

AMERICAN JOURNAL OF TRIAL ADVOCACY

VOLUME 24:2
FALL 2000

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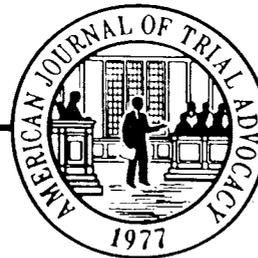
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A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases

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Abstract

In an Article framed as an open letter to federal and state trial judges, the authors argue that current attempts to expedite the number of asbestos case filings are having an interesting effect: the current methods are leading to an increase in the number of cases filed. The authors recommend that trial judges restore the rule of law in their courtrooms. Such a restoration, the authors argue, will lead to a truly more efficient handling of asbestos litigation.

Dear Trial Judges of America,

We write this letter as a result of many hours studying the current picture of asbestos litigation. We bring to our study considerable experience. One author has practiced in the area of liability law for over thirty years and is co-author of the nation's leading torts casebook; the other author has been an on-the-scene investigative reporter and is currently a practicing trial lawyer.

We begin our letter with the first surprise: Asbestos cases are not dwindling, they are mushrooming.

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Most people, including us, thought that asbestos liability cases were a relic of the 1980s, along with the Rubik's Cube. The truth is that asbestos lawsuits are booming. The number of pending cases doubled in the six years from 1993 to 1999, from 100,000 cases to more than 200,000 cases throughout the country.¹ From 1997 to 1999, new filings against individual defendants ranged from 20,000 to over 60,000 for individual defendants each year.² Consider the experience of just one company: By the time it filed for Chapter 11 protection in October 2000, Owens Corning had been the target of approximately 460,000 asbestos personal injury claims from the beginning of the litigation.³ Ironically, while this growth in lawsuits has continued, it is clear that the degree and severity of asbestos-related injuries alleged by those new claimants have precipitously declined. Fewer and fewer people have been exposed to significant levels of asbestos in the workplace. As a result of increased awareness of asbestos dangers, people have been warned and thus protected.

How does a trial judge make sense of this irony? The answer is based on plain common sense. As we will demonstrate, in the past ten years, the focus of many well-intentioned and hard-working trial judges has been

¹ See *Prepared Statement Concerning H.R. 1283, The Fairness in Asbestos Compensation Act: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at II.1. (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School) [hereinafter Prof. Edley Testimony]. This figure may be conservative. In their Form 10Q filings with the Securities and Exchange Commission for the third quarter of 1999, Armstrong World Industries reported 182,000 pending claims, GAF Corporation reported 114,000, USG Corporation reported 100,000, W.R. Grace & Co. reported 102,894, and Kaiser Aluminum reported 110,599. See H.R. REP. NO. 106-782, at 18 (2000) (citing SEC filings); see also Patricia G. Houser & David T. Austern, *Manville Personal Injury Settlement Trust*, Mealey's Asbestos Conference, at 416 (1999) (chart showing that 500,000 claims are estimated to be filed against Manville Personal Injury Settlement Trust over the next fifty years).

² See H.R. REP. NO. 106-782, at 18 (2000). Armstrong World Industries reported receiving 40,200 new claims for the first three quarters of 1999 and 71,000 claims for all of 1998. Kaiser Aluminum reported 29,700 new claims for the first three quarters of 1999 and 22,900 claims for 1998. GAF Corporation reported 42,200 new claims during the first three quarters of 1999, and W.R. Grace & Co. reported 20,629 new claims during that same period. See *id.* at 18-19 n.8.

³ See Joseph B. White & Jim VandeHei, *Owens Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims*, WALL ST. J., Oct. 6, 2000, at A3.

on promoting efficiency in asbestos cases—lowering the legal barriers and moving the cases along at all costs. The hope was that this process would ultimately make the cases disappear. Many trial judges believed, quite sincerely, that processing claims, rather than resolving disputes, was the only thing they could do. You, the trial judges, know that the Supreme Court of the United States, in *Amchem Products, Inc. v. Windsor*⁴ and *Ortiz v. Fibreboard Corp.*,⁵ made clear that Federal Rule of Civil Procedure 23 cannot be used to approve mass settlements in asbestos-related cases in the federal courts. Furthermore, a legislative alternative to address asbestos claims is unlikely. So, the resolution of this problem has been left to you, the trial judges of America. Your general approach to resolve the problem has been to do your best to “move these cases along” as fast as possible. Efficiency has been your primary, initial goal.

The main point of our letter is that your focus on efficiency, unfortunately, has thwarted your final goal: to bring the asbestos litigation mess to a conclusion. Instead of making cases go away, the focus on efficiency has had the opposite effect: it has invited more cases. The efficiency directive has understandably tempted members of the personal injury bar to bring more cases. Many of these asbestos cases would have been dismissed had they been treated as any other type of personal injury claim. But now, plaintiffs’ lawyers believe that they may have a shot with the weakest of cases. They know that they may have a chance against defendants that never made asbestos—so-called peripheral defendants. Some of these defendants are small companies, but others are large, multinational corporations—an attractive bait for potential, massive liability.

The “pile on” litigation situation is reflected in a thoughtful statement by the Honorable Conrad L. Mallett, Jr., former Chief Justice of the Supreme Court of Michigan. He observed:

Think about a country trial circuit judge who has dropped on her 5,000 asbestos cases all at the same time [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge’s first thought then is, “How do I handle these cases quickly and

⁴ 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

⁵ 527 U.S. 815, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999).

efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require that certain values be sacrificed.⁶

As one professor observed about the asbestos mess,

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.⁷

The push toward efficiency has encouraged the filing of baseless claims on behalf of unimpaired claimants. As a result, personal injury lawyers dump on courts lawsuits by people who are "*not sick*, using those who suffer from serious disease to inflate the value of those claims."⁸ Efficiency has become a false god that has made your job almost impossible. Importantly, the efficiency drive also has hurt people who are *seriously* ill; these folks may no longer receive either proper or timely compensation.

In our letter, we will try to show in more detail the unfortunate side effects caused by the drive toward efficiency. We also will suggest how to resolve your final goal: eliminating the asbestos mess in a way that is fair to injured claimants, defendants, and you, as trial judges.

I. Impact of the Focus on Efficiency

As we have briefly outlined, the focus on efficiency has been a magnet for new and unwarranted cases. The numbers are staggering. If these lawsuits were justified, and the claimants actually were injured, the net result might be overwhelming, but at least the results would be fair. This is not the case. The bulk of the new claims are filed by people who have

⁶ *The Fairness in Asbestos Compensation Act of 1999, Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999)* (statement of the Hon. Conrad L. Mallett, Jr.) [hereinafter Hon. Mallett Testimony].

⁷ Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

⁸ Prof. Edley Testimony, *supra* note 1, at II.7.

not been impaired by asbestos. The percentages of those who are unimpaired are major, as much as eighty percent by some estimates.⁹ If the sole focus on efficiency continues, the barrage of new cases will escalate.

A. Shoddy Practices

The focus on efficiency has led to shoddy practices by a few plaintiffs' lawyers. It has been documented in Texas that one plaintiffs' firm "prepared" clients for depositions through the use of a memo containing detailed lists of products that contained asbestos, along with descriptions of product packaging and a list of asbestos-related health symptoms that could enhance legal damages.¹⁰ "It is important to maintain," the memo said, "that you NEVER saw any labels on asbestos products that said WARNING or DANGER . . . Do NOT say you saw one brand more than another, or that one brand was more commonly used than another."¹¹ (A grand jury investigating allegations that the law firm may have coached clients to lie under oath ultimately took no action.¹²) The focus on finding new claimants has led plaintiffs' lawyers to travel in "examobiles" to union halls and into neighborhoods where poor working people reside.¹³

⁹ See *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st & 2d Sess. 77, 100 (Oct. 24, 1991) (testimony of Professor Lester Brickman) [hereinafter Prof. Brickman Testimony]; see also *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 748 (E.D. & S.D.N.Y. 1991) (Weinstein, J., concurring) (stating some plaintiffs' attorneys "have filed all of their cases without regard to the extent of injury"), *vacated*, 982 F.2d 721 (2d Cir. 1992), *op. modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); see *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 935 (showing "pleural" claims accounting for 54.4% of all claims involving the Manville Trust).

¹⁰ See Michael Saul, *Grand Jury Doesn't Act Against Law Firm That Had Been Accused of Coaching Clients*, DALLAS MORNING NEWS, July 17, 1998, at 22A.

¹¹ Holman W. Jenkins, Jr., *Business World: How About a Tony for Best Asbestos-Related Script?*, WALL ST. J., Oct. 7, 1997, at A23.

¹² See Saul, *supra* note 10, at 22A.

¹³ See Prof. Brickman Testimony, *supra* note 9 ("The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with the active assistance of local union officials.

The lawyers bring in people who conduct x-ray tests that are not objective. Such testing does not identify sick people. Rather, the testing is a search for "customers" to enroll in large bulk claims with the hope that their actual medical condition will never be examined or tested.

Shoddy practices embarrass our legal system. They are invited if overzealous personal injury lawyers believe that their claims can proceed without proper scrutiny.¹⁴

B. Paying Unimpaired People

No matter how much you (understandably) may hope that asbestos cases will finally go away, they will not. It is a mistake for our trial judges to allow cases to proceed with payments to unimpaired claimants.

Such payments can take place in a number of ways. First, when courts fail to require the use of objective tests to determine whether an individual is truly sick, courts encourage payments to unimpaired claimants. Courts have acknowledged the tendency of medical screeners to depart from accepted medical standards by diagnosing asbestos-related "injuries" that fail to meet minimum diagnostic criteria set by the American Thoracic

Often, mobile x-ray vans brought to plant sites are used for the screenings."); *see also In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 748 (working "[i]n conjunction with unions, [plaintiffs' lawyers] have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque"); *Eagle-Picher Indus. 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.").

¹⁴ Certain plaintiffs' counsel have candidly acknowledged that such practices have burdened the courts with unmeritorious claims. For example, Ron Motley said in the early 1990s that

[t]here are gross abuses of our system. We have lawyers who have absolutely no ethical concerns for their own clients that they represent—we have untrammelled screenings of marginally exposed people and the dumping of tens of thousands of cases in our court system, which is wrong [and] should be stopped.

Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819, 1889 n.58 (1992) (quoting Ronald L. Motley's remarks in *An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, Transcript of the Administrative Conference of the United States at 15 (Oct. 31, 1991)).

Society of the American Medical Association, which has no affiliation with or control by defendants.¹⁵ One federal district court judge studied the merits of asbestos claims by appointing his own medical experts to evaluate claimants in sixty-five pending cases.¹⁶ Although all the plaintiffs claimed some asbestos-related condition, the court-appointed experts found that, in fact, only fifteen percent had asbestosis, twenty percent had asymptomatic pleural plaques, and sixty-five percent had no asbestos-related conditions at all.¹⁷ In other words, "[t]he ordinary tort-law requirement that a claim be supported by an injury has been lost in asbestos. . . . Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured."¹⁸

Second, some courts allow payments to unimpaired claimants to take place when the courts change existing law and allow claims for "emotional harm," thereby raising the possibility that the truly sick will not be adequately compensated. The Supreme Court of the United States identified such a concern in *Metro-North Commuter Railroad Co. v. Buckley*,¹⁹ where the Court carefully examined both precedent and public

¹⁵ See, e.g., *Raymark Indus. v. Stemple*, No. 88-1014-K, 1990 WL 72588, at *2, *8, *18, *22 (D. Kan. May 30, 1990) (finding that medical screeners disregarded standards set by American Thoracic Society and reported that workers had asbestos-related "injuries" despite the fact their medical readings had no clinical significance, and stating that the screening program produced a "steady flow of faulty claims" and a "fraud on the court"); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1566 (D. Haw. 1990) (cases are often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude," rather than objectively observable clinical findings).

¹⁶ See Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37 (1991). Pleural plaques are areas of the membrane covering the lung and chest wall in which cell tissue is replaced by tougher tissue. Pleural plaques result from asbestos exposure "but do not affect lung functions and do not necessarily lead to asbestosis or increase the risk of cancer." *Id.*; see also *Jumbo Consolidations in Asbestos Litigation, Prepared Statement Concerning H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at I.B. (July 1, 1999) (statement of Prof. William N. Eskridge Jr., Yale Law School) [hereinafter Prof. Eskridge Testimony].

¹⁷ Rubin & Ringenbach, *supra* note 16, at 45.

¹⁸ REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION 2 (Feb. 15, 1999) (comments of John Aldock, Esq., participant in Dec. 8, 1998 Mass Torts Working Group Conference).

¹⁹ 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997).

policy. Under the (pro-plaintiff) Federal Employers' Liability Act, the Court decided that it was inappropriate, in the context of asbestos, to render awards for emotional harm and medical monitoring to people who had been substantially exposed to asbestos (this specifically applied to the so-called "snowmen" who worked fixing steampipes in the tunnels below Grand Central Station in New York City, but who were not sick).²⁰ The Court appreciated that rewarding those who were not ill would facilitate putting companies into bankruptcy: paying people who were not really injured at the expense of those who were harmed was not in the best interest of the public.²¹ As one knowledgeable observer concluded, "people who will discover severe injury in 2010 may not get any recovery at all, because uninjured and least-injured plaintiffs have killed the goose that laid them their golden eggs."²²

Third, payments to unimpaired individuals can take place when a court allows claims for medical monitoring, despite the lack of significant evidence, in terms of probability that the person will get sick in the future.²³ As one commentator has observed, "it is . . . difficult to quantify the amount of increased risk imposed on an individual who does not yet have a disease."²⁴ Further, it is "difficult to conceptualize what that risk is worth in money damages,"²⁵ especially where plaintiffs are being

²⁰ The Court rendered its decision in the context of the Federal Employers' Liability Act, but its reasoning would apply to all asbestos cases.

²¹ *Metro-North*, 521 U.S. at 442.

²² Prof. Eskridge Testimony, *supra* note 16, at 15; see also *Asbestos Compensation, The Fairness in Asbestos Compensation at a Hearing Before the House Committee on the Judiciary Concerning H.R. 1283*, 106th Cong., at I.B. (July 1, 1999) (prepared testimony of Paul R. Verkuil, Dean, Benjamin N. Cardozo School of Law/Yeshiva University) ("[D]isproportionate judgments overcompensate present plaintiffs at the cost of future ones who may be more deserving . . . the funds available for compensation are reduced in total; and bankruptcies of potential defendants become more prevalent, thereby delaying or even foreclosing future awards altogether.").

²³ See Victor E. Schwartz et al., *Medical Monitoring: Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1077 (1999).

²⁴ See *id.* at 1077 (citing Allen Kanner, *Medical Monitoring: State and Federal Perspectives*, in LITIG. 1988, at 549, 560 (PLI Litig. & Admin. Practice Course Handbook Series No. 363, 1988)).

²⁵ *Id.* (citing Kanner, *supra* note 24, at 549, 560).

compensated ““for injuries which have not yet occurred and which . . . probably never will.””²⁶

Finally, payments to the unimpaired can take place when trial courts actively participate in or encourage “block settlements,” where it is known that the majority of the claimants are not really injured but where courts allow plaintiffs’ counsel to pressure defendants to make payments for very questionable claims.²⁷ An extreme example of such a court-compelled settlement was in *Cosey v. E.D. Bullard Co.*,²⁸ a Mississippi state court case. Counsel joined almost 1000 plaintiffs nationwide in the original 1995 complaint in Jefferson County Circuit Court; by the end of 1998, the eighth amended complaint included 1738 plaintiffs.²⁹ In May 1998, a trial of twelve plaintiffs, including several with no demonstrable injury, resulted in a verdict of \$48.5 million in compensatory damages (with punitive damages to be decided separately).³⁰ The judge pressured the defendants to settle on draconian terms.³¹ According to sworn affidavits, the judge told the defendants that if they failed to settle, the judge would try the remaining 1700+ cases immediately, before the same jury, with an instruction to find the defendants liable.³² Counsel for the defendants allegedly said the plan sounded “like this side of hell,” to which the judge

²⁶ Carey C. Jordan, *Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?*, 33 HOUS. L. REV. 473, 487 (1996) (quoting *Potter v. Firestone Tire & Rubber Co.*, 274 Cal. Rptr. 885, 896 (Ct. App. 1990), *rev'd*, 863 P.2d 795 (Cal. 1995)).

²⁷ See, e.g., Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1858 (1997) (“[P]laintiffs’ attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements. Then these plaintiffs’ attorneys can get money for themselves and their clients before all available funds disappear.”); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521 (1994) (“Often the pressure for block settlements comes from plaintiffs’ attorneys who hope to get something for a large mass of questionable cases. Some attorneys . . . will take almost any case without regard to its merit, hoping for a global settlement.” (footnote omitted)).

²⁸ Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995).

²⁹ See Prof. Eskridge Testimony, *supra* note 16, at I.B.

³⁰ See *id.* (citing defense motion for recusal of trial judge, accompanying affidavits, and attempted appeal to Mississippi Supreme Court).

³¹ See *id.*

³² See *id.*

replied, "No counselor, that is hell."³³ Efforts to secure the judge's recusal were rebuffed with threats of discipline against the defense attorneys.³⁴ The cases were settled.³⁵

The victims of the practice of paying unimpaired people are not only the trial judges with their flooded dockets composed of tenuous claims, but seriously injured people whose cases are substantially delayed or devalued as a result of cases brought on behalf of people who are not sick.

II. Trespasses on the Rule of Law

Unfortunately, the goal of efficiency has led some judges to trespass on the rule of law and upon fundamental legal principles. Such trespasses have occurred in a number of ways and should come to an end.

A. False Consolidation of Cases

A few trial judges, who are attempting to reduce their burgeoning asbestos dockets, have approved, and even encouraged, the joinder of cases that should not be joined—literally, "gold" and "fool's gold" cases are joined.³⁶ People who have serious illnesses, such as mesothelioma

³³ See *id.* (citing Affidavit of Daniel P. Myer, ¶¶ 17-11 (attached to defendants' recusal motion)).

³⁴ See Prof. Eskridge Testimony, *supra* note 16, at I.B.

³⁵ See *id.*

³⁶ See, e.g., *id.* Professor Eskridge described the "jumbo consolidation" model of asbestos litigation that has emerged during the past fifteen years as characterized by: hundreds or thousands of plaintiffs and dozens or hundreds of defendants consolidated in one proceeding; plaintiffs with widely disparate exposure and injury allegations, most of them asymptomatic; aggressive, settlement-minded judges; trial phasing; settlements and jumbo verdicts. See *id.* He further explained that

[t]he most obvious beneficiaries of the jumbo consolidation . . . are . . . plaintiffs with pleural thickening, many and perhaps most of whom will never develop asbestosis, cancer, or mesothelioma (the *least-injured* plaintiffs) yet recover verdicts of \$1 million or more; and . . . plaintiffs who have either pleural plaques or no medically discernible effect of asbestos exposure (the *uninjured* plaintiffs) yet who are included in [jumbo consolidation] [c]ases and receive large awards.

Id.

or lung cancer, are lumped into litigation with persons who have nothing wrong with them under *any* reasonable medical criteria.³⁷

In other cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries.³⁸ For example, personal injury lawyers attempted to do just that in so-called repetitive stress injury cases. People who were allegedly injured at check-out counters, computer terminals or meat processing plants suffer distinct injuries, even though the term "repetitive stress injuries" could be used to cover all of them. Federal courts unanimously rejected such consolidation even for purposes of discovery and pre-trial handling.³⁹ Judges adhered to the rule of law in repetitive stress injury cases. They should in asbestos cases as well.

³⁷ See, e.g., *Slafka v. Owens-Corning Fiberglas Corp.*, No. 26,213 (Milam County, Tex.) (consolidated trial plaintiffs suffered from wide range of illnesses—three alleged the fatal disease of mesothelioma, two alleged asbestos-related pleural disease, two alleged asbestosis, and one did not disclose any diagnosis).

Examples of jumbo consolidation cases include the Massachusetts Mass Joinder Cases, *Abdullah v. ACandS, Inc.*, 30 F.3d 264 (1st Cir. 1994) (cases were subsequently settled due to lack of product identification); the putative Ohio class action, *In re Allied-Signal, Inc.*, 915 F.2d 190 (6th Cir. 1990); the Brooklyn Navy Yard Cases, *In re New York City Asbestos Litig.*, 142 F.R.D. 60 (E.D. & S.D.N.Y. 1992) (federal) and 572 N.Y.S.2d 1006 (Sup. Ct. 1991) (state); the New York Powerhouse Cases, *In re New York City Asbestos Litig.*, 142 F.R.D. 60, 64-67 (E.D. & S.D.N.Y. 1992); the Baltimore City Cases, *ACandS, Inc. v. Godwin*, 667 A.2d 116 (Md. 1995); *ACandS, Inc. v. Abate*, 710 A.2d 944 (Md. Ct. Spec. App. 1998), *cert. denied sub nom. Crane v. Abate*, 713 A.2d 979 (Md. 1998), *cert. denied sub nom. John Crane Inc. v. Abate*, 525 U.S. 1171 (1999); the Mississippi Nationwide Joinder Cases, *In re Amchem Prods., Inc.*, No. 1990-M-01383 (Miss. Sept. 29, 1998); the Kanawha County Premises Liability Cases, *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996); the Monongalia County Mon-Mass II Consolidated Cases, (W. Va. Cir. Ct. Jan. 1996).

³⁸ See *Carter v. Artaz*, 1998 WL 782022, at *4 (S.D.N.Y. Nov. 6, 1998); *Foster v. All-Pro Elec., Inc.*, 2000 WL 350467, at *3 (Conn. Super. Ct. Mar. 22, 2000); *Aikman v. Atex, Inc.*, 637 N.Y.S.2d 123, 224 A.D.2d 180 (App. Div. 1996).

³⁹ See, e.g., *Repetitive Stress Injury Prods. Liab. Litig.*, 1992 WL 403023, at *1 (J.P.M.L. Nov. 27, 1992) (Judicial Panel on Multidistrict Litigation declining transfer and consolidation of multiple federal cases, stating: "[W]e are not persuaded . . . that the degree of common questions of fact among these actions rises to the level that transfer under Section 1407 would best serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of this entire litigation.").

B. Improper Discovery Procedures

Basic discovery is a right. Defendants are entitled to find out what the plaintiff's illness is, whether the illness is genuine, how the illness arose, and how serious the illness is or might become. Denying basic discovery rights simply to "move along cases" is a serious trespass on the rule of law. The end result not only denies basic justice to defendants, but the result also encourages plaintiffs' lawyers to bring more and more bogus cases.

C. Pseudo Science

The Supreme Court, in *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*⁴⁰ and *Kumho Tire Co. v. Carmichael*,⁴¹ has given an unequivocal message to federal judges that they must act as gatekeepers against unwarranted and baseless scientific evidence, sometimes called "junk science." There is no exception for asbestos cases or for determining whether exposure to a particular substance causes an illness; courts must apply their gatekeeping function to scientific evidence in asbestos cases. In fact, the legitimacy of expert testimony suggesting a cause of an illness was at the heart of the *Daubert* case. Exposure to asbestos can undoubtedly cause very serious illnesses: over time, mesothelioma has been almost exclusively identified with asbestos exposure.⁴² On the other hand, lung cancer and other diseases sometimes associated with asbestos exposure all have a wide variety of causes.⁴³ If a plaintiff claims that a particular substance caused his cancer, real science should link that person's illness with that substance and the defendant's conduct. Never-

⁴⁰ 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

⁴¹ 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

⁴² Recently some scientists have questioned whether Simian Virus 40 (a virus apparently contained in certain polio vaccines given to individuals in the 1950s) is a contributing factor in the development of mesothelioma.

⁴³ See *The Fairness in Asbestos Compensation Act of 1999, Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (written testimony in support of H.R. 1283, Alex G. Little, M.D., Past President of the American College of Chest Physicians) (mesothelioma "is usually associated with a history of asbestos exposure," whereas "lung cancer has several known causes" and "[c]onsiderable evidence exists that . . . 'other' cancers in fact are not caused by asbestos").

theless, pseudo science or junk science has been used in asbestos cases to suggest that people are ill when they are perfectly healthy. By itself, the tolerance of junk science can bring an avalanche of new claims that are unjustified and baseless. Additionally, it can push legitimate claims to the rear of the line and burden an already overwhelmed docket.

D. Skipping or Not Properly Evaluating Identification of Defendants

A few jurisdictions have abandoned the requirement that a plaintiff identify a specific defendant that caused his injury. In situations when that requirement has been abandoned, however, the cancer-causing products usually involved the pharmaceutical DES, a substance that is absolutely fungible, identical in content and amount.⁴⁴ In this highly confined exception to the general rule, plaintiffs have been unable to determine the manufacturer of the product that allegedly caused them harm. In asbestos cases, however, the product is absolutely not fungible in either content or amount. Equally important in asbestos cases is the fact that plaintiffs have been able to use employment records to identify the products to which they may have been exposed. There is no need to abandon the principle that a plaintiff must show that his injury was caused by a particular defendant's conduct. Additionally, it is important for you, our trial judges, to assure that the plaintiff's identification is grounded in facts, not speculation. If plaintiffs are permitted to make blatantly false identifications, that conduct will continue to encourage fraudulent practices and bogus cases.

E. Failure to Use Summary Judgment and Motions to Dismiss

Summary judgments and motions to dismiss are fundamental tools to protect the integrity of our justice system: primarily they weed out

⁴⁴ See, e.g., *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 145, 607 P.2d 924, 937 (1980) (holding it is reasonable that liability can be apportioned among DES manufacturers according to market share, because DES was absolutely fungible).

baseless and frivolous law suits. Summary judgments and motions to dismiss are used every day in automobile, drug, chemical, and even controversial tobacco cases. In the area of asbestos litigation, the recognition of summary judgments and motions to dismiss has been abandoned by many trial judges. Some trial judges have assumed that if asbestos is mentioned in a complaint, the case is valid. To a great extent this assumption was true with the asbestos cases filed two decades ago; many of the plaintiffs were very sick. Currently, however, the assumption no longer holds true. If the word "asbestos" is used in a complaint, it does not mean serious injury occurred or that there is reliable evidence that the defendant's conduct caused any injury. Accordingly, judges need to restore the recognition of summary judgments and motions to dismiss in asbestos cases. We understand that addressing such motions in hundreds of individual cases is in itself very time-consuming. The effort, however, is worth it. That effort will cut weeds from dockets and not encourage them to grow back.

F. Penalizing Defendants Who Try to Enforce Their Legal Rights

Perhaps the most egregious practice that has arisen in asbestos cases is one that discourages defendants from exercising their legal rights. If asbestos defendants make motions to dismiss or move for summary judgment, they may be singled out and penalized by plaintiffs' lawyers. This penalty, in a form of "legal revenge," involves plaintiff's lawyers thrusting thousands of new cases upon the clients of the "offending" defendant's attorney. Defense counsel suffers a similar revenge if the defense counsel insists that the plaintiffs rely on good science—a right guaranteed to defendants in most jurisdictions. Also, if defendants utilize discovery procedures that are proper, or they move to break up joinder of cases that are dissimilar, they may be punished.⁴⁵

Only the nation's judiciary—you, our trial judges—can stop the practice of retaliation against asbestos defendants who seek to exercise their basic

⁴⁵ See, e.g., text accompanying *supra* notes 28-35 (discussing *Cosey v. E.D. Bullard Co.*, Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995)).

legal rights. Each of you can and should discourage the "legal extortion" mentioned above. Defendants should be *encouraged* to exercise their legitimate rights. Trial judges should stand guard, speak out, and act against plaintiffs' lawyers who use "case dumping" to prevent defendants from exercising fundamental and legitimate rights at trial.

G. The Dwindling Supply of Defendants

When asbestos litigation began, the principal defendants were companies that manufactured asbestos for use in various products or applications. The core of the allegations was that those defendants knew asbestos could create an exposure to workers that presented a significant risk of serious disease and that the defendants failed to warn about the dangers asbestos presents. In numerous cases, those defendants paid dearly with substantial punitive damage awards. Many of those cases were styled as "good triumphing over evil"; the "evil" alleged was so reprehensible that courts bent the rule of law in numerous ways to allow liability against these unpopular defendants and the principle of "equal justice for all" fell by the wayside.

As a result of the court's acquiescence, at least twenty-five defendants went into bankruptcy.⁴⁶ One recent example is Owens-Corning Fiberglass, which was the target of asbestos litigation stemming from its production of a high-temperature pipe insulation known as Kaylo.⁴⁷ Owens-Corning Fiberglass sought to manage its asbestos claims in several ways: first, through individual, out-of-court settlements; second, by seeking judicial and legislative relief; and finally, through an innovative program called the National Settlement Program (NSP). NSP was a "private settlement" under which the company agreed to pay \$2.4 billion for asbestos-related claims over five years.⁴⁸ Ultimately, however, Owens-Corning Fiberglass sought Chapter 11 protection.⁴⁹ "[T]he cost

⁴⁶ See Prof. Edley Testimony, *supra* note 1, at II.4. & n.23; see also H.R. Rep. No. 106-782, *supra* note 1, at 19.

⁴⁷ See *Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability*, PR Newswire, Oct. 5, 2000 [hereinafter *Chapter 11 Petition*]; see also White & VandeHei, *supra* note 3, at A3.

⁴⁸ *Chapter 11 Petition*, *supra* note 47.

⁴⁹ See *id.*

of resolving current and future claims, together with a flurry of recent new filings from plaintiff lawyers not participating in the NSP, led us to the conclusion that a Chapter 11 reorganization was prudent and necessary," said Glen H. Hiner, the company's chairman and chief executive officer.⁵⁰ The company raised approximately \$135 million in total revenues from the sale of the Kaylo product.⁵¹ As of October 2000, the company had paid or agreed to pay more than \$5 billion for asbestos-related awards and settlements, legal expenses, and claims-processing fees.⁵²

Other prominent defendants recently sought bankruptcy court protection. In January 2001, G-I Holdings, Inc., formerly GAF Corp., sought protection under Chapter 11 after paying \$1.5 billion to settle more than 500,000 asbestos claims.⁵³ Armstrong World Industries filed for Chapter 11 protection in December 2000 as a result of suits mainly stemming from its installation of another manufacturer's product between 1939 and 1969.⁵⁴

Now, with the initial defendants (the actual producers of asbestos) no longer viable, a new series of peripheral defendants have been drawn into asbestos litigation.⁵⁵ One plaintiffs' lawyer described the process this way: "You have to look under every stone. . . . The deeper you dig into the industry, the more you find."⁵⁶ The new defendants are diverse; they range from oil companies, to automobile manufacturers, to hospitals and

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Queena Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12.

⁵⁴ Queena Sook Kim, *Armstrong Holdings Unit Files Under Chapter 11*, WALL ST. J., Dec. 7, 2000, at A4.

⁵⁵ See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48 (Weinstein, J., concurring) (stating that "[a] newer generation of peripheral defendants are becoming ensnared in the litigation" as plaintiffs' lawyers seek "to expand the number of those with assets available to pay for asbestos injuries"—even though "[t]he extent of liability, possible defenses and value of the claims against these new defendants is unknown").

⁵⁶ Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1 (quoting New York attorney James Early, whose firm specializes in asbestos litigation).

colleges, to small family-run businesses, but they all have only attenuated connections to asbestos.⁵⁷

Issues relating to what these peripheral defendants knew about asbestos dangers, what they could have done to prevent injury, and the extent of their responsibility, are very different than the cases involving those who produced asbestos-containing products. The peripheral defendants have roles that often are marginal at best. One striking example was recently provided in a case where a jury awarded \$1.5 million to a New York man who said asbestos-containing products he purchased *fifty years ago* at Sears caused his cancer.⁵⁸ The very presence of such peripheral defendants in the litigation demands the restoration of the rule of law in asbestos litigation.

Failure to follow the rule of law with a peripheral defendant creates real injustice. For example, Babcock & Wilcox Company, a long-standing member of corporate America, associated for almost one hundred years with the manufacture of custom-built boilers, is now seeking protection under the Bankruptcy Code because of asbestos litigation.⁵⁹ That company did not produce asbestos and had no specialized knowledge concerning asbestos hazards. Asbestos insulation was incorporated into the company's boiler systems to protect workers and equipment from the high temperatures generated in the boilers and to assure the thermal efficiency of the boiler systems. The company purchased the asbestos from various asbestos manufacturers and installed it during construction.

The plaintiffs who sued Babcock & Wilcox claimed to have come in contact with its boiler systems.⁶⁰ Beginning in the 1980s, the company developed a broad settlement program, opting to negotiate modest settlements for claims meeting certain minimum criteria, thus reducing

⁵⁷ See *id.*; see also Prof. Edley Testimony, *supra* note 1, at II.5.

⁵⁸ See *N.Y. Jury Finds Sears/GE Liable for Exposure; Awards \$1.5 Million to Meso Victim*, MEALEY'S LITIG. REP.: ASBESTOS, Oct. 6, 2000. Sears noted that on the jury's verdict form the jury found that Sears held two percent of the responsibility for the man's illness, and the jury also found that the remaining ninety-eight percent of the responsibility was attributable to the company that supplied asbestos-coated electrical wiring to the man's employer. See *id.*

⁵⁹ *Babcock & Wilcox Begins Bankruptcy Notification, Claims Processing*, 15 No. 21 MEALEY'S LITIG. REP. ASBESTOS 10 (Dec. 1, 2000).

⁶⁰ *Id.*

cost and delay in compensating claimants. Because of the domino effect of the failure to institute the rules of law, Babcock & Wilcox's modest settlements were forced to become larger and larger until the volume of cases eliminated the company.⁶¹ Babcock & Wilcox's experience is a harbinger of the future—unless the rule of law is restored.

Not all peripheral defendants are large companies. The Carborundum Corporation, which manufactures grinding wheels, found itself hit with a \$115 million verdict in one case.⁶² The plaintiffs claimed that their exposure to a grinding wheel that contained asbestos caused an illness that was "asymptomatic." The plaintiffs did not claim to have developed the usual asbestos-related diseases, mesothelioma or cancer, and Carborundum did not produce asbestos, the product primarily involved in the initial asbestos litigations. Prior to this case, no grinding wheel manufacturer had been held liable for an asbestos-related injury. The result shows what can and will occur when the rule of law is not followed.

In another example, Allwood Door Co., a small San Francisco business that sells wooden doors, became the target of lawsuits by construction workers because it sold fire-barrier doors made by another company in the 1960s and 1970s.⁶³ Unbeknownst to Allwood's president, the wood-sheathed doors allegedly "contained asbestos in mineral core."⁶⁴ The avalanche of claims against these smaller peripheral defendants is just beginning.

H. Super Strict Liability for All Asbestos Defendants

Perhaps the treatment of asbestos as being somehow "different" began when the New Jersey Supreme Court altered fundamental products

⁶¹ *Id.* The company filed for protection under Chapter 11 after it already had settled 340,000 claims at a cost of \$1.6 billion and had become unable to see any resolution. *Id.* Babcock & Wilcox's Informational Brief in the U.S. Bankruptcy Court for the Eastern District of Louisiana filed on February 22, 2000, provides a chilling example of what can happen to peripheral defendants.

⁶² See, e.g., *Houston Attorneys Win Unprecedented \$115 Million Verdict: Court Wins Nation's First Against a Grinding Wheel Manufacturer*, *Business Wire*, Feb. 23, 1998.

⁶³ See Warren, *supra* note 56.

⁶⁴ See *id.*

liability law and imposed super strict liability on the defendant in an asbestos case for failure to warn. In *Beshada v. Johns-Mansville Products Corp.*,⁶⁵ the New Jersey court made clear that the defendant would be subject to liability even if it did not know or could not have known of an asbestos risk. This decision was replicated by the Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.*⁶⁶ Some commentators view these cases as being motivated by the need to expedite asbestos litigation, achieved by depriving asbestos manufacturers of defenses that were available to manufacturers of other products.⁶⁷ The clarity of this distinction was made manifest in New Jersey. When the New Jersey Supreme Court considered a case involving pharmaceutical products, the court declined to apply super strict liability and said the defendant could avail itself of a negligence-based defense.⁶⁸ The same occurred in

⁶⁵ 90 N.J. 191, 208, 447 A.2d 539, 549 (1982) (holding that asbestos defendants in strict liability case cannot assert "state of the art" defense to failure to warn claims).

⁶⁶ 484 So. 2d 110, 113-14 (La. 1986) (ruling on certified question in 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).

⁶⁷ See, e.g., Andrew T. Berry, *Beshada v. Johns-Manville Products Corp.: Revolution—or Aberration—in Products Liability Law*, 52 FORDHAM L. REV. 786, 791 (1984) (noting that "*Beshada* is understood best not as a products liability case, but as an asbestos case" due to the elephantine size of asbestos docket); cf. *Beshada*, 447 A.2d at 548 ("Proof of what could have been known will inevitably be complicated, costly, confusing and time-consuming. . . . We doubt that juries will be capable of even understanding the concept of scientific knowability, much less be able to resolve such a complex issue."); M. Stuart Madden, *Strict Products Liability Under Restatement (Second) of Torts § 402A: "Don't Throw the Baby Out with the Bathwater"*, 10 Touro L. REV. 123, 143 (1993) (stating that the *Beshada* court emphasized "that true strict products liability would work economies in the fact-finding process by avoiding laborious mini-trials on the issues of what the manufacturer knew and when the manufacturer learned of it"); Joseph Sanders, *Scientific Validity, Admissibility, and Mass Torts After Daubert*, 78 MINN. L. REV. 1387, 1430-31 & n.234 (1994) (noting that mass tort cases "have placed enormous pressures on the judicial process and judges have reacted by seeking out new, efficient ways to dispose of them" and citing *Beshada*'s rejection of the state-of-the-art approach as one "successful" tactic for enhancing efficiency in asbestos litigation).

⁶⁸ See *Feldman v. Lederle Labs.*, 97 N.J. 429, 434, 479 A.2d 374, 376 (1984) (limiting *Beshada* to asbestos cases and holding that "drug manufacturers have a duty to warn of dangers of which they know or should have known on the basis of reasonably obtainable or available knowledge").

Louisiana in a case involving an escalator incident.⁶⁹ The legislatures in New Jersey and Louisiana sought to end this invidious distinction and put in place statutes to restore fault-based principles for failure to warn and design cases.⁷⁰

Modern products liability law applies fault-based principles to defendants in failure to warn and design cases and makes no distinction as to asbestos.⁷¹ Nevertheless, traces of *Beshada* are occasionally found in the law.⁷² There may be additional situations where trial courts fail to recognize that asbestos defendants have the right to defend on the basis that they neither knew nor could have known about asbestos-related risks. Such defenses are particularly important for peripheral defendants, who may not have known about the risk to the extent that the manufacturer of the asbestos-containing products knew or should have known about it.

Just as modern products liability defense principles apply to asbestos manufacturers, modern defense principles should also apply to peripheral defendants that are not product manufacturers for the purposes of products liability law. Modern products liability principles dictate that judgments about such peripheral defendants should fall under the same standards

⁶⁹ See *Brown v. Sears, Roebuck & Co.*, 514 So. 2d 439, 444 (La. 1987) (stating that "Louisiana imposes strict tort liability on the manufacturer of the defective product if the injury might reasonably have been anticipated") (citing *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987); *Weber v. Fidelity Cas. Ins. Co. of N.Y.*, 259 La. 599, 205 So. 2d 754 (1971)).

⁷⁰ See LA. REV. STAT. ANN. § 9:2800.59(1) (West 1997) ("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 the 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 2000) (providing that "state of the art" is an absolute defense in products liability actions).

⁷¹ See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), (c) (1997).

⁷² See, e.g., *In re Hawaii Fed. Asbestos Cases*, 665 F. Supp. 1454, 1460 (D. Haw. 1986) (state-of-the-art evidence is irrelevant in design defect and failure-to-warn cases); *Johnson v. Raybestos-Manhattan, Inc.*, 69 Haw. 287, 289, 740 P.2d 548, 550 (Haw. 1987) (an asbestos defendant's knowledge of its dangers is irrelevant in a strict products liability action and state-of-the-art evidence is inadmissible); *Elmore v. Owens-Illinois, Inc.*, 673 S.W.2d 434, 438 (Mo. 1984) (the trial court properly denied the use of state-of-the-art evidence in an asbestos case).

as those for providers of services: whether the defendant acted as a reasonable service provider would have acted in the same or similar circumstances.⁷³ Products liability law centers on two main distinctions between sales of products and services. Products liability principles relating to design and warnings are irrelevant when related to mere service providers, and service providers cannot spread their risk of loss through mass production and distribution activities, as product manufacturers do.⁷⁴ Because many peripheral defendants in asbestos litigation are merely service providers, courts should apply the appropriate standard to the peripheral defendants.

III. Restoring the Rule of Law Is Helpful To You

Mr. or Ms. Trial Judge, only you can restore the rule of law in asbestos cases. Only you have the power to assure fairness to injured people and peripheral defendants who have now come under the asbestos claim net. Congress is unlikely to do it, the Supreme Court of the United States has been unwilling to do it, and appellate courts are limited in what they can do—it is up to you!

⁷³ See, e.g., *Pierson v. Sharp Mem'l Hosp., Inc.*, 216 Cal. App. 3d 340, 345, 264 Cal. Rptr. 673 (Ct. App. 1989) (noting that "the law reasonably imposes only a standard of negligence rather than strict liability in the provision of human services"). Like service providers, peripheral defendants in asbestos cases who are not product manufacturers have only incidental involvement with the allegedly defective product; they are not in the business of acting as "suppliers" of that product to plaintiffs for purposes of products liability law. See *San Diego Hosp. Ass'n v. Superior Ct.*, 30 Cal. App. 4th 8, 16, 35 Cal. Rptr. 2d 489 (Ct. App. 1994) (stating, "[r]ather than being a supplier or an entity that places a product in 'the stream of commerce,' . . . the fact the hospital provides [defective] equipment for the physician's use is incidental to the overriding purpose of providing medical services") (citing *Murphy v. E.R. Squib & Sons, Inc.*, 40 Cal. 3d 672, 679, 710 P.2d 247, 252, 221 Cal. Rptr. 447, 452 (1985); *Silverhart v. Mt. Zion Hosp.*, 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187, 192 (Ct. App. 1971)).

⁷⁴ See, e.g., *In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 548, 503 S.E.2d 445, 449 (1998) (explaining that the "economic theories [which] underlie the imposition of strict liability upon makers and sellers of products . . . (e.g., spreading the risk, redistribution of wealth, and problems of proof and deterrence) . . . do not justify the extension of strict liability to service providers") (quoting *Ayyash v. Henry Ford Health Sys.*, 210 Mich. App. 142, 145, 533 N.W.2d 353, 355 (Ct. App. 1995)).

Restoration of the rule of law will not bring about more cases or delay your docket. To the contrary, if the rule of law is restored, cases that are baseless will disappear while legitimate cases will be settled more quickly and for a fair amount. Restoration of the rule of law will take courage. Here is how it can be done.

A. Stop Dragnet Joinders

Put an end to the grouping together of thousands of cases that are not alike; principally, by refusing to join cases brought by a few seriously ill plaintiffs with cases brought by persons who are not ill. Joinders of this type deprive those who are seriously ill of quick and adequate compensation. Those who are currently unimpaired obtain a windfall benefit at the expense of those who are seriously injured.⁷⁵ Claimants need to segregate their cases according to the seriousness of their illnesses. Seriously ill plaintiffs should be separated and treated as individuals. Joinder of factually unrelated claims is clearly inappropriate under Federal Rule of Civil Procedure 20 and analogous state rules. Factually unrelated claims are those plaintiffs' claims that do not arise under any common transaction or occurrence or series of transactions or occurrences, or raise issues of fact or law common to all plaintiffs or all defendants.⁷⁶

Some solutions already exist, as some courts have adopted mechanisms for separating out claims by individuals who are not sick. For example,

⁷⁵ Professor Edley explained:

It is all but certain . . . that impaired victims receive proportionately less of the settlement sum than they would from a tort award based on individualized adjudication. . . . [L]oading a large number of claims together produces a bet-the-company risk for the defendants, making settlement more likely. In the settlement, then, the higher potential jury-award value of the impaired claims is spread, at least partially, to the unimpaired. The arithmetic is straightforward: the unimpaired and the attorneys who receive contingent fees benefit at the expense of impaired victims.

Prof. Edley Testimony, *supra* note 1, at II.7.

⁷⁶ See FED. R. CIV. P. 20; Hon. Mallett Testimony, *supra* note 6 (discussing the harmful effects of consolidation in the context of a Mississippi asbestos case ultimately involving more than 1,700 plaintiffs and 178 defendants); *cf.* *Cosey v. E.D. Bullard Co.*, Civ. No. 95-0069 (Miss. Cir. Ct. Jefferson County 1995) (alleging exposure to silica and asbestos at one or more of more than 300 work sites both in and out of Mississippi over a fifty-six-year period).

in Massachusetts, the judges have an inactive docket, which provides a way for plaintiffs with asbestos-related pleural diseases to toll the statute of limitations until such time that they develop asbestosis or some type of malignancy.⁷⁷ Cases on the inactive dockets are exempt from discovery and can only be removed to the active docket by filing a subsequent complaint. Some courts in Maryland use a similar inactive docket approach. Although clearly not ideal, inactive dockets can offer a practical solution.

B. Apply Sound Medical Criteria

Objective medical criteria, developed by third parties with no interest in the asbestos litigation, should be utilized. For example, the American Thoracic Society of the American Medical Association, which has no affiliation or control by defendants, indicates that a person is only impaired if there is a 1/1 profusion of irregular opacities on a patient's x-ray.⁷⁸ Use of these criteria will give clear preference to claimants whose cases need to be heard. It also will discourage lawyers from bringing baseless claims. In Pennsylvania, for example, where large numbers of claimants might be expected due to the state's industry and shipyards, courts applying sound medical criteria focus the litigation on those who are really sick. It has worked.

C. Require Plaintiffs to Adequately Identify Defendants

There is nothing more unfair than holding people legally responsible for something they did not do. This is as true in civil cases as in criminal cases.⁷⁹ Courts should require objective proof that a particular plaintiff

⁷⁷ Hon. Helen E. Freeman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 *TOURO L. REV.* 685, 697 (1999).

⁷⁸ Richard A. Solomon, *Clearing the Air: Resolving the Asbestos Personal Injury Litigation Crisis*, 2 *FORDHAM ENVTL. L. REP.* 125, 138 (1991).

⁷⁹ "[I]mposition of liability without regard to individualized fault is often unfair to certain defendants, and inconsistent with a basic underlying notion of the tort system: that only one who is responsible for causing particular and identifiable harm should be held liable for civil damages." Victor E. Schwartz & Liberty Mahshigian, *Failure to*

was harmed by a product made or marketed by a specific defendant.⁸⁰ The use of alternative liability theories that do not require proof of individualized fault, such as market-share liability, encourages plaintiffs to perjure themselves by concealing evidence as to the identity of the manufacturers responsible for their injuries, especially where many companies that produced asbestos-containing products have gone out of business or are judgment-proof.⁸¹ Courts should not permit plaintiffs to file and process their claims unless they can adequately identify the proper defendants.

D. Be a Responsible Gatekeeper

The Supreme Court of the United States has stated clearly and unequivocally that federal judges should act as gatekeepers and guard against junk science.⁸² That rule of evidence does not apply automatically to state judges, but the rules of evidence in most states are virtually identical to those that apply in federal courts. Opening courts to junk science or rejecting the gatekeeper role in asbestos cases encourages baseless cases to rush into your court. Conversely, the application of stringent judicial gatekeeping can weed out "weak and frivolous claims," and, as a result, "even a mass tort like asbestos could be managed . . . in a way that avoids judicial meltdown."⁸³ *Daubert* and its progeny are not harsh or artificial rules of law. They are based on the simple principles that good science should be respected, and opinions with no objective basis should be rejected.

State judges who refuse to act as gatekeepers encourage the use of forum shopping. If a plaintiff has a *questionable* expert, and the state

Identify the Defendant in Tort Law: Towards a Legislative Solution, 73 CAL. L. REV. 941, 942 (1985) (citing J. FLEMING, *THE LAW OF TORTS* 179-81 (6th ed. 1983); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 103, at 713-14 (5th ed. 1984)).

⁸⁰ See generally Schwartz & Mahshigian, *supra* note 79.

⁸¹ See, e.g., Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 676 (1981).

⁸² See *Daubert v. Merrill-Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); FED. R. EVID. 702.

⁸³ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747 n.24 (5th Cir. 1996).

court will allow the expert to testify but the federal court will not, the plaintiff's lawyer will do *everything* in his power to oust the federal court of jurisdiction. State judges need to guard against unwarranted forum shopping. This would include requiring that claimants have a real, and not a tenuous connection to the jurisdiction. The vanguard of such forum shopping, unfortunately, has been asbestos. You have an opportunity to bring this to an end.⁸⁴

E. Permit Proper Discovery

Discovery can be endless and unwarranted, but severely limiting discovery in asbestos cases allows plaintiffs' counsel to bring claims for people who are not sick and encourages plaintiff "recruitment" of the worst sort. Some discovery can help segregate the real from the surreal, especially if the judge adopts the gatekeeper role. Persons who are truly sick will not be disadvantaged; in fact, their claims will proceed more quickly and the settlement value of their claims will be adequate for their needs.

Conclusion

Mr. and Ms. Trial Judge of America, you have been patient with us. We thank you for reading our letter. We appreciate the weight of the burdens placed upon you as you follow the suggestions we have made. We strongly believe, however, that the results will enable you to keep the pledge you uttered when you agreed to take on the burdens of the bench: provide equal *justice* under the law.

Both defendants and plaintiffs have pushed efficiency and succumbed to lowering legal barriers in asbestos cases. It is understandable that some trial judges have gone along with this thrust. The numbers of cases seem overwhelming and the "pass-them-through" approach is very tempting, but the results are and will be even more catastrophic—hundreds of thousands of baseless claims may be filed, and those who are really

⁸⁴ See Victor E. Schwartz, Kumho Tire: *Will State Judges Agree to Act as Gatekeepers for Admission of Expert Evidence?*, NJC ALUMNI MAG., 12, 15 (1999).

sick will suffer endless delays and lack of justice. The rule of law must be restored to asbestos cases. Such a restoration will ensure that those who are really sick will be paid more quickly, that baseless claims will be eliminated from the system, that legal costs will be reduced, and that justice will prevail in asbestos cases. All of these can be accomplished by you.