# A Letter to the Nation's Trial Judges: Serious Asbestos Cases– How to Protect Cancer Claimants and Wisely Manage Assets

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Abstract
*The authors provide a review of asbestos litigation in the United States in an effort to aid trial judges in handling cases pending before them.*

Dear Trial Judges of America,

This Letter shares some thoughts about how courts can better handle asbestos cases where plaintiffs allege serious harms, such as mesothelioma or other asbestos-related cancers.

## I. Introduction

Six years prior to writing this Letter, we authored *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, which addressed the lesson

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of the law of unintended consequences.[1] We explained that a number of judges in asbestos cases–with the intent of facilitating and ending large asbestos dockets–were putting aside normal rules of law about discovery, causation, and even the need to show specific harm.[2] Their purpose was to foster settlements, and end what the United States Supreme Court called the "asbestos-litigation crisis."[3] Unfortunately, this push for "efficiency" led to hundreds of thousands of more filings by claimants with little or no injury.[4] The abandonment of the rule of law led to a greater asbestos "crisis;"[5] resulting in mounting bankruptcies and, consequently, fewer assets left to pay seriously harmed asbestos plaintiffs.[6]

## A. The Rule of Law Is Returning to Asbestos Litigation

We are gratified that our message has been well-received by so many courts. Over the last several years, courts administering asbestos cases have been restoring rules of law, and taking specific steps to rein in the most prevalent abuses in the litigation.[7] In particular, judges have recog-

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[1] Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

[2] *See id.*; *see also* 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 (2001).

[3] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[4] *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 284 (2003).

[5] *See* Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 BRIEFLY 1, 29 (June 2002), *available at* http://www.nlcpi.org/books/pdf/Vol6Number6June2002.pdf.; Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 28-29 (2001).

[6] For example, the Manville Trust is now paying five cents on the dollar for claims; and trusts created through the Celotex and Eagle-Picher bankruptcies have also reduced their payments to claimants. *See* Queena Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6.

[7] *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. (forthcoming Jan. 2007); James A.

nized that it is unsound public policy to award damages to plaintiffs who "have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be."[8] Recently, unimpaired claimants have accounted for up to ninety percent of new asbestos filings.[9] These filings have been directly tied to the use of "plaintiff-lawyers' arranged mass screenings programs"[10] in areas with high concentrations of workers who may have worked in jobs where they were exposed to even small quantities of asbestos.[11]

Some courts have concluded that unimpaired claimants have no cause of action, because they have not sustained compensable damages.[12] Other

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Henderson, *Jr., Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey's Tort Reform Update, Jan. 18, 2006, at 12.

[8] *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 5 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School).

[9] *See* Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004, at 186 ("two-thirds to 90% of the nonmalignants are 'unimpaireds'–that is, they have slight or no physical symptoms"); *see also* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A15.

[10] *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 309 (E.D.N.Y. 2002).

[11] *See* Eagle-Picher Indus. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."). The practice of mass litigation screenings has come under significant scrutiny. *See* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005); Eddie Curran, *Asbestosis Diagnoses Have Come Under Fire From Critics*, MOBILE REG., Apr. 4, 2004, at A1; Eddie Curran, *Diagnosing for Dollars?*, MOBILE REG., Apr. 4, 2004, at A1. Former United States Attorney General Griffin Bell has noted, "[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003); *see also* David Egilman & Susanna Rankin Bohme, *Attorney-Directed Screenings Can Be Hazardous*, 45 AM. J. OF INDUS. MED. 305 (2004) (noting danger of attorney-directed screenings that fail to provide adequate medical counseling or treatment). Senior United States District Judge John Fullam has said that many X-ray interpreters (called B Readers) hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 723 (D. Del. 2005).

[12] *See* Burns v. Jaquays Min. Corp., 752 P.2d 28 (Ariz. Ct. App. 1987); *In re* Asbestos Litig., Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 (Del. Super. Ct. 1994), *judgment rev'd on other grounds*, 670 A.2d 1339 (Del. 1995); *In re* Hawaii Federal Asbestos Cases, 734 F. Supp. 1563 (D. Haw. 1990); Bernier v. Raymark Indus.,

courts have reached the same public policy goal of not compensating uninjured plaintiffs by administratively dismissing the claims or creating "inactive dockets" to defer the claims of unimpaired plaintiffs unless and until the plaintiff suffers some real objective harm.[13] Starting in 2004, state legislatures in Florida, Georgia, Kansas, Ohio, South Carolina, and Texas entered the fray, enacting medical criteria statutes to achieve the same result.[14] In these situations, the rights of the non-sick to sue are protected, as statutes of limitation do not begin to run unless the person suffers actual harm from asbestos exposure. The courts and legislatures prioritizing claims of the truly sick have appreciated that when tort law is at the "edge," such as with unimpaired claimants, sound public policy should govern.[15] And when assets are finite, they should be preserved for those who are truly injured.[16]

Courts have also taken steps to allow claims to be determined on their individual merits, which diminishes the incentive for personal injury lawyers to recruit high volumes of unimpaired clients and reduces inappropriate settlement pressure on defendants. For example, some courts have stopped mass trial consolidations, which were used by some judges to clear their asbestos dockets.[17] In addition to fundamental fairness and

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Inc., 516 A.2d 534 (Me. 1986); Owens-Illinois v. Armstrong, 591 A.2d 544 (Md. Ct. Spec. App. 1991); Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996).

[13] *See* Behrens & Goldberg, *supra* note 7; *see also* Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253, 264 (2005); 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, 6 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992).

[14] *See* Behrens & Goldberg, *supra* note 7.

[15] *See generally* Victor E. Schwartz et al., *Defining the Edge of Tort Law in Asbestos Bankruptcies: Addressing Claims Filed by the Non-Sick*, 14:1 J. BANKR. L. & PRAC. 61, 79-81 (2005). These decisions make more sense in light of what has been learned about the unreliability of the mass litigation screenings used by some plaintiffs' attorneys to generate claims. *See also* Judyth Pendell, *Regulating Attorney-Funded Mass Medical Screenings: A Public Health Imperative?*, AEI-Brookings Joint Center for Regulatory Studies (Sept. 2005).

[16] *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, 336 (2002); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 952 (2003).

[17] *See infra* note 194 and accompanying text (discussing Mississippi Supreme Court's decision in Harold's Auto Parts, Inc. v. Mangialardi, 889 So. 2d 493, 495 (Miss. 2004)).

due process problems, trial consolidations that aggregate the claims of the sick and non-sick turned out to be a bit like using a lawn mower to cut down weeds–the practice may have provided a temporary fix, but in the long run it created more problems than it solved.[18] Courts also have begun ending docket management practices that are unfair to defendants, so that claims may properly be evaluated and defended.[19] Finally, some courts have enforced and some state legislatures have enacted venue and *forum non conveniens* restrictions to stop forum shopping.[20] In times past, the mass migration of claims to certain jurisdictions has been a hallmark of asbestos litigation and has dominated the dockets in those courthouses.

An event that has appeared to quicken the decrease of the use of mass screenings as a litigation recruitment tool, as well as mass numbers of unimpaired claims they create, was United States District Court Judge Janis Graham Jack's 2005 ruling in the federal silica multi-district litigation.[21] Judge Jack recommended that thousands of claims on the federal silica docket be dismissed on remand because the diagnoses were fraudulently prepared.[22] "[T]hese diagnoses were driven by neither health

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In addition, in 2005 and 2006, Georgia, Kansas, and Texas enacted laws that generally preclude the joinder of asbestos cases at trial. *See* Mark A. Behrens, *States Address Asbestos Litigation Crisis and Curb Silica Litigation Fraud*, TEX. CIV. JUST. LEAGUE J., Summer 2006, at 5, 7.

[18] Helen E. Freedman, *Product Liability Issues in Mass Tort–View from the Bench*, 15 TOURO L. REV. 685, 688 (1999) (quoting New York City asbestos judge: "Increased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases."); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings.... If you build a superhighway, there will be a traffic jam."); Glenn W. Bailey, *Litigation Is Destroying American Companies*, USA TODAY, Jan. 1, 1994, at 76 ("Judges' efforts to resolve cases all too often have resulted in a perverse incentive–causing more cases and more backlog.").

[19] *See infra* note 196 and accompanying text (discussing improvements in Madison County, Illinois).

[20] *See infra* note 187 and accompanying text (discussing legislative and judicial reforms).

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

[22] *See id.*; *see also* Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. (forthcoming Jan. 2007); Fred Krutz & Jennifer R. Devery, *In the Wake of Silica MDL 1553*, 4:5 Mealey's Litig. Rep.

nor justice," Judge Jack said in her scathing opinion, "they were manufactured for money."[23] Since she published her opinion, both the United States Attorney's Office in Manhattan and the Texas Attorney General have been investigating the screeners in consideration of criminal charges.[24] The United States House Energy & Commerce Subcommittee on Oversight & Investigations also has investigated the filings.[25]

The litigation screen doctors referenced in Judge Jack's opinion, in addition to "diagnosing" silica claimants, also have facilitated thousands of asbestos claims.[26] The Manville Trust found that at least sixty percent of the silica claimants before Judge Jack had already filed asbestos-related claims with the Trust,[27] even though, as Judge Jack described, "[a] golfer is more likely to hit a hole-in-one than an occupational medicine specialist is to find a single case of both silicosis and asbestosis."[28] As a result, in 2005, the Manville, Eagle-Picher, and Celotex Asbestos Settlement Trusts said they would not accept reports prepared by doctors cited by Judge Jack.[29] Similarly, the Court of Common Pleas of Cuya

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Silica 10 (2006); Roger Parloff, *A Court Battle Over Silicosis Shines a Harsh Light on Mass Medical Screeners–The Same People Whose Diagnoses Have Cost Asbestos Defendants Billions*, FORTUNE, June 13, 2005.

[23] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 635.

[24] Peter Geier, *Silica Cases Drawing Resistance; Fallout From Key Texas Case Continues with Grand Jury, Legislation*, 28:16 NAT'L L.J. 7, Dec. 19-26, 2005; Jonathan D. Glater, *Lawyers Challenged on Asbestos*, N.Y. TIMES, July 20, 2005, at C1; Lynn Brezosky, *Texas Probing Potentially Fraudulent Diagnosis of Lung Disease in Thousands of Lawsuits*, 6/8/06 AP DATASTREAM 23:40:04 (June 8, 2006).

[25] *See* Julie Criswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. TIMES, Mar. 8, 2006, at C3; Press Release, Barton, Whitfield Query Physicians Regarding Silicosis (Aug. 2, 2005).

[26] *Asbestos: Mixed Dust and FELA Issues, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 2, 2005) (statement of Prof. Lester Brickman, Cardozo Law School), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3963.

[27] *Id.*

[28] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 603; *see Asbestos: Mixed Dust and FELA Issues, Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 2, 2005) (statement of David Weill, M.D., Associate Professor, Division of Pulmonary and Critical Care Medicine, University of Colorado Health Sciences Center, Denver, Colorado), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=1362&wit_id=3962.

[29] *See* Announcement by David Austern, President, Claims Resolution Management Corporation (Sept. 12, 2005), *available at* http://www.claimsres.com/Home/PDF/905

hoga County (Cleveland), Ohio has dismissed all asbestos cases where two of the doctors cited in Judge Jack's opinion, Drs. Ray Harron and James Ballard, provided the "diagnosis."[30] The court, thus far, has dismissed 3,755 cases.[31]

The net effect of these developments since our last *Letter to the Nation's Trial Judges* is that gradually, but significantly, the problem of massive numbers of payouts to unimpaired claimants is working towards a fair and balanced resolution in a growing number of states.[32]

## B. Courts Are Re-Focusing Attention on Seriously Injured Claimants

Now, many courts are appropriately focusing more attention on seriously injured asbestos claimants. It is estimated that many such cases will be filed every year for the foreseeable future.[33] These cases present a challenge to any judge and jury. Only individuals devoid of any human feeling could fail to appreciate the misfortune and sadness of a person whose exposure to asbestos caused the development of mesothelioma or some other form of asbestos-related cancer. In adjudicating these claims, however, judges must weigh judicial fairness and the economic consequences of liability when such liability is not legally accurate or proportionate to the harm allegedly caused by the defendant.

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Suspension Memo.pdf; Letter from William B. Nurre, Executive Director, Eagle-Picher Personal Injury Settlement Trust, to Claimants' Counsel (Oct. 19, 2005), *available at* http://www.cpf-inc.com/includes/content/PhysicianNotice.pdf; Notice of Trust Policy Regarding Acceptance of Medical Reports from John L. Mekus, Executive Director of the Celotex Asbestos Settlement Trust (Oct. 20, 2005), *available at* http://www.celotextrust. com/news_details.asp?nid=22.

[30] *See In re* Cuyahoga County Asbestos Cases, Special Docket 73958 (Ct. C. P. Cuyahoga County, Ohio Mar. 22, 2006); Peter Geier, *Thousands of Asbestos Cases Dismissed*, 28: 13 NAT'L L.J. 13, Apr. 10, 2006, at 13.

[31] *See* Peter Geier, *States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload*, 28: 17 NAT'L L.J. 1, May 22, 2006.

[32] *See* Alison Frankel, *Asbestos Removal; Thanks to a Combination of State Tort Reform, Judicial Rulings, and Public Scrutiny, The Asbestos Docket Has Dropped Dramatically Over the Last Three Years*, AM. LAW., July 2006, *available at* http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1151571920672.

[33] *Id.*

Careful thought and analysis must be given to assure that those suffering from mesothelioma and other asbestos-related cancers are treated fairly. For example, where one asbestos claimant is initially awarded more than $200 million[34] and another with similar injuries, exposure histories, and factual circumstances receives less than $500,000 against similarly situated defendants,[35] the goal of fair and impartial justice is thwarted and undermined. The legal system appears to be both arbitrary and unwise: a casino mentality is substituted for justice.

The same attention also must be paid to protect the rights of the parties, as well as the limited assets remaining to pay current and future asbestos claimants. At this stage in asbestos litigation, at least seventy-eight companies named as asbestos defendants are now in bankruptcy.[36] In accordance with the bankruptcy laws, bankrupt defendants cannot be pursued in asbestos lawsuits; the claims against them are paid by settlement trusts.[37] With the "traditional" asbestos defendants unavailable for litigation, experience has shown that plaintiffs' lawyers will keep casting their litigation net wider and pull in more and more "peripheral"

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[34] *See* Brian Brueggemann, *Man Awarded $250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 40.

[35] *See, e.g., Verdict Report,* HARRISMARTIN COLUMNS: ASBESTOS 20, 20-30, May 2006 (reporting verdict for mesothelioma plaintiffs ranging from $130,000 to $250 million, with most verdicts in the $1 million to $5 million range).

[36] *See* Current Issues in Asbestos Litigation, ISSUE BRIEF (Am. Acad. of Actuaries, Washington, D.C.), Feb. 2006, at 4.; *see also* Mark D. Plevin, Paul W. Kalish & Leslie A. Epley, *Where Are They Now, Part Three: A Continuing History of the Companies That Have Sought Bankruptcy Protection Due to Asbestos Claims*, 5:4 MEALEY'S ASBESTOS BANKR. REP. 1 (Nov. 2005).

[37] In the early 1990s, Johns-Manville Corporation was the first major asbestos defendant to use the bankruptcy process to set up a trust fund to pay current and future claimants. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies*, 16 Mealey's Litig. Rep.: Asbestos 4 (2001). Through its plan of reorganization, discharge injunction, and supplemental injunction entered pursuant to 11 U.S.C.A. § 105(a), all asbestos-related personal injury claims against Johns-Manville were channeled to a trust, which assumed all of Johns-Manville's asbestos liability. The asbestos claimants were enjoined from asserting claims against the reorganized Johns-Manville, thereby allowing the company to emerge from bankruptcy without the crushing weight of asbestos liability. Soon thereafter, Congress amended the Bankruptcy Code, 11 U.S.C. § 524(g) (2000) (also known as the Manville Amendments), to codify the trust-injunction-discharge approach used in the Johns-Manville bankruptcy. *See* Mark D. Plevin et al., *Don't Bankrupt Asbestos*, LEGAL TIMES, Mar. 19, 2001, at 68.

defendants–companies that may be "far removed from the scene of any putative wrongdoing."[38] In fact, more than 8500 defendants[39] are "ensnarled in the litigation,"[40] up from 300 named defendants in 1982.[41]

Plaintiffs' attorneys acknowledge that asbestos litigation has become an "endless search for a solvent bystander."[42] Defendants are named more for their "deep pockets" than for any actual culpability. When the rights of defendants who have little or no connection to a plaintiff are ignored, the legal system breaks down.

This Letter suggests ways in which the judicial system can handle claims alleging mesothelioma and other asbestos-cancer claimants in a fair and just manner without exhausting assets available to pay future asbestos claimants. Broader legislative solutions may be possible.[43] The United States Congress has been considering important proposals,[44] but the duty of America's courts is to focus on the "now," not to rely on Congress to solve the problem. As esteemed Senior Judge Joseph F. Weis, Jr. of the United States Court of Appeals for the Third Circuit

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[38] Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14; *see also* CONGR. BUDGET OFFICE, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."); Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1.

[39] Deborah R. Hensler, *California Asbestos Litigation–The Big Picture*, COLUMNS–RAISING THE BAR IN ASBESTOS LITIG., Aug. 2004, at 5.

[40] *In re* Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 747-48 (E.D.N.Y. 1991).

[41] *See* VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (James S. Kakalik ed., RAND Inst. for Civil Justice 1984).

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

[43] *See* Jan Amundson, *How a Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and the American Economy*, 44 S. TEX. L. REV. 925 (2003); Victor E. Schwartz et al., *Congress Should Act to Resolve the National Asbestos Crisis: The Basis in Law and Public Policy For Meaningful Progress*, 44 S. TEX. L. REV. 839 (2003).

[44] *See*, Patrick M. Hanlon, *The Proposed Federal Asbestos Trust Fund*, SK040 ALI-ABA 479 (2004).

understood, each court has a responsibility to assure that asbestos cases are heard fairly. Specifically, "courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism that is the problem in this area."[45] Indeed, there are specific issues that have arisen in asbestos litigation that America's judges can and must address in order to assure that seriously injured asbestos claimants and defendants are treated fairly and that assets to compensate more deserving claimants are not wasted. Some courts have begun to do so. This Letter will show that these measures are fair and reasonable and do not require radical changes in existing law.

# II. Adhere to the Fundamental Principles of Tort Law

## A. There Must Be a Legal Basis or Duty for the Civil Action

Increasingly, courts are wrestling with the legal relationship between asbestos cancer claimants and the peripheral defendants who have little or no connection to their claims. As in any tort case, before a defendant may be liable in asbestos litigation, a plaintiff must meet her burden of proving that the defendant owed her a legal duty.[46] Duty questions involve "policy-laden" judgments in which "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit."[47] Examples of the types of duty issues courts have been facing recently can be found in cases involving secondary exposure to workers' family members and those claiming liability against insurers for failure to warn.

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[45] Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1991).

[46] *See* Pulka v. Edelman, 358 N.E.2d 1019, 1022 (N.Y. 1976).

[47] DeAngelis v. Lutheran Med. Center, 449 N.E.2d 406, 407-08 (N.Y. 1983).

## 1. Secondary Exposure

Some spouses and children of workers who may have been exposed to asbestos at home have since developed serious asbestos-related diseases. Their claims can be heart-wrenching, particularly when the children are now in their thirties and forties with families of their own. In assessing which defendants are appropriate targets in this type of litigation, the highest courts in three states have considered whether the workers' employers have a duty and, therefore, potential liability for such off-site exposures to non-employees. In Georgia and New York, the high courts held that such plaintiffs did not have a cause of action against the premises owners because the plaintiffs could not satisfy the necessary element of duty of care.[48] The courts concluded that finding such a duty would upset traditional tort law, be unworkable in practice, and result in unsound public policy.[49] A mid-level appellate court in Texas and a Tennessee trial court have concurred.[50] The Supreme Court of New Jersey, perhaps swayed by compassion for the plaintiff, tried to stake a compromise position by holding that defendants can owe such a duty, but only when a duty is owed to the worker and the risk to the nonworker is foreseeable.[51]

The Georgia and New York rulings are more in line with traditional tort law. In 2005, New York's highest court held in *In re New York City Asbestos Litigation* that an employer does not owe a duty of care to the spouse of an employee who is harmed as a result of "take home"

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[48] *See* CSX Transp., Inc. v. Williams; 608 S.E.2d 208 (Ga. 2005); *In re* New York City Asbestos Litig. 840 N.E.2d 115 (N.Y. 2005); *see also* Satterfield v. Breeding Insulation Co., No. L-14000, 2006 WL 901725, at *1 (Tenn. Cir. Ct. Mar. 21, 2006); Exxon Mobil Corp. v. Altimore, No. 14-04-01133-CV, 2006 WL 2165725, at *1 (Tex. Ct. App. Aug. 1, 2006).

[49] *See Williams*, 608 S.E.2d at 208-10; *New York City Asbestos Litig.*, 840 N.E.2d at 116-23.

[50] *See* Exxon Mobil Corp. v. Altimore, No. 14-04-011330CV, 2006 WL 2165725 (Tex. App.-Houston (14th Dist.) Aug. 1, 2006); Satterfield v. Breeding Insulation Co., No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

[51] *See* Olivo v. Owens-Illinois, 895 A.2d 1143, 1146-51 (N.J. 2006); *see also* Condon v. Union Oil Co. of California, No. A102069, 2004 WL 1932847, at *1 (Cal. Ct. App. Aug. 31, 2004) (unpublished); Zimko v. Am. Cyanamid, 905 So. 2d 465 (La. Ct. App. 2005).

exposure to asbestos that is carried on an employee's work clothes.[52] The plaintiff's husband worked at the Port Authority for thirty-six years and allegedly handled asbestos-containing products in various Port Authority sites.[53] He frequently took his dirty work clothes home to wash, rather than leaving them at work.[54] As a result, his wife often handled his asbestos-soiled clothing and was later diagnosed with mesothelioma.[55] The New York court held that no duty of care existed because there was no relationship between the defendant and the plaintiff.[56]

The court concluded that two factors guided its decision-making.[57] First, it stated that the husband was in a better position than the premises owner to protect against the risk of harm.[58] Second, the court expressed skepticism that a new duty rule to cover family members could be crafted to avoid open-ended liability in that

> [c]ourts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability. Thus, in determining whether a duty exists, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree.[59]

This same logic led the Georgia Supreme Court to reach a similar conclusion in *CSX Transportation, Inc. v. Williams*.[60] The court held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's

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[52] *See New York City Asbestos Litig.*, 840 N.E.2d at 122.

[53] *Id.* at 116.

[54] *Id.*

[55] *Id.* at 116-17.

[56] *Id.* at 122.

[57] *Id.* at 119-20.

[58] *See id.* at 120.

[59] *Id.* at 119 (stating that "[f]oreseeability does not define duty—it merely determines the scope of the duty once it is determined to exist" (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055,1060 (N.Y. 2001))).

[60] *Williams*, 608 S.E.2d at 210.

asbestos-tainted work clothing at locations away from the workplace."[61] The plaintiffs claimed that they were exposed at home to airborne asbestos emitted from the clothing worn by CSX employees and, consequently, contracted asbestos-related diseases.[62] The court, in ruling that no duty of care existed for any of these plaintiffs, reasoned that the corporate defendant did not, itself, spread asbestos beyond the work place.[63] Furthermore, the court declined to rely simply on the potential foreseeability of the plaintiffs' harms "as a basis for extending the employer's duty beyond the workplace."[64]

The Texas appellate court, in *Exxon Mobil Corp. v. Altimore*,[65] and Tennessee trial court, in *Satterfield v. Breeding Insulation Co.*,[66] followed the same rationale. In Texas, the case involved pre-1972 exposure, before OSHA "prohibited employers from allowing workers who had been exposed to asbestos to wear their work clothes home."[67] The court held that only after 1972 did "the risk to [the plaintiff] of contracting a serious illness . . . become foreseeable, triggering, for the first time a duty to protect [the plaintiff] and those persons similarly situated."[68] The Tennessee court left to the "legislature as to whether it is wise to establish [such a] duty."[69]

## 2. Duty to Warn

Plaintiffs in a handful of jurisdictions have attempted to impose a duty on insurers to warn the employees of their policyholders–and even a duty to warn the whole world–of the hazards of asbestos. These plaintiffs have alleged that by virtue of having issued policies to asbestos manufacturers,

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[61] *Id.*

[62] *Id.* at 208.

[63] *See id.* at 208-10.

[64] *Id.* at 209.

[65] No. 14-04-011330CV, 2006 WL 2165725 (Tex. App.-Houston (14th Dist.) Aug. 1, 2006).

[66] No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

[67] *Altimore*, 2006 WL 2165725, at *7.

[68] *Id.*

[69] Satterfield v. Breeding Insulation Co., No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006).

as well as other companies that used or sold asbestos-containing products, insurers acquired knowledge about the hazards of asbestos that they should have shared with the public.

Recently, courts in Ohio have rejected the notion that insurers owe such a duty to warn. As an Ohio appeals court explained in *Bugg v. American Standard, Inc.*, "negligence liability premised on failure to act arises only where a 'special relationship' exists between the parties."[70] No such relationship exists between individuals exposed to a company's asbestos and that company's insurer.[71] In *Bugg*, plaintiffs named as defendants various insurance companies who wrote property and casualty policies for manufacturers, distributors, and premises owners who were also named defendants in the litigation. Plaintiffs argued that the insurers had a duty to voluntarily undertake to protect plaintiffs and other members of the public from the dangers of asbestos, citing the Good Samaritan Doctrine.[72] In addition, the plaintiffs claimed that through "inaction and acquiescence," insurers increased the risk of harm and, therefore, could be held liable under the tort of negligent undertaking. The court rejected those arguments, holding that the insurers "owed no duty to protect the [plaintiffs] from the hazards of asbestos, despite their alleged knowledge of the risks."[73] The court further stated that affirmative conduct by the insurers, including conduct that made conditions worse for the plaintiffs, as well as plaintiffs' reliance on defendants' conduct or representations, are required for a viable negligent undertaking claim.[74]

In *Bope v. A.W. Chesterton Co.*,[75] the same Ohio appeals court affirmed its holding in *Bugg*, stating that claims by individuals against insurers for negligence and fraud suffer from a "gaping hole."[76] In *Bugg*, the court stated "[t]he duty element of a negligence claim and the reliance

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[70] No. 84829, 2005 WL 1245043, at *2 (Ct. App. Cuyahoga County, Ohio May 26, 2005) (unpublished).

[71] *Bugg*, 2005 WL 1245043, at *2.

[72] *Id.* at *1-2 (citing RESTATEMENT (SECOND) OF TORTS § 324A (1965), plaintiffs suggested that an insurer be subject to liability under the Good Samaritan Doctrine for voluntarily assuming a duty of care).

[73] *Id.* at *2.

[74] *Id.* at *6 (dismissing a cause of action for spoliation of evidence).

[75] No. 85215, 2005 WL 2562913, at *1 (Ct. App. Cuyahoga County, Ohio Oct. 13, 2005) (unpublished).

[76] *Bope*, 2005 WL 2562913, at *2.

element of a fraud claim share a common characteristic . . . . In order to prove duty and/or reliance, [plaintiffs] must demonstrate a relationship between themselves and the [insurers]."[77] The court continued, "absent this relationship, there is no duty on behalf of [the insurers] . . . it is legally impossible for [plaintiffs] to justifiably rely on the [insurers'] representations or concealments."[78]

These cases represent the proper judicial response to the duty issue, even when presented with sympathetic plaintiffs. Applying these rules of responsibility will not necessarily leave a claimant stranded. Rather, it will point the personal injury lawyers in a direction of finding a responsible party who should be subject to the rule of law.

## B. The Causation Requirement

It has become increasingly important in asbestos litigation that courts pay heed to issues of both general and specific causation.[79] General causation exists when a substance can cause an injury or condition in the general population.[80] Specific causation exists when the substance is the cause of a specific person's injury.[81] Unlike with most litigation, plaintiffs' lawyers are not selective and do not name only those defendant companies that could have caused the harm. They typically name scores of defendants, regardless of their actual connection to a plaintiff's alleged injury. In addition, most defendants named now are "peripheral" defendants who, even giving the plaintiffs' lawyers the benefit of the doubt, are several steps removed from any actual wrongdoing that caused the claimed harm. Therefore, it is important that courts not make causation assumptions.

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[77] *Id.*

[78] *Id.*

[79] *See, e.g.*, Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714-15 (Tex. 1997) (stating that in toxic tort cases, a plaintiff has a burden of showing both general causation–that the substance, which the plaintiff was allegedly exposed to can generally cause the condition claimed, and specific causation–that the specific exposure was a substantial cause of the specific harm).

[80] *Id.* at 714.

[81] *Id.*; *see also* Mobil Oil Corp. v. Bailey, 187 S.W.3d 265, 270 (Tex. Ct. App. 2006) ("Proving one type of causation does not necessarily prove the other, and both are needed in situations where direct, reliable medical testing for specific causation has not taken place.").

Consequently, for issues relating to both general and specific causation, courts should (1) require that plaintiffs provide credible allegations against each defendant early in the litigation, (2) exercise their judicial responsibility to require the application of well-grounded science in causation arguments, and (3) adhere to their obligation to assure that plaintiffs prove their allegations by a preponderance of the evidence.

## 1. General Causation

In asbestos litigation, as in all toxic tort cases, scientific and medical issues related to general causation are not cut and dry. Litigation can become a battle of experts. In assessing the admissibility and weight accorded to experts' testimonies, the applicable authority arises from the holdings of both *Frye v. United States*[82] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[83] Pursuant to these holdings, courts should act as "gatekeepers" and be guided by epidemiological studies on plaintiffs' work histories and defendants' activities.[84] Epidemiology is the study of the pattern of diseases in the human population, which is generally done by determining the relevant risk of developing a condition as the result of being exposed to a particular substance.[85] Accordingly, epidemiologists help determine the likelihood that a disease, which can occur from several sources, may be linked to the allegations against a particular defendant.

Over the last twenty years, courts have emphasized the importance of epidemiology in toxic tort cases. Consider the following comments from court rulings:

> "[E]pidemiology is the best evidence of general causation in a toxic tort case."[86]

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[82] 293 F. 1013 (D.C. Cir. 1923).

[83] 509 U.S. 579 (1993).

[84] *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 27 (2003).

[85] For a good general discussion of the principles of epidemiology and its use in the courtroom, see MARCIA ANGEL, M.D., SCIENCE ON TRIAL 99-106 (1996); BERT BLACK., EXPERT EVIDENCE: A PRACTITIONER'S GUIDE TO LAW, SCIENCE, AND THE FJC MANUAL 77 (1997).

[86] Norris v. Baxter Healthcare Corp., 397 F.3d at 878, 882 (10th Cir. 2005) (citing to seventeen epidemiology studies discounting any link between breast implants and connective tissue disease).

> "[T]he existence or non-existence of relevant epidemiology can be a significant factor in proving general causation in toxic tort cases."[87]
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> "Epidemiological studies are the primary generally accepted methodology for demonstrating a causal relation between a chemical compound and a set of symptoms or a disease."[88]
>
> "[I]n a [benzene] case such as this, the most conclusive type of evidence of causation is epidemiological evidence."[89]
>
> "The most important evidence relied upon by scientists to determine whether an agent (such as breast implants) cause [sic] disease is controlled epidemiologic studies."[90]

Epidemiologists typically compare an "exposed" group against a "control" group to determine if those exposed to the toxic material are more likely to get the disease than those in the control group. Results are usually reported as a relative risk, or "odds ratio," regarding the likelihood that a particular group of people could contract the disease.[91] Epidemiological studies can be particularly necessary where the underlying biological mechanisms of disease are not well understood, such as with asbestos and mesothelioma. For instance, mesothelioma while it may be unusual, can occur "naturally" without any asbestos exposure; there are no medical or biological "markers" that would prove causation.[92] In cases involving individuals who worked as insulators, asbestos manufacturing workers,

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[87] Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387, 1403 (D. Or. 1996).

[88] Conde v. Velsicol Chem. Corp., 804 F. Supp. 972, 1025-26 (S.D. Ohio 1992).

[89] Chambers v. Exxon Corp., 81 F. Supp. 2d 661, 664 (M.D. La. 2000).

[90] *In re* Breast Implant Litig., 11 F. Supp. 2d 1217, 1224 (D. Colo. 1998).

[91] An "odds ratio" of 1.0 reflects no increase in risk in the exposed population, whereas odds ratios generally of 2.0 or higher are interpreted as showing a doubling of the risk over what would be expected in the general population. REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 349, 384 (2d ed 2000); *see also* Merrell Dow Pharma. v. Havner, 653 S.W.2d 706, 716-17, 19 (Tex. 1997). The term "relative risk" is employed for cohort studies, whereas "odds ratio" is usually used in case control studies.

[92] *See, e.g.*, Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L REV 33, 44 n.19 (2003) (stating that approximately twenty percent of malignant mesotheliomas have been attributed to causes other than exposure to asbestos) (citing Carbone et al., *The Pathogenesis of Mesothelioma*, 29 SEMINARS IN ONCOLOGY 2 (2002); Britton, *The Epidemiology of Mesothelioma*, 29 SEMINARS IN ONCOLOGY 18 (2002)).