

# Asbestos

## **The Baltimore City Circuit Court Should Reject 'Consolidation III'**

*by*  
*Mark A. Behrens, Esq.*  
*and*  
*Cary Silverman, Esq.*

*Shook, Hardy & Bacon L.L.P.*  
*Washington, D.C.*

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# Commentary

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*[Editor's Note: Mark Behrens and Cary Silverman are attorneys in the Washington, D.C. office of Shook, Hardy & Bacon L.L.P. They frequently write about asbestos litigation issues and file amicus briefs on behalf of business and civil justice organizations in tort cases. Copyright © 2013 by Mark Behrens and Cary Silverman. Responses are welcome.]*

### Introduction

In tort law, bad ideas never seem to go away. Instead, they tend to hibernate until memories fade and then they are dusted off or rediscovered. This phenomenon is being repeated in a recent proposal by the Law Offices of Peter G. Angelos, P.C., to consolidate thousands of asbestos cases for trial in Baltimore, Maryland.

In June of 2012, the Angelos firm asked the Circuit Court for Baltimore City to consolidate a "backlog" of over 13,000 non-mesothelioma cases on the Court's docket.<sup>1</sup> Dubbed "Consolidation III," the motion asked the Court to return to a practice used twice in Baltimore in the 1990s to resolve large numbers of cases. We know how those consolidations worked. Each one was followed by a large wave of filings and the defendants filed bankruptcy as a result of pressures from Baltimore and elsewhere.

It is particularly remarkable that a mass consolidation proposal is being floated now, since the practice has not been used in Baltimore for almost two decades, and because it has been abandoned by every other jurisdiction in the country. Courts moved away from mass consolidations several years ago because the practice

places "efficiency" above fairness, invites more filings, and has been shown to threaten recoveries for future claimants with malignancies.<sup>2</sup>

Against this background, Baltimore City Circuit Court Judge John Glynn has openly questioned the plaintiffs' proposed mass trial plan and is exploring alternatives.<sup>3</sup> After a lengthy hearing on December 17, 2012, Judge Glynn, faced with the absence of basic information on the nature and quality of the cases involved and how the proposed trial plan would work, ordered that the parties answer a series of basic questions before he further considers the request.<sup>4</sup> Plaintiffs had until March 5, 2013, to submit responses to the Court's questions. Defendants may respond as late March 25, 2013.

Before Judge Glynn moves forward, the Court should determine how many viable cases are pending. Despite the claimed "backlog," evidence suggests that many of the claimants have no asbestos-related impairment, passed away due to causes unrelated to asbestos exposure, have received significant compensation from trust funds established by bankrupt former defendants, or may have no interest in proceeding on their claims. After engaging in some housecleaning, the Court may find that there is not a significant backlog and that the remaining viable cases may either be scheduled for trial in Baltimore City or transferred to the plaintiffs' home counties.

### Consolidations I And II

The Angelos firm's latest proposal is modeled off two earlier Baltimore City consolidations. In *ACandS, Inc. v.*

*Godwin* (“Consolidation I”), the Court consolidated 8,555 asbestos personal injury and wrongful death cases that were filed on or before October 1, 1990.

These were not just Baltimore City cases. Before the first consolidation, the Maryland Court of Appeals promulgated a rule to facilitate the transfer of asbestos cases from all Maryland counties to Baltimore City.<sup>5</sup> About one-third of the Baltimore City caseload (more than 3,000 cases) came from other circuit courts.<sup>6</sup> As a result, Baltimore became the epicenter for Maryland’s asbestos litigation. It has remained a magnet for asbestos claims ever since.

Initially, the Consolidation I litigation involved over 100 defendants. Prior to trial, however, the plaintiffs voluntarily dismissed their direct claims against all but fifteen of the originally named defendants, leaving unresolved cross- and third-party claims. Between jury selection and jury deliberation, nine of the fifteen remaining defendants settled. Ultimately, the jury considered common issues relating to six illustrative plaintiffs’ cases — three picked by plaintiffs, three picked by defendants — against six defendants, and two cross-claim defendants.

The Consolidation I trial required six months. In the first phase of the trial, each of the six defendants and one of the cross claim defendants was found negligent and strictly liable as to all products submitted. These findings applied to the cases of all plaintiffs. The second phase of the trial resolved individual issues as to the six illustrative plaintiffs. Each of the three illustrative plaintiffs selected by plaintiffs’ counsel resulted in plaintiffs’ verdicts, while each of the three illustrative plaintiffs selected by defense counsel resulted in defense verdicts. In the third phase, four defendants were found liable for punitive damages.<sup>7</sup> One settled; a second filed for bankruptcy and was dismissed from the case. In the final phase, the jury attempted to quantify punitive damages through a “multiplier” that would apply in subsequent individual cases based on the defendant’s share of compensatory damages. The trial concluded in August 1992. Maryland’s highest court upheld the consolidation, but the punitive damage award and multiplier were reversed.<sup>8</sup>

After Consolidation I, asbestos cases continued to pour into Baltimore. Within three years of the Consolidation I cut-off date, plaintiffs’ lawyers had filed approximately

1,300 additional cases. *ACandS, Inc. v. Abate* (“Consolidation II”) included these additional cases (with a cut-off date of October 1, 1993) and all derivative cross, third-party and indemnification claims outstanding from the original 8,555 plaintiffs. Consolidation II resulted in a complex, nine month trial in which five plaintiff cases were tried to verdict on all issues. The Court even had to excuse 113 members of the 200 person jury pool because of the hardship of serving on such a long trial.<sup>9</sup> All of the defendants were found liable to some combination of the trial plaintiffs. The trial also resolved the common issues questions related to nearly 10,000 claims. A Maryland appellate court upheld the December 1994 verdict.<sup>10</sup> After this lengthy litigation, the Baltimore City Circuit Court still needed to dispose of over 8,000 mini-trials against the remaining defendants. Despite some settlements, approximately 10,000 open asbestos claims remained on the Court’s docket.

### The Proposed Consolidation III

Based on this prior experience, plaintiffs’ counsel have asked the Court to deal with the “backlog” of asbestos claims. Unlike the earlier consolidations, however, plaintiffs’ counsel seeks to preserve mesothelioma trial settings while pressing forward on a common issues trial against over sixty defendants for non-mesothelioma claims.

The plaintiffs have proposed a three-phase trial. In Phase I, a jury would consider “common issues” centered upon whether a defendant would be considered liable under negligent or strict liability for its asbestos-containing products.

Plaintiffs’ counsel would select fifteen “illustrative trial Plaintiff cases” based on the asbestos product exposures, jobsites, and alleged injuries. Defense counsel were not the only ones skeptical of the fairness of this proposal. As Judge Glynn noted in a hearing on the plaintiffs’ consolidation motion, “if you get to pick all the plaintiffs, it sounds like my dog could win that case.”<sup>11</sup> The jury would consider these cases in deciding whether a defendant’s product caused a plaintiff to contract an asbestos-related disease, applicable defenses, compensatory damages, and whether the conduct warrants an award of punitive damages.

In the second phase, the jury would consider the amount of punitive damages to award in each illustrative

plaintiff's case. Courts across the country, including the Baltimore City Circuit Court, however, have, for decades, followed a practice of deferring punitive damage claims in asbestos cases because they would provide a windfall to a handful of plaintiffs while depleting resources available to compensate later claimants.<sup>12</sup>

Assuming that the result of the first two phases does not pressure the parties into settlement, which all sides recognize is the intent of this proposal, mini trials in groups of twenty-five cases would begin. In this third phase, separate juries would resolve individual issues for each remaining plaintiff, such as medical causation, damages, and contribution claims. As these mini-trials go to verdict, the understood goal of the plaintiffs is that they would lead to mass settlements for the remaining cases.

#### **Past Consolidations: Success Or Failure?**

Judge Glynn began the December 2012 hearing by posing a very simple question to an attorney for the plaintiffs: Why did the Baltimore City Circuit Court abandon mass trials of asbestos claims after Consolidation II in 1994?<sup>13</sup> Plaintiffs' counsel could not answer why no mass trial consolidations had been ordered, or even proposed, in Baltimore in nearly two decades.<sup>14</sup> Perhaps a reason is that a candid answer would be that the practice has been well understood to be a bad idea and the mix of cases filed by plaintiffs' lawyers has changed.

Mass consolidations are a clash of two competing interests: efficiency and fairness. Plaintiffs' lawyers emphasize the judicial economy of having one judge supervising the cases and avoiding repetition of common issues over the course of thousands of cases.<sup>15</sup> They note that the Maryland courts in *Godwin* and *Abate* permitted Consolidations I and II. These past consolidations were successful, plaintiffs' attorneys say, because they saved time and litigation costs, and resolved cases.<sup>16</sup> According to the *Baltimore Sun*, in 1992 alone, the Angelos firm obtained settlements of more than \$1 billion in asbestos lawsuits.<sup>17</sup>

Defendants, on the other hand, emphasize that due process cannot be sacrificed at the altar of efficiency.<sup>18</sup> In their view, courts have not revisited mass consolidations since Consolidations I and II because the primary defendants went bankrupt and thousands of

claimants were left without full compensation.<sup>19</sup> After the second consolidated trial, all three of the defendants who were held liable filed for bankruptcy. For example, Pittsburgh-Corning declared bankruptcy in 2000 and thousands of claimants were left without full compensation. Mass consolidations also did not continue because the plaintiffs' bar shifted its focus to mesothelioma claims.<sup>20</sup>

Rather than clear the Court's asbestos docket, the unintended effect of Baltimore City's consolidations was the filing of more asbestos claims. In 2000, Maryland had the highest filing rate per capita of asbestos claims in the country.<sup>21</sup>

#### **Is There A Backlog?**

At first glance, 13,000 non-mesothelioma asbestos cases, or 19,000, as defendants estimate,<sup>22</sup> seems to indicate a massive backlog in the Baltimore City Circuit Court. But as Judge Glynn wisely asked, "What is the quality and nature of these cases?"<sup>23</sup>

A substantial number of these cases are considered "inactive," meaning that they involve plaintiffs who allege they were exposed to asbestos, but cannot yet meet threshold minimum requirements for demonstrating an asbestos-related impairment. As Circuit Court Judge Richard Rombro, who oversaw asbestos litigation in Baltimore for more than a decade understood, placing such claims on an inactive docket serves the interests of all parties. "With the number of defendant companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos," Judge Rombro wrote.<sup>24</sup>

A large number of other plaintiffs have had their cases moved to the active docket because the plaintiff was, for instance, sixty years old when suit was filed in the 1990s, and subsequently died – but from natural or other causes unrelated to asbestos exposure. Lawyers for defendants estimate that there may be as many plaintiffs on Baltimore City's active docket solely as a result of their passing away as there are unimpaired plaintiffs on the inactive docket.<sup>25</sup>

Other claims that remain on the docket are there because they may not be viable for one reason or another. For example, many of the older cases may

allege claims only as to bankrupt defendants. In some cases, a plaintiff whose claim has been pending for many years may lack interest in pursuing litigation after receiving significant compensation from asbestos bankruptcy trusts.<sup>26</sup> Other cases may suffer from a lack of evidence.

During the December 2012 hearing before Judge Glynn, defense counsel noted that, given the claimed backlog, one would expect the plaintiffs' lawyers to be clamoring to move their cases to trial.<sup>27</sup> Yet, for over a year and a half, trial dates for asbestos cases have remained unfilled. This is because the asbestos plaintiffs' bar has focused on mesothelioma cases instead of moving forward their marginal cases.

In fact, defense lawyers represented during the December 2012 hearing before Judge Glynn that the Angelos firm and another plan proponent, the Ashcraft & Gerel firm, had not tried an asbestosis, lung cancer, or "other cancer" to verdict in Baltimore in over a decade.<sup>28</sup> Defense lawyers also said they could not remember plaintiffs' lawyers ever scheduling "other cancer" cases for trial.<sup>29</sup> The lung cancer cases that are set for trial are relatively recent filings.

Given the claimed backlog in Baltimore City, plaintiffs' counsel could choose to file their cases in other Maryland counties, such as where their clients live or where they worked when exposed. Yet, these lawyers continue to choose to file in a court with an alleged backlog. That is because there likely is no true backlog.

The system now in place is that plaintiffs' lawyers move the cases with the most severe injuries with established scientific ties to asbestos exposure first. These cases routinely settle. The alternative is that the courts are jammed and defendants' resources are depleted by weak or meritless claims, reducing the likelihood of a timely and full recovery for mesothelioma claimants. That may be the reason why plaintiffs' firms handling more than half of the asbestos cases on the docket have not joined the Angelos firm's motion.<sup>30</sup>

### **Other Courts Have Bailed On Consolidation**

There is now a better understanding by courts that, in addition to fundamental fairness and due process problems, consolidating cases to force defendants to settle is like using a lawn mower to cut down weeds in a garden — the practice may provide a temporary

fix to a clogged docket, but ultimately the approach is likely to fuel the filing of more claims.<sup>31</sup>

In recent years, a number of significant jurisdictions have ended or substantially curbed the use of trial consolidations in asbestos cases. For instance, the Mississippi Supreme Court has severed multi-plaintiff asbestos-related cases,<sup>32</sup> the Michigan Supreme Court adopted an administrative order precluding the "bundling" of asbestos-related cases for trial,<sup>33</sup> and the Delaware Superior Court amended Standing Order No. 1 to prohibit the joinder of asbestos plaintiffs with different claims.<sup>34</sup> A San Francisco Superior Court judge has vacated all sua sponte consolidation orders and further stating that any future consolidations would proceed only by formal motions,<sup>35</sup> which has curbed trial consolidations in the Bay Area.

Georgia, Kansas, Texas enacted laws that generally preclude the joinder of asbestos cases at trial.<sup>36</sup> Ohio took a similar action by court rule.<sup>37</sup>

Two states that formerly allowed extraordinarily large trial consolidations, Virginia<sup>38</sup> and West Virginia,<sup>39</sup> no longer use such practices.

In fact, architects of early mass consolidations have repudiated them. For example, Duke Law School Professor Francis McGovern, who worked with Judge Marshal Levin to devise the consolidation of asbestos claims in Maryland, has since explained,

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.<sup>40</sup>

Judges handling asbestos litigation in other states ultimately reached similar conclusions. As West Virginia Judge Andrew MacQueen acknowledged, "I will admit that we thought that [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases."<sup>41</sup> Judge Helen Freedman, who managed New York City asbestos litigation, similarly recognized that "[i]ncreased

efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.<sup>42</sup>

The Philadelphia Court of Common Pleas' Complex Litigation Center (CLC) is the most recent court to reject trial consolidations. In February 2012, the CLC made significant changes to its protocol governing mass tort cases.<sup>43</sup> General Court Regulation No. 2012-01 and current General Court Regulation No. 2013-01 significantly limit the consolidation of asbestos and other mass tort cases absent an agreement of all parties.<sup>44</sup> After the CLC made this and other changes, the flow of asbestos and other mass tort cases into Philadelphia declined seventy percent from 2011, and the overall inventory of mass tort cases was reduced by fourteen percent.<sup>45</sup>

### **Changes That Make Consolidation Even Less Sound Than In The 1990s**

Asbestos litigation has changed significantly since the 1990s.<sup>46</sup> There are now more companies named as defendants in asbestos litigation and they are more varied than in earlier years. Initially, litigation focused on companies that made or supplied thermal insulation.<sup>47</sup> When most of those companies went bankrupt, due, in part, to mass consolidations, the litigation spread to premises owners in claims brought by independent contractors.<sup>48</sup> Now, new companies and industries are being targeted, and new theories are being raised. One well-known former plaintiffs' attorney candidly described the litigation as an "endless search for a solvent bystander."<sup>49</sup>

While the earlier consolidations primarily involved steelworkers, the cases today have significant variability in occupations, job sites, products, and illnesses. Cross-claims and third-party claims would also need to be considered, further increasing the size and complexity of the litigation.

The Angelos firm has proposed more "illustrative" plaintiffs than in the 1990s, which is necessary given the increased diversity of the plaintiff pool. In addition to lung cancer, a single jury would need to determine the viability of claims for renal cancer, esophageal cancer, colorectal cancer, laryngeal, and pharyngeal cancers.

How long would the trial take? While the earlier asbestos consolidations required six to nine months, it

appears that significantly more time would be needed to try a case with defendants with far less in common than the traditional asbestos defendant of the 1990s. In addition, given that there are ten times as many defendants, and more than twice the number of illustrative plaintiffs, as the first consolidation, it appears reasonable to prepare for a trial on the scale of years, not months, followed by thousands of mini-trials. To begin, as Judge Glynn asked, "When there are 15 plaintiffs and dozens of defendants, how do you pick a jury?"<sup>50</sup>

In addition to the changes in asbestos litigation, the legal landscape governing mass litigation has changed since the mass consolidations of the early to mid-1990s. The U.S. Supreme Court has repeatedly ruled, in a variety of contexts, that efficiency cannot trump due process.<sup>51</sup>

### **Spring Cleaning: Better Options For Baltimore Than Mass Consolidation**

Before moving forward, it is imperative for the Court to determine how many viable cases are pending. The Court should evaluate how many cases involve asymptomatic plaintiffs, impairing asbestosis, lung cancers, and other cancers. For cases pending for more than five years, the Court might require the plaintiff to file a declaration indicating that he or she remains interested in proceeding with the case and indicating any compensation already received from asbestos trusts or other sources. The Court should also require the plaintiffs' attorneys to identify clients who are no longer alive and, if deceased, require the filing of documentation indicating the cause of death.

After elimination of unimpaired plaintiffs, cases that lack a plaintiff who is interested in proceeding, cases in which the plaintiff has already received full or near complete compensation for his or her injuries, cases that lack a viable defendant, cases in which the plaintiff died of causes unrelated to asbestos exposure, and cases with insufficient evidence to move forward, there may be relatively few cases on the Court's docket. These cases may be handled by open trial slots without the need to abandon traditional procedural safeguards. Many are likely to settle.

The Court should also consider whether the remaining cases should stay in Baltimore City. By some estimates, at least half of the cases come from Baltimore

County and western Maryland. The Court could transfer these claims to the plaintiffs' home court. Cases from other states might be dismissed on the basis of *forum non conveniens*. By "taking up the welcome mat," the Baltimore City Circuit Court could appropriately focus its resources on litigation involving local residents.

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## Endnotes

1. See *In re Baltimore City Personal Injury Asbestos Cases, Proposed Consolidation*, No. 24-X-87-048500 (Md. Cir. Ct. Baltimore City, filed June 19, 2012) (Plaintiffs' Motion for Asbestos Case Consolidation and Adoption of Trial Plan and Memorandum in Support of Motion for Asbestos Case Consolidation and Adoption of Trial Plan).
2. See Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. OF TRIAL ADVOC. 1 (2012).
3. See Transcript of Hearing Upon the Motion for Asbestos Case Consolidation and Trial Plan, *In re In re Asbestos Personal Injury and Wrongful Death Litig. Global*, No. 24-X-87-048500, at 3 (Dec. 17, 2012) [hereinafter "Hearing Tr."].
4. See *In re Asbestos Personal Injury and Wrongful Death Litig. Global*, No. 24-X-87-048500 (Md. Cir. Ct. Baltimore City, Feb. 5, 2013) (Memorandum Opinion).
5. See Md. Rule 16-203(c) (adopted Dec. 8, 1992).
6. *ACandS, Inc. v. Godwin*, 340 Md. 334, 343, 667 A.2d 116, 120 (1995).
7. The court had granted a motion for judgment in favor of two defendants on punitive damages. *Id.* at 345.
8. *Godwin*, 340 Md. 334, 667 A.2d 116.
9. *ACandS, Inc. v. Abate*, 121 Md. App. 590, 710 A.2d 944 (1998).
10. See *id.*
11. Hearing Tr. at 47.
12. See generally Mark Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 RUTGERS J. OF L. & PUB. POL'Y 50 (2011). In Baltimore City, Judge Marshall A. Levin stayed punitive damages claims in asbestos cases. See *Abate v. A.C. & S., Inc.*, No. 89236704, slip op. at 26 (Md. Cir. Ct. Baltimore City Dec. 9, 1992). Judge Levin commented that it "is manifestly unjust for a judicial system to allow relief based chiefly on the lottery of when a human being happens to become ill." *Id.* Judge Levin was also "deeply concerned about the fact that the immediate payment of such damages will hurt crucially those claimants who are found to be entitled to fair compensation in the future. . . . The stark fact is that unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages in the future." *Id.*
13. Hearing Tr. at 18.
14. *Id.* at 19 (statement of Theodore Flerlage of the Law Offices of Peter G. Angelos, P.C.).
15. See, e.g., *id.* at 53-54.
16. See *id.* at 56.
17. Andrea F. Siegel, *Angelos Asks Judge to Revive Thousands of Asbestos Cases*, BALTIMORE SUN, Dec. 17, 2012.
18. See, e.g., Hearing Tr. at 110-16 (statement of Mr. Allen).
19. See *id.* at 83 (statement of Ted Roberts representing the Wallace & Gale Asbestos Settlement Trust).
20. See *id.* at 68-69 (statement of F. Ford Loker of Miles & Stockbridge, P.C.).
21. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 63 (RAND Corp. 2005).
22. Hearing Tr. at 73 (statement of Mr. Roberts).
23. Hearing Tr. at 32.
24. *In re Personal Injury and Wrongful Death Asbestos Cases*, No 24-X-92-344501, at 5-6 (Md. Cir. Ct. Baltimore City Aug. 15, 2002) (Mem. Op. and Order

- Denying Modification to Inactive Docket Medical Removal Criteria).
25. Hearing Tr. at 132 (statement of David W. Allen of Goodell, DeVries, Leech & Dann, LLP).
26. Over sixty trusts have been established to collectively form a \$36.8 billion privately-funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. See U.S. GOV'T ACCOUNTABILITY OFFICE, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS, GAO-11-819, at 3 (Sept. 2011).
27. Hearing Tr. at 81-82 (statement of Mr. Roberts).
28. Hearing Tr. at 76 (statement of Mr. Roberts).
29. Hearing Tr. at 127 (statement of Mr. Allen).
30. Hearing Tr. at 84 (statement of Mr. Roberts).
31. 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, 536-38 (2001).
32. See, e.g., *Alexander v. AC & S, Inc.*, 947 So. 2d 891 (Miss. 2007); *Albert v. Allied Glove Corp.*, 944 So. 2d 1 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853 (Miss. 2005); *Ill. Cent. R.R. v. Gregory*, 912 So. 2d 829 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004).
33. See Prohibition on "Bundling" Cases, Mich. Supreme Court Admin. Order No. 2006-6 (Aug. 9, 2006).
34. See *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1).
35. *San Francisco Trial Judge Vacates His Own Consolidation Order*, HARRISMARTIN'S COLUMNS — ASBESTOS, May 2008, at 13.
36. See Ga. Code Ann. § 51-14-11; Kan. Stat. Ann. § 60-4902(j); Tex. Civ. Prac. & Rem. Code Ann. § 90.009.
37. See, e.g., Ohio R. Civ. P. 42(A)(2) (providing that in tort actions involving an asbestos claim, "[f]or purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.").
38. See *In re Hopeman Bros., Inc.*, 569 S.E.2d 409, 409 (Va. 2002) (rejecting mandamus petition arising from consolidation of 1,300 asbestos claims against twenty-five defendants, even though the trial court found that "consolidation of all of the cases would adversely affect the rights of the parties to a fair trial").
39. See *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 419, 428-29 (W. Va. 2002) (Maynard, J., concurring) (approving mass consolidation involving more than 8,000 plaintiffs suing more than 250 defendants).
40. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).
41. See Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 284-85 (2004).
42. Helen E. Freedman, *Product Liability Issues in Mass Torts — View from the Bench*, 15 TOURO L. REV. 685, 688 (1999).
43. See General Court Regulation No. 2012-01, *In re Mass Tort & Asbestos Programs* (Pa. Ct. Com. Pl. Phila. County Feb. 15, 2012).
44. See *id.*; General Court Regulation No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report (Pa. Ct. Com. Pl. Phila. County Feb. 7, 2013). In addition to restricting mass consolidation, the CLC eliminated reverse bifurcation of any mass tort case absent consent of all parties, continued the court's longstanding practice of deferring punitive damages claims in asbestos cases, and limited the number of cases that can be tried by out-of-state attorneys annually.

45. See General Court Regulation No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report (Pa. Ct. Com. Pl. Phila. County Feb. 7, 2013).
46. See Mark Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501 (2009).
47. See JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 5 (RAND 1984).
48. See Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14 (“[T]he net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”).
49. ‘*Medical Monitoring and Asbestos Litigation*’— *A Discussion with Richard Scruggs and Victor Schwartz*, 17-3 MEALEY’S LITIG. REP.: ASBESTOS 19 (Mar. 1, 2002) (quoting Richard Scruggs).
50. Hearing Tr. at 42.
51. See, e.g., *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997). ■



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*edited by Bryan Redding*

**The Report** is produced twice monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: [mealeyinfo@lexisnexis.com](mailto:mealeyinfo@lexisnexis.com)

Web site: <http://www.lexisnexis.com/mealeys>

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