

**THE EVOLVING CIVIL JUSTICE REFORM
MOVEMENT:
PROCEDURAL REFORMS HAVE GAINED STEAM,
BUT CRITICS STILL FOCUS ON ARGUMENTS OF
THE PAST**

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I. INTRODUCTION

For many years, most state and federal civil justice reform efforts were focused on a few key areas: joint liability, punitive damages, product liability, and health care liability.¹ Some of these reforms were driven by the rapid development of product liability law following judicial decisions in the 1970s and 1980s to expand liability and the emergence of punitive damages in such cases.² Many of these efforts were successful. For example, a large majority of states have abolished or modified the traditional doctrine of joint liability³ and require an elevated burden of proof standard for punitive damages liability.⁴

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¹ See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with “New Style” Litigation*, 27 Wm. Mitchell L. Rev. 237, 241 (2000) [hereinafter Schwartz et al., *Tort Reform Past, Present And Future*].

² See Victor E. Schwartz & Mark A. Behrens, *A Proposal for Federal Product Liability Reform in the New Millennium*, 4 Tex. Rev. L. & Pol. 261 (2000); Victor E. Schwartz & Mark A. Behrens, *Punitive Damages Reform—State Legislatures Can and Should Meet The Challenge Issued by the Supreme Court of the United States in Haslip*, 42 Am. U. L. Rev. 1365 (1993).

³ See Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1148-50 (2005) (surveying state joint liability laws) [hereinafter Hantler et al]; Steven B. Hantler et al., *Moving Toward the Fully Informed Civil Jury*, 3 Geo. J. of L. & Pub. Policy 21, 41 (2005).

⁴ See Victor E. Schwartz et al., *Reining in Punitive Damages “Run Wild”*: *Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003 (2000) [hereinafter Schwartz et al., *Reining In Punitive Damages “Run Wild”*].

In recent years, the civil justice reform movement has evolved to respond to changes in the legal landscape and to address new issues. Defendant-supported civil justice efforts are increasingly focused on procedural reforms that neither limit an injured person's ability to sue nor cap the amount of actual damages the person may recover. One such example is the recently enacted federal Class Action Fairness Act (CAFA), which was signed into law in February 2005.⁵ When the framers of the United States Constitution established the federal court system, they believed it would provide a neutral forum for hearing large claims involving residents of different states.⁶ Until the passage of the CAFA, however, lawyers filing class actions were able to use various tricks to escape from the jurisdiction of federal courts.⁷ The CAFA closes some of these loopholes to allow defendants to remove what were formerly nondiverse state law class actions to federal courts if minimal diversity exists and the aggregate amount in controversy exceeds \$5 million. This effectively will foreclose the joinder of local defendants to defeat complete diversity and prevent removal. Truly local class actions will remain in state court.⁸ Nothing in the CAFA bars class actions or limits recoveries for class members.

Various factors are driving civil defendants' interest in pursuing procedural reforms, particularly at the state level. First, as stated, many states have adopted more traditional tort reforms⁹—the “low hanging fruit” has largely been picked. Significant reforms also have been adopted in states such as Alabama, Mississippi, and Texas¹⁰—places with local courts that, in the past, were often viewed as unfair to civil defendants, particularly

⁵ Pub. L. No. 109-2, § 3(a), 119 Stat. 7 (2005).

⁶ See S. Rep. 109-14, at 6 (Fe. 28, 2005).

⁷ See Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000).

⁸ In addition, the CAFA establishes a *Class Action Bill of Rights* with judicial review and approval of non-cash settlements, protection against loss by class members because of payments to class counsel, a prohibition against court approval of a proposed settlement that would provide for greater payments to class members that are located in closer geographic proximity to the court, a prohibition against court approval of a proposed settlement that would provide for payment of a greater share of the award to a class representative serving on behalf of a class, standardized settlement notification information, and specific requirements regarding proposed settlement notifications to federal and state officials. The CAFA also addresses abusive coupon settlements by providing that contingency fees must be based on the value to class members of coupons that are actually redeemed. See Sen. Rpt. 109-14 (Feb. 28, 2005); see also Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 Geo. J. Leg. Ethics 1343 (2005).

⁹ See Paul H. Rubin, *Tort Reform Saves Lives*, Wall St. J. A7 (Oct. 8, 2005) (stating that from 1981-2000, states passed 141 “tort reform” measures, including caps on noneconomic and punitive damages and product liability reforms).

¹⁰ See e.g. Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate* (unpublished ms., copy on file with Mississippi College Law Review).

from the point of view of out-of-state corporate defendants.¹¹ Ohio enacted significant legal reforms in 2004.¹² There are now few states where liability and damages remain totally open-ended. Even in the states that have not enacted tort reform laws, the United States Supreme Court's recent jurisprudence makes clear that constitutional due process limits apply to constrain excessive punitive damages awards.¹³

Second, procedural reforms are being pursued in response to successes that the plaintiffs' bar has had in challenging substantive civil justice reform laws on state constitutional grounds.¹⁴ These challenges have been successful in some, but not most, states.¹⁵ Increased participation in judicial elections is another way that business groups have responded to the threat of "judicial nullification" of state tort reform.¹⁶

Third, procedural reforms are being pursued to respond to emerging legal issues, such as the trend toward mass aggregation of cases through coordinated state attorneys general litigation.¹⁷

Ironically, as the civil justice reform effort has changed focus, critics of reform efforts seem intent on continuing arguments of the past. Critics seem to be debating the merits of the cold war (e.g., whether caps on damages are sound) while the legal reform efforts of business groups are focused on other issues. One must question why this disconnect exists. It is unlikely that critics of civil justice reform proposals are unaware of the proposals being adopted today. One explanation, therefore, might be that opponents of reform have chosen not to engage in a debate over the current

¹¹ The American Tort Reform Association calls these counties "Judicial Hellholes." Am. Tort Reform Assn., *Bringing Justice to Judicial Hellholes* (2004), <http://www.atra.org/reports/hellholes/> [hereinafter ATRA Hellholes Rep.].

¹² See Kurt Tunnell et al., *Once again . . . Ohio Legislators Approve Comprehensive Tort Reform*, 20:23 Legal Backgrounder (Wash. Leg. Found.) (May 20, 2005).

¹³ See *P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *BMW of N.A., Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 433 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

¹⁴ See Victor E. Schwartz et al., *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); Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688 (2001).

¹⁵ See 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).

¹⁶ See Schwartz et al., *Tort Reform Past, Present and Future*, *supra* n. 1.

¹⁷ *Id.*

issues of the day because they believe it may be advantageous to play on the perceived inequities of more traditional tort reforms.

This article seeks to elicit debate on current issues by providing some background on key reforms that are now a focus of state and federal civil justice reform efforts. In particular, this article will discuss the trend toward coordinated state attorney actions and reforms that are being promoted to respond to this type of litigation. Next, this article will discuss innovative model legislation to address excessive noneconomic damages through heightened judicial review similar to that used in punitive damages cases. Third, this article will discuss legislation that is gaining momentum in the states to address the current “asbestos-litigation crisis”¹⁸ by prioritizing claims so that sick claimants can have their claims heard more expeditiously. This article also will discuss similar reforms that are being pursued to prevent asbestos plaintiffs’ lawyers from re-styling their asbestos claims as silica claims, as some lawyers have already done. Next, this article will address efforts in the states to improve the function and representativeness of the jury system. Lastly, the article will discuss a current proposal at the federal level to address frivolous complaints and curb forum-shopping abuse. These reforms demonstrate that the civil justice reform landscape has changed in recent years. We invite debate on these new issues and hope that this symposium can be a springboard for such discussions.

II. THE EMERGENCE OF COORDINATED STATE ATTORNEY LITIGATION

The coordinated state attorneys general litigation against tobacco product manufacturers began a trend of government executive branch officials partnering with private personal injury lawyers to sue legal, private industries. Clinton Administration Secretary of Labor Robert Reich labeled this practice “regulation through litigation.”¹⁹

In the state Medicaid recoupment lawsuits against tobacco companies, the partnership between governments and private personal injury lawyers was unprecedented—and lucrative. Ultimately, the litigation resulted in settlements of approximately \$243 billion in damages,²⁰ with

¹⁸ *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

¹⁹ Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA Today A15 (Feb. 11, 1999) (stating that “The era of big government may be over, but the era of regulation through litigation has just begun.”); see also Michael I. Krauss, *Regulation Masquerading As Judgment: Chaos Masquerading as Tort Law*, 71 Miss. L.J. 631 (2001).

²⁰ See Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 Vand. L. Rev. 2177 (2004); W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*,

additional billions of dollars of contingency fees being paid to the attorneys involved.²¹ The state official/trial lawyer alliance will no doubt continue because government-sponsored lawsuits can regulate entire industries and build the public coffers through awards and settlements that equate to tax increases for businesses and are imposed outside of the democratic process.²²

In fact, while most attorneys general during the tobacco litigation claimed that tobacco was a *unique* situation and that no lawsuits would be brought against other industries, local governments soon hired private attorneys to sue gun manufacturers in a large number of cities.²³ A Colorado writer has explained:

First there was the nicotine litigation Now there are similar lawsuits against firearms manufacturers, filed by large cities.

[T]he trend seems pretty clear here—if there’s a form of social improvement that you can’t accomplish by the normal legislative process, or is impeded by archaic constitutional provisions like the Bill of Rights, then engage some high-powered attorneys who know where to find deep pockets for their contingency fees, and go for it.²⁴

Rhode Island’s attorney general retained a veteran firm from the state tobacco litigation to assist in an effort to hold former manufacturers of lead

42 J.L. & Econ. 575 (1999); W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 Cumb. L. Rev. 523 (1999); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation*, 33 Conn. L. Rev. 1143, 1184 (2001).

²¹ The Hudson Institute estimated that the tobacco litigation settlement “will provide \$500 million per year to 200 to 300 lawyers—most probably in perpetuity.” John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation* 9 (Am. Tort Reform Found. 2000) (quoting the Hudson Institute’s Michael Horowitz).

²² See Walter K. Olson, *Plaintiffs Lawyers Take Aim at Democracy*, Wall St. J. A26 (Mar. 21, 2000); Symposium, Jonathan Turley, *A Crisis in Faith: Tobacco and the Madisonian Democracy*, 37 Harv. J. on Legis. 433 (2000); Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563 (2001).

²³ See Jeff Reh, *Social Issue Litigation and the Route Around Democracy*, 37 Harv. J. on Legis. 515 (2000).

²⁴ Ed Quillen, *Novel Litigation We Can Look Forward To*, Denver Post. (Mar. 7, 1999) (available at <http://www.custerguide.com/quillen/eqcols/19993073.htm>).

paint liable for government healthcare costs.²⁵ Several attorneys general have tried coordinated litigation to force power companies to reduce carbon dioxide emissions that allegedly contribute to global warming.²⁶ Connecticut's attorney general has solicited private attorneys for their services in pursuing litigation against any company connected with the manufacture, distribution, or sale of gasoline with Methyl Tertiary Butyl Ether (MTBE).²⁷ A number of state attorneys general are pursuing actions against pharmaceutical companies for prescription drug pricing practices.²⁸ Reports suggest that other targets of attorneys general litigation could include "HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, 'Hollywood,' video game makers, and even the dairy and fast food industries."²⁹

When attorneys general and state agencies work with private attorneys—individuals with interests different from the state—the overall benefit to the public becomes suspect at best. As Secretary Reich, who coined the phrase “regulation by litigation,” has sagely observed: “The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the

²⁵ See Bonnie Campbell, *Hiring Contingent-Fee Lawyers to Bring Public Lawsuits Only Looks Like Justice On the Cheap*, 26:33 Legal Times 60 (Aug. 18, 2003); R.I., *DuPont Reach Deal on Lead Paint*, Providence J.-Bull. A1 (July 1, 2005) (available at 2005 WLNR 10538139); Kara Sissell, *DuPont to Pay \$12 Million to Settle Lead Paint Suit*, 167:23 Chem. Wk. 41 (July 13, 2005) (available at 2005 WLNR 11820948); Editorial, *Paint by Lawyer*, Wall St. J., A20 (Nov. 7, 2005).

²⁶ See Michael I. Krauss & S. Fred Singer, *Pseudo-Tort Alert!*, Wall St. J. A10 (Aug. 3, 2004); C. Boyden Gray, *Democracy At Home*, 9 Tex. Rev. L. & Pol. 205 (2005); Jeff Nesmith, *Emissions Suits Against Utilities Dismissed*, Atlanta J.-Const. G4 (Sept. 16, 2005) (available at 2005 WLNR 14628862).

²⁷ See State of Connecticut, Attorney General's Office, *Request for Proposals: Litigation Services Involving Compensatory and Punitive Damages and Injunctive Relief Against Manufacturers, Designers, Refiners, Distributors, and Sellers of Methyl Tertiary Butyl Ether ("MTBE") for Pollution and Contamination of the Waters of the State of Connecticut*, RFP No. 04-01 (MTBE), Feb. 25, 2004 (available at <http://www.cslib.org/attygenl/hottopics/mtbe%20rfp.pdf>).

²⁸ See David S. Nalven, *Prescription Drug Litigation: Seeking Reform Through the Courts*, 49-Feb. B. B.J. 18 (2005); Guy Boulton, *Scrutiny of Drug Companies Expands: State Is One of Many to File Lawsuits, Launch Investigations*, Milwaukee J. Sentinel 1 (July 10, 2005) (available at 2005 WLNR 11346409); *Texas Goes After Big Pharma*, 97:5 Tex. Observer 6 (Mar. 4, 2005) (available at 2005 WLNR 8739160); William Hathaway, *State Sues Drug Companies, Claiming Price Gouging*, Hartford Courant B7 (Mar. 14, 2003); Russell Gold & Andrew Caffrey, *States Suing Drug Makers Spurn Former Allies on Tobacco*, Wall St. J. B1 (May 29, 2002).

²⁹ Schwartz et al., *Tort Reform Past, Present and Future*, *supra* n. 1, at 258; see also Matthew T. Salzman, *More Than A Fat Chance For Lard Litigation: The Viability of State Medicaid Reimbursement Actions*, 56 Rutgers L. Rev. 1039 (2004); John J. Zefutue, Jr., *From Butts to Big Macs—Can The Big Tobacco Litigation and Nation-wide Settlement With States' Attorneys General Service as a Model for Attacking the Fast Food Industry?*, 34 Seton Hall L. Rev. 1383 (2004); Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 Cornell L. Rev. 1334 (2001).

discretion of administration officials operating in secrecy.”³⁰

A. *What Can Be Done?*

1. Legislation to Require Open and Competitive Bidding

Too often, as Secretary Reich suggested, the fee agreements between public officials and private contingency fee lawyers are made behind closed doors without a competitive bidding process. Because there is no public oversight, the attorney selection process can be abused for personal gain and political patronage.³¹ Lack of disclosure and legislative oversight also can leave the public with a perception that attorneys are hired by the state primarily based on their connections, and not all attorneys have a fair opportunity to compete. Perception can become reality, and the public may lose faith in government. Rules should be adopted to require open and competitive bidding and greater public oversight in government retention of private legal services.³²

In most jurisdictions, when government entities contract for goods and services, the bidding generally is done through an open and competitive process. Federal and state sunshine laws ensure that these transactions are above board and result in the best use of taxpayer dollars. In the state Medicaid recoupment lawsuits against tobacco companies, however, many state attorneys general disregarded such practices and, instead, negotiated contingent fee contracts—behind closed doors—with hand-picked private personal injury lawyers. These contracts stipulated that in lieu of a flat or hourly fee, the private lawyers were guaranteed a percentage of any trial judgment or settlement. Some contingency fee personal injury lawyers have earned astronomical fees as a result of their contracts with states—

³⁰ Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J. A22 (Jan. 12, 2000); see also Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. Ill. U. L.J. 601 (1998); Charles Christopher Harris, *State Tobacco Settlement: A Windfall of Problems*, 17 J.L. & Pol. 167 (2001); Ed Dawson, *Legigation*, 79 Tex. L. Rev. 1727 (2001).

³¹ One New York antitrust lawyer who has worked with and against state attorneys general has explained: “The state AGs are elected, and the trial lawyers are heavy contributors It’s a dangerous circle when the trial bar supports activist AGs who by being activist AGs support the work of the trial lawyers.” Jenny Anderson, *New Cops on the Beat; State Attorneys General Are No Longer Simply Chasing Telemarketers and Cross-Border Pyramid Schemes. They Are Taking on Global Giants, from Wall Street to the Pharmaceuticals Industry, and Business is Complaining*, 36:7 Inst. Inv. 77 (July 1, 2002) (available at 2002 WLNR 10787251).

³² See e.g. Brooke Jones Bacak, *The Case for Regulation of Private Attorney Retention by the State of Alabama*, 29 J. Legal Prof. 179 (2004-2005).

sometimes amounts equal to as much as \$105,022 an hour per lawyer!³³

The practice of hiring private attorneys to handle coordinate state attorneys general litigation raises troubling questions and creates several fundamental public policy problems.

First, governments and private contingency fee attorneys are guided by conflicting goals and principles. Attorneys general take oaths to the United States Constitution and the constitutions of their states. Their overriding duty is to impartially serve the best interests of the public. As the United States Supreme Court has explained, an attorney for the state “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.”³⁴ In contrast, private contingency fee personal injury attorneys are motivated by profit. Thus, the personal injury lawyers’ inclination is to push the law into new and uncharted territory to obtain the maximum recovery—regardless of whether the legal principles advocated benefit society as a whole.

Second, the public official/private attorney alliance creates a strong potential for the appearance of impropriety. Kansas serves as an apt illustration of this problem. In 1996, then Attorney General Carla Stovall hired her former law partners at Entz & Chanay to serve as local counsel in Kansas’s tobacco lawsuit without the benefit of competitive bidding.³⁵ In addition to accepting the case that resulted in a jackpot fee award, Entz & Chanay’s basement housed Ms. Stovall’s campaign. Entz & Chanay also contributed money to her campaign effort.³⁶

Texas serves as another example. In 1996, then Texas Attorney General Dan Morales hired five firms to file his state’s tobacco litigation.³⁷ Four of these firms together had contributed nearly \$150,000 in campaign contributions to Morales from 1990 to 1995.³⁸ The tobacco settlement

³³ Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times 27 (Feb. 1, 1999) [hereinafter Levy, *Tobacco Robbery*].

³⁴ *Berger v. U.S.*, 295 U.S. 78, 88 (1935).

³⁵ See Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, 28:38 Prod. Safety & Liab. Rptr. (BNA) 915, 915 (Oct. 2, 2000) [hereinafter Behrens & Kochan, *Let the Sunshine In*].

³⁶ See John L. Petterson, *Payment for Law Firm Draws Fire; Hearing Continues in Case Involving Tobacco Litigation*, Kansas City Star B3 (Feb. 17, 2000).

³⁷ See Editorial, *\$30,000 An Hour*, Wall St. J., July 5, 2000, at A22.

³⁸ See Victor E. Schwartz & Leah Lorber, *Secret Government Deals With Private Lawyers: Opportunities for Fraud and Abuse*, 18:9 Leader’s Prod. Liab. L. & Strategy 1 (Mar. 2000) (citing Levy, *Tobacco Robbery*, supra n. 33, at 27).

awarded the lawyers fifteen percent of the state's \$15.3 billion recovery—about \$2.3 billion, which was increased by an arbitration panel adjudicating the fee dispute to \$3.3 billion.³⁹ When calculated over the time spent on the project, the lawyers in Texas were paid over \$92,000 per hour.⁴⁰ Such blatant preferential treatment by Morales of firms that supported him politically creates, at the very least, the appearance of impropriety.

In Washington state, after Jon Ferguson, senior counsel of the antitrust section of the Washington attorney general, and Steve Berman of the Chandler, Franklin & O'Bryan firm led Washington's lucrative lawsuit against the tobacco companies, Ferguson announced that he was leaving his post to join Berman's firm to work on a class action against the tobacco industry.⁴¹ When asked why he was leaving his post to go work for the firm that handled the state's case, Ferguson explained: "Steve Berman got \$50 million and I got a plaque."⁴² Apparently, Ferguson also had a job waiting for him at the firm.

Third, even in cases where contingency fee contracts are legitimately negotiated, private agreements between contingency fee lawyers and attorneys general may not result in the selection of the best person at the best cost. Once again, Kansas serves as an example. General Stovall's selection of her former firm was at the expense of another Kansas firm, Hutton & Hutton, which specializes in large product liability cases.⁴³ Hutton & Hutton criticized Entz & Chanay's handling of the Kansas suit and claimed that they could have recovered an additional \$1 billion for Kansas.⁴⁴ If so, that is something that might be avoided in the future if contracts for government-sponsored lawsuits are subject to open and competitive bidding.

Finally, the deals between attorneys general and private personal injury lawyers have spawned bitter fee disputes.⁴⁵ These controversies force government officials to waste taxpayer dollars, divert their attention from

³⁹ *Id.*

⁴⁰ David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees By Special Assistants In Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743, 777 (2000).

⁴¹ See Behrens & Kochan, *Let the Sunshine In*, *supra* n. 35, at 916.

⁴² *Id.*

⁴³ See Jim McLean, *Wichita Firm: Snub Cost \$1 Billion*, Topeka Capital-J. A1 (Feb. 18, 2000).

⁴⁴ *Id.*

⁴⁵ See Levy, *Tobacco Robbery*, *supra* n. 35, at 29; Editorial, *\$30,000 an Hour*, Wall St. J. A22 (July 5, 2000).

other matters, or engage in unnecessary litigation. The potential for such costly fee disputes would be reduced if attorney fee agreements were made with greater public oversight.⁴⁶

The American Legislative Exchange Council (ALEC), the nation's largest nonpartisan membership organization of state legislators, has developed model legislation called the Private Attorney Retention Sunshine Act to address these problems.⁴⁷ First, the Act requires open and competitive bidding before the attorney general or any state agency that retains private attorneys to represent the state.⁴⁸ Second, the Act would provide for legislative oversight when the attorney general or any state agency seeks to enter a contract for private legal services with legal costs that are expected to exceed \$1 million.⁴⁹ Third, the Act would require that when a state agency contracts with contingent fee attorneys to work on state's behalf, the private attorneys must keep a record of the time spent on the state's behalf.⁵⁰ At the conclusion of the case, the attorney would be required to provide the agency with a statement of the hours worked, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate (based on hours worked for the amount recovered, less expenses).⁵¹ This provision would give the state the means to determine whether the taxpayers received a fair deal or whether the private attorneys received an extraordinary and unreasonable fee.⁵² Finally, the Act would limit the amount of the fee that could be charged to an amount equivalent to \$1,000 per hour.⁵³

Legislation based on ALEC's model Act has been enacted in Colorado,⁵⁴ Connecticut,⁵⁵ Kansas,⁵⁶ Minnesota,⁵⁷ North Dakota,⁵⁸ Texas,⁵⁹

⁴⁶ See Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 Temp. L. Rev. 825, 910 (2004).

⁴⁷ See Hon. Don Stenberg, *States Disserve the Public Interest When Hiring Contingent Fee Lawyers*, Legal Backgrounder, Vol. 18, No. 24 (Washington Legal Found. June 20, 2003).

⁴⁸ See Am. Legis. Exch. Council, *Private Attorney Retention Sunshine Act* (approved by ALEC Bd. of Dirs. Sept. 1998).

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ Colo. Rev. Stat. Ann. §§ 13-17-301 to 304 (West 2005).

⁵⁵ Conn. H. 7502, 2005 Leg., June Spec. Sess. (2005).

⁵⁶ Kan. Stat. Ann. §§ 75-37, 130 to 135 (Supp. 2005).

⁵⁷ Minn. H. File 1481, 84th Leg., Reg. Sess. (2005).

⁵⁸ N.D. Cent. Code § 54-12-08.1 (2001).

⁵⁹ Tex. Govt. Code Ann. §§ 404.097, 2254.101 (2005).

and Virginia.⁶⁰ The legislation has been successful; and, in the years since it was first enacted, there have been no reports of attorneys general or other state agencies having difficulty procuring private legal services.

2. Appeal Bond Reform

Appeal bonds provide security that a civil defendant who suffers an adverse judgment at trial will have assets sufficient to satisfy the judgment if efforts to challenge the verdict on appeal prove to be unsuccessful. Thus, a defendant facing a multi-million dollar judgment may have to post an enormous bond (equal to the amount of the judgment plus costs and interest) in order to be able to prevent the plaintiff from seizing its assets while it appeals.

The appeal bond statutes in many states are outdated and in need of reform.⁶¹ They were adopted when judgments were generally more reasonable in scale—before the creation of novel and expansive theories of liability and before the emergence of government-sponsored lawsuits and class actions that aim to reach deep into the pockets of corporate defendants. In this day of increasingly massive verdicts, the current bonding requirement in some states can force a defendant into bankruptcy before it can have its day in an appellate court. This obviously has terrible implications for the defendant, its workers, and shareholders. In addition, the potential for appeal bond requirements to stand as a roadblock to appellate review raises constitutional concerns.

The problem of oppressive bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. As one law professor has observed, “[I]f multi-billion dollar judgments had been entered against the tobacco manufacturers in the states’ lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even post an appeal bond), and may have been forced into bankruptcy.”⁶²

Civil defendants should have full access to a state’s appellate court

⁶⁰ Va. Code Ann. § 2.2-510.1 (2005).

⁶¹ 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).

⁶² Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 Pepp. L. Rev. 685, 689-90 (2000).

system to challenge an adverse judgment—just as losing plaintiffs should have the ability to test their case on appeal. The defendants' right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested legal theories, is the product of bias or prejudice, or is so large as to violate constitutional due process protections.

Picture the following scenario. A state executive brings a lawsuit against an unpopular out-of-state corporation. The trial judge allows the case to proceed based on a novel legal theory. Prejudicial and inflammatory evidence is paraded before the jury. The jury returns an unconstitutionally excessive punitive damages verdict. If the defendant cannot post the bond, there is nothing it can do to reverse the plainly erroneous and unconstitutional judgment. The defendant's right to an appeal is effectively blocked. Ironically, the more egregious the errors at trial, and the more outrageous the award, the more likely it is that the defendant will be unable to post a bond sufficient for the judgment to be appealed. The very cases that cry out for appellate review are the ones that a defendant may not be able to appeal. That result is unfair and wrong.

There is only one way for a defendant to avoid this fate, and it is equally disturbing—the defendant must settle, even if it believes the case is flimsy or without merit. As if to add insult to injury, the defendant will most likely be forced to settle on unfavorable terms and pay a premium because it has been placed over a barrel. The defendant either accepts the plaintiffs' terms or risks bankruptcy. Bonding statutes can, therefore, be abused as a tool to facilitate legal extortion.

Recognizing this problem, ALEC has proposed sound and fair model legislation to protect the right to an appeal in civil cases. ALEC's Appeal Bond Waiver Act would waive the appeal bond requirement as to that portion of the judgment that exceeds \$25 million if the defendant is a larger business.⁶³ If the defendant is a smaller business (i.e., the defendant has fifty or fewer employees and annual revenues of \$5 million or less), the appeal bond requirement would be waived for that portion of the judgment that exceeds \$1 million.⁶⁴ The bill in no way limits the amount of damages that can be imposed in litigation. The Act is merely intended to ensure that a defendant can appeal a massive judgment without being put out of

⁶³ See, Am. Legis. Exch. Council, *Appeal Bond Waiver Act* (approved by ALEC Bd. of Dirs. Jan. 2006, as amended).

⁶⁴ See *id.*

business by a plaintiff who seeks to execute on that judgment.

A majority of jurisdictions have now enacted legislation or changed court rules to limit the size of the bond requirement in cases involving large judgments.⁶⁵ Some of the reforms that have been adopted apply to all civil defendants,⁶⁶ while others are limited to cases involving signatories to the state attorneys general tobacco Master Settlement Agreement, generally including their successors and affiliates.⁶⁷ Some appeal bond reforms that

⁶⁵ Six jurisdictions do not require defendants to post a bond at all during an appeal: Connecticut (Conn. R. App. P. § 61-11), Maine (Me. R. Civ. P. 62), Massachusetts (Mass. R. Civ. P. 62(d)), New Hampshire (N.H. Rev. Stat. Ann. § 527:1), Vermont (Vt. R. Civ. P. 62(d)(1)) or Puerto Rico (P.R. R. Civ. P. 53.9).

⁶⁶ See Ark. Code Ann. § 16-55-214 (2005) (applies to all civil judgments; \$25 million bond cap); Colo. Rev. Stat. Ann. § 13-16-12 (2005) (applies to all civil judgments; \$25 million bond cap); Fla. Stat. Ann. § 768.733 (West 2005) (applies to class action defendants; \$100 million bond cap); Ga. Code Ann. § 5-6-46 (1995 & Supp. 2005) (applies to all civil judgments; \$25 million bond cap); Idaho Code § 13-202 (2004) (applies to punitive damages only; \$1 million bond cap); Ind. Code Ann. § 34-49-5-3 (West Supp. 2005) (applies to all civil judgments; \$25 million bond cap); Iowa Code Ann. § 625A.9 (West 1999 & Supp. 2005) (applies to money judgments; \$100 million bond cap); Ky. Rev. Stat. Ann. § 205.1 (West 2001) (applies to punitive damages portion of a judgment; \$100 million bond cap)(repealed); Mich. Comp. Laws Ann. § 600.2607(1) (West Supp. 2005) (applies to all civil judgments; \$25 million bond cap); Minn. Stat. Ann. § 550.36 (West 2000 & Supp. 2005) (applies to all civil judgments; \$150 million bond cap); Miss. R. App. P. 8 (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. Rev. Stat. § 25-1916 (2005) (applies to all civil judgments; 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 (2003) (applies to money judgments; \$25 million bond cap); Ohio Rev. Code Ann. § 2505.09 (West 2005) (applies to all civil judgments; \$50 million bond cap); S.D. Sup. Ct. Rule 03-13 (applies to money judgments; \$25 million bond cap); Tenn. Code Ann. § 27-1-124 (Supp. 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 (2000 & Supp. 2005) (applies to all civil judgments; \$25 million bond cap); Wis. Stat. Ann. § 808.07 (West 1994 & Supp. 2005) (applies to all civil judgments; \$100 million bond cap).

⁶⁷ Ala. H.B. 220, 2006 Reg. Sess. (applies to all civil judgments; \$125 million bond cap); Cal. Health & Safety Code § 104558 (West 1996 & Supp. 2005) (applies to all civil judgments; bond capped at the lesser of 100 percent of the judgment or \$150 million); Fla. Stat. Ann. § 768.733 (applies to all civil judgments; \$100 million bond cap); Haw. Rev. Stat. Ann. § 328L-7 (LEXIS 1993 & Supp. 2004) (applies to all civil judgments; \$150 million bond cap); Kan. Stat. Ann. § 50-6a05 (West Supp. 2004) (applies to all civil judgments; \$25 million bond cap); La. Stat. Ann. § 98.6 (2005) (applies to all money judgments; \$50 million bond cap); Mo. Rev. Stat. § 512.085 (West Supp. 2005) (applies to all civil judgments; \$50 million bond cap); Nev. Rev. 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 (Supp. 2005) (applies to all civil judgments; \$50 million bond cap); Okla. Stat. Ann. tit. 12, § 990.4 B.5 (West Supp. 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); Pa. Stat. Ann. tit. 35, § 5701.309 (West Supp. 2005) (applies to all civil judgments; \$100 million bond cap); S.C. Code Ann. § 18-9-130 (1985 & Supp. 2004) (applies to all forms of civil judgments; automatic stay—no bond required); W. Va. Code § 4-11 A-4 (2002 & Supp. 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).

have been adopted apply to total damages, while some limit the bonding requirement only for the punitive damages portion of the judgment. These reforms are supported by due process and equal protection principles. As the United States Supreme Court has explained in another context, “The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms.”⁶⁸ Bonding requirements that make it impossible to pursue an appeal are, therefore, constitutionally defective as a matter of due process. Similarly, bonding requirements may run afoul of equal protection guarantees by creating a system that treats defendants “differently for purposes of offering them a meaningful appeal” based on their ability to post a bond without going bankrupt.⁶⁹ Appeal bond reforms can help ensure that a lack of resources will not result in a denial of these fundamental constitutional safeguards.

III. FULL & FAIR NONECONOMIC DAMAGES ACT

Windfall compensatory awards, namely pain and suffering, are an emerging concern for civil defendants. “This trend toward excessive pain and suffering awards appears to be in response to efforts by the Supreme Court of the United States to rein in ‘grossly excessive’ punitive awards”⁷⁰ and state statutes that restrict the availability and amount of such awards.⁷¹ Perhaps most importantly, as a practical matter, judges at both the trial and appellate level have more vigorously used their inherent power to reduce large awards. As a result of these initiatives, while multi-million and -billion dollar punitive awards are still common, punitive damages, in general, no longer operate under an anything goes standard.

Similar to punitive damages, pain and suffering awards are inherently subjective. “Juries are left with nothing but their consciences to guide them.”⁷² As one group of commentators noted, “Courts have usually been content to say that pain and suffering damages should amount to ‘fair compensation’ or a ‘reasonable amount,’ without any more definite guide.”⁷³ Absent a finding that the award shocks the conscience, courts often uphold such awards with little more than cursory review.

⁶⁸ *Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985).

⁶⁹ *Id.* at 405 (discussing cases involving indigent defendants that are denied an appeal (for example, because they are unable to afford a transcript) in violation of equal protection and due process).

⁷⁰ Hantler et al., *supra* n. 3, at 1130.

⁷¹ See Schwartz et al., *Reining In Punitive Damages “Run Wild,” supra* n. 4.

⁷² Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985).

⁷³ Randall J. Bovberg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 Nw. U. L. Rev. 908, 912 (1989).

This hands-off approach creates the opportunity for manipulation of the system by using the defendant's supposed bad acts to augment pain and suffering awards.⁷⁴ Without proper oversight by the court, the jury can be directed away from the plaintiff and toward the wrongdoing of the defendant by a carefully constructed maze of guilt evidence. As a result, the fundamental purpose of pain and suffering awards—to compensate the plaintiff—is upended. The defendant is punished, but the award is not subject to the extensive legal controls that help assure that punitive awards do not cross the constitutional line.

In addition, inflated pain and suffering awards can be used to justify higher punitive damages than would otherwise be constitutionally permissible. For example, if the underlying compensatory damages result from an inflated pain and suffering award, this would then allow a punitive award that is a multiple of the already overstated compensatory damages. Thus, when a pain and suffering award improperly results from consideration of wrongful conduct, the error may be further exacerbated through a redundant and constitutionally excessive punitive damage award.

ALEC has developed a model Full & Fair Noneconomic Damages Act to ensure that pain and suffering awards serve their true compensatory purpose.⁷⁵ The model Act would prohibit consideration of guilt evidence when a jury determines an award for pain and suffering.⁷⁶ The jury would be instructed that the law requires them to consider only what it would take to compensate the plaintiff for pain and suffering.⁷⁷ Jurors would be told that they are not to consider any alleged wrongdoing, misconduct, guilt, the defendant's wealth, or any other evidence that is offered for the purpose of punishment when they are determining noneconomic damages.

The Act also requires a trial court to closely review pain and suffering awards during the post-trial phase.⁷⁸ First, the judge would consider whether the facts of the case or the arguments of counsel inflamed

⁷⁴ 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).

⁷⁵ 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).

⁷⁶ See Am. Legis. Exch. Council, *Full & Fair Noneconomic Damages Act* (approved by ALEC Bd. of Dirs. Aug. 2004)

⁷⁷ See *id.*

⁷⁸ See *id.*

the passion or prejudice of the jury, including whether the jury improperly considered the wealth of the defendant.⁷⁹ Next, the judge would consider the amount of the pain and suffering award relative to the severity of any physical injury and the amount of any economic loss.⁸⁰ Finally, the judge would take into account whether the noneconomic damage award is in excess of verdicts involving comparable injuries to similarly situated plaintiffs.⁸¹ If so, the court could uphold the award if it finds extraordinary circumstances in the record to support an award in excess of the amount awarded in similar cases.

Finally, the Act requires appellate courts to engage in a *de novo* review of an appeal of a noneconomic damages award challenged on grounds of excessiveness.⁸² This means that the appellate court would independently consider the legality of the noneconomic damage award, rather than rely on the judgment of the trial court absent finding an abuse of discretion.⁸³ This *de novo* standard is the same type of thorough review mandated by the United States Supreme Court for determining whether a punitive damage award is unconstitutionally excessive.⁸⁴

IV. ASBESTOS AND SILICA MEDICAL CRITERIA REFORM

A. *The Asbestos Litigation Crisis: An Overview*

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an ever growing “asbestos-litigation crisis.”⁸⁵ Instead of easing, “[t]he crisis is

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ Courts have successfully used this comparative approach to incorporate an objective element into the review of noneconomic damage awards, a practice that is supported by legal scholars. *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 Iowa L. Rev. 1109, 1134-35 (1995) (noting that the comparative approach is most widely practiced for the review of general damage awards in New York); David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 323 (1989) (“It is not enough for reviewing judges simply to ask whether the specific factual circumstances of the award justify a particularly large award. They must also ask whether the facts indicate that the plaintiff has suffered sufficiently more than similarly situated plaintiffs to justify an award larger than other juries or judges have granted.”); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 Hofstra L. Rev. 763, 777 (1995) (proposing that jurors in all cases in which non-pecuniary damages are sought receive a grid of the median, high, and low awards in similar cases in the same state during a contemporaneous time period to avoid extraordinary awards and the need for appellate review).

⁸² *See* Am. Legis. Exch. Council, *Full & Fair Noneconomic Damages Act*, *supra*, n. 76.

⁸³ *See id.*

⁸⁴ *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001).

⁸⁵ *Amchem*, 521 U.S. at 597.

worsening at a much more rapid pace than even the most pessimistic projections.”⁸⁶ At least 322,000 asbestos claims are now pending.⁸⁷

Today, the vast majority of new asbestos claimants—up to ninety percent—are “people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be.”⁸⁸ Mass screenings conducted by plaintiffs’ lawyers and their agents have “driven the flow of new asbestos claims by healthy plaintiffs.”⁸⁹ These screenings are frequently conducted in areas with high concentrations of workers that may have worked in jobs where they were exposed to asbestos.⁹⁰ Plaintiffs are recruited through exaggerated ads, such as: “Find out if YOU have MILLION DOLLAR LUNGS!”⁹¹

The active and retired [union] members of [asbestos-affected industries] crafts are notified through their newsletters and through meetings of retired employees that mobile vans or temporary offices equipped with X-ray machines are available to screen those with a history of asbestos exposure. The X-rays in turn are then viewed by radiologists for any abnormalities.

⁸⁶ Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve The Asbestos Litigation Crisis*, 6:6 Briefly 7 (Natl. Leg. Ctr. for the Pub. Interest June 2002); see also Stephen J. Carroll et al., *Asbestos Litigation* xxiv, RAND Inst. for Civ. Just. (2005) (“The number of claims filed annually has increased sharply in the past few years.”) [hereinafter RAND Rep.].

⁸⁷ See Am Acad. of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006), (available at http://www.actuary.org/pdf/casualty/asbestos_feb06.pdf) [hereinafter Am. Acad. of Actuaries Rep.].

⁸⁸ H.R. Jud. Comm., *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283*, 106th Cong. 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) (available at 1999 WL 458254); see also Roger Parloff, *Asbestos*, Fortune 186 (Sept. 6, 2004) (available at 2004 WLNR 17888598) (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms.”); RAND Rep., *supra* n. 86, at 76 (“[A] large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living.”); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times A15 (Apr. 10, 2002) (available at 2002 WLNR 4092639).

⁸⁹ Hon. Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003); see also Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

⁹⁰ See *Eagle-Picher Indus., Inc. v. Am. Employers’ Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989).

⁹¹ Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep. 36 (Dec. 17, 2001).

At the initial screening, representatives associated with the national counsel of the various unions are present and distribute brochures advising both retired and still working employees of their legal remedies. Retainer agreements are often obtained on the spot.

After initial screenings, those with anything other than normal X-rays are called in for a second examination which may include more chest X-rays, CT scans, pulmonary function tests and a clinical examination. A more detailed history of asbestos exposure is also obtained. If abnormal findings consistent with asbestos exposure are again demonstrated, a lawsuit is usually filed.⁹²

Some attorneys reportedly pass an x-ray around to numerous radiologists until they find one who is willing to say that the x-ray shows symptoms of an asbestos-related disease, a practice strongly suggesting unreliable scientific evidence.⁹³ Many of the x-ray interpreters (B-readers) are “so biased that their readings [are] simply unreliable.”⁹⁴ As one physician has explained, “[T]he chest x-rays are not read blindly, but always with knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.”⁹⁵ “The result is the epidemic of asbestosis observed . . . in numbers which are inconceivable and among industries where the disease has never been previously recognized by medical investigation.”⁹⁶

⁹² John C. Corrigan & Craig J. Whitney, *Asbestos Litigation Under the F.E.L.A.*, 20 Forum 580 (Summer 1985). 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), <http://www.aei-brookings.org/publications/abstract.php?pid=993> [hereinafter Pendell].

⁹³ See David Egilman, *Asbestos Screenings*, 42 Am. J. of Indus. Med. 163 (2002); see also Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer 1 (Nov. 5, 2002) (available at 2002 WLNR 269888) (reporting that one expert medical witness for plaintiffs remarked, “I was amazed to discover that, in some of the screenings, the worker’s x-ray had been ‘shopped around’ to as many as six radiologists until a slightly positive reading was reported by the last one.”).

⁹⁴ *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005).

⁹⁵ David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.). In 2004, researchers at Johns Hopkins University re-evaluated 551 x-rays and 492 matching interpretive reports used as a basis for an asbestos claim. The x-ray readers who had been retained by plaintiffs’ lawyers found that 95.9% of the films revealed abnormalities. When six independent radiologists reinterpreted the x-rays, they found abnormalities in only 4.5% of the cases. See Joseph N. Gitlin et al., *Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004).

⁹⁶ Andrew J. Ghio, M.D., *Asbestosis: Over Diagnosed?*, News & Observer (Charlotte, N.C.) A11 (Apr. 12, 2004).

The problem presented by mass filings by unimpaired claimants is self-evident: they create judicial backlogs and exhaust scarce resources that should go to “the sick and dying, their widows and survivors.”⁹⁷ Sick plaintiffs and asymptomatic claimants are forced to compete against each other for scarce resources.⁹⁸ The former manager of the federal asbestos docket explained: “Only a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases.”⁹⁹

Lawyers who represent cancer victims have been highly critical of mass screenings and the filings they generate. Here is what some of these lawyers have said:

- Matthew Bergman of Seattle: “Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.”¹⁰⁰
- Peter Kraus of Dallas: Plaintiffs’ lawyers who file suits on behalf of the non-sick are “sucking the money away from the truly impaired.”¹⁰¹
- Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.¹⁰²

⁹⁷ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom. *Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted).

⁹⁸ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) (“Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency—as in the case of some dozen manufacturers already in bankruptcy.”), vacated, 982 F.2d 721 (2d Cir. 1992).

⁹⁹ *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E.D. Pa. Sept. 12, 1996).

¹⁰⁰ Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer B7 (May 30, 2002) (available at 2002 WLNR 2149929).

¹⁰¹ Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J. A1 (Apr. 25, 2002).

¹⁰² See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Jud.*, 107th Cong. (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farris) (available at 2003 WL 785389).

- Terrence Lavin, an Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray."¹⁰³

The concerns of the asbestos cancer lawyers are well founded. Asbestos litigation has forced at least seventy-eight employers into bankruptcy.¹⁰⁴ The RAND Institute for Civil Justice (RAND) reported that "[f]ollowing 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades."¹⁰⁵ The "process is accelerating,"¹⁰⁶ due to the "piling on" nature of asbestos liabilities.¹⁰⁷ A study by Columbia University Nobel Prize-winning economist Joseph Stiglitz and two colleagues found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000.¹⁰⁸ Those workers and their families lost \$175 million to \$200 million in wages,¹⁰⁹ and employee retirement assets declined roughly twenty-five percent.¹¹⁰

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."¹¹¹ Plaintiffs' attorney Richard Scruggs has remarked that the litigation has turned into the "endless search for a solvent bystander."¹¹²

¹⁰³ Editorial, *ABA Backs Asbestos Reform*, Wash. Times B2 (Feb. 16, 2003).

¹⁰⁴ See Am. Acad. of Actuaries Rep., supra n. 87, at Attachment 3, Sheet 1.

¹⁰⁵ RAND Rep., supra n. 86, at xxvii.; see also Ronald Barliant, Dimitri G. Karcazes & Anne M. Sherry, *From Free-Fall To Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 Am. Bankr. Inst. L. Rev. 441 (2004); Mark D. Plevin et al., *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 S. Tex. L. Rev. 883 (2003).

¹⁰⁶ *In re Collins*, 233 F.3d at 812.

¹⁰⁷ See Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (stating that each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."); *In re Combustion Engr., Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy.").

¹⁰⁸ See Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

¹⁰⁹ See *id.* at 76.

¹¹⁰ See *id.* at 83.

¹¹¹ Editorial, *Lawyers Torch the Economy*, Wall St. J. A14 (Apr. 6, 2001); see also U.S. Cong., Cong. Budget Off., *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities").

¹¹² *Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002).

More than 8,500 defendants¹¹³ have become “ensnarled in the litigation.”¹¹⁴ Many of these defendants are familiar names.¹¹⁵ Other defendants are small businesses facing potentially devastating liability.¹¹⁶ Nontraditional defendants now account for more than half of asbestos expenditures.¹¹⁷

B. Rise in Silica-Related Lawsuits

For years, litigation against industrial sand manufacturers and other aggregates, industrial minerals companies, respirator (dust mask) makers, and related safety equipment manufacturers by workers alleging health conditions from workplace exposures to silica was stable, with only a low number of people pursuing claims each year.¹¹⁸ Recently, however, there has been a marked increase in the number of silica lawsuits.¹¹⁹ One large insurance company is handling more than 25,000 silica claims in twenty-eight states—a tenfold rise from August 2002.¹²⁰ E.D. Bullard Co., the inventor of the hard hat and a maker of respirators, has seen a similar jump in claims since 2002: 62 cases with 200 plaintiffs in 1999; 156 cases with 4,305 plaintiffs in 2002; and 643 cases with 17,288 plaintiffs in 2003.¹²¹

It appears that the same lawsuit-generating tactics that worked to

¹¹³ See Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, Columns—Asbestos 5 (Aug. 2004).

¹¹⁴ *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48.

¹¹⁵ See Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J. B1 (Apr. 12, 2000).

¹¹⁶ See Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J. B1 (Jan. 27, 2003).

¹¹⁷ See RAND Rep., *supra* n. 86, at 94.

¹¹⁸ See Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 Mealey’s Litig. Rep.: Asbestos 33 (Feb. 21, 2005) [hereinafter Behrens et al.]; Victor E. Schwartz & Leah Lorber, *A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis*, 28 Am. J. of Tr. Advoc. 296 (2004).

¹¹⁹ See Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. Times C1 (Sept. 6, 2003) (available at 2003 WLNR 5662921); Kelly Barron, *Bonanza or Boondoggle? Plaintiffs’ Lawyers Hope Silica Could be the Next Asbestos*, 28:9 Crain’s Chi. Bus. 35 (Feb. 28, 2005) (available at 2005 WLNR 3322581); Patti Waldmeir, *Business Fears Silica Lawsuits Could Wreak Same Havoc as Asbestosis*, Fin. Times 3 (Feb. 2, 2005) (available at 2005 WLNR 1400086).

¹²⁰ See Susan Warren, *Silicosis Suits Rise Like Dust/Lawyers in Asbestos Cases Target Many of the Same Companies*, Wall St. J. B5 (Sept. 4, 2003).

¹²¹ See Susanne Sclafane, *Silica Dust: The Next Asbestos?*, 108:18 Natl. Underwriter Prop. & Cas. / Risk & Ben. Mgmt. 18 (May 10, 2004) (available at 2004 WLNR 14746125); see also Bob Sherwood, *Weighing the Risk from Food and Phones*, Fin. Times 12 (Apr. 28, 2003) (available at 2003 WLNR 8136508) (“[s]ilicosis claims [in the United States] are climbing at such a rate that one company has 17,000 suits against it—and it just makes masks designed to protect people from silica dust”).

generate asbestos claims are now being exploited in the silica context.¹²² Such tactics include plaintiff recruitment through direct mailings, the use of marketing firms to develop inventories, free mass screenings,¹²³ mobile x-ray vans,¹²⁴ and Internet websites. Screenings of potential silica plaintiffs by plaintiffs' law firms and their agents have increased immeasurably during the past few years.¹²⁵

“Most commentators point to pending legislative efforts relating to asbestos litigation, tort-reform initiatives in Mississippi and Texas, and the use of mass screenings as the reason silicosis ‘victims’ have seemingly emerged from the woodwork.”¹²⁶ Some lawyers are even filing asbestos “re-tread” cases—bringing silica lawsuits on behalf of people who have already received an asbestos-related recovery.¹²⁷ As the *National Law Journal* reported in February 2005: “One of the most explosive revelations that has emerged from the [federal silica MDL proceeding] is that at least half of the approximately 10,000 plaintiffs in the silica MDL had previously filed asbestos claims.”¹²⁸

¹²² See Pendell, supra n. 92; see also Jonathan D. Glater, *The Tort Wars, at a Turning Point*, N.Y. Times C1 (Oct. 9, 2005) (available at 2005 WLNR 16361092).

¹²³ See Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, 13:136 Corp. Leg. Times Col. 1 (Mar. 2003) [hereinafter Reisinger].

¹²⁴ See *Increase in Screening for Silica Exposure Victims Evident in Texas*, 1:2 Mealey's Litig. Rep.: Silica 10 (Oct. 18, 2002).

¹²⁵ See *id.* Medical screening is big business. See e.g. David M. Setter et al., *Why We Have To Defend Against Screened Cases Now Is the Time for a Change*, 2:4 Mealey's Litig. Rep.: Silica 11 (2003) (detailing deposition testimony regarding profits generated from medical screenings and stating, “[t]hese individuals make huge amounts of money at other's expense.”).

¹²⁶ Roy T. Atwood et al., Commentary, *In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation*, 26:2 Andrews Asbestos Litig. Rptr. 12 (Dec. 4, 2003); see also *Asbestos: The Mixed Dust and FELA Issues: Hearing Before the Senate Committee on the Judiciary*, 109th Cong. 9 (Feb. 2, 2005) (statement of Lester Brickman, Professor, Benjamin N. Cardozo School of Law of Yeshiva University) (available at 2005 WL 265224); Gilbert S. Keteltas, *Learning the Lessons of Asbestos: Courts and Defendants Can Do Better in the Case of Silica*, 26:6 Andrews Asbestos Litig. Rptr. 9 (Jan. 15, 2004).

¹²⁷ See Jonathan D. Glater, *Asbestos Claims Decline, but Questions Rise*, N.Y. Times C1 (Apr. 6, 2005) (available at 2005 WLNR 5343368) (stating with respect to the federal silica multidistrict litigation: “The details of the diagnoses underlying some silica claimants are striking. Some of the same doctors who diagnosed silicosis in claimants had previously found asbestosis—another disease, which doctors said was typically characterized by different scarring of a different part of the lungs in the people they examined.”). “Suffering from both asbestosis and silicosis is, statistically speaking, nearly impossible.” Carlyn Kolker, *Spreading the Blame*, Am. Law. 25 (Oct. 2005). One lawyer in the federal silica litigation, responding to an accusation by the federal judge that the lawyer brought silica claims on behalf of previous asbestosis claimants, asserted that he “doubt[ed] his clients’ asbestosis diagnoses.” *Id.* at 25.

¹²⁸ David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, Natl. L.J. 18 (Feb. 28, 2005); see also Roger Parloff, *Diagnosing for Dollars*, Fortune 96 (June 13, 2005) (available at 2005 WLNR 8694138); Jonathan D. Glater, *Companies Get Weapon In Injury Suits; Many Silica-Damage Plaintiffs Also Filed Claims Over Asbestos*, N.Y. Times C1 (Feb. 2, 2005) (available at 2005 WLNR 1415209); Jerry Mitchell, *Silicosis Screening Process Irks Judge*, Clarion-Ledger A1 (Mar. 6, 2005) (available at 2005 WLNR 3546204) (explaining that U.S. District Judge Janis Graham Jack used the word “fraudulent” to describe the process that led to the diagnosis of many of the MDL

In June 2005, the manager of the federal silica docket, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, 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 the diagnoses were fraudulently prepared.¹²⁹ “[T]hese diagnoses were driven by neither health nor justice,” Judge Jack said in her opinion.¹³⁰ “[T]hey were manufactured for money.”¹³¹ As Judge Jack appreciated:

This explosion in the number of silicosis claims in Mississippi suggests . . . perhaps the worst industrial disaster in recorded world history.

And yet, these claims do not look anything like what one would expect from an industrial disaster The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the nation.

Moreover, given the sheer volume of claims—each supported by a silicosis diagnosis by a physician—one would expect the CDC or NIOSH to be involved One would expect local health departments and physicians groups to be mobilized. One would expect a flurry of articles and attention from the media, such as what occurred in 2003 with SARS.

But none of these things have happened. There has been no response from OSHA, the CDC, NIOSH or the American Medical Association to this sudden, unprecedented onslaught of silicosis cases Likewise,

plaintiffs); David M. Setter & Andrew L. Kalish, *Recent Screening Developments: The Silica MDL 1553 Daubert Hearing*, Columns—Silica 4 (May 2005). Asbestos personal injury lawyer Steve Kazan of Oakland, California, has said “[t]he whole thing is somewhere between shameless and shameful.” Justin Scheck, *Critics Sandblast Local Silicosis Suits*, 129: 63 Recorder (San Francisco) 7 (Apr. 1, 2005) (available on Westlaw at 4/1/2005 RECORDER-SF 1).

¹²⁹ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 567 (S.D. Tex. 2005).

¹³⁰ *Id.* at 635.

¹³¹ *Id.*; see also John S. Stadler, Commentary, *Judge’s Silica Opinion Exposes Manufactured Tort Claims to Antiseptic Sunshine*, 23:15 Andrews Toxic Torts Litig. Rptr. 10 (Sept. 2, 2005).

Mississippi's silicosis epidemic has been greeted with silence by the media, the public, Congress and the scientific communities.

In short, this appears to be a phantom epidemic . . .

¹³²

Indeed, the federal government reports that silica-related deaths have declined dramatically.¹³³ According to the National Institute for Occupational Safety and Health and the U.S. Center for Disease Control and Prevention (CDC), the number of silica-related deaths dropped from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999, and to 148 in 2002.¹³⁴ To put these figures into context, the CDC reports that, on average, 400 people in the United States die each year from extreme heat,¹³⁵ and the Bureau of Labor Statistics reports that 671 workers die annually from falls "to [a] lower level."¹³⁶ A recent study by federal Occupational Safety & Health Administration staff found that "a downward trend in the airborne silica exposure levels was observed during 1988-2003."¹³⁷

C. Medical Criteria-Based Solutions

State courts and legislatures are aggressively acting to address asbestos and silica litigation within their own jurisdictions and borders. For

¹³² *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 572-73 (emphasis added); see also Mike Tolson, *Attorneys Behind Silicosis Suits Draw U.S. Judge's Wrath; Houston Legal Firm Fined; Order From Bench Says Diagnoses Made for the Money*, Houston Chron. A1 (July 2, 2005); Editorial, *The Silicosis Sheriff*, Wall St. J. A10 (July 14, 2005). A federal grand jury has been convened in Manhattan to consider possible criminal charges arising out of the federal silica litigation. See Jonathan D. Glater, *Civil Suits Over Silica In Texas Become a Criminal Matter in New York*, N.Y. Times C5 (May 18, 2005) (available at 2005 WLNR 7826957); Editorial, *Silicosis, Inc.*, Wall St. J. A20 (Oct. 27, 2005) (supporting Justice Department probe of asbestos and silica suits).

¹³³ See Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, Natl. Inst. for Occupational Safety & Health: *The Work-Related Lung Disease Surveillance Rpt.*, 2002 54 tbl. 3-1 (Pub. No. 2003-111, 2003).

¹³⁴ See Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, Natl. Inst. for Occupational Safety & Health, *Worker Health Chartbook 2004* 169 (Pub. No. 2004-146, Sept. 2004) (available at <http://www.cdc.gov/niosh/docs/chartbook/>); Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, *Silicosis Mortality, Prevention, and Control—United States, 1968-2002*, MMWR Wkly. 1 (Apr. 29, 2005) (available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5416a2.htm>), printed in 29:21 J. Am. Med. Assn. 2585 (June 1, 2005).

¹³⁵ See Ctrs. for Disease Control & Prevention, U.S. Dept. of Health & Human Servs., Washington, D.C., *About CDC's Program*, <http://www.bt.cdc.gov/disasters/extremeheat/program.asp> (last modified May 14, 2004).

¹³⁶ See Bureau of Labor Statistics, U.S. Dept. of Labor, *Census of Fatal Occupational Injuries Data*, <http://www.bls.gov/iif/> (accessed Jan. 27, 2006).

¹³⁷ A.S. Yassin et al., *Occupational Exposure to Crystalline Silica Dust in the United States, 1988-2003*, 113 *Envtl. Health Persps.* 3255, 3255 (Mar. 1, 2005) (available at 2005 WLNR 5475971).

instance, a growing number of courts have chosen to implement an unimpaired asbestos docket (also called an inactive docket, pleural registry, or deferred docket) to give trial priority to the truly sick and preserve compensation for those that may become sick in the future, rather than have those resources depleted by earlier-filing unimpaired claimants.¹³⁸ Claims placed on an unimpaired docket are exempt from discovery and do not age. Claimants are moved to the active docket when they present credible medical evidence of impairment.¹³⁹

In the late 1980s and early 1990s, three major jurisdictions adopted unimpaired asbestos dockets—Massachusetts (coordinated litigation) (September 1986),¹⁴⁰ Cook County (Chicago), Illinois (March 1991); and Baltimore City (December 1992).¹⁴¹ Since 2002, unimpaired asbestos dockets have been implemented in Minnesota (coordinated litigation) (June 2005); St. Clair, Illinois (February 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004),¹⁴² Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002).¹⁴³ A 2005 RAND report concluded that one of the “most significant developments in asbestos case processing” has been the “reemergence of deferred dockets as a popular court management tool.”¹⁴⁴ Some jurists, including the coordinating judge for all South Carolina

¹³⁸See *In re USG Corp.*, 290 B.R. 223, 227 n.3 (Bankr. Del. Feb. 2003) (stating that “[t]he practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in many jurisdictions.”); Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 Pepp. L. Rev. 271 (2004); Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253 (2005).

¹³⁹See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Policy 541 (1992).

¹⁴⁰Judge 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 3 (Feb. 2002). 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.

¹⁴¹See Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).

¹⁴²Madison County asbestos plaintiffs’ lawyer John Simmons has said that the 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 A1 (Sept. 22, 2004).

¹⁴³See Mark A. Behrens & Phil 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).

¹⁴⁴Rand Rep., *supra* n. 86, at xx.

asbestos cases and the judge presiding over the federal asbestos docket, have entered orders dismissing claims filed by the non-sick.¹⁴⁵

The latest trend is for state legislatures to require asbestos and silica claimants to demonstrate physical impairment in order to bring or maintain a claim. In 2004, Ohio became the first state to enact such medical criteria legislation for asbestos claims.¹⁴⁶ Ohio also passed silica medical criteria legislation to help ensure that silica filings would not be exacerbated by plaintiffs' lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of the asbestos medical criteria law.¹⁴⁷ In 2005, Georgia, Texas, and Florida enacted asbestos and silica medical criteria legislation.¹⁴⁸ These laws draw support from a model Asbestos and Silica Claims Priorities Act developed by ALEC¹⁴⁹ and a February 2003 resolution by the American Bar Association (ABA) House of Delegates calling for the enactment of federal medical criteria reform legislation.¹⁵⁰ The number of states that consider medical criteria legislation will no doubt continue as more states explore solutions to address asbestos and silica litigation within their borders.

V. THE JURY PATRIOTISM ACT

According to a 2004 ABA opinion poll, eighty-four percent of Americans believe jury service is an important civic duty and three in four Americans would prefer to have their case heard by a jury should they find themselves in court.¹⁵¹ Despite such beliefs, courts around the country report serious problems with low response rates to jury summonses. One study found that, on average, about twenty percent of those summoned to

¹⁴⁵ 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).

¹⁴⁶ See Ohio Rev. Code § 2307.91 et seq. (Anderson 2005); see also Kurtis A. Tunnell et al., *New Ohio Asbestos Reform Law Protects Victims and State Economy*, 26:22 *Andrews Asbestos Litig. Rep.* 10 (Aug. 26, 2004).

¹⁴⁷ See Ohio Rev. Code § 2307.84 et seq. (Anderson 2005).

¹⁴⁸ See Mark A. Behrens & Phil Goldberg, *State-Based Medical Criteria For Asbestos Suits Gains Momentum*, 15:13 *Legal Opinion Letter* (Wash. Leg. Found.) (July 1, 2005).

¹⁴⁹ See Mark A. Behrens & Phil S. Goldberg, *The Asbestos Litigation Crisis in a Nutshell*, *The State Factor* (Am. Legis. Exch. Council July 2004).

¹⁵⁰ 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 Assn.) (available at 2003 WL 785387); Am. Bar Assn., H. of Delegates, *ABA Standard for Non-Malignant Asbestos Related Disease Claims* (res. adopted Feb. 2003).

¹⁵¹ Am. Bar Assn., *Jury Service: Is Fulfilling Your Civic Duty a Trial?* (Harris Interactive July 2004) (available at <http://www.abanews.org/releases/juryreport.pdf>).

jury duty each year in state courts do not respond.¹⁵²

The contradiction between strong public support for the jury system and the avoidance of jury service suggests that the jury system needs to be reformed to better serve Americans. It needs to become more user friendly. All citizens should equally share the obligation of jury duty regardless of their occupation and income level. Not only does requiring all to serve more fairly distribute the burden of jury service throughout the public, but it is also necessary to ensure a representative jury. The absence of a representative jury may mean that plaintiffs and defendants in both civil and criminal cases may not receive a fair trial before a true jury of their peers.

ALEC has adopted model legislation known as the Jury Patriotism Act (JPA) to alleviate the financial burden and inconvenience placed on those called to serve, while making it more difficult for people to escape from jury service without showing true hardship.¹⁵³ The JPA, which has the support of a wide range of organizations from across the political spectrum, is part of a broad effort to improve the jury system for all Americans.¹⁵⁴ It is a *good government* bill, not tort reform.

The JPA's first goal is to make jury service more flexible and alleviate a juror's fear of being selected for a lengthy trial without fair compensation.¹⁵⁵ Under the JPA, individuals may schedule jury service around their business and family commitments through a one-time automatic postponement system.¹⁵⁶ The summoned juror would simply contact the appropriate court official and provide a date on which he or she

¹⁵² See Robert G. Boatright, *Improving Citizen Response to Jury Summonses: A Report With Recommendations* 13 (Am. Judicature Socy. 1998); see also Ted M. Eades, *Revisiting the Jury System in Texas: A Study of the Jury Pool in Dallas County*, 54 SMU L. Rev. 1813, 1815 (2001) (joint study conducted by the *Dallas Morning News* and Southern Methodist University found that in Dallas County, Texas "at least 80% of the people summoned each week for jury duty disregard their summonses and refuse to participate in the system."). Some estimate that as many as two-thirds of the approximately 15 million Americans summoned do not report for jury service. See David Schneider, *Jury Deliberations and the Need for Jury Reform: An Outsider's View*, 36:4 Judges J. 23, 25 (Fall 1997).

¹⁵³ See Am. Legis. Exch. Council, *Jury Patriotism Act* (approved by ALEC Bd. of Dirs. Mar. 2003).

¹⁵⁴ For example, ABA President Robert Grey made jury service improvement his top priority during his 2004-05 term. In February 2005, this effort culminated in the ABA House of Delegates adopting *Principles for Juries and Jury Trials*. Am. Bar Assn., *ABA Jury Principles*, <http://www.abanet.org/jury/principles.html> (accessed Dec. 20, 2005). The JPA is fully consistent with the ABA Principles, which incorporate several JPA provisions.

¹⁵⁵ See Am. Legis. Exch. Council, *Jury Patriotism Act*, *supra*, n. 153.

¹⁵⁶ See *id.*

would be able to appear for jury service within six months.¹⁵⁷ As the ABA has observed, “[d]eferral of jury service accommodates the public-necessity rationale upon which most exemptions and automatic excuses were originally premised, while enabling a broader spectrum of the community to serve as jurors.”¹⁵⁸

The JPA also would reduce the length and frequency of jury service. Summoned jurors would serve no more than one day unless they are selected to serve on a trial. “One-day/one-trial” has been adopted by about one-half of the state courts nationwide.¹⁵⁹ It is favored by jurors who spend less time in waiting rooms.¹⁶⁰ Employers also like the approach because it means fewer days absent from work for jury duty for employees.¹⁶¹ The JPA also recommends that citizens not be required to serve any more than once every two years, eliminating the potential for some citizens to be called repeatedly for jury service and better distributing the obligation to serve throughout the eligible population of potential jurors.¹⁶²

In addition, the JPA addresses one of the most persistent factors that limits the ability of people to serve on juries—low compensation. The JPA contains a provision for a “Lengthy Trial Fund” to ensure that all citizens are able to participate as a juror on a long trial without severe financial hardship.¹⁶³ Lengthy trials are uncommon, but jurors who find themselves called to serve on such a trial may be subject to extreme financial hardship. Self-employed individuals, small business owners and employees, wage earners, and independent contractors are especially likely to request to be excused from such trials. As a housepainter who served on an extended trial and lost over \$3,500 in income told the *San Francisco Chronicle*, “When I started jury duty, I had a nice savings. Now I’m itching and scratching just to get by.”¹⁶⁴

¹⁵⁷ See *id.*

¹⁵⁸ Am. Bar Assn., *Standards Related to Juror Use & Mgt.* 51 (1993).

¹⁵⁹ See The Natl. Ctr. for St. Cts., *Jury Administration and Management*, http://www.ncsconline.org/Projects_Initiatives/BPI/JuryAdminManage.htm (accessed Feb. 25, 2006).

¹⁶⁰ See Victor E. Schwartz & Cary Silverman, *Jury Service: It’s Changing in Ohio*, 32 Cap. U. L. Rev. 101, 106 (2003).

¹⁶¹ In a study of juror attitudes, approximately ninety percent of 5,500 jurors selected the one-day/one-trial system as preferable to a 30-day term, and a majority would not object to being called again. See David E. Kasunic, *One Day/One Trial: A Major Improvement in the Jury System*, 67:2 *Judicature* 81 (Aug. 1983).

¹⁶² See Am. Legis. Exch. Council, *Jury Patriotism Act*, *supra*, n. 153.

¹⁶³ See *id.*

¹⁶⁴ Torri Minton, *Jurors Sometimes Get the Harshest Punishment at Trials / \$15-A-Day Doesn’t Come Close to Making Up for Lost Wages*, *San Francisco Chron.* J1 (Dec. 16, 2001).

The JPA's Lengthy Trial Fund would provide those jurors who are not fully compensated by their employers and who would not be otherwise able to serve with up to \$150 per day after the third day of service. After the tenth day of jury service, all jurors who do not receive their usual income during jury service would receive compensation of up to \$300 per day after the tenth day of service for the remainder of the trial. The amount of supplemental compensation would never exceed the juror's usual daily income. The additional compensation, including the costs of administering the Fund, would be financed by a nominal filing fee paid by each attorney who files a civil case or a pleading in response to a complaint. As the *Chicago Tribune* commented, the Lengthy Trial Fund "would encourage a more diverse cross-section of the public to serve on juries. Most important, in an era of great cynicism about the political process, this would lend overdue support to one of the few public institutions where citizens make big decisions every day."¹⁶⁵ The unanimous response from judges and jurors to the additional compensation made available by the Fund has been, according to one Arizona jury administrator, an overwhelming expression of appreciation.¹⁶⁶

Given the greater convenience of serving, the model Act seeks to ensure that all people, regardless of income or background, serve on juries. Some states unnecessarily limit the jury pool and automatically exempt potential jurors from service based on their occupation.¹⁶⁷ For some reason

¹⁶⁵ *The Verdict: Better Pay for Juries*, Chi. Trib. Zone C 26 (Sept. 24, 2004).

¹⁶⁶ See G. Thomas Munsterman & Cary Silverman, *The Jury Patriotism Act In Arizona: Examining its Impact After One Year* (forthcoming 2006).

¹⁶⁷ See e.g. Haw. Rev. Stat. Ann. § 612-6 (LEXIS 1993) (exempting attorneys, heads of executive departments, elected officials, judges, ministers or priests, physicians, dentists, members of the armed forces, and members of police and fire departments); Ind. Code Ann. § 33-4-5-7 (West 2004) (repealed) (exempting members of the armed forces; elected or appointed officials of the government; honorary military staff officers; officers or enlisted persons of the guard reserve forces; veterinarians; persons serving as a member of the board of school commissioners of the city of Indianapolis; dentists; members of a police or fire departments); 14 Me. Rev. Stat. Ann. § 1211 (2005) (exempting the Governor, judges, physicians, dentists, sheriffs, attorneys, and those in the state military forces); Nev. Rev. Stat. Ann. 6.020 (LEXIS 1998 & Supp. 2003) (exempting federal or state officers, judges, attorneys, certain county officers, police officers, certain locomotive operators, correctional officers, employees of the legislature, physicians, optometrists, and dentists); Tenn. Code Ann. § 22-1-103(a) (Supp. 2005) (excusing from the initial summons all persons holding public office, practicing attorneys, certified public accountants, physicians, clergy, acting professors or teachers, members of fire companies, full-time law enforcement officers, pharmacists, practicing registered professional nurses, and those serving in the national guard); Va. Code Ann. §§ 8.01-341 to 8.01-341.1 (2000 & Supp. 2005) (exempting the President and Vice President of the United States, members of Congress, members of the General Assembly, attorneys, judges, members of the State Corporation Commission, members of the Virginia Workers' Compensation Commission, sheriffs, police officers, certain penitentiary and jail officers and employees, mariners, and certain small business operators).

or another, these people are regarded as too important: socially, politically, or economically to serve on a jury, such as health care professionals, lawyers, or government officials. Other exemptions appear to be obsolete remnants of a time past.¹⁶⁸ Some people simply feel, “I don’t belong here with these people.”¹⁶⁹ As the ABA has recognized, however, “broad categorical exceptions not only reduce the inclusiveness and representativeness of a jury panel, but also place a disproportionate burden on those who are not exempt,” most notably blue-collar workers, the retired, and the unemployed.¹⁷⁰ For this reason, the JPA eliminates all exemptions or disqualification based on a person’s occupation. This cross-section of the public is necessary to ensure a diverse and representative jury and to distribute the burden of jury service equally throughout the population.

The JPA also addresses the ease at which citizens can avoid jury service, either through the vague standard for a hardship excuse or simply not appearing in court. In many states, the standard for an excuse is subject to abuse and provides little guidance to judges.¹⁷¹ Many states simply define the grounds for an excuse as “undue hardship, severe inconvenience, or public necessity.”¹⁷² Given the added convenience of an automatic postponement, shorter term of service, and limited frequency of service, citizens should be expected to fulfill their important civic duty to participate in the justice system. The JPA makes it more difficult for the privileged to avoid jury service by tightening the standard for hardship excuses. Citizens, who would be inconvenienced by jury service due to scheduling conflicts or work or educational commitments, could take advantage of the postponement procedure provided by the Bill and request deferral of their service to a more convenient time. Individuals requesting to be excused for hardship also would be expected to provide the court with documentation supporting the need for release or dismissal from jury service.

Finally, the JPA addresses the increasing number of people who

¹⁶⁸ For example, locomotive engineers, locomotive firemen, conductors, brakemen, switchmen, and engine foremen may be surprised to learn that they are exempt from jury service in Nevada. See Nev. Rev. Stat. 6.020(1)(d).

¹⁶⁹ Julia Vitullo-Martin, *Successful Innovations Will Require Citizen Education and Participation*, 73-JUN N.Y. St. B.J. 43, 44 (June 2001) (quoting comment of “an elegant woman” summoned to jury duty in New York State one year prior to the state’s elimination of occupational exemptions).

¹⁷⁰ Am. Bar Assn., *Standards Related to Juror Use & Mgt.*, *supra* n. 158, at 51.

¹⁷¹ In some areas, excuse rates are extraordinarily high. For example, in one recent year, twenty-eight percent of jurors (those who actually appeared for jury service) in Baltimore, Maryland, City Circuit Court were excused, and excuse rates reached as high as thirty-nine percent and forty-one percent in Roland Park and Mt. Washington, Maryland, respectively. See Peter Geier, *Baltimore’s Jury Pool Expanded*, Daily Record (Baltimore, MD) (June 20, 2003).

¹⁷² See e.g. Fla. Stat. Ann. § 40.013 (West 2003); Ky. Rev. Stat. Ann. § 29A.100(1) (LEXIS 2003); W. Va. Code § 52-1-11(b) (2000).

simply choose to ignore jury summonses—a situation that has led to a critical shortage of jurors in some areas. Most states currently provide that a person can be held in contempt of court or required to pay a minimal civil fine, comparable to a parking ticket, for failing to appear for jury service.¹⁷³ It is no secret that such provisions, however minimal, are rarely imposed or enforced by courts. The JPA suggests higher penalties, such as making failure to appear in court a criminal offense.¹⁷⁴ In practice, most states that have adopted legislation based on the JPA have chosen to increase civil fines.¹⁷⁵

Recently, legislation based on the JPA has become law in Alabama,¹⁷⁶ Arizona,¹⁷⁷ Colorado,¹⁷⁸ Louisiana,¹⁷⁹ Mississippi,¹⁸⁰ Missouri,¹⁸¹ Ohio,¹⁸² Oklahoma,¹⁸³ and Utah.¹⁸⁴ Maryland,¹⁸⁵ Texas,¹⁸⁶ and Vermont¹⁸⁷ have adopted legislation loosely based on the JPA.

VI. THE LAWSUIT ABUSE REDUCTION ACT

Congress is currently considering legislation called the Lawsuit Abuse Reduction Act of 2005 (LARA) to address frivolous litigation and

¹⁷³ See e.g. 705 Ill. Comp. Stat. 305/15 (West 1999) (contempt and fine of between \$5 and \$100 unless good cause shown); N.C. Gen. Stat. § 9-13 (2003) (fine of not more than \$50 unless renders an excuse deemed sufficient); Tex. Govt. Code Ann. § 62.111 (2005) (contempt action subjecting juror to fine of between \$10 and \$100 unless provides a “reasonable excuse”); Va. Code Ann. § 8.01-356 (2000 & Supp. 2005) (fine of between \$25 and \$100 unless provides a sufficient excuse).

¹⁷⁴ See Am. Legis. Exch. Council, *Jury Patriotism Act*, *supra*, n. 153.

¹⁷⁵ See e.g. S.B. 87, 2005 Spec. Sess. (Ala. 2005) (increasing maximum fine from \$100 to \$300) (to be codified at Ala. Code § 12-16-82); H.B. 2520, 46th Leg., 1st Reg. Sess. (Ariz. Rev. Stat. § 21-334) (increasing minimum fine from \$100 to \$500) codified at Ariz. Rev. Stat. § 21-334); Am. Sub S.B. 71, 125th Gen. Assem., Reg. Sess. (Ohio 2004) (increasing minimum fine from \$25 to \$100) (codified at Ohio Rev. Code § 2313.99(A)); H. 538, 2003-2004 Leg. Sess. (Vt. 2004) (increasing maximum fine from \$50 to \$200) (codified at Vt. Code § 958).

¹⁷⁶ Ala. Sen. 87, 1st Spec. Sess. (2005).

¹⁷⁷ Ariz. H. 2520, 46th Leg., 1st Reg. Sess. (2003), as amended by Ariz. H. 2305, 47th Leg., 1st Reg. Sess. (2005).

¹⁷⁸ Colo. H. 1159, 2004 Leg. Sess. (2004).

¹⁷⁹ La. H. 2008, Reg. Sess. (2003).

¹⁸⁰ Miss. H. 13, 1st Extra Sess. (2004).

¹⁸¹ Mo. Sen. 1211, 92nd Gen. Assembly, 2d Reg. Sess. (2004), as amended by Mo. Sen. 420 & 344, 93rd Gen. Assembly, 1st Reg. Sess. (2005).

¹⁸² Ohio Amend. Substitute Sen. 71, 125th Gen. Assembly, Reg. Sess. (2004).

¹⁸³ Okla. Sen. 479, 49th Leg., 2nd Reg. Sess. (2004).

¹⁸⁴ Utah H. 324, Gen. Sess. (2003).

¹⁸⁵ Md. H. 1185, Reg. Sess. (2005).

¹⁸⁶ Tex. Sen. 1704, 79th Leg., Reg. Sess. (2005).

¹⁸⁷ Vt. H. 538, 2003-04 Leg. Sess. (2004).

forum shopping abuse. LARA seeks to re-institute mandatory sanctions for frivolous lawsuits by reforming Rule 11 of the Federal Rules of Civil Procedure.¹⁸⁸ The Act would reverse changes made to Rule 11 in 1993 that rendered sanctions discretionary rather than mandatory. Unfortunately, the 1993 amendments allowed judges to ignore or forget sanctions. For that reason, irresponsible personal injury lawyers could game the legal system.¹⁸⁹ The proposed legislation also would reverse the 1993 prohibition against money sanctions for discovery abuses.

Second, as stated, LARA addresses rampant nationwide forum shopping. Forum shopping occurs when what some call “litigation tourists” are guided by their attorneys into bringing claims in so-called “Judicial Hellholes.”¹⁹⁰ These jurisdictions have become a powerful magnet for out-of-state plaintiffs that have absolutely nothing to do with the location. The plaintiffs were not injured in the jurisdiction, never lived in the jurisdiction, and do not work in the jurisdiction. Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there. The litigation tourist is only there to sue.

The LARA helps shut down these “Judicial Hellholes” with equity and fairness. The LARA would allow a plaintiff to file a case where he resides at the time of filing, or resided at the time of the alleged injury, where the circumstances giving rise to the injury occurred, or in the place of the defendant’s principal place of business.¹⁹¹

VII. CONCLUSION

The civil justice reform movement is not static; it is a dynamic chess match. As civil defendants have had to confront new issues, the reform effort has evolved to keep up with these changes. Increasingly, business-supported federal and state civil justice efforts are focused on procedural reforms that neither limit an injured person’s ability to sue nor cap the amount of actual damages the person may recover. Examples at the

¹⁸⁸ H.R. 420, 109th Congress (Oct. 27, 2005).

¹⁸⁹ When the 1993 amendments weakening Rule 11 were approved, Justice Scalia dissented from the process, noting that, “In my view, those who file frivolous suits and pleadings, should have no ‘safe harbor.’ The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule [11], parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty.” *Amendments to the R. of Civ. Proc.*, 146 F.R.D. 401, 508 (1993).

¹⁹⁰ See ATRA Hellholes Rep., *supra* n. 11.

¹⁹¹ H.R. 420, 109th Congress (Oct. 27, 2005).

federal level include the federal Class Action Fairness Act of 2005¹⁹² and the Lawsuit Abuse Reduction Act¹⁹³ currently before Congress. At the state level, procedural reforms are being promoted as ways to address problematic aspects of state attorneys general litigation, excessive noneconomic damages awards, mass filings by unimpaired asbestos and silica claimants, and to improve the representativeness and functioning of the jury system.

In fact, the label most often used to describe too many business-supported legal efforts of the past—tort reform—does not even fit these new initiatives. They are civil justice reforms, not “roll-backs” to tort liability. These changes, however, have been virtually ignored by most critics of more traditional, substantive reform proposals. It often seems that critics of reform are playing badminton while supporters of reform are playing baseball. Perhaps this is driven by a knee jerk reaction that any reform supported by business must be adverse to plaintiffs. As this article has demonstrated, this is simply not true.

We invite debate on the new issues identified in this article with the hope of identifying areas of common ground. This has occurred already in the asbestos arena where lawyers who represent cancer victims have spoken in favor of medical criteria-based solutions to the litigation because their clients would benefit from such reforms. Jury system improvements are another area where attorneys representing plaintiffs and defendants can work together to promote good government reforms like the Jury Patriotism Act that are neither pro-plaintiff nor pro-defendant. There may be other areas where bridges can be built to improve the legal system and make it fairer for all parties. We hope that this article stimulates that discussion and helps to identify those areas.

¹⁹² Sen. Rpt. 109-14 (Feb. 28, 2005).

¹⁹³ H.R. 420, 109th Congress (Oct. 27, 2005).