 30, 2005); *Miller v. PECO Energy Co.*, No 50-07014451 (Pa. Ct. Com. Pl. Phila. County Apr. 16, 2007) (order); *In re Asbestos Litig.*, MDL No. 2004-03964 (Tex. Cir. Ct. Harris County Jan. 16, 2009) (letter ruling); *see, e.g., In re New York City Asbestos Litig. (Negrepoint v. A.C. & S., Inc.)*, No. 120894/01 (N.Y. Sup. Ct. N.Y.C. Dec. 11, 2003) (order at motions hearing); *In re Personal Injury & Wrongful Death Asbestos Litig. (Poole v. A.C. & S., Inc.)*, No. 24X0400077 (Md. Cir. Ct. Baltimore City Jan. 6, 2005) (order at motions hearing).

⁸⁷ *In re Asbestos Pers. Injury Litig.*, No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County Mar. 3, 2010) (order amending case management order and addressing claims

The West Virginia order also provides that plaintiffs have a continuing obligation to supplement the information.⁸⁸ Additionally, the order provides for sanctions for noncompliance and contains set-off and assignment provisions to give judgment defendants credits for trust recoveries.⁸⁹ In the New York City state court asbestos litigation, the current case management order provides,

Any plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after a plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.⁹⁰

Most recently, a case management order entered for all asbestos personal injury litigation in Massachusetts, based upon a joint motion by plaintiffs' and defendants' liaison counsel, provides in relevant part:

a) Plaintiffs will produce the product exposure section of bankruptcy claim forms that have been filed on behalf of the Plaintiff within ninety (90) days of a determined trial date. Plaintiffs have a continuing duty to supplement this information through trial. Any amounts received will be redacted from the documents provided to Defendants.

b) Any payments made to a Plaintiff by an asbestos bankruptcy trust acts as a dollar-for-dollar set-off of any damages awarded to a Plaintiff in a tort trial in those cases in which Massachusetts law is applied.

against bankruptcy trusts); *see also In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1, ¶ 7(1)); *In re Asbestos Pers. Injury Litig.*, Master File (Ky. Cir. Ct. Jefferson County Mar. 6, 2006); *In re All Asbestos Pers. Injury Cases*, No. 03-310422-NP (Mich. Cir. Ct. Wayne County Mar. 27, 2009) (Order No. 16) (case management order requiring mandatory production of bankruptcy claim forms); *In re All Asbestos Cases*, No. CV-073958 (Ohio Ct. Com. Pl. Cuyahoga County May 8, 2007); *Thibeault v. Allis Chalmers Corp. Prod. Liab. Trust.*, No. 07-27545 (Pa. Ct. Com. Pl. Montgomery County Feb. 22, 2010) (order applying to all asbestos cases pending or to be filed in the court); *In re Asbestos Litig.*, No. 0001 (Pa. Ct. Com. Pl. Phila. County Apr. 5, 2010) (order amending master case management order requiring asbestos personal injury plaintiffs to respond to discovery concerning applications or claims to any 524(g) asbestos bankrupt trusts).

⁸⁸ *See In re Asbestos Pers. Injury Litig.*, No. 03-C-9600 (W. Va. Cir. Ct. Kanawha County Mar. 3, 2010) (order amending case management order and addressing claims against bankruptcy trusts).

⁸⁹ *See id.*

⁹⁰ *In re New York City Asbestos Litig.*, No. 40000/88, at 48 (N.Y. Sup. Ct. N.Y.C. May 26, 2011) (amended case management order).

c) Plaintiffs will assign to Defendant all asbestos bankruptcy trust claims to which a Plaintiff is entitled upon payment of a verdict in favor of a Plaintiff. Plaintiff agrees to cooperate in good faith with a Defendant(s) against whom a verdict is rendered in determining and filing any asbestos bankruptcy trust claims to which a Plaintiff is entitled to compensation.

d) Notwithstanding the foregoing, nothing in this Pre-Trial Order shall preclude any party from seeking the disclosure, after jury empanelment, of the amounts Plaintiff has received in connection with the bankruptcy forms.

e) Within thirty days of trial, Plaintiff will serve a certification with the [court] that all known bankruptcy claims have been filed.⁹¹

In addition, a Pennsylvania appellate court recently approved a trial court's use of equitable powers to deduct bankruptcy trust recoveries from an asbestos plaintiff's tort system recovery for claims involving the same alleged injury.⁹² The decision, *Reed v. Honeywell International, Inc.*, recognizes that simply ignoring the real-world impact of tens of billions of dollars flowing to tort system plaintiffs from insolvent tortfeasors is not an appropriate means of computing an award.⁹³ Given the availability of recovery from bankruptcy trust funds, *Reed* provides persuasive precedent for other courts to exercise equitable powers to preclude double dipping in asbestos personal injury cases.

Trust transparency is also an area where federal and state legislation can help.

B. Premises Owner Liability for “Take Home” Asbestos Exposures

Looking ahead to the next decade of asbestos litigation, we are taken back to the first year law school course in tort law. A fundamental part of tort law, and a stumbling block for many, is the concept of duty. Plain and simple, the concept of duty establishes the standard of liability for tort law—the duty concept is the “public policy headquarters” for the formation of tort law. As Judge Benjamin Cardozo's opinion makes clear

⁹¹ *In re* Mass. State Court Asbestos Litig., Amended Pre-Trial Order No. 9, ¶ XIII(C)(7)(o)(2) (effective June 27, 2012).

⁹² *See* *Reed v. Honeywell Int'l, Inc.*, Nos. 3022 EDA 2010, 3023 EDA 2010, 2011 WL 6645694, at *10-12 (Pa. Super. Ct. Dec. 6, 2011).

⁹³ *See id.* at *11-12.

in *Palsgraf v. Long Island Railroad Co.*,⁹⁴ duty is not based solely on whether a defendant could foresee that his own acts might injure another person.⁹⁵ Courts realize that there are public policy reasons to limit the economic pursuit of potential defendants, even in situations where the harm is arguably foreseeable.⁹⁶

So it is with asbestos cases. As trial judges appreciate, not all plaintiffs seriously harmed in some remote way by exposure to asbestos can or should recover damages. This issue is frequently litigated in cases involving whether premises owners owe a duty to “take home” exposure claimants (e.g., workers’ family members who allege exposure to asbestos off-site, typically through contact with a directly exposed worker or that worker’s soiled work clothes).

“Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists.”⁹⁷ “In jurisdictions . . . where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos.”⁹⁸ Courts in New York,⁹⁹ Michigan,¹⁰⁰ Georgia,¹⁰¹ Maryland,¹⁰² Delaware,¹⁰³

⁹⁴ 162 N.E. 99 (N.Y. 1928).

⁹⁵ *Palsgraf*, 162 N.E. at 103.

⁹⁶ See, e.g., *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001) (finding that no duty was owed by firearm manufacturer to victim of crimes for negligent marketing and distribution of weapons).

⁹⁷ *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009).

⁹⁸ *In re Asbestos Litig.*, C.A. No. 04C-07-099-ASB, 2007 WL 4571196, at *8 (Del. Super. Ct. New Castle County Dec. 21, 2007) (emphasis added), *aff’d sub nom.* *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

⁹⁹ See *In re Eighth Judicial Dist. Asbestos Litig.* (*Rindfleisch v. Alliedsignal, Inc.*), 815 N.Y.S.2d 815, 820-21 (N.Y. Sup. Ct. 2006); *In re New York City Asbestos Litig.* (*Holdampf v. A.C. & S., Inc.*), 840 N.E.2d 115, 119, 122 (N.Y. 2005).

¹⁰⁰ See *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas* (*Miller v. Ford Motor Co.*), 740 N.W.2d 206, 216 (Mich. 2007).

¹⁰¹ See *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005).

¹⁰² See *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998); see also *Doe v. Pharmacia & Upjohn Co.*, 879 A.2d 1088, 1092-93 (Md. 2005) (involving HIV transmission).

¹⁰³ See *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 167-68 (Del. 2011); *Riedel*, 968 A.2d at 25-26.

Iowa,¹⁰⁴ Illinois,¹⁰⁵ Pennsylvania,¹⁰⁶ and California¹⁰⁷ have recognized that limit, along with the Ohio and Kansas legislatures.¹⁰⁸

Expanding the availability of asbestos actions against premises owners for persons who were not occupationally exposed can create an almost infinite expansion of potential asbestos plaintiffs. Future potential plaintiffs might include anyone who came into contact with an exposed worker or the worker's clothes.¹⁰⁹

¹⁰⁴ See *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 696-99 (Iowa 2009).

¹⁰⁵ See *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931, 934-39 (Ill. App. Ct. 2009).

¹⁰⁶ See *Jesensky v. A-Best Prods. Co.*, No. CIV A 96-680, 2003 WL 25518083, at *1-2 (W.D. Pa. Dec. 16, 2003) (magistrate's supplemental report and recommendation), *adopted in part and rejected in part on other grounds*, 2004 WL 5267498 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 Fed. Appx. 968 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1614 (2009); see also *In re Asbestos Litig. (McCoy v. Polyvision)*, No. N10C-04-203 ASB, 2012 WL 1413887, at *1-2, 4 (Del. Super. Ct. New Castle County Feb. 21, 2012) (applying Pennsylvania law).

¹⁰⁷ See *Campbell v. Ford Motor Co.*, 206 Cal. App. 4th 15, 30 (2012).

¹⁰⁸ See KAN. STAT. ANN. § 60-4905(a) (West, Westlaw through 2012 Reg. Sess.); OHIO REV. CODE ANN. § 2307.941(a)(1) (West, Westlaw through 2011 legislation); see also *Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448, 452-53 (Ohio 2010) (statute barring tort liability for asbestos exposure not occurring at premises owner's property applied to bar claims).

¹⁰⁹ See *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206, 219 (Mich. 2007) (noting that potential plaintiffs could include "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker" (quoting Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 MEALEY'S LITIG. REP.: ASBESTOS 15 (July 2006))); *Van Fossen*, 777 N.W.2d at 699 (The plaintiff's proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat."); *In re Asbestos Litig.*, C.A. No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007) ("[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member . . . from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/carpool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day."), *aff'd sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115, 122 (N.Y. 2005) (fearing that to expand duty would raise the "specter

“In nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision turned on the court’s conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis.”¹¹⁰ Courts that have taken a careful look at the state of knowledge have concluded that no duty exists with respect to take-home household exposures occurring before 1972 (or, in some cases, the mid-1960s) because the risks regarding nonoccupational exposure to asbestos were not foreseeable.¹¹¹ Consequently, post-1972 nonoccu-

of limitless liability,” perhaps resulting in liability to family babysitter or employees of a neighborhood laundry (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001)); *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (“If liability for exposure to asbestos could be premised on [decedent’s] handling of her husband’s clothing, presumably Bethlehem, the premises owner would owe a duty to others who came into close contact with [decedent’s husband], including other family members, automobile passengers, and co-workers.”); *Campbell*, 206 Cal. App. 4th at 33 (“[W]here the claim is that the laundering of the worker’s clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater [than just family members of an occupationally exposed employee], including fellow commuters, those performing laundry services and more.”).

¹¹⁰ *In re Asbestos Litig.*, 2007 WL 4571196, at *11.

¹¹¹ See *Martin v. General Elec. Co.*, No. 02-201-DLB, 2007 WL 2682064, at *5 (E.D. Ky. Sep. 5, 2007) (“Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930s, the extension of that harm to others was not widely known until at least 1972, when OSHA regulations recognized a causal connection.”), *aff’d sub nom.* *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 445-46 (6th Cir. 2009) (“There has been no showing of any general knowledge of bystander exposure in the industry. Indeed, other courts have found there was no knowledge of bystander exposure in the asbestos industry in the 1950’s . . . Plaintiff’s expert report concedes that the first studies of bystander exposure were not published until 1965.”); *Rodarmel v. Pneumo Abex, L.L.C.*, 957 N.E.2d 107, 109 (Ill. App. Ct. 2011) (“[I]n 1953 through 1956, the infliction of illness merely from asbestos carried home on clothing was not reasonably foreseeable, given what was known during that period.”); *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 422 (Tex. Ct. App. Hous. 2008) (“According to Dr. Lemen, 1972 was a crucial year in the history of asbestos research. By 1972, experts agreed that a certain degree of exposure to asbestos could cause asbestosis or cancer. . . . Therefore, during the relevant time period, 1942 to 1972, there was a consensus within the scientific community that there was a measurably safe level of exposure to asbestos.”); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 461-62 (Tex. Ct. App. Dallas 2007) (“The first case study of *non-occupational* asbestos exposure was published in 1965 . . . Several witnesses also testified in this case about the regulations instituted in 1972 by the Occupational Safety and Hazard Administration (OSHA) that expressly mandated, for the first time, restrictions on allowing asbestos to be carried home on clothing. The record in this case also reflects that the first epidemiological study of the

pational exposures could give rise to a duty owed by premises owners in these states.¹¹² Some courts, however, have taken a more permissive approach that glosses over the science-specific to nonoccupational asbestos exposures.¹¹³

C. Liability for Asbestos Products Made or Sold by Third Parties

An emerging theory being promoted by some plaintiffs' counsel is that makers of nondefective products, such as pumps or valves, should be held liable for harms allegedly caused by asbestos-containing replacement internal gaskets or packing or replacement external flange gaskets manufactured or sold by third parties, or for asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, for example, by the United States Navy. This theory is attractive to plaintiffs' lawyers because most major manufacturers of asbestos-containing products have filed for bankruptcy, and the Navy enjoys sovereign immunity.¹¹⁴ As a substitute, plaintiffs seek to impose

link between females with mesothelioma and non-occupational asbestos exposure was published in 1978 Based on the record in this case, the danger of non-occupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s."); *see also Miller*, 740 N.W.2d at 218 (Mich. 2007) (stating that "plaintiffs' own expert conceded that the first published literature suggesting a 'specific attribution to washing of clothes' was not published until 1965").

¹¹² *See Chaisson v. Avondale Indus.*, 947 So. 2d 171, 183 (La. Ct. App. 2006) ("[A] company aware of the 1972 OSHA standards regarding the hazards of household exposure to asbestos, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos."); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355, 366-67, 370 (Tenn. 2008) (permitting misfeasance claim for exposures from 1973 to 1975 and from 1978 until at least 1984).

¹¹³ *See Zimko v. Am. Cyanamid*, 905 So. 2d 465, 484-85 (La. Ct. App. 2005); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1149-50 (N.J. 2006); *Rochon v. Saberhagen Holdings, Inc.*, No. 58579-7-I, 2007 WL 2325214, at *2-4 (Wash. Ct. App. Aug 13, 2007). *But see Thomas v. A.P. Green Indus.*, 933 So. 2d 843, 871-72 (La. Ct. App. 2006) (Tobias, J., concurring) ("Any person citing *Zimko* in the future should be wary of the problems of the majority's opinion in *Zimko* in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.").

¹¹⁴ *See Gray v. Bell*, 712 F.2d 490, 506 (D.C. Cir. 1983) ("The United States is protected from unconsented suit under the ancient common law doctrine of sovereign immunity.").

liability on solvent manufacturers for harms caused by products they never made or sold.

Thus far, courts have almost uniformly drawn the line, holding that defendants are only responsible for harms caused by their own products. These courts include the Supreme Courts of Washington¹¹⁵ and California;¹¹⁶ state courts in Pennsylvania,¹¹⁷ Minnesota,¹¹⁸ Maryland,¹¹⁹ New Jersey,¹²⁰ Massachusetts,¹²¹ and Maine;¹²² courts applying New York law;¹²³ Delaware courts applying the law of Delaware and various other

¹¹⁵ See *Simonetta v. Viad Corp.*, 197 P.3d 127, 131-33 (Wash. 2008); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 497-99 (Wash. 2008); see also *Yankee v. APV N. Am., Inc.*, 262 P.3d 515, 520-21 (Wash. Ct. App. 2011); *Wangen v. A.W. Chesterton Co.*, No. 65258-3-I, 2011 WL 3443962, at *5-7 (Wash. Ct. App. Aug. 8, 2011); *Anderson v. Asbestos Corp.*, No. 60271-3-I, 2009 WL 2032332, at *1 (Wash. Ct. App. July 13, 2009).

¹¹⁶ See *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012); see also *Floyd v. Air & Liquid Sys. Corp.*, No. 2:10-CV-69379-ER, 2012 WL 975359, at *1 (E.D. Pa. Feb. 8, 2012) (applying California law).

¹¹⁷ See *Schaffner v. Aesys Tech., LLC*, Nos. 1901 EDA 2008, 1902 EDA 2008, 2010 WL 605275, at *6 (Pa. Super. Ct. Jan. 21, 2010); *Montoney v. Cleaver-Brooks, Inc.*, No. 3253, 2012 WL 359523, at *1 (Pa. Ct. Com. Pl. Phila. County Jan. 5, 2012); *Kolar v. Buffalo Pumps, Inc.*, No. 0199, 2010 WL 5312168, at *45-46 (Pa. Ct. Com. Pl. Phila. County Aug. 2, 2010); *Milich v. Anchor Packing Co.*, A.D. No. 08-10532 (Pa. Ct. Com. Pl. Butler County Mar. 16, 2009); *Ottinger v. Am. Standard, Inc.*, No. 001674, 2007 WL 7306556, at *11-14 (Pa. Ct. Com. Pl. Phila. County Sept. 11, 2007). But see *In re Asbestos Prods. Liab. Litig. (No. VI) (Hoffeditz v. Am General LLC)*, C.A. No. 2:09-7010, 2011 WL 5881008, at *1 n.1 (E.D. Pa. July 29, 2011); *Chicano v. General Elec. Co.*, No. Civ. A. 03-5126, 2004 WL 2250990, at *3 (E.D. Pa. Oct. 5, 2004).

¹¹⁸ See *Nelson v. 3M Co.*, No. 62-CV-08-6245, 2011 WL 3983257 (D. Minn. Aug. 16, 2011).

¹¹⁹ See *Ford Motor Co. v. Wood*, 703 A.2d 1315, 1330-32 (Md. Ct. Spec. App. 1998), *abrogated on other grounds by John Crane, Inc. v. Scribner*, 800 A.2d 727, 743-44 (Md. 2002).

¹²⁰ See *Mystrena v. A.W. Chesterton Co.*, No. MID-L-4208-10, slip op. at 23 (N.J. Super. Ct. Middlesex County May 8, 2012); *Fayer v. A.W. Chesterton Co.*, No. MID-L-5016-10, slip op. at 23 (N.J. Super. Ct. Middlesex County May 8, 2012).

¹²¹ See *Dombrowski v. Alfa Laval, Inc.*, No. CA08-1938, 2010 WL 4168848, at *3-5 (Mass. Super. Ct. Middlesex County July 1, 2010).

¹²² See *Rumery v. Garlock Sealing Techs., Inc.*, No. 05-CV-599, 2009 WL 1747857, at *2-4 (Me. Super. Ct. Cumberland County Apr. 24, 2009).

¹²³ See *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 802 (S.D.N.Y. 2011); *In re Eighth Judicial Dist. Asbestos Litig. (Drabczyk v. Fisher Controls Int'l, LLC)*, 938 N.Y.S.2d 715, 802-03 (N.Y. App. Div. 4th Dept. 2012). But see *Berkowitz v. A.C.*

states;¹²⁴ an Illinois federal court;¹²⁵ a Florida federal court;¹²⁶ and a number of courts applying maritime law.¹²⁷

& S., Inc., 733 N.Y.S.2d 410, 411-12 (N.Y. App. Div. 1st Dept. 2001); *Sawyer v. A.C. & S., Inc.*, No. 111152/99, 2011 WL 3764074, at *3 (N.Y. Sup. Ct. New York County June 24, 2011); *Defazio v. A.W. Chesterton*, No. 127988/02, 2011 WL 3667717, at *3 (N.Y. Sup. Ct. New York County Aug. 12, 2011); *Kersten v. A.O. Smith Water Prods. Co.*, No. 190129/10, 2011 WL 1096996 (N.Y. Sup. Ct. New York County Mar. 14, 2011); *In re New York City Asbestos Litig. (Ronald Dummitt v. A.W. Chesterton et al.)*, No. 1090196/10, 2012 WL 3642303 (N.Y. Sup. Ct. New York County Aug. 20, 2012).

¹²⁴ See *Wilkerson v. Am. Honda Motor Co., Inc.*, C.A. No. 04C-08-268ASB, 2008 WL 162522, at *2-3 (Del. Super. Ct. New Castle County Jan. 17, 2008); *In re Asbestos Litig. (James Petroski)*, No. N10C-11-139 ASB (Del. Super. Ct. New Castle County June 27, 2012) (applying Arizona law); *In re Asbestos Litig. (Parente v. Crane Co.)*, C.A. No. N10C-11140ASB, 2012 WL 1415709, at *2 (Del. Super. Ct. New Castle County Mar. 2, 2012) (applying Connecticut law); *In re Asbestos Litig. (Irene Taska)*, C.A. No. 09C-03-197ASB, 2011 WL 379327, at *1-2 (Del. Super. Ct. New Castle County Jan. 19, 2011) (applying Connecticut law); *In re Asbestos Litig. (Arland Olson)*, C.A. No. 09C-12-287 AS, 2011 WL 322674, at *1-2 (Del. Super. Ct. New Castle County Jan. 18, 2011) (applying Idaho law); *In re Asbestos Litig. (Anita Cosner)*, C.A. No. N10C-12-100 ASB, 2012 WL 1694442, at *1 (Del. Super. Ct. New Castle County May 14, 2012) (applying Massachusetts law); *In re Asbestos Litig. (Thomas Milstead)*, C.A. No. N10C-09211ASB, 2012 WL 1996799, at *2-4 (Del. Super. Ct. New Castle County May 31, 2012) (applying Maryland law); *In re Asbestos Litig. (Ralph Curtis and Janice Wolfe)*, C.A. No. N10C-08258ASB, 2012 WL 1415706, at *2-4 (Del. Super. Ct. New Castle County Feb. 28, 2012) (applying Oregon law); *In re Asbestos Litig. (Reed Grgich)*, C.A. N10C-12011ASb, 2012 WL 1408982, at *3-4 (Del. Super. Ct. New Castle County Apr. 2, 2012) (applying Utah law), *reargument denied*, 2012 WL 1593123 (Del. Super. Ct. New Castle County Apr. 11, 2012), *appeal refused sub nom. Crane Co. v. Grgich*, No. 233, 2012, 2012 WL 1716788 (Del. Super. May 14, 2012). *But see In re Asbestos Litig. (Kenneth Carlton)*, C.A. No. N10C-08-216 ASB, 2012 WL 2007291, *3 (Del. Super. Ct. New Castle County June 1, 2012) (applying Arkansas law); *In re Asbestos Litig. (Darlene K. Merritt & James Kilby Story)*, C.A. No. N10C-11-200 ASB, 2012 WL 1409225, *3 (Del. Super. Ct. New Castle County Apr. 5, 2012) (applying Virginia law); *Urian v. Ford Motor Co.*, C.A. No. 06C-09-246 ASB, 2010 WL 3005539, *2-3 (Del. Super. Ct. New Castle County July 30, 2010) (applying Pennsylvania law).

¹²⁵ See *Niemann v. McDonnell Douglas Corp.*, 721 F. Supp. 1019, 1027-28 (S.D. Ill. 1989).

¹²⁶ See *Faddish v. Buffalo Pumps*, No. 08-80724-CIV, 2012 WL 3140200, at *10-11 (S.D. Fla. Aug. 2, 2012).

¹²⁷ See *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492-93 (6th Cir. 2005); *Stark v. Armstrong World Indus., Inc.*, 21 Fed. Appx. 371, 375-76 (6th Cir. 2001); *Conner v. Alfa Laval, Inc.*, Nos. 2:09-CV-67099-ER, 2:09-CV-91848-ER, 2:09-CV-93726-ER, 2012 WL 288364, at *4-6 (E.D. Pa. Feb. 1, 2012); *Various Plaintiffs v. Various Defendants*, MDL 875, 2012 WL 1106730, at *6-7 (E.D. Pa. Feb. 1, 2012);

Perhaps the most important of these opinions is the California Supreme Court's unanimous decision in *O'Neil v. Crane Co.*¹²⁸ The case involved a mesothelioma plaintiff allegedly exposed to asbestos in the late 1960s as a result of supervising individuals who repaired equipment in the engine and boiler rooms of a World War II-era naval ship.¹²⁹ The plaintiff sued two companies that sold valves and pumps to the United States Navy (for use in the ship's steam propulsion system) at least twenty years before plaintiff worked aboard the ship.¹³⁰ It was undisputed that the defendants never manufactured or sold any of the asbestos-containing materials to which plaintiff was exposed.¹³¹ Plaintiff's alleged asbestos exposures came from external insulation and internal gaskets and packing made by third parties and added to the pumps and valves post-sale.¹³²

Applying general principles of product liability, the California Supreme Court stated that while "manufacturers, distributors, and retailers have a duty to ensure the safety of their products [W]e have never held that these responsibilities extend to preventing injuries caused by *other* products that might foreseeably be used in conjunction with a defendant's product."¹³³ The court reasoned that requiring manufacturers to warn about the dangerous propensities of products they did not design, make, or sell would be contrary to the purposes of strict liability.¹³⁴

Floyd v. Air & Liquid Sys. Corp., 2:10-CV-69379-ER, 2012 WL 975615, at *1 (E.D. Pa. Feb. 8, 2012); Floyd v. Air & Liquid Sys. Corp., 2:10-CV-69379-ER, 2012 WL 975756, at *1 (E.D. Pa. Feb. 10, 2012); *In re Asbestos Litig.* (Harold and Shirley Howton), C.A. No. N11C-03218ASB, 2012 WL 1409011, at *5 (Del. Super. Ct. Apr. 2, 2012), *appeal refused sub nom.* Crane Co. v. Howton, No. 234, 2012, 2012 WL 1716831, at *1 (Del. Super. Ct. New Castle County 2012); *In re Asbestos Litig.* (Wesley K. Davis), C.A. No. 09C-08-258 ASB, 2011 WL 2462569, at *5-6 (Del. Super. Ct. New Castle County June 7, 2011).

¹²⁸ 266 P.3d 987 (Cal. 2012).

¹²⁹ *O'Neil*, 266 P.3d at 993.

¹³⁰ *Id.* at 991-94.

¹³¹ *Id.* at 996.

¹³² *Id.*

¹³³ *Id.* at 991.

¹³⁴ *See id.* at 995-96 ("[T]he reach of strict liability is not limitless. We have never held that strict liability extends to harm from entirely distinct products that the consumer can be expected to use with, or in, the defendant's nondefective product.").

Since the seminal case of *Greenman v. Yuba Power Products, Inc.*,¹³⁵ strict liability has been understood to “insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market” or who are in the chain of commerce for that product.¹³⁶ The court in *O’Neil* noted, “It is also unfair to require manufacturers of nondefective products to shoulder a burden of liability when they derived no economic benefit from the sale of the products that injured the plaintiff.”¹³⁷ The *O’Neil* court rejected the notion that a manufacturer has a duty to warn about the dangers of products that it knew or should have known would be used alongside its own.¹³⁸ The court concluded that “expansion of the duty of care as urged here would impose an obligation to compensate on those whose products caused the plaintiffs no harm. To do so would exceed the boundaries established over decades of product liability law.”¹³⁹

D. The “Any Exposure” Theory of Liability

Now that many former asbestos product manufacturers have been forced into bankruptcy, plaintiffs increasingly bring claims against “peripheral defendants” for *de minimis* or remote exposures.¹⁴⁰ The basis for their claims is the *any exposure* theory of causation. Plaintiffs’ experts who support this approach “opine that any occupational or product-related exposure to asbestos fibers” above or different from “background” exposures is a substantial contributing factor to the ultimate disease, without regard to assessing dosage.¹⁴¹

¹³⁵ 377 P.2d 897 (Cal. 1963).

¹³⁶ *O’Neil*, 266 P.3d at 995 (quoting *Greenman*, 377 P.2d at 901).

¹³⁷ *Id.* at 1006.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1007.

¹⁴⁰ See Mark A. Behrens & William L. Anderson, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. REV. 479, 528 (2008); William L. Anderson et al., *The “Any Exposure” Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 KAN. J.L. & PUB. POL’Y 1 (2012).

¹⁴¹ Behrens & Anderson, *supra* note 140; see also *Gregg v. V-J Auto Parts, Co.*, 943 A.2d 216, 226 (Pa. 2007) (“We recognize that it is common for plaintiffs to submit

In recent years, however, a growing number of courts have excluded or criticized *any exposure* testimony. Courts have criticized the testimony either as insufficient to support causation or as unscientific under *Daubert*¹⁴² or *Frye*¹⁴³ analyses. For example, in *Borg-Warner Corp. v. Flores*,¹⁴⁴ a mechanic/asbestosis case, the Texas Supreme Court held that “[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice” to prove causation.¹⁴⁵ Most recently, in *Betz v. Pneumo Abex LLC*,¹⁴⁶ a mechanic/mesothelioma case, the Pennsylvania Supreme Court rejected the “any fiber” theory, explaining that the “any-exposure opinion [of the plaintiff’s expert] is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive.”¹⁴⁷ Numerous other courts have reached similar decisions, the most significant including:

- The United States Court of Appeals for the Sixth Circuit has addressed *any exposure* testimony in three matters, rejecting it each time as inconsistent with a substantial factor causation standard.¹⁴⁸

expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease.”); *Georgia-Pac. Corp. v. Stephens*, 239 S.W.3d 304, 308 (Tex. App. Hous. 2007) (noting plaintiffs relied on “expert testimony that any exposure to asbestos contributes to cause mesothelioma”).

¹⁴² See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993).

¹⁴³ See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

¹⁴⁴ 232 S.W.3d 765 (Tex. 2007).

¹⁴⁵ *Borg-Wagner*, 232 S.W.3d at 773. Texas appellate courts have rejected attempts to limit *Borg-Warner* and have broadly applied the opinion to prevent *any exposure* testimony in mesothelioma and other cases. See *Smith v. Kelly-Moore Paint Co.*, 307 S.W.3d 829, 832-34 (Tex. App. Fort Worth 2010); *Georgia-Pac. Corp. v. Bostic*, 320 S.W.3d 588, 596-97 (Tex. App. Dallas 2010), *pet. for rev. filed* (Nov. 12, 2010); *Georgia-Pacific*, 239 S.W.3d at 320-21.

¹⁴⁶ 44 A.3d 27 (Pa. 2012).

¹⁴⁷ *Betz*, 44 A.3d at 56. The Pennsylvania Supreme Court previously declared the *any exposure* position, espoused in affidavits by plaintiff’s experts in a mesothelioma case against an auto parts company, to be a “fiction.” See *Gregg*, 943 A.2d at 218, 223, 226-27.

¹⁴⁸ See *Moeller v. Garlock Sealing Techs.*, 660 F.3d 950, 955 (6th Cir. 2011); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009); *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005).

- The Georgia Court of Appeals rejected the testimony of *any exposure* experts in a case involving alleged exposure to fibers in molding materials, noting in the process that the studies these experts relied on were irrelevant to the type of low dose exposures in the case.¹⁴⁹

Additional trial courts around the country have found the theory to be, at best, a speculative hypothesis, lacking a scientific foundation and insufficient as either expert testimony or as causation evidence in asbestos cases.¹⁵⁰ Other courts have rejected the theory in the context of non-asbestos tort litigation.¹⁵¹ A few courts have permitted *any exposure* or similar testimony to suffice, but this typically only occurs by accepting the experts' testimony at face value and not investigating the cited literature and analysis relied on by the experts.¹⁵²

These cases demonstrate that the *any exposure* theory is failing in a multitude of diverse courts and across the spectrum of asbestos cases, regardless of disease and type of exposure. Courts are appreciating that the *any exposure* theory can be extremely unfair when applied to defendants with small exposures, especially when the plaintiffs' experts

¹⁴⁹ See *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552-53 (Ga. Ct. App. 2011).

¹⁵⁰ See, e.g., *In re W.R. Grace & Co.*, 355 B.R. 462, 490-91 (Bankr. D. Del. 2006); *Daly v. Arvinmeritor, Inc.*, No. 07-19211, 2009 WL 4662280, at *8 (Fla. Cir. Ct. Nov. 30, 2009); *Brooks v. Stone Architecture, P.A.*, 934 So. 2d 350, 355-56 (Miss. Ct. App. 2006); *Anderson v. Asbestos Corp., Ltd.*, No. 05-2-04551-5SEA, at 144-45 (Wash. Super. Ct. King County Oct. 31, 2006) (Erlick, J.) (transcript of bench ruling); *Free v. Ametek*, No. 07-2-04091-9-SEA (Wash. Super. Ct. King County Feb. 29, 2008) (Barnett, J.) (ruling on motion in limine).

¹⁵¹ See, e.g., *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676-77 (6th Cir. 2011); *Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 98 (4th Cir. 2011); *In re Denture Cream Prods. Liab. Litig. (Chapman v. Proctor & Gamble Distrib. LLC)*, 795 F. Supp. 2d 1345, 1349-50 (S.D. Fla. 2011); *Emerald Coast Utils. Auth. v. 3M Co.*, 746 F. Supp. 2d 1216, 1231-32 (N.D. Fla. 2010); *Newkirk v. Conagra Foods, Inc.*, 727 F. Supp. 2d 1006, 1014 (E.D. Wash. 2010); *Richardson v. Union Pac. R.R.*, No. CA 10-591, 2011 WL 4477791, at *19-22, *34 (Ark. Ct. App. 2011); *Parker v. Mobil Oil Corp.*, 857 N.E.2d 1114, 1119-20 (N.Y. 2006); *Blanchard v. Goodyear Tire & Rubber Co.*, 30 A.3d 1271, 1277-78 (Vt. 2011).

¹⁵² See, e.g., *In re Asbestos Prods. Liab. Litig. (No. VI) (Rabovsky v. Air & Liquid Sys. Corp.)*, No. 10-cv-03202, 2012 WL 252919, at *4 (E.D. Pa. Jan. 25, 2012); *In re Asbestos Prods. Liab. Litig. (No. VI) (Anderson v. Saberhagen Holdings, Inc.)*, No. 10-cv-61118, 2011 WL 605801, at *6-7 (E.D. Pa. Feb. 16, 2011); *In re Asbestos Prods. Liab. Litig. (No. VI) (Larson v. Bondex Int'l)*, No. 09-69123, 2010 WL 4676563, at *4 n.3 (E.D. Pa. Nov. 15, 2010) (citing *Schumacher v. Amtico*, No. 10-01627 (E.D. Pa. Nov. 2, 2010)); *Buttitta v. Allied Signal, Inc.*, 2010 WL 1427273, at *12-13 (N.J. Super. Ct. App. Div. 2010) (per curiam).

ignore more significant exposures that almost certainly cause disease.¹⁵³ The decisions also “reflect a proper assessment of the dose requirement of toxicology.”¹⁵⁴

E. The Role for Punitive Damages Has Passed in Asbestos Cases

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.¹⁵⁵ These are not normal civil damages; rather, they are awarded over and above compensatory damages. Punitive damages, therefore, provide a “windfall recovery” to the individual plaintiffs in the cases where awarded.¹⁵⁶

Earlier in the asbestos litigation, the manager of the federal asbestos multi-district litigation, United States District Court Judge Charles Weiner for the Eastern District of Pennsylvania, chose to sever and retain jurisdiction over punitive damages claims in cases sent out for trial.¹⁵⁷ Judge Weiner wanted to preserve assets for future plaintiffs rather than allow windfalls by earlier-filing plaintiffs to add to the pressure threatening the solvency of defendants.¹⁵⁸ That practice was affirmed and strongly supported by the Third Circuit Court of Appeals.¹⁵⁹ Forward-

¹⁵³ See Behrens & Anderson, *supra* note 140, at 508.

¹⁵⁴ *Id.* at 483.

¹⁵⁵ See Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 810 (1981).

¹⁵⁶ 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) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981)).

¹⁵⁷ See Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 RUTGERS J.L. & PUB. POL’Y 50, 52 (2010).

¹⁵⁸ See 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, 16 (2001) (discussing an administrative order designed “to give a priority to malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury.” (quoting Admin. Order No. 3 at 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. Sept. 8, 1992))).

¹⁵⁹ See *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000) (“An even more compelling reason to adopt the Panel’s interpretation is the public policy underlying the practice of severing punitive damages claims.”).

thinking judges in New York City and Philadelphia, among a few other jurisdictions, joined Judge Weiner.¹⁶⁰

“Continuing to award punitive damages in asbestos cases no longer makes sense.”¹⁶¹ First, as these wise judges appreciated, punitive damages “threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants.”¹⁶² Second, because most traditional asbestos companies have declared bankruptcy, the burden of paying punitive damages falls to the peripheral defendants who did not engage in conscious, flagrant wrongdoing.

We have reached a stage in asbestos litigation where the awarding of punitive damages is not only inappropriate but also detrimental in that such awards waste valuable resources that are needed to compensate seriously ill plaintiffs. There is only a *limited* amount of assets available for seriously injured victims of asbestos, and wasting those assets on punitive damages no longer serves a legitimate purpose in the asbestos litigation.

V. Conclusion

When my first “Letter” was written to asbestos trial judges in 2000 about how too much emphasis on efficiency could be adverse, there was a degree of optimism that calls for reform might be heard. Many judges responded positively to the message. The litigation is now refocused on claimants with legitimate illnesses. Now, however, the issues are whether the defendants being named are legitimate defendants and whether they are being asked to shoulder an appropriate burden for harms for which they, and not others, are responsible. The war is still being waged but the battlegrounds have shifted to new issues. It is imperative that the trial courts continue the progress of the past decade and work to solve the issues of today. The past shows this can be done.

¹⁶⁰ See Behrens & Silverman, *supra* note 157, at 54-56.

¹⁶¹ Rothstein, *supra* note 10, at 26.

¹⁶² *In re Collins*, 233 F.3d at 812 (quoting 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*, at 32 (Mar. 1991)).

Trial judges can help assure transparency between tort and asbestos bankruptcy trust systems to curb fraud and abuse. Plaintiffs who are remote from a place of exposure should not be extended a duty under tort law. Defendants who are peripheral and had little or no knowledge about asbestos or did not make the products that caused the plaintiff's harm should not be deemed responsible for what admittedly are often serious injuries. Real evidence of causation, not junk science, should be required. Finally, the time for punishing asbestos defendants with punitive damages is over; assets should be preserved to help compensate future claimants.

