

Asbestos

State Asbestos And Silica Reform: Past Successes — Future Opportunities?

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Commentary

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After years of downward spiral, the asbestos litigation tide finally may be turning because of important actions taken by state legislatures and the courts in key states. The end of the tunnel is still far away, but some signs of light may be appearing. Recent events also may put to rest suggestions that silica litigation may be the "next asbestos." Below is a summary of recent developments in asbestos and silica litigation,¹ and a brief discussion about some challenges for defendants in the future.

State Legislatures

In recent years, a number of states have enacted meaningful civil justice reform legislation that will impact asbestos and silica cases. For example, in 2003, Texas enacted comprehensive civil justice reform legislation. In 2004, Mississippi passed significant tort reform measures, including needed venue and case consolidation reforms.² Ohio also enacted significant legal reforms in 2004.³ Significant civil justice reforms were enacted in 2005 in Georgia, South Carolina, and Missouri.

States also are beginning to enact legislation specific to asbestos and silica claims. In 2004, for example, Ohio became the first state to enact legislation to

require asbestos claimants to demonstrate physical impairment in order to bring or maintain a claim. Ohio also enacted pioneering silica medical criteria legislation to prevent entrepreneurial plaintiffs' lawyers from re-styling their asbestos claims as silica claims, as some lawyers have done. In 2005, Georgia, Texas, and Florida enacted asbestos and silica medical criteria legislation.⁴ These laws draw support from a model Asbestos and Silica Claims Priorities Act developed by the American Legislative Exchange Council (ALEC), the nation's largest nonpartisan membership organization of state legislators,⁵ and a February 2003 resolution by the American Bar Association's House of Delegates calling for the enactment of federal medical asbestos criteria reform legislation.⁶

State Courts

In state courts, inactive dockets (also called unimpaired dockets, deferred dockets, and pleural registries) that suspend and preserve claims filed by the non-sick continue to gain momentum.⁷ Recently, inactive asbestos dockets have been adopted in Minnesota (coordinated litigation) (June 2005); St. Clair, Illinois (February 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002).⁸ These courts joined several leading jurisdictions that adopted inactive asbestos dockets years earlier – Massachusetts (coordinated litigation) (September 1986); Cook County (Chicago), Illinois (March 1991); and Baltimore City, Maryland (December 1992).⁹ A 2005 RAND report concluded that one of the "most significant developments in asbestos

processing” has been the “reemergence of deferred dockets as a popular court management tool.”¹⁰

Some jurists, including the coordinating judge for all South Carolina asbestos cases and the judge presiding over the federal asbestos docket, have entered orders dismissing claims filed by the non-sick.¹¹ The Pennsylvania Supreme Court has held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to an asbestos cause of action.¹²

Mass Screenings: On the Way Out

These various developments provide hope for defendants that a major fuel behind the recent explosion in asbestos and silica claims — mass filings by the non-sick generated through mass screening programs — may be on the wane.¹³

The extraordinary findings of the manager of the federal silica MDL docket, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, also will impact mass screening practices. In June 2005, Judge Jack issued a scathing, lengthy opinion in which she recommended that all but one of the 10,000 claims on the MDL docket should be dismissed on remand because she concluded that the diagnoses were fraudulently prepared.¹⁴ “[T]hese diagnoses were driven by neither health nor justice,” Judge Jack said in her opinion.¹⁵ “[T]hey were manufactured for money.”¹⁶

Already, Judge Jack’s findings have spilled over into asbestos litigation. In September 2005, Claims Resolution Management Corporation, which manages the Manville Personal Injury Settlement Trust, stated that it will no longer accept reports prepared by the doctors and screening facilities that were the subject of Judge Jack’s opinion.¹⁷ The Eagle-Picher Personal Injury Settlement Trust reached the same decision in October 2005.

Lawyers, doctors, and screening facility operators also may be deterred by the possibility of having to trade in their pinstripes for prison uniforms. The U.S. Attorney’s Office in the Southern District of New York — famous for its prosecution of organized crime figures — has convened a federal grand jury to consider possible criminal charges arising out of the federal silica litigation.¹⁸ Federal prosecutors in Manhattan also may be investigating the conduct of three plaintiffs’ asbestos law firms involved in the bankruptcy case of

G-1 Holdings, formerly GAF Corporation.¹⁹ Lawyers for the company reportedly have turned over records of extensive interviews with former employees of the plaintiffs’ firms in which some employees describe coaching potential claimants and efforts to influence doctors’ diagnoses.²⁰ Some of these allegations have been raised before in asbestos litigation,²¹ but Judge Jack’s silica opinion may provide a new stimulus for the government to pursue the asbestos investigation more aggressively this time. These investigations could be just the tip of the iceberg as more facts come to light through the government’s investigation.

Congress may be looking into screening abuses as well. In August 2005, U.S. Rep. Joe Barton (R-TX), Chairman of the House Energy and Commerce Committee, and Oversight and Investigations Subcommittee Chairman Ed Whitfield (R-KY) sent a letter to the plaintiffs’ medical experts involved in the silica MDL litigation seeking records and information regarding public health concerns arising from various medical practices conducted in support of that litigation.²²

In addition, one must wonder how long the medical community will stand on the sideline and allow sound medical practices to be disregarded for profit in litigation. As Reps. Barton and Whitfield noted in their letter to the MDL silica screeners, “Judge Jack’s opinion paints a disturbing picture of individuals perhaps holding themselves out as medical professionals and basing their work not on medical science but the criteria of a lawyer.”²³ At some point, medical licensing boards might act to police their own and ensure that medical licenses are issued to promote public health, rather than being abused as a label to support a legal claim, despite the diagnosing doctor’s failure to follow proper medical practices.

Similarly, perhaps it is time for the National Institute for Occupational Safety and Health (NIOSH) to implement an audit program for B Readers. As the certifying body, NIOSH has an obligation to ensure that certified physicians use the credential bestowed upon them in an ethical manner.

Will There Be An Encore?

The challenge for defendants will be to build on this momentum: 2006 will either be a year of continued momentum or opportunities lost. Here are some

suggestions for the defendant community to continue building on recent successes.

Priorities must be set: From 2003-2005, there was consensus among defendants as to state legislative goals – both with respect to the target states (e.g., Ohio, Mississippi, Florida, and Texas) and the type of reforms sought (e.g., asbestos and silica medical criteria or general tort reform). Now, except for the push for general tort reform in Florida, those missions have been accomplished. These gains must be protected and new goals must be set. Fewer medical criteria “home runs” may be hit, but some “doubles” are possible in states like Michigan, Mississippi, and Missouri. California and West Virginia are probably longer-term goals worth pursuing for medical criteria reforms. Tort reform efforts are likely to continue in Oklahoma and Florida. If the defendant community does not set priorities and achieve consensus, legal reform efforts could be diluted and resources spent unproductively.

Homework must be done: A “one size fits all” strategy to address asbestos and silica litigation at the state level is unlikely to work, because many state courts have already acted to address litigation problems and key issues differ from state to state. Legal reform strategies must be tailored to fit the circumstances of each state.

For example, the distinguishing feature of asbestos litigation in one state might be mass filings by unimpaired claimants. In that instance, a medical criteria-based solution may be the best fit. Elsewhere, medical criteria legislation may be unnecessary, such as in Illinois where the three counties that experience the bulk of asbestos filings have inactive asbestos dockets. In these instances, venue reform might address the “signature” feature of the state’s civil justice system, whereas trial consolidation reform might be a higher priority for defendants in a different state.

Policymakers, defendants, and insurers need to examine asbestos and silica litigation issues on a state-by-state basis to make sure that resources are spent wisely.

Judicial nullification: The state-by-state analysis should consider whether a state has an activist state high court that has nullified the tort policy judgments

of the legislature in the past.²⁴ Judicial nullification of state tort reform is a problem in some, but not most, states.²⁵ Defendants can learn from challenges to some of the recently enacted asbestos medical criteria laws. In addition, defendants in some states might consider legislation to create a statewide inactive docket that would suspend (rather than dismiss) claims filed by the unimpaired and preserve statutes of limitations for the non-sick. Another approach may be to require screenings to be done in accordance with proper medical procedures to prevent shoddy or fraudulent claims of the type described by Judge Jack in the federal silica MDL proceeding.

Avoid fighting yesterday’s battles: States where RAND estimates that *fifty-eight percent* of asbestos claims were filed from 1998 to 2000 have now adopted rulings, orders, and laws to prioritize asbestos cases by filtering out or suspending the claims of the unimpaired. These reforms are likely to remove much of the economic incentive of plaintiffs’ lawyers to pursue flimsy claims and the mass screening techniques used to generate them.²⁶ Sound case management orders also can help by allowing discovery as to the quality of test results and conclusions used to support legal claims, helping to ensure that the evidence is credible.

Medical criteria laws and inactive dockets would help in the jurisdictions that still encourage the filing of claims by the unimpaired, but the defendant community needs to begin to look ahead to the future. The asbestos and silica environments are likely to look very different in a year or two than they do now. Plaintiffs’ lawyers will adapt to recent trends in the litigation; they always do. Defendants will have to adapt too.

Back To The Future

Plaintiffs’ lawyers are likely to focus more of their efforts on bringing claims for serious injuries. As a result, asbestos and silica litigation in 2006 may look more like 1985 than 2005. There are likely to be fewer unimpaired claimant filings and, in turn, fewer mass round-ups and “inventory settlements.”

In addition, the lawyers are likely to forum-shop, filing claims in states that have failed to enact reforms. For example, there are reports that asbestos and silica claims are on the rise in California. Recent reports

also indicate that a well-known Madison County, Illinois, plaintiffs' firm has shifted some of its new asbestos cases to Wilmington, Delaware.

Finally, plaintiffs' lawyers are likely to "diversify" their litigation portfolios, seeking out potential new pots of gold, such as welding rod and pharmaceutical claims. Consequently, in addition to asbestos and silica litigation reforms, defendants should work to improve the mass tort litigation environment in general.

Reforms Likely to Gain Steam

Several reforms are likely to be considered in the dynamic "chess match" of state asbestos and silica litigation. The reforms that are likely to be most successful are those that promote fundamental fairness and a level playing field, such as procedural reforms that neither limit an injured person's ability to sue nor cap the amount of actual damages the person may recover.

These include:

Joint liability reform: to slow the spread of asbestos and silica litigation to attenuated "peripheral defendants."²⁷ Many states have already abolished or modified the traditional doctrine of full joint liability to prevent a minimally at-fault defendant from having to pay more than its "fair share" for a harm.²⁸ Juries also could be instructed as to the effects of joint liability, so that they can use their collective wisdom to decide whether a minor player in the case should potentially be held responsible for 100 percent of any judgment.²⁹

Noneconomic damages reform: to ensure that pain and suffering awards serve their true compensatory purpose and are reasonable in the circumstances.³⁰ ALEC has developed a model Full & Fair Noneconomic Damages Act to require heightened judicial review of noneconomic damage awards similar to that used in punitive damages cases.³¹ The legislation does not cap pain and suffering awards. In 2004, Ohio became the first state to enact ALEC's model proposal.

Punitive damages reform: to ensure proportionality between punitive and compensatory damages or to prevent repetitive punishment that can strip a company of assets and threaten recoveries for later-filing claimants.³² Some courts, includ-

ing the manager of the federal asbestos docket and the manager of the New York City asbestos litigation, have already chosen to defer, sever, or stay punitive damages claims in asbestos cases so that more resources are available to compensate the truly sick.³³ Legislative reforms also can reduce the threat of punitive damages being abused as a "wild card" to force inflated settlements.³⁴ In 2005, Florida abolished punitive damages in asbestos and silica cases.

Innocent seller reform: to prevent the fraudulent joinder of local defendants (e.g., retailers, distributors, and wholesalers) as a mechanism to oust the federal courts of diversity-of-citizenship jurisdiction over asbestos and silica cases. Innocent seller reform laws have been enacted in a number of states. Florida enacted innocent seller reform legislation applicable to asbestos and silica cases in 2005.

Appeal bond reform: to help preserve defendants' access to the appellate courts in cases involving large damage awards that may be excessive and unconstitutional.³⁵ A majority of jurisdictions have now enacted legislation or changed court rules to limit the size of the bond required in cases involving large judgments.³⁶ Some of these reforms apply to all civil defendants,³⁷ while others are limited to cases involving signatories to the state attorneys general tobacco Master Settlement Agreement, generally including their successors and affiliates.³⁸

Venue reform: to curb forum shopping abuse that leads to large numbers of nonresident filings in places like Madison County, Illinois. Forum shopping is a problem in asbestos and silica litigation because different states, and different jurisdictions within states, treat claims in different ways. Rather than file cases where there is a logical connection to an injury, plaintiffs' lawyers often strategically file cases in certain "magic jurisdictions" with a reputation for producing large settlements and verdicts. Mississippi trial lawyer Richard Scruggs has called these places "magic jurisdictions." The American Tort Reform Association calls them "judicial hellholes," because court procedures and laws are routinely applied in an unfair manner against civil defendants. Legislation should provide that an asbestos or silica-related claim could only be filed in the state and county with the most logical connec-

tion to the claim – where the plaintiff lives or was exposed.³⁹ Venue reform legislation to discourage “litigation tourists” has been enacted in Alabama, Florida, Georgia, Mississippi, South Carolina, Texas, and West Virginia, among other states.

Trial consolidation reform: to ensure that claimants and defendants receive individualized justice rather than being part of a trial where claims are jumbled together in a courtroom Cuisinart.⁴⁰ Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique particularly unfair to the litigants is to join disparate claims for trial, either in mass consolidations or in clusters. People with serious illnesses are often lumped together with claimants having no illness at all. Defendants have no real ability to defend the cases, and are forced to settle, regardless of the merits of the individual claims. Legislation should provide that consolidation of asbestos or silica claims at trial may only be permitted if all parties consent. This reform would be helpful in states, such as Virginia, where courts have consolidated large numbers of dissimilar claims for trial. Georgia and Texas enacted trial consolidation reform legislation for asbestos and silica cases in 2005.

Many of the reforms summarized above may require legislation, but some have been and can be achieved in state courts. Defendants should not view “tort reform” as limited to state legislatures; they also should pursue reforms through the courts. Furthermore, courts should be encouraged to apply sound science and traditional principles of causation in mass tort litigation.⁴¹

In addition, defendants should support public and judicial education efforts. For example, the spotlight of media attention has helped right the scales of justice in some jurisdictions that civil defendants viewed as unfair forums. In other instances, judicial education has resulted in change. It is likely, for example, that the proliferation of inactive asbestos dockets is a result of judges learning that the approach has proven to be fair and workable.⁴² Symposiums and legal scholarship can be helpful in this regard.

Conclusion

Recently, there has been marked change in the asbestos and silica litigation environments in many

states. Additional reforms are possible. A “one size fits all” strategy, however, is unlikely to be successful. A surgical approach is required. Each state must be viewed individually to account for the particular circumstances in the state, including the existence of judicially adopted reforms, the types of litigation problems frequently found in the state, and the receptivity of the courts to legislative enactments. In addition, defendants must be forward looking and anticipate the face of mass tort litigation in the future. Time will tell whether the business community will come together to focus on clear objectives to bring about continued, meaningful improvement in the mass tort litigation environment.

Endnotes

1. See Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2004); Mark A. Behrens, Leah Lorber & Cary Silverman, *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 MEALEY'S LITIG. REP.: ASBESTOS 33 (Feb. 21, 2005).
2. See Hon. Charles Ross, Editorial, *Action Jackson*, WALL ST. J., Sept. 15, 2005, at A21.
3. See Kurt Tunnell, Anne Marie Sferra Vorys & Miranda Creviston Motter, *Once again . . . Ohio Legislators Approve Comprehensive Tort Reform*, 20:23 LEGAL BACKGROUNDER (Wash. Legal Found. May 20, 2005).
4. See Mark A. Behrens & Phil S. Goldberg, *State-Based Medical Criteria for Asbestos Suits Gains Momentum*, 15:13 LEGAL OPINION LETTER (Wash. Legal Found. July 1, 2005).
5. See Mark A. Behrens & Phil S. Goldberg, *The Asbestos Litigation Crisis in a Nutshell*, THE STATE FACTOR (Am. Legis. Exch. Council July 2004).
6. See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-Elect,

- Am. Bar Ass'n), available at 2003 WL 785387; Am. Bar Ass'n, House of Delegates, *ABA Standard for Non-Malignant Asbestos Related Disease Claims* (resolution adopted Feb. 2003).
7. See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).
 8. See Mark A. Behrens & Phil S. Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 MEALEY'S LITIG. REP.: ASBESTOS 33 (Apr. 13, 2005).
 9. See Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2005); Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001); see also Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).
 10. Stephen J. Carroll et al., *Asbestos Litigation* xx (RAND Inst. for Civil Justice 2005).
 11. See Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002).
 12. See *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. 1993), *aff'd sub nom. Simmons v. Pacor, Inc.*, 674 A.2d 232, 236-38 (Pa. 1996). For other cases holding that asymptomatic asbestos claimants do not have a legal claim, see *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1988), *review dismissed*, 781 P.2d 1373 (Ariz. 1989); *Owens-Illinois v. Armstrong*, 591 A.2d 544 (Md. Ct. App. 1991), *aff'd in part and rev'd on other grounds*, 604 A.2d 47 (Md. 1992); *In re Asbestos Litigation Leary Trial Group*, 1994 WL 721763 (Del. Super. Ct. June 14, 1994) (unpublished decision), *rev'd on other grounds*, 670 A.2d 1339 (Del. 1995); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990) (applying Hawaii law); *In re Massachusetts Asbestos Cases*, 639 F. Supp. 1 (D. Mass 1985) (applying Massachusetts law). See generally Victor E. Schwartz, Mark A. Behrens & Phil Goldberg, *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14 J. BANKR. L. & PRAC. 61 (2005).
 13. See Jonathan D. Glater, *The Tort Wars, at a Turning Point*, N.Y. TIMES, Oct. 9, 2005, at C1, available at 2005 WLNR 16361092 [hereinafter Glater, *Tort Wars*].
 14. *In re Silica Prods. Liab. Litig.* (MDL No. 1553), 2005 WL 1593936 (S.D. Tex. June 30, 2005) (Order No. 29 Addressing Subject-Matter Jurisdiction, Expert Testimony and Sanctions).
 15. *Id.* at *60.
 16. *Id.*; see also John S. Stadler, Commentary, *Judge's Silica Opinion Exposes Manufactured Tort Claims to Antiseptic Sunshine*, 23:15 ANDREWS TOXIC TORTS LITIG. RPTER. 10 (Sept. 2, 2005).
 17. See Glater, *Tort Wars*, *supra* note 13.
 18. See Jonathan D. Glater, *Lawyers Challenged on Asbestos*, N.Y. TIMES, July 20, 2005, at C1, available at 2005 WLNR 11332864.
 19. See Jonathan D. Glater, *Civil Suits Over Silica in Texas Become a Criminal Matter in New York*, N.Y. TIMES, May 18, 2005, at C5, available at 2005 WLNR 7826957.
 20. See *id.*; see also Editorial, *Silicosis, Inc.*, WALL ST. J., Oct. 27, 2005, at A20 (supporting Justice Department probe of asbestos and silica suits).
 21. See Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33 (2003); see also Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005).
 22. See Press Release, *Barton, Whitfield Query Physicians Regarding Silicosis*, Aug. 2, 2005, at http://energycommerce.house.gov/108/News/08022005_1619.htm.
 23. *Id.*
 24. See Victor E. Schwartz, Mark A. Behrens & Monica Parham, *Fostering Mutual Respect and Cooperation Between*

- State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. VA. L. REV. 1 (2000).
25. See Victor E. Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL. L. REV. 688 (2001); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907 (2001).
26. For a thorough discussion of screening practices, see Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, (AEI-Brookings Joint Center for Regulatory Studies Sept. 2005), available at <http://www.aei-brookings.org/publications/abstract.php?pid=993>.
27. See Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203 (2003).
28. See Steven B. Hantler, Mark A. Behrens & Leah Lorber, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121 (2005).
29. See Steven B. Hantler, Victor E. Schwartz, Cary Silverman & Emily J. Laird, *Moving Toward the Fully Informed Civil Jury*, 3 GEO. J. OF L. & PUB. POL'Y 21, 41 (2005).
30. See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. REV. 47 (2002).
31. See Victor E. Schwartz & Cary Silverman, *New Model Bill to Address Inflated Non-Economic Damage Awards*, ALEC ISSUE ANALYSIS (Am. Legis. Exch. Council July 2004).
32. See Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrosimone, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (2000).
33. See Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137 (2001).
34. See George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 829 (1996) (observing that "the availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process. . . .").
35. See Mark A. Behrens & Donald Kochan, *Protecting the Right to Appellate Review in the New Era of Civil Actions: A Call for Bonding Fairness*, 2:17 CLASS ACTION LITIG. REP. (BNA) 644 (Sept. 14, 2001), also printed in 29:21 PROD. SAFETY & LIAB. RPTR. (BNA) 515 (May 21, 2001).
36. Several jurisdictions do not require defendants to post a bond during an appeal. See CONN. R. APP. P. § 61-11 (2005); ME. R. CIV. P. 62 (2005); MASS. R. CIV. P. 62(d) (2005); N.H. REV. STATE. ANN. § 527:1 (2005); VT. R. CIV. P. 62(d)(1) (2005).
37. See ARK. CODE § 16-55-214 (2005) (applies to all civil judgments; \$25 million bond cap); COLO. REV. STAT. § 13-16-12 (2005) (applies to all civil judgments; \$25 million bond cap); FLA. STAT. § 768.733 (2005) (applies to class action defendants; \$100 million bond cap); GA. CODE ANN. § 5-6-46 (2005) (applies to all civil judgments; \$25 million bond cap); IDAHO STAT. ANN. § 13-202 (2005) (applies to punitive damages only; \$1 million bond cap); IND. CODE ANN. § 34-49-5-3 (2005) (applies to all civil judgments; \$25 million bond cap); IOWA CODE § 625A.9 (2005) (applies to money judgments; \$100 million bond cap); KY. REV. STAT. ANN. § 205.1 (2005) (applies to punitive damages portion of a judgment; \$100 million bond cap); MICH. COMP. LAWS. ANN. § 600.2607(1) (2005) (applies to all civil judgments; \$25 million bond cap); MINN. STAT. ANN. § 550.36 (2005) (applies to all civil judgments; \$150 million bond cap); MISS. R. APP. P. 8 (2005) (applies to the punitive damages portion of a judgment; bond capped at the lesser of 125 percent of the judgment, 10 percent of the defendant's net worth, or \$100 million); NEB. STAT. REV. § 25-1916 (2005) (applies to all civil judg-

- ments; bond capped at the lesser of the amount of the judgment, 50 percent of defendant's net worth, or \$50 million); N.C. GEN. STAT. § 1-289 (2005) (applies to money judgments; \$25 million bond cap); OHIO REV. CODE ANN. § 2505.09 (2005) (applies to all civil judgments; \$50 million bond cap); S.D. SUP. CT. RULE 03-13 (2005) (applies to money judgments; \$25 million bond cap); TENN. CODE § 27-1-124 (2005) (applies to all civil judgments; \$75 million bond cap); TEX. CIV. P. & REM. § 52.006(b) (2005) (applies to money judgments; bond capped at the lesser of 50 percent of the judgment debtor's net worth or \$25 million); VA. CODE ANN. § 8.01-676.1 J (2005) (applies to all civil judgments; \$25 million bond cap); WIS. STAT. ANN. § 808.07 (2005) (applies to all civil judgments; \$100 million bond cap).
38. CAL. HEALTH & SAFETY CODE § 104558 (2005) (applies to all civil judgments; bond capped at the lesser of 100 percent of the judgment or \$150 million); FLA. STAT. § 768.733 (2005) (applies to all civil judgments; \$100 million bond cap); HAW. REV. STAT. ANN. § 328L-7 (2005) (applies to all civil judgments; \$150 million bond cap); KAN. CODE § 50-6a05 (2005) (applies to all civil judgments; \$25 million bond cap); LA. REV. STAT. ANN. § 98.6 (2005) (applies to all money judgments; \$50 million bond cap); MO. REV. STAT. § 512.085 (applies to all civil judgments; \$50 million bond cap); NEV. STAT. § 20.035.1 (amended by 2005 Nev. Laws Ch. 138 (A.B. 486)) (applies to all civil judgments; \$50 million bond cap); N.J. STAT. ANN. § 52:4D-13 (2005) (applies to all civil judgments; \$50 million bond cap); OKLA. STAT. ANN. tit. 12 § 990.4 B.5 (2005) (applies to all civil judgments; \$25 million bond cap); 2003 Or. Laws 804 (not yet codified) (applies to all civil judgments; \$150 million bond cap); 35 PA. STAT. ANN. § 5701.309 (2005) (applies to all civil judgments; \$100 million bond cap); S.C. CODE ANN. § 18-9-130 (2005) (applies to all forms of civil judgments; automatic stay – no bond required); W. VA. CODE § 4-11 A-4 (2005) (applies to all civil litigation and provides that consolidated or aggregated cases shall be treated as a single judgment for purposes of the appeal bond limits; \$100 million bond cap for all portions of a judgment other than punitive damages; \$100 million bond cap for the punitive damages portion of judgment).
39. See Mark A. Behrens & Phil S. Goldberg, *The Asbestos Litigation Crisis in a Nutshell*, THE STATE FACTOR (Am. Legis. Exch. Council July 2004).
40. See *id.*
41. See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11 (2003).
42. Judge Hiller Zobel, who adopted the Massachusetts unimpaired docket, has said that it has been “really a very good system that has worked out. . . .” *Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, COLUMNS – ASBESTOS, Feb. 2002, at 3. Jim Ryan, special master of the Massachusetts asbestos litigation, has described the unimpaired docket as “an extremely useful tool,” saying, “I don’t see any downside for creating one anywhere else.” *Id.* at 70. Madison County asbestos plaintiffs’ lawyer John Simmons has said that his county’s unimpaired docket has been “a win-win. . . . If they (plaintiffs without symptoms) never get sick, they never get paid, and that’s the best scenario. And it preserves the dollars that are going to be spent on settlements for those who are truly deserving.” Paul Hampel, *Lack of Trust Poisons Efforts to Reform Asbestos Litigation*, ST. LOUIS POST-DISPATCH, Sept. 22, 2004, at A1. ■

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