

Unimpaired Asbestos Dockets: They Are Constitutional

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The United States Supreme Court has said that asbestos litigation has reached “crisis” proportions.¹ At least 300,000 asbestos claims are pending.² Over 100,000 claims were filed in 2003 – “the most in a single year.”³ Before the litigation ends, at least one million more claims may be filed, according to the RAND Institute for Civil Justice (“RAND”).⁴

The “elephantine mass”⁵ of pending and anticipated asbestos claims raises the fundamental question of whether there is going to be enough money to provide compensation to current and future claimants.⁶ Already, over seventy companies have declared bankruptcy due to asbestos-related liabilities.⁷ Additional bankruptcy filings are virtually certain to occur.⁸

Sick plaintiffs and asymptomatic claimants are now forced to compete against each other for scarce resources, depleting them.⁹ As

1. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *see also* *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) (stating that “vast numbers” of asbestos cases have “swamp[ed] the courts”).

2. *See* S. Rep. 108-118, 22 (2003) (Senate Judiciary Committee report on The Fairness in Asbestos Injury Resolution Act of 2003). Over 600,000 people filed asbestos personal injury claims through the end of 2000. STEPHEN CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION vi (2004) [hereinafter RAND REP.].

3. Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16.

4. RAND REP., *supra* note 2, at 77.

5. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

6. *See In re Joint E. & S. Dists. 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).

7. Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, 18 MEALEY’S LITIG. REP.: ASBESTOS 1 (2003); *see also* *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) (stating that “[f]or some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy”).

8. Each time a defendant declares bankruptcy, “mounting and cumulative” financial pressure is placed on the “remaining defendants, whose resources are limited.” Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993); *see also* Mark D. Plevin & Paul W. Kalish, *What’s Behind the Recent Wave of Asbestos Bankruptcies?*, 16 MEALEY’S LITIG. REP.: ASBESTOS 20 (2001) (investigating the causes of bankruptcy).

9. *See* Steven Hantler, *Judges Must Play Key Role in Stemming Tide of Asbestos Litigation*, ANDREWS ASBESTOS LITIG. REP., May 22, 2003, at 12

leading commentators have explained, the presence of unimpaired claimants on court dockets and in settlement negotiations “inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now.”¹⁰

Consider, for example, the litigation involving Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company’s bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990 and did not resume until 1995. According to the Manville trustees, a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.”¹¹ The Trust is now paying out just *five cents on the dollar* to asbestos claimants.¹² The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants.¹³

The same injustice can be seen on an individual level. For example, the widow of a Washington state man who died from mesothelioma has been told that she should expect to receive only fifteen percent of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.¹⁴ The widow of an Ohio mechanic will recover at most

(assistant general counsel for DaimlerChrysler Corp. stating that “[t]he tragedy is that as plaintiffs’ lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying.”); Lillian Thomas, *Asbestos Litigation Runs Wild: Flood of Lawsuits From People Who Aren’t Sick Threatens to Dry Up Funds*, PITT. POST-GAZETTE, Nov. 3, 2002, at A1.

10. Edley & Weiler, *supra* note 8, at 393; *see also* Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 273 (2001) (stating that “the ‘asbestos litigation crisis’ would never have arisen and would not exist today” if not for the claims filed by the unimpaired).

11. Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683.

12. *Id.*

13. Mark Goodman et al., Editorial, *Plaintiffs’ Bar Now Opposes Unimpaired Asbestos Suits*, NAT’L L.J., Apr. 1, 2002, at B14.

14. Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, WASH. POST., Sept. 25, 2002, at E1, available at 2002 WL 100084407.

\$150,000 of the \$4.4 million award that she received for her husband's death.¹⁵

Currently, up to ninety percent of the claimants who file asbestos cases today have no medically cognizable injury or impairment.¹⁶ These claimants "are diagnosed largely through plaintiff-lawyer arranged mass-screening programs targeting possible exposed asbestos workers and attraction of potential claimants through the mass media."¹⁷ Plaintiffs are recruited through exaggerated ads, such as "Find out if YOU have MILLION DOLLAR LUNGS!"¹⁸ Former U.S. Attorney General Griffin Bell has noted that "[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up."¹⁹ Mass

15. Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, CLEVELAND PLAIN DEALER, Nov. 5, 2002, at A1, available at 2002 WL 6382801.

16. RAND REP., *supra* note 2, at 46; Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 1 (2001), available at <http://www.actuary.org/mono.htm> (last visited Mar. 29, 2005); see also *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (stating that "[i]n virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring"); Roger Parloff, *Asbestos*, FORTUNE, Sept. 6, 2004, at 186, available at 2004 WL 55184416 (reporting that "[a]ccording 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").

17. *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002); see also *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) (stating, "[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); Letter from U.S. Senator Don Nickles, Chairman, Committee on Budget, to Hon. Timothy J. Muris, Chairman, Federal Trade Commission and Lester M. Crawford, D.V.M., Ph.D., Acting Commissioner, Food and Drug Administration 1 (Apr. 28, 2004) (on file with authors) (calling for a federal inquiry into the "widespread use of for-profit mass X-ray screening vans and trucks to generate lawsuits by claimants, many of whom are not sick").

18. Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36, available at 2001 WL 30366341.

19. Hon. Griffin B. Bell, *Asbestos & the Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2004); see also David Egilman & Susanna Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. OF INDUS. MED. 305 (2004) (noting the danger of attorney-directed screenings that fail to provide adequate medical counseling or treatment).

screenings are a key source of increasing numbers of asbestos filings.²⁰

Recently, the American Bar Association (“ABA”) Commission on Asbestos Litigation studied this problem.²¹ The ABA Board of Governors authorized the formation of the Commission to craft a legal standard for asbestos-related impairment. With the assistance of the American Medical Association, the Commission consulted some of the Nation’s most prominent physicians in the field of occupational medicine and pulmonary disease. The doctors interviewed “represented a cross-section of experts in this area – some had testified for plaintiffs in asbestos litigation, some had testified for defendants, some for both, and some for neither.”²² These physicians confirmed published reports that only a small percentage of current asbestos claims involve functional impairment:

Asbestos-related cancer and impairing asbestosis continue to occur, but they represent a small fraction of annual new filings. According to the recent RAND report, somewhere between two-thirds and 90% of new claims are now brought by individuals who have radiographically detectable changes in their lungs that are “consistent with” asbestos-related disease (and with dozens of other causes), but have no demonstrated functional impairment from those changes. In sum, it appears that a large and growing proportion of the claims entering the system in recent years were submitted by individuals who have not

20. Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 132 (2004).

21. See ABA Commission on Asbestos Litigation Report to the House of Delegates, available at http://www.abanet.org/leadership/full_report.pdf (last visited Mar. 29, 2005) [hereinafter *ABA Report*]. As a result of its findings, the ABA Commission proposed the enactment of federal medical criteria standards for nonmalignant claims. The ABA’s House of Delegates adopted the Commission’s proposal in February 2003. See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-elect, American Bar Association), available at 2003 WL 11715910.

22. *ABA Report*, *supra* note 21, at 11.

incurred an injury that affects their ability to perform activities of daily life.²³

The ABA Commission also confirmed that a large percentage of asbestos cases arise from the activities of for-profit litigation screening companies whose sole purpose is to identify large numbers of people who have minimal X-ray changes that are “consistent with” prior asbestos exposure, thus providing the pretext for a lawsuit. The Commission reported:

For-profit litigation “screening” companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have “free” testing done – usually only chest X-rays. Promotional ads declare that “You May Have Million \$ Lungs” and urge the workers to be screened even if they have no breathing problems because “you may be sick with no feeling of illness.” The X-rays are usually taken in “X-ray mobiles” that are driven to union halls or hotel parking lots. There is evidence that many litigation-screening companies commonly administer the X-rays in violation of state and federal safety regulations. In order to get an X-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are “positive.”

The X-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the X-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for X-ray evidence that is “consistent with” asbestos-related disease. Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars – in some cases, millions – in the aggregate by

23. *ABA Report*, *supra* note 21, at 9.

the litigation screening companies due to the volume of films read.²⁴

Given the way in which mass-litigation screenings are conducted, it is hardly surprising that the medical “findings” they generate are notoriously unreliable. The ABA Commission reported that the rate of “positive” findings (*i.e.*, findings consistent with prior asbestos exposure) generated by litigation-screening companies is “startlingly high,” often exceeding fifty percent and sometimes reaching ninety percent.²⁵

Lawyers who represent cancer victims have been highly critical of mass screenings and the filings they generate. Here is what some of the 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 . . . the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.”²⁶

24. *ABA Report*, *supra* note 21, at 10.

25. *ABA Report*, *supra* note 21, at 8. As one physician has explained, “the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker’s behalf.” See 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). In a study of 439 chest films from tire workers who had filed legal claims, an independent panel of three board-certified radiologists found that less than 4% had conditions consistent with asbestos exposure. See Bernstein, *supra* at 13. A review of 65 asbestos claims undertaken by medical experts appointed by a federal court overseeing asbestos cases found that 65% of the claimants had no asbestos-related conditions. See Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39, 45 (1991).

26. Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, available at 2002 WL-STLPI 5934774.

- Peter Kraus of Dallas: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."²⁷
- Mark Iola of the same Dallas firm has said that unimpaired asbestos claimants are "stealing money from the very sick."²⁸
- Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.²⁹
- Randy Bono, a prominent Madison County, Illinois attorney: "I welcome change. Getting people who aren't sick out of the system, that's a good idea."³⁰
- Bono's partner John Simmons has said that Madison County's unimpaired docket has been "a win-win If they (plaintiffs without symptoms) never get sick, they never get paid, and that's the best scenario. And it preserves the dollars that are going to be spent on settlements for those who are truly deserving."³¹
- 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."³²

27. Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, available at 2002 WL-WSJ 3392934.

28. Thomas Korosec, *Enough to Make You Sick*, DALLAS OBSERVER, Sept. 26, 2002, available at <http://www.dallasobserver.com/issues/2002-09-26/feature.html/1/index.html> (last visited Mar. 29, 2005).

29. *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., at 4 (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise), available at 2003 WL 785389.

30. Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties; Bill Would Substitute Trust Fund for Lawsuits*, ST. LOUIS POST-DISPATCH, July 23, 2003, at A1, available at 2003 WL 3596458.

31. Paul Hampel, *Lack of Trust Poisons Efforts to Reform Asbestos Litigation*, ST. LOUIS POST-DISPATCH, Sept. 22, 2004, at A1, available at 2004 WL 94484376.

32. Editorial, *ABA Backs Asbestos Reform*, WASH. TIMES, Feb. 16, 2003, at B2, available at 2003 WL-WATIMES 7706224; see also Terrence J. Lavin, Editorial, *Those 'Sick and Dying' From Asbestos Exposure Deserve Top Priority*, CHI. DAILY L. BULL., Feb. 13, 2003, at 2 (stating that asbestos reform is

Filings by the unimpaired not only threaten payments to the truly sick, they also have serious consequences for defendants.³³ Now that virtually all former manufacturers of asbestos-containing products have been forced into bankruptcy, “the net has spread . . . to companies far removed from the scene of any putative wrongdoing.”³⁴ “A newer generation of peripheral defendants are becoming ensnarled in the litigation” to make up for the “traditional defendants” who are no longer around to pay their full share.³⁵ RAND has now identified more than 8,500 asbestos defendants³⁶—up from only 300 in 1982.³⁷ Asbestos litigation now touches firms in industries engaged in almost every form of economic activity that takes place in the economy.³⁸

The combination of forces at work in asbestos litigation has set off a chain reaction: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted

desperately needed because the courts are crowded with hundreds of thousands of claimants who are not sick).

33. See Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 534 (2001) (discussing how the list of asbestos defendants entering bankruptcy has grown).

34. Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, available at 2001 WL-WSJ 2859560; see also Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1, available at 2003 WL-WSJ 3957497 (commenting on the new trend of asbestos lawsuits that target peripheral asbestos defendants); Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1, available at 2000 WL-WSJ 3025073 (using a door maker as an example of one of the unlikely new targets of asbestos litigation). Plaintiffs’ attorney Richard Scruggs has remarked that asbestos litigation has turned into the “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation—A Discussion With Richard Scruggs and Victor Schwartz*, 17 MEALEY’S LITIG. REP.: ASBESTOS 5 (2002).

35. *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747; see also Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, available at 2001 WL-WSJ 2856111 (discussing how asbestos companies are going bankrupt and plaintiffs’ attorneys are seeking other defendants to pay claims).

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

37. JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (1984).

38. See RAND REP., *supra* note 2, at 41 (explaining the increase in the number of asbestos litigation claims over the last decade).

the assets of the defendant companies and forced many of them into bankruptcy.³⁹ As more companies have been driven into bankruptcy, the process has accelerated because more and more liability is being pushed onto fewer and fewer companies.⁴⁰ To make up for the shares of the bankrupt companies, defendants with increasingly attenuated connections to asbestos are dragged into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them.⁴¹

A growing number of jurisdictions are adopting unimpaired-asbestos dockets (also called an inactive docket, pleural registry, or deferred docket) to give trial priority to the truly sick and to preserve compensation for those who may become sick in the future, rather than have those resources depleted by earlier-filing, unimpaired claimants.⁴² Claims placed on an unimpaired docket are exempt from discovery and do not age.⁴³ A plaintiff may petition to have his or her case removed to the active docket and set for trial by presenting credible medical evidence that an impairing condition has developed.⁴⁴

39. See Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 951-52 (2003) (explaining the effect of asbestos-related bankruptcies on companies).

40. *Id.*

41. *Id.*

42. See Dee McAree, *A Battle Over Asbestos Backlogs: States Are Moving Sickest Plaintiffs to the Front*, NAT'L L.J., Sept. 1, 2003, at 6; Susan Warren, *Swamped Courts Practice Plaintiff Triage*, WALL ST. J., Jan. 27, 2003, at B1, available at 2003 WL-WSJ 3957498 (discussing court practice of separating asbestos claims based on whether plaintiff has become sick or not). For background on the use of medical criteria to prioritize asbestos claims, see Dr. John E. Parker, *Understanding Asbestos-Related Medical Criteria*, 18 MEALEY'S LITIG. REP.: ASBESTOS 45 (2003).

43. The doctrine of judicial tolling gives courts discretion to toll statutes of limitations. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974) (holding that despite a clear time limitation set forth in an antitrust statute, it was within the court's discretion and power to toll the statute of limitations "under certain circumstances not inconsistent with the legislative purpose"); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 427 (1965) (holding that the statute of limitations tolled for the period of time between the filing of the state-court proceeding until the case's dismissal for improper venue); see also *Lewis v. Detroit Auto. Inter-Ins. Exch.*, 393 N.W.2d 167, 172 (Mich. 1986) (stating that statutes of limitations are not inflexible and are subject to judicial tolling under certain circumstances).

44. 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, 11 (2001).

Unimpaired-asbestos dockets offer several important public-policy benefits:⁴⁵

- **The truly sick:** The sick are able to move “to the front of the line” and are not forced to wait until earlier-filed claims by unimpaired individuals are resolved. Removing these delays can be especially important if the individual has a fatal disease. By eliminating the pressure to settle claims filed by the unimpaired and reducing transaction costs spent litigating their claims, unimpaired dockets preserve resources needed to compensate the truly sick now—and in the future.⁴⁶

- **The unimpaired are protected:** Unimpaired individuals are protected from having their claims deemed time-barred should an asbestos-related disease later develop. This would address a primary engine driving the filing of many claims by unimpaired claimants.⁴⁷

45. See *In re* USG Corp., 290 B.R. 223, 227 n.3 (Bankr. D. 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.”); *Sopha v. Owens-Corning Fiberglass Corp.*, 601 N.W.2d 627, 641 (Wis. 1999) (indicating that a pleural registry “may be [a] good solution to an admittedly difficult situation for both claimants and alleged tortfeasors”); *In re* Report of the Advisory Group, 1993 WL 30497, at *51 (D. Me. Feb. 1, 1993) (stating that “[b]y using the suspense docket, plaintiffs need not engage in the expense of trial for what are still minimal damages, but are protected in their right to recover if their symptoms later worsen. For defendants, the procedure is costless and carries the possibility that plaintiffs will live out their lives without significant injury from asbestos.”); Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Court’s Duty to Help Solve the Asbestos Litigation Crisis*, BRIEFLY, June 2002, at 33-38 (Nat’l Legal Center for the Pub. Interest monograph) (advocating a return to traditional tort principles to fix the asbestos litigation system), available at <http://www.nlcp.org> (last visited Mar. 29, 2005).

46. See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 1 (2001).

47. See *In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. Ct. 1991) (explaining that a primary reason that so many unimpaired individuals are filing claims is the “fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability”); *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary of the U.S. Department of Health and Human Services) (stating that there are “mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation”), available at 1999 WL 20009757.

- ***Defendant businesses and their workers:*** Defendants are able to conserve scarce financial resources that are needed to compensate sick claimants. Unimpaired dockets also can reduce the specter of more employers being driven into bankruptcy and can help slow the spread of asbestos litigation to peripheral defendants.⁴⁸
- ***The judicial system:*** Unimpaired dockets relieve the pressure on courts to decide “claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be).”⁴⁹ Other parties in the civil justice system benefit too, because their cases can be heard more quickly.

In the late 1980s and early 1990s, three major jurisdictions adopted unimpaired docket plans: Boston, Chicago and Baltimore.⁵⁰ Judges from all three courts have stated that they believe the plans are working well for all parties.⁵¹ Since 2002, unimpaired dockets have been implemented in several other jurisdictions with a significant number of asbestos claims: St. Clair County, Illinois (Feb. 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002).⁵²

48. 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, 346 (2002) (explaining the benefits of an inactive docket plan).

49. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 555 (1992).

50. See *In re Asbestos Cases* (Cook County Cir. Ct., Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters) (on file with the authors); *In re Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, 1992 WL 12019620 (Baltimore City Cir. Ct., Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases); Mass. State Court Asbestos Pers. Injury Litig. (Middlesex Super. Ct., Mass. Sept. 1986) (order) (on file with the authors).

51. Judge Hiller Zobel has said that the Massachusetts unimpaired docket has been “really a very good system that has worked out.” *Unimpaired Asbestos Dockets: Are They Easing the Flow of Litigation?*, COLUMNS—RAISING THE BAR IN ASBESTOS LITIG., Feb. 2002, at 2. Baltimore County Circuit Court Judge Richard Rombro has written: “[T]he docket is working and . . . a substantial number of cases have been moved to the active docket while those without any impairment remain on the unimpaired docket.” *In re Pers. Injury and Wrongful Death Asbestos Cases*, No. 24-X-92-344501, at 5 (Baltimore City Cir. Ct., Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Unimpaired Docket Medical Removal Criteria).

52. See *In re All Asbestos Litig.* Filed in St. Clair County (St. Clair County Cir. Ct., Ill. Feb. 25, 2005) (Order Establishing Asbestos Deferred Registry); *In re*

As more courts consider unimpaired dockets to address the “asbestos mess,”⁵³ they may question whether a state court has the authority to implement an unimpaired docket and if such an order would be constitutional. This article will describe the inherent authority of state courts to adopt unimpaired-asbestos dockets. This article will also discuss the various constitutional rights that may be implicated by such orders. The article concludes that unimpaired-asbestos dockets are constitutional.⁵⁴

I. UNIMPAIRED DOCKET PLANS PASS CONSTITUTIONAL MUSTER

Parties challenging judicially created unimpaired dockets may allege that such orders violate one or more federal and state constitutional rights: separation of powers, jury trial, due process, open courts (sometimes called access to courts or right to a remedy),

All Asbestos Litig. Filed in Madison County (Madison County Cir. Ct., Ill. Jan. 23, 2004) (Order Establishing Asbestos Deferred Registry) (on file with the authors); *In re* Fifth Judicial Dist. Asbestos Litig. (N.Y. Sup. Ct. Jan. 31, 2003) (Amendment to Amended Case Management Order No. 1) (on file with the authors); *In re* New York City Asbestos Litig., 2002 WL 32151568 (N.Y.C. Sup. Ct., N.Y. Dec. 19, 2002) (Order Amending Prior Case Management Orders); *In re* All Asbestos Cases (Portsmouth Cir. Ct., Va. Aug. 4, 2004) (Order Establishing an Inactive Docket For Cases Filed By the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims) (on file with the authors); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties 1 (Dec. 3, 2002) (on file with the authors). As of this writing, the Michigan Supreme Court has before it a petition filed by nearly 70 companies and numerous *amici* who have asked the court to adopt a statewide unimpaired-asbestos docket. *See In re* Pet. for an Admin. Order, No. 124213, 2003 WL 22341301 (Mich. Sept. 11, 2003). In 2004, Ohio became the first state to enact legislation requiring asbestos claimants to demonstrate physical impairment in order to bring or maintain a claim. *See* OHIO REV. CODE § 2307.91 et seq. (Anderson 2005). Georgia enacted similar legislation in 2005. *see* Ga. H.B. 416, 2005-2006 Legis. Sess. (2005).

53. *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

54. The article focuses on court-created unimpaired asbestos dockets. Court orders that require the dismissal of asbestos claims that fail to meet minimum medical criteria and legislative enactments establishing an unimpaired asbestos docket or requiring minimum medical criteria to be met for the filing of asbestos-related personal injury and wrongful death claims are beyond the scope of this article, although the arguments supporting judicially adopted unimpaired dockets lend support to these approaches.

equal protection, and the prohibition against takings, although it is questionable whether such non-final orders are subject to constitutional challenge.⁵⁵

A. *Separation of Powers*

Opponents of judicially adopted unimpaired docket orders may allege that such plans violate the separation of powers on the theory that they represent an intrusion by the judiciary into purely legislative functions because the plans involve a balancing of policy interests.⁵⁶ Simply because a court weighs various interests and considers the effect of its actions on litigants and the public, however, does not make its action “legislative” in nature.

To the contrary, there is no more inherent judicial power than the ability of a court “to control its calendar to serve the interests of justice.”⁵⁷ The implementation of procedural docket management

55. Trial court unimpaired docket orders are generally beyond the jurisdiction of appellate courts. *See Burns v. Celotex Corp.*, 587 N.E.2d 1092, 1093 (Ill. App. Ct. 1992) (holding that the appellate court lacked jurisdiction to consider a challenge regarding an unimpaired asbestos docket), *appeal denied*, 596 N.E.2d 626 (Ill. 1992); *In re Asbestos Cases* (Mulligan v. Keene Corp.), 586 N.E.2d 521, 524 (Ill. App. Ct. 1991) (holding that an “order establishing the deferred docket registry is a nonappealable, noninjunctive order”); *In re Cuyahoga County Asbestos Cases*, 713 N.E.2d 20, 25 (Ohio Ct. App. 1998) (declining to consider constitutional challenges to unimpaired docket decision because it was not a “final and appealable order”); *In re Cuyahoga County Asbestos Cases*, Special Docket No. 73958 (Cuyahoga County Ct. Com. Pleas, Ohio Sept. 16, 2004) (In an asbestos case-management order dismissing claims filed by unimpaired claimants the court said: “For purposes of appeal, any order of administrative dismissal is not a final order; it is a temporary classification to allow the court to advance the cases of those with evidence of impairment.”) (on file with the authors); *see also* *First Benefits Agency, Inc. v. Tri-County Bldg. Trades Welfare Fund*, 721 N.E.2d 479, 481 (Ohio Ct. App. 1998) (extending the reasoning in *Cuyahoga* to an inactive docket that did not involve asbestos).

56. *See* Memorandum in Support of the Aggrieved Plaintiffs’ Motion to Vacate as to Them, the Deferred Docket Provisions of This Court’s Case Management Order at 8, *In re New York City Asbestos Litig.* (N.Y.C. Sup. Ct., N.Y. Apr. 23, 2004) (examining separation of powers and policy interests); *see also* Michael B. Serling, statement at Public Hearing Before the Michigan Supreme Court on a Petition to Establish a Court Rule or Administrative Order Creating a Statewide Inactive Asbestos Docketing System, (Mich. Jan. 29, 2004) (statement of plaintiffs’ attorney relating to *In re Pet. for an Admin. Order*, No. 124213) (on file with the authors).

57. *Lang v. Pataki*, 674 N.Y.S.2d 903, 914 (N.Y. Sup. Ct. 1998); *see also* *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936) (stating that every trial court has the “inherent power” to control the disposition of the cases on its docket “with

mechanisms is a classic judicial function very different from a judicial decision to make sweeping changes in substantive tort law.⁵⁸

1. Unimpaired Asbestos Docket Orders

Numerous state trial and appellate courts have held that unimpaired asbestos dockets represent a traditional exercise of a court's inherent power to control its docket.⁵⁹ For instance, *In re*

economy of time and effort for itself, for counsel, and for litigants"); *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979) (defining "inherent" judicial powers as those a court "may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity"); *Werner v. Miller*, 579 S.W.2d 455, 457 (Tex. 1979) (stating that "the supervision of the trial docket is properly left to the discretion of the trial judge").

58. See, e.g., *Azzolino v. Dingfelder*, 337 S.E.2d 528, 537 (N.C. 1985) (stating that the legislature was the most appropriate body to decide on a new cause of action for wrongful birth or wrongful life in the context of a child born with Down's Syndrome); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983) (holding that recognition of a new cause of action for the tort of abusive or wrongful discharge of employee "must await action of the Legislature"); see also 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) (discussing the need for courts to respect legislative tort-policy decisions); Victor E. Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688 (2001) (discussing the historical role of state legislatures in deciding broad tort-law rules).

59. For trial court rulings, see *In re All Asbestos Litig.* Filed in Madison County, at 1 (Madison County Cir. Ct., Ill. Jan. 23, 2004) (Order Establishing Asbestos Deferred Registry) (stating that "[t]his Court has the inherent power to control cases on its docket and to order the trial or disposition of these cases in a manner consistent with an economical allocation of judicial resources and the parties' interests") (on file with the authors); *In re Asbestos Cases*, at 2 (Cook County Cir. Ct., Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters) (stating that "[t]his Court has the inherent power to control cases on its docket and to order the trial or disposition of these cases in a manner consistent with an economical allocation of judicial resources and the parties' interests") (on file with the authors); *In re Asbestos Pers. Injury and Wrongful-Death Asbestos Cases*, 1992 WL 12019620, at *1 (Baltimore City Cir. Ct., Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases) (stating that "the Court's inherent power to control its docket" permitted the entry of an order to create an unimpaired asbestos docket); *In re All Asbestos Cases*, at 1 (Portsmouth Cir. Ct., Va. Aug. 4, 2004) (Order Establishing an Inactive Docket for Cases Filed by the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims) (entering unimpaired asbestos docket order based on "the Court's inherent power to control its docket") (on file with the authors).

Asbestos Cases (Mulligan v. Keene Corp.),⁶⁰ an Illinois appellate court upheld an order establishing an unimpaired asbestos docket in Cook County (Chicago), Illinois.⁶¹ Circuit Court Judge Dean Trafelet created the docket because he found that a “substantial number of [asbestos] cases” on the docket involved “plaintiffs who claim[ed] significant asbestos exposure, but who [were] not . . . physically ill.”⁶² These claims were presenting “a serious threat of calendar congestion to the Court.”⁶³ Judge Trafelet believed that the defendants’ resources could be better expended if the litigation “focused on those cases that involve claims of actual and current conditions of impairment.”⁶⁴ The appellate court, which upheld the plan, stated that “[g]iven the number of cases presently in the system, delay in litigating the claims is inevitable. Thus, the registry is a tool whereby the court may prioritize the litigation of cases already filed and an example of the court exercising its inherent authority to control its docket.”⁶⁵

An Ohio appellate court reached the same conclusion in *In re Cuyahoga County Asbestos Cases*.⁶⁶ There, plaintiffs—not defendants—sought the unimpaired docket “in order to give the more seriously impaired claimants quicker access to the courts while preserving the claims of the less impaired plaintiffs.”⁶⁷ As in Illinois, the appellate court found that trial courts possess the inherent power to establish an unimpaired asbestos docket.⁶⁸

Similarly, the Pennsylvania Supreme Court in *Pittsburgh Corning Corp. v. Bradley*⁶⁹ permitted the implementation of a court rule establishing a program of non-jury trials in asbestos cases in

60. 586 N.E.2d 521 (Ill. App. Ct. 1991).

61. See *In re Asbestos Cases* (Cook County Cir. Ct., Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters).

62. *Id.* at 3.

63. *Id.*

64. *Id.*

65. *Mulligan*, 586 N.E.2d at 524.

66. 713 N.E.2d 20 (Ohio Ct. App. 1998).

67. *Id.* at 23.

68. *Id.* at 25 (stating that “[w]e conclude that the order establishing the Voluntary Registry for Unimpaired Asbestos Claims demonstrates a traditional exercise of the court’s authority to control its docket”); see also *In re Special Docket 73958 Cuyahoga County Asbestos Cases*, at 1 (Cuyahoga County Ct. Com. Pleas Jan. 4, 2002) (Addendum to Amended Case Management Order) (stating that “our reviewing court has recognized the inherent power of the Court to create a registry if we desired”).

69. 453 A.2d 314 (Pa. 1982).

Philadelphia, with a right of a jury trial de novo. The court said that the “critical nature of the problem created by the avalanche of asbestos litigation require[d]” the court to “exercise the ‘general supervisory and administrative authority over all the courts’” and “direct that there be a non-jury trial with a right of a jury trial de novo in all asbestos-related litigation” in the Philadelphia courts.⁷⁰

2. Inherent Power to Prioritize Cases

The authority of trial courts to create unimpaired asbestos dockets finds support in cases that recognize the power of courts to decide which cases should be accorded preferential treatment. For example, in *Plachte v. Bancroft, Inc.*,⁷¹ a New York appellate court considered the constitutionality of a trial-court rule that gave preference to certain types of personal injury actions. The rule was brought on by “the fact that there were more personal injury cases being received . . . for trial than could be handled on a current basis.”⁷² A plaintiff challenged the rule, arguing that non-preferred cases were being “indefinitely postponed” due to the “seemingly endless advance for trial of new issues entitled to and receiving preference . . . under the Rule.”⁷³ The court held that the preference was a permissible exercise of the trial courts’ “inherent power over the control of their calendars, and the disposition of business before them, *including the order in which disposition will be made of that business.*”⁷⁴

Moreover, as a Texas appellate court said in denying a husband’s request to compel a lower court to try his divorce suit after several months of delay, “no litigant is entitled to trial at the time he selects.”⁷⁵ The court explained that “the trial court has the duty and corresponding power to control its docket and select which cases to try, so that priority may be given to cases that involve more pressing

70. *Id.* at 317-18.

71. 161 N.Y.S.2d 892 (N.Y. App. Div. 1957).

72. *Id.* at 896.

73. *Id.* at 893.

74. *Id.* (citing *Landis*, 299 U.S. at 254) (additional citations omitted) (emphasis added).

75. *In re Carter*, 958 S.W.2d 919, 924-25 (Tex. App.—Amarillo 1997, orig. proceeding).

circumstances.”⁷⁶ Claims brought by impaired or dying asbestos claimants represent the type of “pressing circumstances” that entitle trial courts to give sick and dying claimants priority over the non-sick.

3. Additional Support in Other Docket Management Procedures

Additional support for unimpaired asbestos dockets comes from decisions permitting trial courts to abate or stay cases,⁷⁷ deny continuances,⁷⁸ dismiss cases for failure to prosecute,⁷⁹ consolidate

76. *Id.* at 924-25; *see also* *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 693-94 (Tex. App.—Amarillo 1998, pet. denied) (stating that “[a]long with other inherent powers and duties, a trial court is given wide discretion in managing its docket”).

77. *See, e.g., In re Estate of R.H. Lanterman v. Lanterman*, 462 N.E.2d 46, 51 (Ill. App. Ct. 1984) (stating that “[t]he power of a trial court to issue a stay order is an attribute of its inherent power to control the disposition of cases before it”); *Lang*, 674 N.Y.S.2d at 913 (stating that “[a] fundamental element of inherent judicial power is the authority to control the court’s calendar exercised through the discretion to stay proceedings”); *Dolenz v. Cont’l Nat’l Bank of Fort Worth*, 620 S.W.2d 572, 575 (Tex. 1981) (recognizing that a trial court has discretion to grant or deny a plea in abatement even when two cases lack a complete identity of parties and issues); *Soliz v. Cofer*, No. 03-01-00246-CV, 2002 WL 821909, at *8 n.11 (Tex. App.—Austin 2002, pet. denied) (not designated for publication) (stating that “[w]e regard the power to abate a lawsuit to be ‘incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants’”) (quoting *Landis*, 299 U.S. at 254-57).

78. For example, in *Davis v. United Fruit Co.*, 402 F.2d 328 (2d Cir. 1968), the Second Circuit upheld a trial court’s decision to deny a continuance to a seaman who was at sea and could not make a personal appearance at trial. The court wrote:

The courts must take the initiative in making their procedures more efficient [T]he calendars of the . . . [d]istrict court are clogged and justice is being delayed or perhaps impaired as a result. In order to reduce this choking congestion, the district courts must be permitted to exercise their discretion in appropriate ways that will ensure justice to all who seek it. We will not interfere with the conscientious judge who will not accept the status quo of calendar congestion.

Id. at 331-32.

79. *See, e.g., Veterans’ Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976) (holding that the trial court did not abuse its discretion in dismissing suit brought by plaintiff for want of prosecution).

cases,⁸⁰ dismiss unmeritorious claims brought by repeat litigants,⁸¹ enjoin the filing of claims by repeat litigants,⁸² implement a designated defense counsel system,⁸³ and adopt case-management orders (“CMOs”).⁸⁴

For example, in *In re Love Canal Actions*,⁸⁵ a New York trial court adopted a CMO that required plaintiffs to submit, immediately after filing a summons and complaint, a detailed evidentiary record showing: (1) a statement of exposure to an alleged toxic substance at or from the Love Canal landfill, (2) a physician’s report documenting the claimed injury, and (3) an affidavit of a physician or other qualified expert demonstrating that the plaintiff’s injury was

80. See, e.g., *In re Minn. Pers. Injury Asbestos Cases v. Keene Corp.*, 481 N.W.2d 24, 27 (Minn. 1992) (holding that consolidation of asbestos actions and resulting changes in venues was within the broad discretion accorded the trial court); *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 305 (W. Va. 1996) (holding that the trial court did not abuse its discretion by formulating a trial-management plan to consolidate all pending asbestos premises-liability cases, and stating that “this case is probably the best example of why a trial court should be given broad authority to manage its docket with regard to asbestos cases”). Consolidations of dissimilar asbestos claims, such as in *Appalachian Power*, have been criticized as encouraging the filing of more asbestos claims. Victor E. Schwartz et al., *Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Unimpaired Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2004).

81. See, e.g., *Mason v. Snyder*, 774 N.E.2d 457, 462 (Ill. App. Ct. 2002) (holding that trial courts have authority to strike frivolous mandamus petitions).

82. See, e.g., *Kondrat v. Byron*, 579 N.E.2d 287, 289 (Ohio Ct. App. 1989) (holding that the court did not abuse its discretion in barring repeat litigant from filing new claims without court approval).

83. See *Asbestos Claims Facility v. Berry & Berry*, 219 Cal. App. 3d 9, 19 (1990) (stating that the inherent authority of the trial court to manage its asbestos docket permitted the court to implement a designated defense counsel system to coordinate the scheduling of discovery-related activities on behalf of all defendants).

84. See, e.g., *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986) (involving case-management order requiring plaintiffs’ counsel to produce evidentiary documentation on behalf of each plaintiff who claimed injury arising from a landfill); *Koslow’s v. Mackie*, 796 S.W.2d 700, 705 (Tex. 1990) (upholding the ability of a trial judge to require a status report on a case at a pretrial conference); cf. *Able Supply Co. v. Moyer*, 898 S.W.2d 766, 770-73 (Tex. 1995) (holding that the trial court acted outside its inherent authority to manage its docket when it refused to compel plaintiffs to provide substantive answers to interrogatories regarding the identity of physicians who had diagnosed the plaintiffs with a disease attributable to a particular product).

85. 547 N.Y.S.2d 174 (N.Y. Sup. Ct. 1989).

“in fact” caused by exposure to a toxic substance at the landfill.⁸⁶ Claimants that did not submit the required information would have their claims dismissed, not merely deferred.⁸⁷ The court explained the basis for its authority to issue the order:

[A] court may invoke its inherent authority to deal with cases before it (as here) in any appropriate manner, even in the absence of any direct grant of legislative or administrative power. Inherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions and to make its lawful actions effective. Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction⁸⁸

CMOs have been adopted in asbestos cases to accomplish the same public-policy and legal objectives as an unimpaired asbestos docket. For example, in September 2004 the Court of Common Pleas of Cuyahoga County (Cleveland), Ohio, entered an order to “administratively dismiss the cases of those plaintiffs who have been diagnosed with pleural plaques or with a condition ‘consistent with asbestosis’ and who have not failed a pulmonary function test.”⁸⁹ The order also states that “[c]ases that are administratively dismissed will be restored to the regular trial docket when the plaintiff develops evidence of impairment or when all plaintiffs’ cases are resolved.”⁹⁰ The court explained that its action was “consistent with the court’s authority to control its own docket.”⁹¹

Likewise, in 2002, the judge appointed by the South Carolina Supreme Court to coordinate and control all asbestos-related cases filed in the South Carolina Circuit Courts issued a CMO governing all asbestos-related cases filed by the Wallace & Graham law firm

86. *Id.* at 179.

87. *Id.* at 175.

88. *Id.* at 177 (internal citations and quotations omitted).

89. *In re Cuyahoga County Asbestos Cases*, Special Docket No. 73958 (Cuyahoga County Ct. Com. Pleas, Ohio Sept. 16, 2004) (on file with the authors).

90. *Id.*

91. *Id.*

based in Salisbury, North Carolina.⁹² The order dismissed without prejudice all Wallace & Graham asbestos-related claims except those filed by persons who suffer from malignant diseases, have functionally impairing asbestosis, or have died as a result of an asbestos-related disease.⁹³ The statute of limitations for dismissed claims was tolled.⁹⁴ Claimants later meeting the minimum medical criteria set forth in the order were able to refile their claims at that time.⁹⁵

3. Federal Asbestos Docket

Finally, state court unimpaired asbestos dockets find support in orders issued by the judge presiding over the federal asbestos docket, Senior United States District Judge Charles Weiner.⁹⁶ As far back as 1992, Judge Weiner adopted procedures to prioritize “malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury.”⁹⁷ Under the court’s order, a select number of cases were identified and placed into one of four disease categories: (1) mesothelioma, living and deceased; (2) lung cancer, living and deceased; (3) other malignancies, living and deceased; and (4) asbestosis, total disability deceased or total disability living.⁹⁸ In each case, plaintiff’s counsel was required

92. *See In re Wallace & Graham Asbestos-Related Cases* (Greenville County Ct. Com. Pl., S.C. Nov. 26, 2002) (Case Management Order on file with the authors).

93. *Id.* at 4.

94. *See id.*

95. *See id.* at 5.

96. In 1991, the Judicial Panel on Multidistrict Litigation ordered all federal asbestos personal injury and wrongful death actions to be centralized before Judge Weiner in the Eastern District of Pennsylvania. *See In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) (addressing MDL 875). At the time of the transfer, unimpaired dockets existed in about a dozen federal districts, including some districts with “very large asbestos caseloads.” Schuck, *supra* note 49, at 568. These included a broad and diverse number of courts, ranging from the Northern District of California, the North District of Illinois, the Northern and Southern Districts of Mississippi, the Western District of New York, the Northern District of Ohio, to the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. *See* Schuck, *supra* note 49, at 568 n.109.

97. *In re Asbestos Prods. Liab. Litig.* (No. VI) (E.D. Pa. Sept. 8, 1992) (Administrative Order No. 3) (concerning MDL 875) (on file with the authors).

98. *See id.* at 1.

to have a written medical opinion by a board-certified specialist indicating that exposure to either asbestos or products containing asbestos was a contributing cause to the claimant's condition. Cases in which the claimant suffered from mesothelioma or lung cancer were given priority with respect to review, settlement, or further litigation. Through utilization of the ordering device, thousands of cases involving non-impaired claimants were dismissed.⁹⁹

Judge Weiner later administratively dismissed thousands of maritime asbestos cases and ordered that those claims could be reinstated only if each plaintiff provided the court with sufficient medical evidence of a personal injury.¹⁰⁰ He issued the order after finding that "only a fraction" of the plaintiffs had an asbestos-related condition, "and many of these [were] open to question."¹⁰¹ Judge Weiner said that it is "improper and a waste of the Court's time" for plaintiffs' lawyers to file so many unsupported cases.¹⁰² He also noted that "[o]ther victims suffer while the Court is clogged with such filings."¹⁰³

More recently, Judge Weiner ruled that "[a]ll non-malignant, asbestos-related, personal injury cases assigned to the [federal asbestos docket] which were initiated through a mass screening shall be subject to . . . dismissal without prejudice and with the tolling of all applicable statutes of limitations."¹⁰⁴ Cases may be reinstated only if the claimant shows evidence of asbestos exposure and an

99. See *In re Asbestos Prods. Liab. Litig.* (No. VI) (E.D. Pa. Oct. 16, 1997) (order) (concerning MDL 875) (on file with the authors).

100. See *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996) (Order) (concerning MDL 875).

101. *Id.*

102. *Id.*

103. *Id.*

104. *In re Asbestos Prods. Liab. Litig.* (No. VI), 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002) (Admin. Order No. 8) (concerning MDL 875). Likewise, Judge Sharon Armstrong of the King County Superior Court in Seattle recently ruled on motions for summary judgment in cases generated by litigation screenings. The cases were based upon findings by Dr. Jay Segarra, an out-of-state physician-screener not licensed in the State of Washington. Dr. Segarra's only involvement with the plaintiffs was his participation in mass litigation screenings. Judge Armstrong ruled that "Dr. Segarra has improperly performed examinations, rendered diagnoses, and recommended treatment without being licensed in Washington, a criminal offense." Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties 1 (Oct. 15, 2002) (on file with the authors). The court concluded that allowing the cases to proceed would "contravene public policy" and dismissed them without prejudice.

asbestos-related disease.¹⁰⁵ Judge Weiner explained the basis for his ruling:

[T]he position of the moving parties, that the screening cases have been filed without a doctor-patient medical report setting forth an asbestos-related disease, has not been refuted. The basis of each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an X-ray reading “consistent with” an asbestos related disease *Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future.* Filing fees are paid, service costs incurred, and defense files are opened and processed. *Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims. The Court has the responsibility to administratively manage these cases so as to protect the rights of all the parties, yet preserve and maintain any funds available for compensation to victims. . . . [T]he filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.*¹⁰⁶

These decisions all make clear that courts have the inherent power to develop unimpaired asbestos dockets to accomplish the fair and common sense objective “that the sick and dying, their widows and survivors should have their claims addressed first.”¹⁰⁷

105. *In re Asbestos Prods. Liab. Litig.* (No. VI), 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002) (Admin. Order No. 8) (concerning MDL 875).

106. *Id.* (emphasis added).

107. *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) (citing *In re Patenaude*, 210 F.3d 135, 139 (3d Cir.), *cert. denied*, 531 U.S. 1011 (2000)); *see also Ho*, 984 S.W.2d at 693-94 (stating that “[a]long with other inherent powers and duties, a trial court is given wide discretion in managing its docket”).

B. *Right to a Jury Trial*

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial in federal civil cases.¹⁰⁸ The Seventh Amendment does not apply to the states,¹⁰⁹ so there is no requirement for an unimpaired asbestos docket to independently satisfy its requirements. Many states, however, have companion right to jury trial guarantees.¹¹⁰

Unimpaired asbestos dockets do not infringe upon a plaintiff's right to jury trial because his or her cause of action is preserved. A claimant that develops an asbestos-related impairing condition is immediately entitled to petition that his or her claim be removed to the active trial docket. It is also important to remember that such plans *accelerate* jury trials for the truly sick and other claimants in the tort system.

1. Delay is Not Denial

Opponents of unimpaired asbestos dockets may claim that such plans violate the right to a jury trial by deferring an unimpaired claimant's day in court.¹¹¹ Courts have consistently ruled, however, "that no constitutional violation results where a plaintiff's access to a jury is delayed as the result of the judicial system's attempt to

108. See U.S. CONST. amend. VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Id.

109. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1488 (5th Cir. 1993).

110. See, e.g., TEX. CONST., art. V, § 10 (stating that "[i]n the trial of all causes of action in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury"); TEX. CONST., art. I, § 15 (stating that "[t]he right of trial by jury shall remain inviolate").

111. This argument is more properly directed at open courts and due process rights. See *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 527 (Tex. 1995) (stating that "[a]lthough legislation altering or restricting a cause of action is subject to scrutiny under the open courts doctrine, this substantive change does not implicate the right to jury trial, as long as the relevant issues under the modified cause of action are decided by a jury").

provide for the fair and efficient disposition of cases.”¹¹² As one commentator has explained, “there is no constitutional right to a speedy civil trial.”¹¹³ Indeed, the United States Supreme Court said as far back as 1899 in *Capital Traction Co. v. Hof* that the Seventh Amendment “does not prescribe at what stage of an action a trial by jury must, if demanded, be had.”¹¹⁴

Some courts, nevertheless, have engaged in a reasonableness analysis to determine whether civil jury trial delays violate the right to jury trial. These rulings all make clear that “[d]elay *per se* is not unconstitutional.”¹¹⁵

For instance, in *Pittsburgh Corning Corp. v. Bradley*,¹¹⁶ the Pennsylvania Supreme Court required all plaintiffs in Philadelphia-area asbestos cases to proceed initially with a non-jury trial, after which either party could have a *de novo* jury trial. In its opinion, the court described an earlier stage of the asbestos litigation crisis with statistics that seem modest now: “The past ten years have witnessed . . . the explosion of asbestos-related litigation throughout the country, with over 16,000 cases having been filed nationwide.”¹¹⁷ The hope was that the non-jury trials would prove to be quick and fair, and that most litigants would not request jury trials. The court held that the requirement to first go to trial before a judge did “not unduly burden the parties’ right to a trial by jury” in light of the high volume of pending asbestos-related cases.¹¹⁸ The court recognized that the enormous asbestos docket itself prevented access to a jury – not the proposed solution.¹¹⁹

112. *In re Asbestos Litig.*, No. 2004-03964, at 36 (Harris County Dist. Ct., Tex. May 3, 2004) (Defendants’ Motion to Establish an Unimpaired Docket) (on file with the authors).

113. Jonathan Bunge, *Congressional Underappropriation for Civil Juries: Responding to the Attack on a Constitutional Guarantee*, 55 U. CHI. L. REV. 237, 266 (1988).

114. 174 U.S. 1, 23 (1899); *see also* *Galloway v. United States*, 319 U.S. 372, 392 (1943) (holding that the right of trial by jury extends only to “its most fundamental elements, not the great mass of procedural forms and details”).

115. *Ad Hoc Comm. on Judicial Admin. v. Mass.*, 488 F.2d 1241, 1244 (1st Cir. 1973).

116. 453 A.2d 314 (Pa. 1982).

117. *Id.* at 315.

118. *Id.* at 317.

119. *Id.* (stating that “the most onerous burden on asbestos litigants’ right to a jury trial is the effect of the sheer volume of asbestos cases pending and yet to be filed” and that “[t]he requirement that the parties proceed initially before a judge is intended to alleviate, not increase this burden”).

In 1990, the Vermont Supreme Court considered an administrative directive ordering the postponement of most civil jury trials in the face of a state budget crisis.¹²⁰ Petitioners challenged the plan arguing that “a jury trial delayed is equal to a jury trial denied” for purposes of the Vermont Constitution.¹²¹ The court upheld the moratorium, stating that it could not “accept the analysis that the jury trial right is infringed when access to juries is delayed a relatively short period of time.”¹²²

In contrast, over ten years ago, the Louisiana Supreme Court ruled in *In re Asbestos Plaintiffs v. Borden, Inc.*¹²³ that a mandatory unimpaired asbestos docket that indefinitely postponed civil trials violated Louisiana’s statutory right to a jury trial and access to courts.¹²⁴ The court acknowledged, however, that trial courts have the right to prioritize trials on the basis of the *severity* of the illness:

Our opinion in this matter is not to be construed as a prohibition against the prioritization of claims. A district judge will continue to have the discretion . . . to set claims for trial based upon reasonable criteria, such as disease progression. In complicated mass tort litigation such as this, that discretion might include the creation of lists of claimants with common gravity of disease characteristics, and the utilization of such lists to prioritize the setting of claims for trial.¹²⁵

120. *In re* Vt. Supreme Court Admin. Directive No. 17 v. Vt. Supreme Court, 579 A.2d 1036 (Vt. 1990).

121. *Id.* at 1040.

122. *Id.* at 1043; *cf.* *Armster v. United States Dist. Court for the Cent. Dist. of Cal.*, 792 F.2d 1423, 1428 (9th Cir. 1986) (drawing a distinction between the impermissible “wholesale non-discretionary” suspension of jury trials and the traditional discretion that trial courts have to schedule trials). The court stated:

We recognize that calendar delays resulting from the current high volume of litigation are all too common, and we have frequently said that the district courts must have wide discretion to handle such matters. In such circumstances, the proper exercise of discretion by district judges implicates no seventh amendment right.

Id.

123. 630 So. 2d 1310 (La. 1994).

124. *Id.* at 1311.

125. *Id.*

Despite this inherent authority, the *Borden* court concluded that the “additional burdens” on the plaintiffs were “unacceptable.”¹²⁶ In effect, *Borden* employed a balancing test, weighing the trial court’s inherent authority and discretion to schedule trials against the burdens that the plan imposed on the rights of less impaired plaintiffs.

If unimpaired asbestos claimants are delayed access to a jury trial because of the prioritizing effect of an unimpaired docket, that delay should not be found to deny the jury trial right. First, contrary to the summary conclusion of the *Borden* court long ago, unimpaired asbestos dockets do not indefinitely delay asbestos trials. Once a claimant can demonstrate a present physical impairment, he or she may petition to have his or her case removed to the active trial docket. The delay is not indefinite.¹²⁷

Second, unimpaired asbestos claimants are already experiencing delays in litigating their claims due to the fact that tens of thousands of unimpaired claimant cases are filed annually.¹²⁸ Given these existing delays, it is possible that an unimpaired asbestos docket may not result in substantial, additional delay for some unimpaired claimants.¹²⁹

Finally, the need for sick asbestos claimants and other claimants in the civil justice system to receive prompt adjudication of their claims provides sufficient basis for delaying the trials of individuals who are not sick and may never develop an asbestos-related impairment. Today’s litigation environment is vastly

126. *Id.* at 1311-12.

127. Over the years, courts have upheld many other programs that are persuasive analogies to unimpaired docket plans. Yale Law School Professor Peter Schuck, for example, has cited to opinions upholding the constitutionality of preliminary non-jury trials, mandatory mediation or arbitration, and medical review panels. *See* Schuck, *supra* note 49, at 588 (describing the impact of unimpaired dockets on the court).

128. *Mulligan*, 586 N.E.2d at 524 (stating that “[g]iven the number of cases presently in the system, delay in litigating the claims is inevitable”).

129. *See In re Pers. Injury and Wrongful Death Asbestos Cases*, No. 24-X-92-344501, at 4 (Baltimore City Cir. Ct., Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Unimpaired Docket Medical Removal Criteria) (denying a challenge to an unimpaired docket in Baltimore and stating that “[t]his court does not have the ability to process the thousands of cases in the short period of time the Plaintiff’s counsel desires [I]f the inactive docket was repealed today, it would be years before those Plaintiff’s cases would be heard.”).

different from the environment that existed when the Louisiana Supreme Court decided *Borden*.

2. Juries Decide the Merits

Opponents of unimpaired asbestos dockets also may object to the application of objective medical criteria to decide which claims should be removed to the active trial docket. The right to a jury trial, however, does not extend to “preliminary and incidental proceedings which do not involve the question of liability.”¹³⁰ As the Pennsylvania Supreme Court has explained: “The only purpose of the constitutional provision is to secure the right of trial by jury before rights of persons or property are *finally* determined.”¹³¹ A Texas appellate court further explained the inefficiencies that would result if juries were needed to decide all factual issues arising during the course of litigation: “If we were to allow jury trials on every preliminary matter simply because they involved a factual determination, we would be introducing the rope that would ultimately hang our legal system.”¹³² Plaintiffs have no constitutional right to have juries decide the medical criteria governing when a claim may be activated for trial.

In sum, using unimpaired asbestos dockets to prioritize cases for trial does not raise federal right to jury trial issues and should not violate state jury trial rights. Given the plight of truly sick asbestos plaintiffs and the depleted resources available to compensate them now and in the future, courts should conclude that delays incurred by

130. *Miller v. Stout*, 706 S.W.2d 785, 787 (Tex. App.—San Antonio 1986, no writ); *see also* *Tull v. United States*, 481 U.S. 412, 426 (1987) (concluding that juries are confined to finding facts); *Ramirez v. Consol. HGM Corp.*, 124 S.W.3d 914, 916 (Tex. App.—Amarillo 2004, no pet.) (stating that “a party is not entitled to a jury trial on fact issues that arise from preliminary motions and pleas which do not involve the merits or ultimate disposition of the case on the merits”) (citation omitted); Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675 (1918) (explaining that the only matters “properly within the province of the jury” are questions of fact and all other questions, being questions of law, are for the court).

131. *Application of Smith*, 112 A.2d 625, 629 (Pa. 1955), *appeal dismissed sub nom.* *Smith v. Wissler*, 350 U.S. 858 (1958); *see also* *Phillips v. Mirac Inc.*, 685 N.W.2d 174 (Mich. 2004) (upholding a statutory cap on the vicarious liability of automobile lessors).

132. *Union Pac. Fuels, Inc. v. Johnson*, 909 S.W.2d 130, 135 (Tex. App.—Houston [14th Dist.] 1995, no writ).

asymptomatic claimants through an unimpaired asbestos docket are “not unreasonably burdensome.”¹³³

C. *Due Process*

Unimpaired plaintiffs may also argue that unimpaired docket plans deny them property rights without due process of law. This argument should fail.

First, there is continuing debate about whether a cause of action constitutes “vested” property under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.¹³⁴ Historically, federal courts held that a plaintiff has no vested property right in any tort claim for damages.¹³⁵ In 1982 the Supreme Court arguably overturned this long-standing

133. *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880, 889-90 (Mass. App. Ct. 1981).

134. Some courts have held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury. See *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (applying Hawaiian law); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987); *In re Asbestos Litig.*, 1994 WL 721763, at *3 (Del. Super. Ct. June 14, 1994); *Owens-Ill. v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. Spec. App. 1991), *aff'd in part and rev'd on other grounds*, 604 A.2d 47 (Md. 1992); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996). These rulings, however, do not raise separation of powers problems. Instead, they reflect the type of incremental policy determinations routinely made by courts in the absence of legislation. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON TORTS* § 3, at 19 (5th ed. 1984) (stating that “[t]ort law is overwhelmingly common law, developed in case-by-case decision making by courts.”).

135. See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (upholding federal Price-Anderson Act); *Silver v. Silver*, 280 U.S. 117 (1929) (sustaining abolition of a gratuitous passenger’s right to sue host for negligence); *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1 (1912) (upholding Federal Employers’ Liability Act of 1908); *In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982 (9th Cir. 1987) (upholding federal Atomic Weapons Testing Liability Act); *Ducharme v. Merrill-Nat. Labs.*, 574 F.2d 1307 (5th Cir. 1978) (upholding federal Swine Flu Act); *Carr v. United States*, 422 F.2d 1007 (4th Cir. 1970) (upholding federal Drivers Act); *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411 (W.D. Okla. 1977) (upholding federal Swine Flu Act). See generally Victor E. Schwartz et al., *Federalism and Federal Liability Reform: The United States Constitution Supports Reform*, 36 HARV. J. ON LEGIS. 269 (1999).

doctrine.¹³⁶ Nevertheless, many federal courts continue to hold that tort claims do not constitute vested property rights.

For example, in *Sowell v. American Cyanamid Co.*,¹³⁷ the Eleventh Circuit reaffirmed the historic federal position when considering the constitutionality of the Federal Employees Liability Reform and Tort Compensation Act of 1998, the “Westfall Act,” which abolished certain causes of action that had already accrued. The court stated that “[t]he fact that the statute is retroactive does not make it unconstitutional [because] a legal claim affords no definite or enforceable property right until reduced to final judgment.”¹³⁸ Other federal appellate decisions are in accord.¹³⁹

State courts are divided on the issue. The Louisiana Supreme Court explicitly held in *Cole v. Celotex Corp.*¹⁴⁰ that “[o]nce a party’s cause of action accrues, it becomes a vested property right that may not constitutionally be divested.”¹⁴¹ On the other hand, other state courts agree with the traditional federal position.¹⁴² One

136. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (indicating that causes of action are a “species of property protected by the Fourteenth Amendment’s Due Process Clause”).

137. 888 F.2d 802 (11th Cir. 1989).

138. *Id.* at 805 (citations omitted).

139. See *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (stating that the district court may review whether additional discovery is needed even after the United States Attorney certifies that more discovery is not needed); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (stating that “[b]ecause rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort”); *Connell v. United States*, 737 F. Supp. 61, 63 (S.D. Iowa 1990) (stating that “[r]ights in a tort cause of action do not vest until reduced to a final, unreviewable judgment.”).

140. 599 So. 2d 1058 (La. 1992).

141. *Id.* at 1063 (citations omitted); see also *Rupp v. Bryant*, 417 So. 2d 658, 666 (Fla. 1982) (holding that the retroactive application of a statute expanding sovereign immunity violated due process when it abolished plaintiffs’ pre-existing “right to recover” from public employees); *Thorp v. Casey’s Gen. Stores, Inc.*, 446 N.W.2d 457, 460-64 (Iowa 1989) (finding that causes of action constitute vested property rights and are subject to due process protection); *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 500-06 (Kan. 1995) (finding that causes of action constitute vested property rights and distinguishing numerous cases holding otherwise).

142. See, e.g., *Clausell v. Hobart Corp.*, 515 So. 2d 1275, 1276 (Fla. 1987) (stating that “[s]ince Clausell had no vested right in his cause of action, he suffered no deprivation of due process under the United States Constitution”); *Johnson v. Cont’l W., Inc.*, 663 P.2d 482, 486 (Wash. 1983) (stating that, “[t]hese being actions sounding in tort, which were on appeal, no one can be said to have had a vested right until the cases were finally resolved on appeal and a final judgment

court staked out a middle ground, noting that plaintiffs' interests in non-final judgments "are entitled to recognition as property rights, [but] those interests are not as firmly established as rights of the kind that this court has protected against retroactive legislative abolition."¹⁴³

Some courts that have moved away from a "vested rights" due process analysis have replaced it with the deferential "rational basis" test. The New Jersey Supreme Court recently explained that this was the trend: "Those decisions do not engage in a 'vested rights' inquiry. The standard they apply—the familiar 'rational basis' test—is the same standard that is applied to legislation generally when challenged on due process grounds."¹⁴⁴

A rational basis test is not likely to justify overturning an unimpaired docket plan.¹⁴⁵ In *Jones v. Weyerhaeuser Co.*,¹⁴⁶ for example, a defendant challenged a workers' compensation law providing special compensation for workers suffering from occupational exposure to asbestos or silica.¹⁴⁷ That law was:

designed to effect these objects: (1) To prevent the employment of unaffected persons particularly susceptible to asbestosis or silicosis in industries with dust hazards; (2) to secure compensation to those workers affected with asbestosis or silicosis, whose principal need is compensation; and (3) to provide compulsory changes of occupations for those workmen affected by asbestosis or silicosis, whose

entered") (citations omitted); *Tex. Gas Exploration Corp. v. Fluor Corp.*, 828 S.W.2d 28, 31-32 (Tex. App.—Texarkana 1991, writ granted) (stating that "[a] party has no vested right to a cause of action") (citations omitted).

143. *Carleton v. Town of Framingham*, 640 N.E.2d 452, 457 (Mass. 1994).

144. *Nobrega v. Edison Glen Assocs.*, 772 A.2d 368, 382 (N.J. 2001).

145. The rational basis review is likely to apply instead of strict scrutiny or intermediate review because prompt prosecution of tort claims is not a fundamental right under the Constitution. *See Miller v. United States*, 73 F.3d 878, 881 (9th Cir. 1995) (stating that "the Constitution does not create a fundamental right to bring suit for injuries"); *Zehner v. Trigg*, 952 F. Supp. 1318, 1332 (S.D. Ind. 1997) (stating that "[t]he Constitution does not create a fundamental right to pursue specific tort actions."), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

146. 539 S.E.2d 380 (N.C. App. Ct. 2000).

147. N.C. GEN. STAT. § 97-61.5 (2004).

primary need is removal to employments without dust hazards.¹⁴⁸

A North Carolina appellate court held that the legislature's decision was "at a minimum, rationally related to a legitimate governmental interest."¹⁴⁹

Likewise, in 2001, for example, the Massachusetts Supreme Court in *Harlfinger v. Martin*¹⁵⁰ upheld a statute of repose for medical malpractice lawsuits against a due process challenge, even though the law completely abolished the plaintiff's cause of action.¹⁵¹ The court explained that the rational basis test applies to "economic legislation [that] does not infringe on any fundamental right."¹⁵² The court particularly noted that the rational basis test did not become more stringent merely because the action abolished a tort cause of action.¹⁵³

Even if one assumes that tort claims constitute property, unimpaired docket plans still comport with due process. At its core, due process guarantees the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"¹⁵⁴ At the same time, "due process is flexible and calls for such procedural protections as the particular situation demands."¹⁵⁵ The question becomes, under the circumstances, "what process is due?"¹⁵⁶

The unimpaired docket plans that have been adopted by courts provide all of the process that is due to unimpaired plaintiffs. First, the plans contain detailed objective criteria for determining whether a party is injured. This approach accomplishes the legitimate objective of prioritizing cases by severity of illness. Moreover, the plans toll otherwise applicable statutes of limitations for unimpaired plaintiffs. This preserves the "property" rights of an unimpaired plaintiff who might eventually develop an asbestos illness in the future. In fact, the plans may dramatically *enhance* the value of the tort claims for plaintiffs who subsequently develop

148. *Jones*, 539 S.E.2d at 383 (quoting *Young v. Whitehall Co.*, 49 S.E.2d 797, 800-03 (N.C. 1948)).

149. *Id.*

150. 754 N.E.2d 63 (Mass. 2001).

151. *Id.* at 68-72.

152. *Id.* at 68 (citations omitted).

153. *Id.* at 68-69 (citations omitted).

154. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted).

155. *Id.* at 334 (citations omitted).

156. *Id.* at 333.

serious illnesses, but might otherwise find their claims time-barred. Finally, an unimpaired claimant may petition the trial court for removal to the active docket by demonstrating a present physical impairment.

In addition to these protections, courts must consider the rights of the truly sick, not just those of unimpaired plaintiffs, in determining the constitutionality of an unimpaired docket. As the United States Supreme Court explained in *Mathews v. Eldridge*,¹⁵⁷ “resolution of the issue whether the administrative procedures provided . . . are constitutionally sufficient requires analysis of the governmental and *private* interests that are *affected*.”¹⁵⁸ Allowing unimpaired plaintiffs to go first certainly affects the interests of the truly sick. In particular, giving trial priority to the unimpaired may deprive the truly sick of a meaningful review of their cases—both because they may not have a long life expectancy and because of the potential bankruptcy of target defendants.

Other private interests promoted by unimpaired docket plans include defendant companies, their employees, shareholders, and communities. As stated, over seventy companies have already declared bankruptcy due to asbestos-related liabilities. Nobel Prize-winning economist Joseph Stiglitz and two colleagues found that asbestos-related bankruptcies cost nearly 60,000 people their jobs and up to \$200 million in wages between 1997 and 2000.¹⁵⁹ National Economic Research Associates (NERA) found that

157. *Id.*

158. *Id.* at 334 (emphasis added and citations omitted); *see also Logan*, 455 U.S. at 430 n.5 (stating that “the State may not deprive someone of . . . access unless the balance of state and private interests favors the government scheme”). Significantly, in *Mathews*, when the Court considered the *public* interest, it also considered the impact on other *private* parties. *See* 424 U.S. at 347-48 (noting that the increased public costs “may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited”) (citations omitted); *see also Pennsylvania v. Williams*, 294 U.S. 176, 185 (1935) (stating that “[a] court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest . . . would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer”); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 422 (1837) (stating that “[w]hile the rights of private property are sacredly guarded, we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation”).

159. Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. BANKR. L. & PRAC. 51, 73-74 (2003).

workers, communities, and taxpayers will bear as much as \$2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos.¹⁶⁰ Goldman Sachs Managing Director Scott Kapnick has testified before the U.S. Congress that “the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their stockholders and employees, and the economy as a whole.”¹⁶¹

D. Open Courts / Right to a Remedy

Unimpaired plaintiffs may allege that unimpaired dockets violate the “open courts” or “right to a remedy” provisions found in many state constitutions. The open courts provision serves as a type of due process guarantee.¹⁶²

According to a recent article by former Chief Justice Thomas Phillips of the Texas Supreme Court, forty states either implicitly or explicitly contain these provisions.¹⁶³ He goes on to note that some states virtually ignore these provisions while other states give them more potency.¹⁶⁴ In the latter states, these provisions are often interpreted to guarantee that the courts will provide remedies for established common law causes of action. This article will primarily consider that line of open courts jurisprudence.¹⁶⁵

160. JESSE DAVID, NAT’L ECON. RESEARCH ASSOCS., *THE SECONDARY IMPACTS OF ASBESTOS LIABILITIES* (Jan. 23, 2003). NERA also found that for every ten jobs lost directly, communities tend to lose eight additional jobs, leading to a decline in per capita income, real estate values, and lower tax receipts. Additional costs brought upon workers and communities include up to \$76 million in worker retraining, \$30 million in increased healthcare costs, and \$80 million in payment of unemployment benefits. *See id.* at 11-15.

161. *Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong. at 2 (June 4, 2003) (statement of Scott B. Kapnick).

162. *See Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) (stating that “[w]hile it is true that this provision is sometimes referred to as the ‘Open Courts Provision,’ it is, quite plainly, a due process guarantee”).

163. Hon. Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

164. *Id.* at 1313-14 (quoting Judge William C. Koch, Jr. as explaining “[i]n some states, [the right to a remedy] is second only to the due process clause in importance; while in other states, it is little more than an interesting historical relic”) (citations omitted).

165. The United States Constitution contains an implicit right of access to the courts, but it does not protect common law causes of action. Instead, it tends to protect parties’ right to sue. *See, e.g., Copeland v. Green*, 949 F.2d 390, 391 (11th

As a preliminary matter, some states, such as Texas, apply the open courts provision only to statutory enactments—not to judicial actions. As the Texas Supreme Court has explained, the open courts provision “applies only to statutory restrictions of a cognizable common law cause of action.”¹⁶⁶ Therefore, open courts may not apply to judicially created unimpaired docket plans at all.

Even in jurisdictions that may apply open courts provisions to judicial actions, unimpaired asbestos dockets should be sustained because they only delay trials until a claimant can demonstrate that he or she is impaired.¹⁶⁷ The United States Supreme Court’s decision in *Sosna v. Iowa*¹⁶⁸ is instructive. There, the Court affirmed the constitutionality of Iowa’s one-year residency requirement for a divorce. The Court contrasted its holding with an earlier decision, *Boddie v. Connecticut*,¹⁶⁹ in which it ruled that states could not deny access to divorce petitioners unable to pay filing fees, noting that unlike in that case, the Iowa statute at issue in *Sosna* did not involve “total deprivation . . . but only delay.”¹⁷⁰

Cir. 1991) (overturning an order that prohibited a repeat *pro se* litigant from entering the courthouse). While federal courts also ensure that the right to sue is “adequate, effective and meaningful,” they nevertheless generally construe the right narrowly. *See, e.g., Swekel v. City of River Rouge*, 119 F.3d 1259, 1262-63 (6th Cir. 1997) (limiting the federal right of access to the courts to “abuses” that occur before a lawsuit is filed because “[w]hen the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the abuse”).

166. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 410 (Tex. 1997) (quoting *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 499 (Tex. 1995)); *see also Lattrell v. Chrysler Corp.*, 79 S.W.3d 141, 149 (Tex. App.—Texarkana 2002, pet. denied) (rejecting open courts challenge to no-evidence summary judgment rule because Texas Rule of Civil Procedure 166a(i) was not a legislative enactment); *Armstrong v. Randle*, 881 S.W.2d 53, 56 (Tex. App.—Texarkana 1994, writ denied) (stating that “[i]n this case [plaintiff] challenges the discretionary act of a trial judge, not a legislative enactment. The open courts provision is therefore inapplicable to this issue.”).

167. *See Baluch v. Miller*, 774 S.W.2d 299, 301-02 (Tex. App.—Dallas 1989, orig. proceeding) (stating that “a conditional abatement of proceedings is not a denial of access to the courts”).

168. 419 U.S. 393 (1975).

169. 401 U.S. 371 (1971).

170. 419 U.S. at 410.

1. Reasonable Basis

Open courts decisions only tend to invalidate “unreasonable” restrictions on common law causes of action.¹⁷¹ Given the enormity of the asbestos litigation problem, courts should conclude that unimpaired dockets are reasonable. The United States Supreme Court has explained that asbestos litigation “defies customary judicial administration.”¹⁷² The Texas Supreme Court has agreed, explaining “that established doctrine and procedures must change to accommodate asbestos litigation.”¹⁷³ The Michigan Supreme Court has said, “We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.”¹⁷⁴

Unimpaired docket plans represent a fair balance between the rights of sick and unimpaired claimants. The current system basically denies open courts to the truly sick, and the courts can remedy this problem by adopting unimpaired docket plans. Furthermore, unimpaired asbestos dockets promote the open courts rights of other plaintiffs in the civil justice system by allowing their claims to be heard more promptly.

2. Rational Basis

Not all states use a reasonableness test under their open courts provisions. Montana courts, for example, apply the familiar three-tiered approach normally used to evaluate equal protection challenges (selecting between strict scrutiny, middle-tier scrutiny, or

171. *Wright v. Onembo*, 2000 WL 1521567, at *5 n.12 (E.D. Pa. Oct. 4, 2000) (stating that “not all undue delays give rise to constitutional violations under the due process or access to the courts. Rather, such delays only present constitutional problems when, and to the extent that, they result in some tangible unfairness”); *Bystrom v. Diaz*, 514 So. 2d 1072, 1075 (Fla. 1987) (stating that “there may be reasonable restrictions prescribed by law”) (citations omitted); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983) (stating that “the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute”).

172. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also In re Asbestos Litig.*, 829 F.2d 1233, 1235 (3d Cir. 1987) (stating that “[t]he formidable number of asbestos suits has prompted efforts to adapt the procedural framework of the existing tort system with its inefficiencies, high costs, and inconsistent judgments to the pressing demands of this massive litigation”).

173. *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 653 (Tex. 2000).

174. *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 9 (Mich. 1986).

rational basis scrutiny depending on the type of right at issue).¹⁷⁵ The rational basis test applies “when the right under examination is not fundamental and does not warrant middle-tier scrutiny.”¹⁷⁶

The Montana Supreme Court recently rejected an open courts challenge to a medical malpractice statute of repose directed at malpractice claims by a minor. The court applied the rational basis test to a minor’s right to tort recoveries.¹⁷⁷ Thus, the court would presumably apply the same test to an asbestos claimant’s right to tort recoveries. The court found the statute of repose to be constitutional because “the rational basis test . . . requires only that the classification created by the statute bear a rational relationship to a legitimate legislative purpose.”¹⁷⁸ An unimpaired docket plan would bear a rational relationship to the legitimate policy of prioritizing asbestos claims so that the truly injured can have their claims decided first.

3. Permanent or Indefinite Stays

Unimpaired plaintiffs may claim that unimpaired docket plans effectively amount to permanent suspensions of their lawsuits, supposedly in violation of open courts provisions. This argument, however, ignores the fact that these plans uniformly provide a mechanism by which to remove a case to the active docket—once a plaintiff develops actual physical impairment.

Delays can have constitutional significance. For example, the Pennsylvania Supreme Court struck down its system of medical arbitration panels on the basis that it took years to process potentially

175. See *Estate of McCarthy v. Mont. Second Judicial Dist. Court, Silverbow Co.*, 994 P.2d 1090, 1093-94 (Mont. 1999). In contrast to Montana, Ohio courts use a test for Ohio’s constitutional “right-to-remedy” clause that is reminiscent of the test for due process challenges: the restriction must “grant Ohioans an opportunity for remedy at a meaningful time or in a meaningful manner.” *Burgess v. Eli Lilly & Co.*, 609 N.E.2d 140, 142-43 (Ohio 1993). As explained above for the due process analysis, an unimpaired docket plan provides a meaningful preliminary review that accomplishes the legitimate objective of prioritizing cases by severity of illness. Moreover, the plan does not extinguish a claimant’s tort rights if the claimant suffers no present injury. This should be sufficient to satisfy the Ohio Constitution’s Right-to-Remedy Clause.

176. *Estate of McCarthy*, 994 P.2d at 1094.

177. *Id.*

178. *Id.* at 1095.

valid medical malpractice cases, postponing access to the courts.¹⁷⁹ The Pennsylvania Supreme Court relied primarily on Pennsylvania's right to trial by jury provision, but also cited the state's access to courts provision.¹⁸⁰ Nevertheless, the court did not broadly determine that any delay was automatically unconstitutional. It only invalidated the Pennsylvania plan after finding that the arbitration panels literally did not work.¹⁸¹

Likewise, the question in evaluating an open courts challenge is not whether an unimpaired docket plan causes delays for some plaintiffs, but whether the delays are reasonable.¹⁸² Given the enormity of the asbestos litigation problem, delaying the cases of unimpaired plaintiffs in order to allow the truly sick to go first is reasonable.

4. Adequate Quid Pro Quo

Finally, if a court were to require a quid pro quo as necessary to uphold a restriction in the face of an open courts challenge,¹⁸³ the requirement would be satisfied by an unimpaired asbestos docket. As stated, an unimpaired asbestos docket would *benefit* any unimpaired plaintiff who eventually might develop an impairing

179. *Mattos v. Thompson*, 421 A.2d 190, 195-96 (Pa. 1980).

180. *Id.* at 191 n.3 and accompanying text.

181. *Id.* at 195 (stating that "[t]he findings . . . indicate that the arbitration panels . . . are incapable of providing the 'prompt determination and adjudication' of medical malpractice claims which was the goal of the Act Most importantly, these statistics amply demonstrate that 'the legislative scheme is incapable of achieving its stated purpose.'" (citations omitted).

182. *See, e.g., Snyder v. Douglas*, 647 S.2d 275, 278 (Fla. Dist. Ct. App. 1994) (declaring automatic six-month stay period under Florida Insurance Guaranty Association Act "a reasonable restriction" on access to the courts challenge stemming from a legal malpractice action).

183. In *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), the Texas Supreme Court held that a \$500,000 aggregate limit on damages in health care liability actions violated the open courts provision of the Texas Constitution and suggested that plaintiffs who are being denied access to the courts must be supplied a quid pro quo. The majority, however, did not directly state that such a requirement exists. *See id.* at 697 (Gonzalez, J., dissenting) (characterizing the majority's language as "guarded"). The Texas Supreme Court as recently as 1995 affirmed a version of the open courts test that requires a substitute remedy only where the restriction is found not to be a "reasonable exercise of the police power in the interest of the general welfare." *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (quoting *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994)).

condition and have his or her claim time-barred under existing statutes of limitations. Such plans also accelerate jury trials for the truly sick and other claimants in the civil justice system.

E. Equal Protection

Furthermore, unimpaired plaintiffs may claim that unimpaired docket plans violate their constitutional right to equal protection because such plans treat unimpaired plaintiffs differently than seriously injured plaintiffs. Such a challenge should fail, because courts are likely to scrutinize unimpaired docket plans under the permissive rational basis test—which at least one court has described as “the most anemic form of constitutional scrutiny.”¹⁸⁴ Courts strike down few governmental actions under the rational basis test. As the United States Supreme Court explained in *F.C.C. v. Beach Communications, Inc.*¹⁸⁵ when the Court considered the constitutionality of the 1984 Cable Communications Policy Act:

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.¹⁸⁶

Solving a core part of the asbestos litigation crisis—mass filings by unimpaired claimants—would certainly qualify as a “reasonably conceivable state of facts” that justifies classifying asbestos claims as sick or unimpaired.

In perhaps the most relevant case, *Pittsburgh Corning Corp. v. Bradley*,¹⁸⁷ discussed earlier, the Pennsylvania Supreme Court rejected an equal protection challenge to a plan requiring asbestos, but not other civil cases, to proceed initially to a non-jury trial, with the right to a later jury trial *de novo*. The court concluded that “[t]here [wa]s a manifest need for an effective procedure to facilitate the prompt disposition of the growing backlog of asbestos cases . . .

184. *BellSouth Corp. v. F.C.C.*, 144 F.3d 58, 66 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1086 (1999).

185. 508 U.S. 307 (1993).

186. *Id.* at 313 (emphasis added).

187. 453 A.2d 314 (Pa. 1982).

and the procedure chosen [wa]s clearly related to the paramount goal of achieving timely justice.”¹⁸⁸

Outside of the asbestos context, the United States Supreme Court has upheld a pre-trial screening mechanism under a “rational basis” level of scrutiny. In *Jones v. Union Guano Co.*,¹⁸⁹ the Court upheld a North Carolina statute that prevented lawsuits against fertilizer manufacturers unless the claimant first obtained a chemical analysis. The Court explained, “The Fourteenth Amendment does not prevent a state from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object.”¹⁹⁰

Strict scrutiny is the opposite level of review. It applies to protect suspect categories and fundamental rights and would create a tremendous hurdle to any program.¹⁹¹ In rare cases, the courts will sometimes invoke a so-called “intermediate” level of scrutiny that would likewise constitute a hurdle to an unimpaired docket plan.¹⁹² As United States Supreme Court Justice Brennan first explained it, this level of review applies “when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution.”¹⁹³ The deciding question is thus likely to be which test applies.

As mentioned above, the case law appears to be quite clear. Courts generally apply the rational basis test to legislation that affects most economic interests.¹⁹⁴ The same test applies to court

188. *Id.* at 317.

189. 264 U.S. 171 (1924).

190. *Id.* at 181.

191. In the context of racial classifications, this standard has been described in now-famous language as “strict in theory, but fatal in fact.” *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring). It seems unlikely that strict scrutiny would be that strict outside of that context—or even in that context. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (O’Connor, J., plurality opinion) (stating that “[f]inally, we wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact’”).

192. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216-24 (1982) (applying an intermediate level of scrutiny for state legislation denying public education to children of illegal aliens). *Plyler* appears to be one of the first Supreme Court opinions to describe this level of scrutiny as “intermediate.” *Id.* at 218 n.16.

193. *Id.*

194. See, e.g., *F.C.C. v. Beach Communications.*, 508 U.S. 307, 313 (1993) (stating that “[i]n areas of social and economic policy, a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”); *Ford Motor Co. v. Tex. Dept. of Transp.*, 264 F.3d 493, 506 (5th Cir. 2001)

actions or rules, unless they affect fundamental rights.¹⁹⁵ Courts rarely consider tort rights to be fundamental.¹⁹⁶ As the Third Circuit Court of Appeals has explained, “[t]he Constitution does not create a fundamental right to pursue specific tort actions.”¹⁹⁷ Thus, with no fundamental right or suspect class to justify strict scrutiny, courts considering challenges to unimpaired asbestos dockets will almost certainly proceed under the rational basis test. Under this test, it would be highly unlikely for an unimpaired asbestos docket to be struck down given the strong support justifying such plans.

(stating that “[t]ypically, when an individual or corporation challenges an economic regulation under the Due Process or Equal Protection Clause, a State has the minimal burden of showing that the law has a rational basis”).

195. *See, e.g.,* *Giannini v. Real*, 711 F. Supp. 992, 999-1000 (C.D. Cal. 1989), *aff’d*, 911 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) (applying rational basis test to evaluate constitutionality of a district court local rule because the rule did not affect fundamental rights). On appeal, the Ninth Circuit also applied the rational basis test to the local court rules. 911 F.2d at 359-60.

196. A handful of state courts have applied an intermediate level of review to protect a plaintiff’s tort rights. *See, e.g.,* *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980) (stating that “[a]lthough the right to recover for personal injuries is not a ‘fundamental right,’ . . . it is nevertheless an important substantive right”). Those courts, however, are distinctly in the minority. *See* *Murphy v. Edmonds*, 601 A.2d 102, 111 (Md. 1992) (rejecting *Carson*); *Estate of McCarthy*, 994 P.2d at 1095 (same); *Gourley v. Neb. Methodist Health Sys., Inc.*, 663 N.W.2d 43, 73 (Neb. 2003) (same); *see also* *Richardson v. Sport Shinko*, 880 P.2d 169, 191 (Haw. 1994) (adopting the rational basis test for evaluating a statute that allegedly impinged the right to assert tort claims). In fact, the intermediate level of review is rare, and it appears to have become more disfavored over time. *See, e.g.,* *Murphy*, 601 A.2d at 110. The court in *Murphy* stated:

Whether the Supreme Court will apply an ‘intermediate’ scrutiny test to any new statutory classifications may be questionable. Some of the Court’s recent opinions seem to suggest that equal protection analysis should be two-tiered, and that, unless a statutory classification is subject to strict scrutiny . . . it should be reviewed under the traditional rational basis test.

Id.

197. *Edelstein v. Wilentz*, 812 F.2d 128, 131 (3d Cir. 1987); *see also* *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173 n.16 (5th Cir. 1979) (stating that “[r]egulation of the practice of medicine does not involve a fundamental right or suspect class . . . [and] neither should the bringing of a malpractice action.”).

F. Takings

Finally, unimpaired plaintiffs may argue that unimpaired docket plans deprive them of their causes of action, and thus constitute unconstitutional “takings” in violation of the Fifth Amendment and as made applicable to the states through the Fourteenth Amendment. Such plans, however, merely prioritize trials. There is no taking in the classic sense, such as occurs when the government appropriates land for road expansion or some other government use. Unimpaired plaintiffs retain ownership of their causes of action and the benefits to be derived from them.

In a particularly relevant decision, a Baltimore City Circuit Court judge rejected a takings challenge to the Baltimore unimpaired asbestos docket.¹⁹⁸ The court determined that the Baltimore order was not an unconstitutional “taking of property,” as no plaintiff had been denied access to the judicial system.¹⁹⁹ The court noted that the deferral order “is a mechanism to prioritize by severity of the injury the large number of asbestos cases already filed and to be filed in the future.”²⁰⁰ The court went on to state that the order “allows the court to control its docket and to assign trial and court time to plaintiffs in an efficient, objective and uniform manner . . . [the order] is a reasonable restriction on access to the courtroom.”²⁰¹

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,²⁰² the United States Supreme Court reiterated the long-standing distinction between classic takings and “regulatory takings,” which is where government regulations impose such rigorous restrictions on the use of property that it, in effect, constitutes a taking of that property.²⁰³

The obvious question in such a case is whether a taking even occurred. Government regulations permeate all aspects of life and impose countless burdens on individuals. Obviously, not many constitute takings. The *Tahoe-Sierra* opinion emphasized the difficulty of answering this question:

198. See *In re Asbestos Pers. Injury & Wrongful Death Asbestos Cases*, No. 9234501 (Cir. Ct. Baltimore City, Md. May 9, 2001) (Memorandum and Opinion) (on file with the authors).

199. *Id.* at 3-5.

200. *Id.* at 3.

201. *Id.* at 4.

202. 535 U.S. 302 (2002).

203. *Id.* at 321-22.

When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.²⁰⁴

In deciding whether any particular regulation constitutes a taking, the court must engage in “essentially ad hoc, factual inquiries”²⁰⁵ based on three factors: “1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interfered with distinct investment-backed expectations; and 3) the character of the governmental action.”²⁰⁶ When discussing these factors in *Tahoe-Sierra*, the Supreme Court emphasized that even a complete prohibition against the use of property, if it is temporary, may not be a taking.²⁰⁷ The court must conduct a detailed review of the factors to decide.

The first factor strongly points away from finding that an unimpaired docket plan constitutes a taking. The economic impact of the plan on an unimpaired claimant is small because of the nature of the alleged property interest. In short, the progress of an asbestos lawsuit does not impact the daily life of an unimpaired plaintiff. In contrast, the economic impact of an asbestos lawsuit on the truly sick is high, because they may need the proceeds to obtain adequate compensation and treatment for their cancers or other impairing conditions.

Also, economic impact on unimpaired claimants is small because unimpaired docket plans do not abolish causes of action. Any attempt to characterize unimpaired docket plans as permanent deprivations of these claims is simply wrong. With regard to the unimpaired docket plan in Baltimore, for example, over forty percent

204. *Id.* at 322 n.17.

205. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

206. *Moore v. United States*, 943 F. Supp. 603, 609 (E.D. Va. 1996) (citing *Penn Central*).

207. *Tahoe-Sierra*, 535 U.S. at 330-32 (holding that a 32-month complete moratorium on the development of land around Lake Tahoe must be evaluated under the *Penn Central* standard); see also *id.* at 337 n.32 (listing cases where absolute, but temporary, prohibitions on land use were held not to be takings).

of the plaintiffs on the unimpaired docket have moved to the active docket.²⁰⁸ The Ohio appellate court in *Cuyahoga*, discussed earlier, also rejected any notion that unimpaired docket plans constitute a permanent obstacle to the resolution of the underlying claims: “Judgment in these cases will be *deferred* for those plaintiffs whose claims are on the inactive docket It, therefore, cannot be said that this order ‘prevents a judgment.’”²⁰⁹

In fact, instead of abolishing causes of action, unimpaired docket plans *preserve* causes of action. As mentioned, unimpaired docket plans toll statutes of limitations.²¹⁰ Therefore, plaintiffs will not lose their claims for damages for later-developed real injuries.²¹¹ This means that there will be a net economic *benefit* to any unimpaired plaintiff who subsequently develops a serious illness if such a claim would be time-barred under an otherwise applicable statute of limitations.

The second factor, regarding investment-backed expectations, also points against the finding of a taking. Plaintiffs’ alleged causes of action for their benign physical conditions are certainly not the product of financial investments.

The third factor, regarding the character of the governmental action, also strongly points away from finding a taking to have occurred through the adoption of an unimpaired asbestos docket. As the United States Supreme Court explained in *Penn Central Transportation Co. v. New York City*,²¹² “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”²¹³ An

208. *In re Pers. Injury & Wrongful Death Asbestos Cases*, No. 24-X-92-344501, at 5 (Baltimore City Cir. Ct., Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Unimpaired Docket Medical Removal Criteria) (on file with the authors).

209. *Cuyahoga*, 713 N.E.2d at 24 (emphasis added).

210. See Behrens & Parham, *supra* note 44, at 8, 10 (stating that generally inactive docket programs contain a procedure which tolls statutes of limitations when unimpaired claimants are placed on an inactive or deferred track); Schuck, *supra* note 50, at 572 (stating that tolling of statutes of limitations is essential in unimpaired docket plan).

211. See Schuck, *supra* note 49, at 563-64 (discussing how the single-judgment rule and statutes of limitations often force claimants to file a pre-impairment claim).

212. 438 U.S. 104 (1978).

213. *Id.* at 124 (citation omitted).

unimpaired asbestos docket is a device that prioritizes trials and thus merely adjusts the “benefits and burdens” of filing asbestos lawsuits among the different plaintiffs.

More recent opinions have described these factors as the “fairness and justice” considerations.²¹⁴ The main point of unimpaired docket plans is to correct the unfairness of the current system by allowing the truly sick to go to the front of the line. This represents a reasonable burden on unimpaired plaintiffs in comparison to the current burdens on the truly sick, defendants swept into the litigation, affected interests, and others who require prompt adjudication of their claims in the civil justice system. Unimpaired docket plans should thus not be considered a taking.

Another reason that unimpaired docket plans do not violate the Takings Clause is that unimpaired plaintiffs do not have a property interest subject to constitutional protection. As this article discussed above, an unimpaired claimant’s cause of action should not constitute a “vested” property right under a due process analysis.²¹⁵ In addition, a party invoking the Takings Clause must show that he or she has a property interest in the resolution of his or her lawsuit *quickly or by a particular date*. Judge Posner, writing for the Seventh Circuit Court of Appeals in *Schroeder v. City of Chicago*,²¹⁶ rejected a due process claim on this basis when a disability claimant argued that a delay in the start of his disability payments violated his constitutional rights. The Seventh Circuit ruled, in short, that the law did not give the claimant “a legally enforceable right, an entitlement, to immediate payment.”²¹⁷ Without a property right to a certain time frame, the delay did not

214. See, e.g., *Tahoe-Sierra*, 535 U.S. at 336 (discussing Justice O’Connor’s comments on the “fairness and justice” inquiry).

215. The *Hammond* court explained that this debate would apply to the Takings Clause. *Hammond*, 786 F.2d at 15 (stating that “[w]e have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a ‘taking’ here”).

216. 927 F.2d 957 (7th Cir. 1991).

217. *Id.* at 959.

violate due process.²¹⁸ Judge Posner then indicated that the delay may not constitute a taking for the same reason.²¹⁹

Finally, several decisions strongly imply that the Takings Clause simply does not apply to trial delays. Judge Posner in *Schroeder* and another panel of the Seventh Circuit a year later held that claims for delay in the adjudication of an entitlement could not be “fitted within the boundaries of the takings clause, even broadly construed.”²²⁰ This makes sense. Applying the Takings Clause to claims for *delays* in an adjudication seems remarkably unworkable. Both short and long trial delays are frequent in the civil justice system. Even indefinite delays are common, as many ordinary lawsuits often go long periods of time without definite trial settings. To rule that an unimpaired docket plan constitutes a taking would set an awkward precedent that would call into question everyday scheduling decisions of the trial courts.

II. CONCLUSION

The current asbestos litigation system is not working for sick claimants, defendants, or the judiciary. Changes are needed. As a federal appellate judge has stated:

It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view It is judicial paralysis, not activism, that is the problem in this area.²²¹

218. *Id.* The key issue thus becomes whether the law creates a deadline that constitutes a right for the claimant. *See id.* at 960 (stating that “[claimant] must lose because there was no deadline for the Retirement Board to act on his application”).

219. *Id.* at 961 (finding no violation of the Takings Clause “even if *Schroeder* had an entitlement to immediate receipt of his disability benefit”).

220. *Schroeder*, 927 F.2d at 961 (emphasis added); *see also* Clifton v. Schafer, 969 F.2d 278, 282-83 (7th Cir. 1991) (holding that delays in the receipt of benefits under the Aid to Families with Dependent Children program could not constitute a violation of the Takings Clause) (citing *Schroeder*).

221. *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.* *Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993).

Many courts are, in fact, reevaluating the way they handle asbestos claims and are working to make improvements.²²² A growing number of jurisdictions have chosen to implement an unimpaired asbestos docket (also called an inactive docket, a pleural registry, or deferred docket) to give trial priority to the truly sick and to preserve the claims of the presently unimpaired. These plans have existed for many years in some jurisdictions and have proven to be fair and workable. As additional courts explore this course they are likely to question whether they have the authority to implement an unimpaired docket and if such an order would be constitutional. This article has shown that the power to adopt an unimpaired asbestos docket rests squarely within the inherent power of the courts to control their calendars to serve the interests of justice. The article has also shown that unimpaired asbestos dockets are constitutional.

222. See *The Fairness in Asbestos Compensation Act of 1999: Hearing on S. 758 Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 106th Cong. 2 (Oct. 5, 1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court) (stating that “[d]uring my tenure on my state’s highest court I was keenly aware of my responsibility to be sure the court system functioned efficiently”).