

PREFACE

Nearly thirty years ago, the Fifth Circuit Court of Appeals in *Borel v. Fibreboard* affirmed a jury verdict that gave asbestos-exposed workers a new remedy beyond workers' compensation. The *Borel* decision marked the beginning of the asbestos litigation, which has become the largest area of product liability litigation in American history.

In 1982, approximately 20,000 asbestos claimants had filed lawsuits. Currently, more than 200,000 asbestos-related cases are pending in state and federal courts, and that number is growing at the rate of more than 50,000 new cases every year. According to a recent estimate, the total number of asbestos claims may reach 2.5 million, and the economic toll of asbestos litigation on businesses could reach \$275 billion. Without question, asbestos litigation has become a crisis, flooding state and federal courts with thousands of claims, most of them filed by "unimpaired" claimants who are not sick.

In this article, Griffin B. Bell, former federal appeals court judge and Attorney General of the United States, examines the causes of the asbestos litigation crisis and argues that, because of Congress' failure to act, our legal system must do a dramatically better job of adjudicating and managing asbestos cases. According to Judge Bell, the sheer number of cases, unlike any type of previous litigation, has compelled some courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. Nonetheless, Judge Bell asserts that state and federal judges have the ability and resources to help solve the asbestos litigation crisis. He outlines several options for judges to consider when managing their asbestos dockets.

This report, like all of the monographs published by the National Legal Center, is presented to encourage greater understanding of legal issues. It is not intended to influence legislation but to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions or positions of the advisors, officers, or directors of the National Legal Center. This publication is presented purely as an educational public service.

Ernest B. Hueter
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National Legal Center

ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL

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ASBESTOS LITIGATION AND JUDICIAL LEADERSHIP: THE COURTS' DUTY TO HELP SOLVE THE ASBESTOS LITIGATION CRISIS

GRIFFIN B. BELL*

I. INTRODUCTION

The Judicial System in the United States is unique. I cherish it. I have spent more than fifty years of my professional career attempting to protect its integrity and ensure its delivery of fairness and justice to our citizenry.

In large part, the Judicial System has functioned as intended, safeguarding the rights afforded by our federal and state constitutions, serving as a forum for individuals to seek redress for injuries, and providing individualized treatment of cases and controversies. Our federal and state judges form the most qualified and committed bench in the world. We are fortunate to live in a country where the rule of law prevails.

There is one respect, however, in which our Judicial System is falling short: the asbestos litigation.

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Judge Bell acknowledges the co-authorship of this article by Wick Sollers and Mark Jensen. Mr. Sollers is a partner and Mr. Jensen is an associate at King & Spalding's Washington, D.C., office.

In asbestos litigation, the Judicial System fails to guarantee basic elements of justice that we take for granted in other disputes. Courts, understandably, struggle to adapt to and manage the unexpected and unprecedented volume of asbestos personal injury claims. Hundreds of thousands of cases—and counting—have overtaken and incapacitated certain courts since the 1970s, with no realistic end for several more decades. In the history of our legal system, no other type of litigation has been as profuse, long-standing, and difficult to resolve.

In my view, the judiciary must make a choice. Judges need not passively accept the asbestos litigation's debilitating effects on our Judicial System. They have at their disposal a number of judicial tools to help solve this crisis, not the least of which is their intellect and capacity to innovate when justice is compromised. The Supreme Court of the United States is no doubt correct in saying that national legislation may be the most effective means to ensure that sick claimants are compensated fairly and efficiently, but its pleas to Congress go unheeded. I submit that it is time for the judiciary to take bold steps to manage fairly those dockets that are inundated by the crushing load of asbestos cases.

II. THE TORT SYSTEM HAS FAILED TO COPE WITH THE EXPLOSION OF ASBESTOS LITIGATION

A. Asbestos Litigation Has Overwhelmed and Incapacitated Certain Courts

Federal and state courts should not be faulted for their management of the asbestos litigation deluge; it is like no other litigation they have experienced before in either size or longevity. In 1999, the Supreme Court acknowledged the intractable nature of the almost thirty-year-old asbestos litigation. The Court employed unusually strong language in an often-quoted passage, describing the litigation as an "elephantine mass of asbestos cases . . . [that] defies customary judicial administration and calls for national legislation."¹

The crisis is worsening at a much more rapid pace than even the most pessimistic projections. For example, the RAND Institute for

Civil Justice has been studying asbestos litigation since 1984, when approximately 20,000 cases were pending.² RAND estimated, at that time, that the *total* number of cases against asbestos defendants could reach 200,000.³ Today, there are in excess of 200,000 cases *pending*.⁴ In its most recent 2001 study, RAND predicts that the asbestos litigation crisis will worsen,⁵ estimating that 500,000 claims have been filed and that the number of claims has risen sharply in recent years.⁶ The study concludes that the number of claims yet to be filed could range from 500,000 to 2.5 million.⁷

More than ten years ago, Chief Justice Rehnquist appointed a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation, which drafted a report that forecast the crisis we now face. The Committee "concluded that the situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."⁸

In its 1991 report, the Ad Hoc Committee stated a fact that has become even more apparent over the past decade:

[T]he large volume of cases and the resulting delays and costs have resulted in a denial of justice and fundamental unfairness to litigants. Justice is denied because claims cannot be evaluated and either dismissed, paid, or litigated in a reasonable time frame. Unfairness results because of the excessive transaction costs and the finite resources available to pay meritorious claims.⁹

Furthermore, the Committee stated that the asbestos crisis affects not only the asbestos litigants, but also "impedes the resolution of other cases in the justice system."¹⁰ The Committee correctly foreshadowed that "the worst is yet to come. . . . [U]nless Congress acts to formulate a national solution, with the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources for payment of these claims will be exhausted."¹¹

In 1999, eight years later, Chief Justice Rehnquist again noted that the crisis had worsened in the absence of congressional action, writing that asbestos-related claims were having a "massive impact" on the court system.¹²

B. Bankruptcy

The inability of the tort system to manage asbestos cases fairly has resulted in an alarming number of bankruptcies. Some experts estimate that the total economic toll of asbestos liability on businesses will reach \$275 billion, more than cost estimates for all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks.¹³ More than fifty companies suffering from overwhelming asbestos costs have filed for bankruptcy, with North American Refractories Company (NARCO), Kaiser Aluminum, A.P. Green, Harbison-Walker, and Shook & Fletcher the latest to succumb in 2002.¹⁴ As one journalist recently noted, "the prospects for all the remaining [solvent] companies worsen" with each successive bankruptcy.¹⁵

Bankruptcy courts currently may provide a rational and workable claims administration facility, but they ought not displace the tort system as the primary method for resolving asbestos cases. Bankruptcies have far-reaching, negative consequences for both truly sick claimants and innocent employees and shareholders. However, our incapacitated tort system leaves companies with no viable alternative to declaring bankruptcy.

Bankruptcy judges, and the federal district and appellate judges who review their decisions, find themselves in a unique position to control the asbestos litigation as more companies seek Chapter 11 protection. The varied and often competing interests of innocent employees and shareholders, sick claimants, unimpaired, future claimants, and lawyers seeking attorney fees all converge within the bankruptcy court's jurisdiction. The expanding list of bankrupt companies is a constant reminder to bankruptcy jurists that they have an important role to play in fashioning comprehensive, innovative, and fair improvements to our failing Judicial System.

C. Most Asbestos Claimants Are Not Sick

The onslaught of asbestos cases is dominated by claims from the "Unimpaired"—plaintiffs without cancer who are not physically sick by any accepted medical standard. The *New York Times* recently reported that the latest surge in asbestos claims includes many healthy plaintiffs: "[v]ery few new plaintiffs have serious injuries."¹⁶ Payment of only those claims filed by plaintiffs who are sick would represent a major step toward solving the litigation crisis.

Supreme Court and district court judges, plaintiff lawyers who represent truly sick claimants, physicians, and business analysts all have recognized the prevalence of unimpaired claimants.

Justice Breyer acknowledged in the 1990s that many modern asbestos cases do not involve claimants who are impaired, quoting one source who estimated that "up to one-half of asbestos claims are now being filed by people who have little or no physical impairment."¹⁷ That situation has only grown worse.

Federal courts responsible for managing asbestos dockets likewise have expressed concern that limited asbestos funds are compensating claimants with less serious injuries. In November 2001, Judges Weinstein and Lifland, who preside over one of the oldest and most significant asbestos bankruptcy trusts, the Manville Trust, "took judicial notice of the continuing media and other campaigns encouraging a flood of new claims." They noted "that there is a continuing rise in the number of claims and that the amount paid pro rata on claims has been reduced from 10 percent to 5 percent of the original value." Judges Weinstein and Lifland observed that "there may be a misallocation of available funds, inequitably favoring those who are less needy over those with more pressing asbestos related injuries."¹⁸

Similarly, in January 2002, Judge Weiner, who manages the federal MDL asbestos litigation, observed that asbestos cases filed on the basis of mass litigation screenings "[o]ftentimes . . . are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future."¹⁹

Other experts and physicians have explained why modern asbestos cases frequently involve claimants who are not sick.

By 1991, it was estimated that more than 50% of pending asbestos claims against the Manville Trust were filed by claimants who alleged having a form of pleural plaques, a fibrosis of the pleural lining of the lung that in most cases does not cause any physical impairment.²⁰ According to a 1992 article by one legal scholar, pleural claims accounted for "sixty to seventy percent of new asbestos claims filed."²¹ As two experts have summarized, "[t]he benign conditions of the pleura that are produced by asbestos are seldom of any lasting importance. . . . Diffuse pleural thickening, which may follow an effusion or may develop without an effusion ever having been detected, is usually asymptomatic. It may rarely cause constriction of the lungs with impairment of function and, in extreme cases, consequent disablement."²² A federal district court also concluded 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."²³

The other type of noncancerous, asbestos-related condition is a scarring of the lung tissue known as "asbestosis," a type of interstitial fibrosis. Fibrosis has approximately 150 known causes, only one of which is asbestos exposure. Individuals can have various degrees of asbestosis and, like pleural plaques and thickening, claimants with less severe asbestosis can exhibit no functional impairment or sickness of any kind. In the early 1970s, the federal government, through OSHA, began reducing the acceptable levels of occupational exposure to asbestos. According to one leading asbestos pathologist, these OSHA standards have "markedly decreased the incidence and severity of asbestosis."²⁴

Well-regarded experts have explained in simple terms why modern asbestosis cases are less likely to involve physical impairment: "[w]ith the reduction in the amount of exposure, the development of incapacitating fibrosis slows down and the reaction becomes so slight and its spread so slow that no person with otherwise healthy lungs would

develop significant disability before reaching an age when he was likely to die of other causes."²⁵

A recent *Fortune* article concluded that "asbestos defendants are very likely now paying compensation for every occupational disease known to man. Incipient or marginal asbestosis, as picked up on an X-ray, bears at least a superficial resemblance to more than 130 other lung inflammations, including scores caused by various airborne particles."²⁶

Business analysts have agreed with these assessments. In 2001, A.M. Best reported that "[t]o date, the vast majority of filed claims have been for nonmalignant type exposures, including a large number of asymptomatic claimants."²⁷ Similarly, in 2001, both the RAND Institute²⁸ and Tillinghast-Towers²⁹ accepted estimates that at least 90% of claims are filed by plaintiffs who do not have cancer.

Perhaps the most revealing insight into the nature of many modern asbestos cases comes from certain plaintiff lawyers who represent truly sick claimants. In December 2001, one such prominent plaintiff attorney concluded, in a court filing in the Manville bankruptcy, that many workers filing new claims do not have real asbestos exposure:

The [Manville] Trust has reported that [] current projections beginning in 2002 call for somewhere between a million and a half and two and a half million future cases.

Of course, none of this means that more people are really getting sick as a result of their asbestos exposure. Rather, we are seeing large numbers of cases from "new" industries where it seems clear that if there is any asbestos exposure at all it is very likely limited in intensity as well as scope, with relatively few workers having real exposure.³⁰

This lawyer for sick claimants opined on the potential causes for new claims in an October 24, 2001, letter sent to other asbestos plaintiff lawyers:

Call it intuition or naivete, but I simply cannot believe that there is significant asbestos exposure from asbestos insulation in situ within textile mills to produce the flood of claims that the [Manville] Trust is now receiving. Whether the explanation is fraud, physician incompetence, or failure of recollection by claimants, I do not know. What I do know is that this claimed epidemic of the 21st Century "asbestosis" cannot possibly be real.³¹

Regardless of the reason for the dramatic numbers of unimpaired claimants, courts have attempted the difficult task of managing them efficiently and fairly. Many courts have succeeded. But some courts have failed in dramatic fashion—and plaintiff lawyers have flocked to those venues. The following section contains an overview of the ways asbestos claims have gravitated to those courts that have relaxed or ignored traditional tort requirements and gatekeeping functions.

III. FAIRNESS HAS BEEN SACRIFICED BY SOME COURTS STRUGGLING TO MANAGE THE ASBESTOS LITIGATION

The most significant casualty of the asbestos litigation crisis is fairness itself. Some courts in which plaintiff lawyers have aggregated thousands of claimants into mass "inventories," consisting of many unimpaired claimants and relatively few sick claimants, have struggled to manage claims fairly.

The selective filing of inventories of nonsick claimants in courts that will not turn these claims away coerces defendants into settling unsubstantiated claims by the nonsick. Certain courts will not scrutinize the unsubstantiated claims, and plaintiff lawyers often will not settle the substantiated claims absent payment for their nonsick inventories. Defendants, on the other hand, often cannot afford the risk of trial—inadequate notice and discovery, unfair combinations of sick and nonsick trial plaintiffs, and the possibility of bet-the-company verdicts in unfriendly jurisdictions can be the stark reality—all of which may threaten not only the defendant's finances, but also its workforce, its share price, and even its viability.

Of course, defendants historically settled cases by the nonsick because they believed at that time (but incorrectly in hindsight) that massive inventory deals would substantially reduce their total asbestos liability. Eventually, each additional bankrupt company learned the same lesson: the inexhaustible pipeline of nonsick claimants refills each time it is purged by another settlement. In some cases, judges and defendants beset with this onslaught of claims have abandoned their roles as watchdogs in an adversarial system predicated on such checks and balances. Courts have become claims processing machines, more concerned with resolving massive numbers of cases than with ensuring integrity in the process or truth in the result.

As one professor has written, the result has been to encourage the filing of even more claims:

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 the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.³²

These traffic jams of cases result, in large part, from the huge amount of money paid to plaintiff lawyers, who use the funds as seed money to recruit large replacement inventories of asbestos claimants. Lawyer advertising and mass screenings, which are most responsible for the proliferation of claims, are funded by the settlements. A new generation of plaintiff lawyers also is attracted by the wealth generated by their predecessors, which creates even more competitive pressure for lawyers to locate plaintiffs regardless of their health and to file claims on behalf of the nonsick.

A. Faced with Thousands of Claims, Certain Courts Have Relaxed Traditional Elements of Tort Claims

Legal principles that normally require proof of causation and injury as conditions of recovery have been suspended in some jurisdictions in the context of the asbestos litigation.

In mid-1996, the Manville Personal Injury Settlement Trust ("the Trust") retained neutral academics to evaluate the results of more than 6,400 audited claims of alleged asbestosis and pleural disease. Once the Trust received the X-rays allegedly supporting the randomly selected claims, those X-rays would be reviewed by up to two of five independent physicians (B-readers) retained by the Trust. The Trust intentionally designed the X-ray review process to operate in favor of confirming the disease allegedly suffered by the claimant and to afford the benefit of any doubt to the claimant.³⁹ Accordingly, both independent B-readers had to disagree with the plaintiff expert's diagnosis before a claim would "fail" the audit and be rejected (if no compensable disease) or reclassified (if a less severe, compensable disease). On the other hand, if either B-reader agreed with the plaintiff expert, or determined that the claimant had a more severe disease, the claim would be paid and, depending on the new diagnosis, paid at the higher level even if more than originally requested by the claimant. A review by the second Trust B-reader was not even conducted if the initial B-reader agreed with the plaintiff expert or diagnosed a more severe disease.

By early 1998, the experts had completed their analysis of the 1996 data and determined that, in approximately 41% of the cases, both of the Trust's physicians disagreed with the plaintiff experts and found that the claimant either had no disease whatsoever or had a less severe disease than alleged (e.g., nonimpairing pleural disease instead of asbestosis).⁴⁰

The Trust continued to audit medical evidence after 1996, concluding generally that plaintiff law firms disproportionately hired doctors who had consistently poor pass rates for interstitial fibrosis claims.⁴¹ As an example of the over-utilization of doctors who were inclined to find an asbestos-related condition, the former executive director of the Manville Trust analyzed the Manville claims data from the first quarter of 1998.⁴² Of more than nine thousand claims submitted by plaintiff lawyers, a mere ten doctors provided X-ray interpretations for 87% of the claims. The average failure rate for these doctors was a striking 59%. The highest volume doctor accounted for

over half of the total X-ray interpretations, failing the audit 57% of the time.⁴³

An earlier, 1990 study published in the *Journal of Occupational Medicine* uncovered similar exaggerated medical diagnoses by certain plaintiff experts. A 1986 mass screening had generated legal claims of alleged asbestos-related diseases after 700 to 750 tire workers submitted to X-ray screening at their worksite.⁴⁴ Almost 60% (439) of the screened tire workers filed lawsuits claiming an asbestos-related disease, a prevalence of alleged disease that would prove grossly divergent from the study's results. In 1990, four respected radiologists and professors reported the results of a medical study involving these claims.

Overall, the study demonstrated that *only 16 of the 439 claimants that had filed lawsuits, or 3.6%, exhibited chest abnormalities that may have been consistent with asbestos exposure.* The authors concluded that more than half (265, or 60.4%) of the claimants had "what might be considered completely normal chests for their ages."⁴⁵ Of the remaining 174 claimants that had chest abnormalities, most of them (158, or 36.0% of the total claimants) had abnormalities that were "nonoccupational in origin and consisted of conditions one might expect in an aged population."⁴⁶ Put another way, although the claimants had irregularities on their chest X-rays that resemble asbestos disease, they were caused by something other than asbestos, such as "healed tuberculosis, histoplasmosis, emphysema, discoid stelectasis, effusions, healed rib fractures, scarring due to infection or old inflammatory disease, possible cancer, miscellaneous nonspecific linear markings consistent with cigarette smoking and aging, and heart and vascular diseases."⁴⁷

The authors ultimately observed that "the data from this re-evaluation study suggest the prevalence of disease noted [by the plaintiffs' doctor(s)] is mistakenly high."⁴⁸

Despite these studies, the surprising, practical reality is that defendants almost never have the opportunity or desire to arrange for neutral B-reader panels to conduct comprehensive medical reviews.

Take, for instance, the traditional tort requirement of "injury." Most jurists and citizens likely would assume that any plaintiff who receives millions of dollars in compensatory damages would suffer from a serious and debilitating medical condition. Not so in a recent Mississippi asbestos case, resulting in one of the largest asbestos awards ever, in which a jury awarded six plaintiffs \$25 million each in compensatory damages alone.

None of the plaintiffs in this case claimed to have missed a day of work due to an alleged asbestos-related disease.³³ Not one claimed any prior medical expenses due to asbestos exposure.³⁴ None of the claimants had cancer; rather, each plaintiff either alleged a non-impairing pleural condition and/or slight asbestosis. One claimant even admitted at trial that he did not suffer from any shortness of breath and that he exercised by walking three to four miles per day. Nonetheless, the court allowed the jury to consider the "evidence" of injury, after which it returned a \$150 million verdict (one of the ten highest jury awards in 2001) for a group of claimants who were not sick from asbestos exposure. The practical result of the award is not simply that the system now has \$150 million less with which to compensate asbestos workers who are sick or who will become sick in the future. The verdict, returned in the very courtroom in which mass screening informational meetings had recently been held, also underscored the inability of defendants to resist even the most frivolous cases.

The Manville Trustees, who have the responsibility for monitoring millions of dollars in Trust payments to claimants, recently noted that nonsick claimants are receiving a significant share of the Trust's assets. The Trustees concluded in a letter to the bankruptcy court that the flood of new claims received by the Trust were filed on behalf of unimpaired claimants "whose daily life is unaffected by their past asbestos exposure. Indeed, a large share of the Trust's claimants now have 'injuries' which are imperceptible, even to themselves, without the aid of X-ray or other imaging technology."³⁵

Like the element of "injury," some courts have relaxed the traditional tort requirement of "causation" in many asbestos cases. To prove that a defendant's product caused the plaintiff's alleged injury,

the plaintiff naturally must demonstrate that he or she was exposed to the defendant's product. Commonly referred to as obtaining "product identification," the plaintiff lawyer often must find a witness willing to testify that the plaintiff worked around the particular product and breathed its airborne particles.

In theory, the task is tremendously difficult. Predominately older claimants are asked to remember products to which they were allegedly exposed decades ago. Such necessary details include remembering the names of products, their locations at the worksites, and their physical descriptions, including small lettering on bags and packaging colors. In practice, however, plaintiffs invariably identify the product of solvent companies that have available funds to pay inventory settlements. The system rarely accommodates a determination of whether plaintiffs made valid product identification, one of the most basic elements of establishing an asbestos tort.

The harm from the absence of any real check and balance is substantial. Plaintiff lawyers frequently attempt, and succeed, in extracting large "inventory" settlements from defendants by filing an overwhelming number of claims against certain defendant targets. Plaintiff lawyers eventually may obtain product identification, but the mere filing of a large suit often prompts settlement regardless of the factual merits. Defendants are forced to incur the costs of defending cases that may not have a good-faith basis. Preferring not to incur such transaction costs, defendants routinely believe that it is cheaper to settle cases than to litigate, even though the cases may not have merit and have not been substantiated with any evidence, much less with reliable medical evidence. Bedrock tort principles of proof, causation, and damages become a casualty in a judicial process whose objective is to resolve cases above all else.

A federal bankruptcy court recently expressed concern that lawyers may abuse the litigation process by filing asbestos lawsuits without ensuring a reasonable basis for their cases. As an example of one court's attempt to question the plaintiff's pre-filing causation investigation, bankruptcy Judge Burton Lifland engaged in the following

exchange with an asbestos plaintiff lawyer (the witness) about the basis for naming Kentile as an asbestos defendant:

Court: How does Kentile get to be a Defendant if the Plaintiff doesn't know he had been exposed to Kentile? Is that invented by the lawyer based upon an insurance coverage? What do you mean you wouldn't know of your own clients?

Witness: It's my understanding that --

Court: What do you know of your own knowledge? How does Kentile get to be a Defendant?

Witness: (No response.)

Court: We are here on a hourly basis. You used up the better part of a minute and a half [] to respond to the Court. I am thinking, Your Honor.

Witness:

Court: It should not be much of a thought here. This is your firm, right?

Witness: That is correct.

Court: This is your area of focus. How about answering the question?

Witness: I am thinking about it, Your Honor. Generally speaking, one would speak with the client and find out to what products he has been exposed to.

Court: So then the clients would know that they were exposed to Kentile in order to make Kentile the Defendant in the suit, is that right?

Witness: That is correct.

Q. [by different questioner]:

What due diligence have you done to identify Kentile as a Defendant?

A: In the cases—I don't believe that I have spoken with my clients about Kentile in general.³⁶

Even more disturbing than the lack of pre-filing investigations are widespread allegations that the litigation is punctuated by improper witness coaching, possibly crossing the line into fraud. One prominent law firm inadvertently gave to the defense a memorandum that an employee of the plaintiff law firm had supposedly used to coach plaintiffs to answer questions only as instructed—without any admonition in the memorandum to tell the truth.³⁷ This same law firm is one of three being sued under RICO for, among other things, allegedly forging plaintiff signatures and manufacturing missing information on plaintiff affidavits, including work histories and product identification information.³⁸

Whether it is this unacceptable, alleged behavior, the routine failure to conduct pre-filing investigation into causation, or the continued relaxation of such legal requirements as "injury," the result is the subordination of truth to the expediency of resolving asbestos cases. While this perverse result in the face of overcrowded dockets is understandable, it is not the appropriate balance that our Judicial System should accept.

B. Some State Courts Are Too Overwhelmed to Exercise Gatekeeping Functions and Monitor Medical Evidence

State and federal courts have the authority to assess the reliability and relevance of medical evidence and to monitor the integrity of the judicial process. This commitment, of course, requires judicial energy and time. More than 99% of asbestos cases settle, most commonly in the context of mass inventory deals. Accordingly, courts frequently manage the cases until settlement but believe that they cannot afford to invest the judicial resources to supervise such settlements or monitor medical evidence submitted by plaintiffs pursuant to settlement terms.

Two significant reviews of medical evidence in the asbestos litigation suggest that judicial monitoring of medical opinions is necessary to ensure accurate diagnoses of asbestos-related conditions in cases filed in the courts.

Plaintiff lawyers often avoid submitting X-rays by settling claims *en masse* with the leverage of their sick clients.

Many defendants are reluctant to demand X-rays and conduct such audits for fear that plaintiff lawyers will target the company, refuse to settle any claims, and try their most serious cancer cases in plaintiff-friendly jurisdictions. While serious cases are relatively few in number compared to cases filed by the unimpaired, the risk of even a handful of multimillion dollar verdicts often dissuades defendants from a high-profile, contentious fight that could bankrupt the company in the short term. One business analyst has observed, "[i]n a sense, the plaintiffs' attorneys have the asbestos defendants held hostage."⁴⁹ Defendants often conclude that rather than question this X-ray evidence, it is cheaper to treat the claims as administrative costs, regardless of merit, than to litigate. This strategy has failed for a number of defendants in the long run, as an endless supply of nonsick claimants have replenished the plaintiff lawyers' client base, leaving bankruptcy as the only realistic option for those companies.

The ultimate result is that potentially superficial and unreliable medical evidence justifies billions of dollars in settlement payments without any oversight or verification from an adversary or the court. It is difficult to conceive of any other compensation system that is more susceptible to abuse and less likely to arrive at accurate results.

C. Due Process Rights Are Sacrificed in the Asbestos Litigation

The axiom that every litigant has a right to prepare his or her case adequately seems so basic as to not require any explanation whatsoever. Unfortunately, in many asbestos cases, basic due process rights have been minimized in the name of resolving cases and clearing court dockets.

The procedural due process guaranteed by the United States Constitution and state constitutions requires that a litigant be afforded the right to prepare and present a full defense.⁵⁰ For this right to have any meaning, a party must have adequate notice of court proceedings and a meaningful opportunity to prepare. Similarly, it is impossible to

prepare an adequate defense without the chance to obtain information about the other side's claims and defenses. This concern is magnified in those state jurisdictions that generate the greatest number of litigant complaints about due process violations.

1. Certain Jurisdictions Are Magnets for Huge Numbers of Asbestos Cases

It is no coincidence that a few jurisdictions have become the favorite locations for plaintiff attorneys. A principal reason for this concentration is that juries in these jurisdictions have consistently awarded huge verdicts in favor of plaintiffs against corporations, especially out-of-state corporations. Perhaps the most notorious jurisdictions in this regard are a few Mississippi counties, in which litigation has seemingly become the counties' principal business. Jefferson County, for example, with 9,740 residents, had 21,000 plaintiffs file claims in the county courts from 1995 to 2000.⁵¹ Mississippi juries have returned at least twenty verdicts of \$9 million or more since 1995, including at least seven that exceeded \$100 million each.⁵² Plaintiff attorneys have learned that their chances of obtaining large jury verdicts, and, as a result, their chances of extracting favorable pretrial settlements from defendants, are much greater in jurisdictions that have plaintiff-friendly reputations. In addition to the Mississippi counties, other notoriously pro-plaintiff jurisdictions crowded with asbestos cases include certain locales in Texas, West Virginia, Louisiana, New York, and California.⁵³

Not surprisingly, a 2002 Harris Poll found that senior corporate lawyers ranked Mississippi, West Virginia, Alabama, Louisiana, and Texas as the five worst states in the country in terms of the fairness of their tort liability systems.⁵⁴ Mississippi is ranked worst or next to worst on all criteria except treatment of class action suits, on which it was not rated because it does not have them. The average economic growth rate from 1995 to 1999 was substantially higher among the ten states ranked highest in the survey (4.8%) than in the bottom ten states (3.8%). Seventy-eight percent of the respondents confirmed that a state litigation environment could affect important business decisions such as where to locate or do business.⁵⁵ Obviously, it is in a state's self-

interest to insist that its courts afford fair treatment not only to its citizens, but to its businesses as well.

Large, well-publicized jury verdicts and out-of-court settlements attract additional plaintiff lawyers, both from inside and outside the jurisdictions. These lawyers file claims on behalf of out-of-state clients, relying on liberal rules concerning jurisdiction and venue. In Mississippi, for example, historically it has not mattered how many plaintiffs in a case live out of state, as long as one lives in state.⁵⁶ The fact that in-state plaintiffs may reside in different counties also is not an obstacle because venue is proper in a county as long as any plaintiff in the case resides there.⁵⁷ These rules attract plaintiff lawyers from other states seeking large verdicts or settlements, whose home states may have limits on punitive damages recovery or other procedural obstacles. It was recently reported that of the 403 plaintiffs involved in litigation filed in Jefferson County, Mississippi, against GAF Corporation, more than half were from Texas.⁵⁸

2. Misuse of Joinder and Consolidation Rules Aggravates the Problem

The willingness of juries in certain jurisdictions to return large verdicts, coupled with the ease of filing suit even as a nonresident, has resulted in a substantial caseload of asbestos actions in these jurisdictions. Overwhelmed by massive numbers of cases, judges in these jurisdictions have liberally interpreted procedural rules regarding the joinder and consolidation of claims in an attempt to manage their dockets.

The result is that some judges permit the consolidation of massive numbers of cases, even involving plaintiffs with largely dissimilar claims. Trial judges exercise broad discretion in determining whether joinder is proper, and, when pressured by massive numbers of claims to resolve, they have used that discretion to permit the joinder of thousands of plaintiffs in a single action.⁵⁹ Once again, Mississippi is perhaps the best example of this practice.

Even if plaintiffs cannot meet Mississippi's relatively liberal joinder standards, judges have the option of consolidating separately filed cases for trial if there is a question of law or fact common to the parties.⁶⁰ As with joinder, a Mississippi trial court has broad discretion to consolidate actions for trial.⁶¹ For defendants, the end result of such practices often is the prospect of an unfair trial involving numerous plaintiffs from different jurisdictions, who worked in different occupations, at different worksites over long periods of time, alleging injuries ranging from mesothelioma to asymptomatic chest X-ray anomalies.

The expansive interpretation by judges of joinder and consolidation rules stems mainly from well-meaning attempts to maintain control over dockets and dispose of cases efficiently. As former Chief Justice Mallett of the Supreme Court of Michigan stated in testimony before Congress:

Think about a county circuit judge who has dropped on her 5,000 asbestos cases all at the same time . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.⁶²

Imagine Justice Mallett's scenario replicating itself many times over in pro-plaintiff jurisdictions as judges attempt to process thousands of new claims filed each year.

Plaintiff lawyers also have seized upon consolidation as a means of exerting greater leverage on defendants. By combining great numbers of plaintiffs, both sick and unimpaired, plaintiff lawyers create inventories of cases that are more amenable to huge, lucrative settlements. For this reason, plaintiff lawyers push judges, who are already disposed to combine cases in the name of efficiency, to exercise their discretion in consolidating cases.

Permitting large numbers of misjoined claims to proceed to trial jeopardizes defendants' due process rights. Aggregations of sick and nonsick claimants taint the nonsick with a type of "sympathy of association" before the jury, which makes it "more likely that a defendant will be found liable and results in significantly higher damage awards."⁶⁴ Similarly, when the claims of numerous plaintiffs with dissimilar alleged injuries and factual situations are tried together, "the maelstrom of facts, figures, and witnesses" is likely to lead to jury confusion and an unfair trial.⁶⁵

3. Some Judges Cede Case Management Decisions to Plaintiffs' Counsel

Other procedural decisions are also prejudicial to litigants. Whether in an attempt to move cases through the system, or for other unexplained reasons, some judges cede control over case management to plaintiff lawyers, prejudicing defendants in the process. For example, certain Texas courts routinely permit plaintiff counsel to select which cases and which plaintiffs will proceed to trial, often mere days before trial. Plaintiff counsel often include at least one serious, high-value case (e.g., the relatively rare sick claimant) in any trial group they choose, ensuring that they maintain the pressure to settle unimpaired cases, while maximizing the potential for a large jury verdict should the case proceed to trial. Indeed, defendants sometimes cannot obtain even basic discovery information about these plaintiffs until the eve of trial, if at all.

A recent opinion by a Texas appellate court illustrates just such a situation. More than 4,000 plaintiffs filed suit against NARCO in Orange County, Texas.⁶⁶ In November 2000, three trial settings were identified for fifty plaintiffs. While a group of fifty plaintiffs was severed from the rest in February 2001, four months before trial, it was not until *two weeks* before trial that plaintiff counsel unilaterally selected the specific ten plaintiffs who would go to trial, only then notifying defense counsel.⁶⁷

Even two weeks before trial, fundamental discovery activities, such as obtaining the plaintiffs' medical reports and conducting independent

medical examinations, had not been completed. As a result, the defendants moved for a continuance, but the trial court denied the motion.⁶⁸ The appellate court concluded that two weeks' notice was not meaningful notice under the circumstances, and that NARCO's due process rights had been violated as a result.⁶⁹ Unfortunately, appellate review is the exception rather than the rule. Because of the pressure to settle, few of these cases go to trial and fewer still make it to an appellate court, making the practice of limiting discovery rights largely unremedied.

The recent *NARCO* case illustrates the confluence of events that can lead to due process violations. Plaintiff counsel files suit in a plaintiff-friendly jurisdiction, on behalf of thousands of plaintiffs. Claims with few, if any, common factual and legal issues are joined together for trial. The trial court permits plaintiff counsel to determine unilaterally which plaintiffs will proceed to trial, with notice provided to the defendants at the eleventh hour. The defendants do not have the opportunity to obtain even the most rudimentary information concerning the plaintiffs' work history, medical status, and the nature of their claims. Taken together, these actions operate to deny defendants the opportunity to prepare adequately for trial and test the particulars of the plaintiffs' claims. Without this opportunity, defendants do not receive the "fair trial in a fair tribunal" that is the basic requirement of due process.

D. Recoveries for the Unimpaired Jeopardize Future Recoveries for the Sick

Commentators have observed that the growth of unimpaired claims threatens recovery for impaired claimants by bankrupting defendants and exhausting asbestos reserves.⁷⁰ The bankruptcies can be devastating to current and future impaired claimants, as any recovery against a bankrupt entity can be greatly discounted.⁷¹

For example, impaired claimants recovering from Johns-Manville can expect to receive a mere 5% of the bankruptcy court's valuation of their claim.⁷² Tragically, the bankruptcy means that Johns-Manville claimants who have now developed serious asbestos-related injuries,

such as mesothelioma or lung cancer, may receive substantially less compensation than those with relatively trivial injuries, or even no injury, can obtain against those companies who are now solvent.⁷³

According to a letter that Manville Trustees sent to Judges Weinstein and Lifland on December 5, 2001, a "disproportionate amount of Trust settlement dollars has gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."⁷⁴ Meanwhile, the Trust continues to struggle to meet its obligations to pay sick claimants. Because asbestos defendants have limited resources with which to compensate claimants, "the rush of non-impaired cases diverts the limited resources of defendants away from compensating the victims of asbestos related disease—including, tragically, cancer cases that will be with us well into the next century."⁷⁵

Federal Judge Weiner also has expressed concern that payments to nonsick claimants may jeopardize future payments to workers who are truly ill. Judge Weiner, who manages the federal MDL asbestos litigation, ruled that he would begin giving priority "to the malignancy and other serious health cases over the asymptomatic claims."⁷⁶

One plaintiff lawyer, who represents claimants that mainly have mesothelioma cancer, advocated in a letter to the court overseeing the Manville Trust that "claimants with no asbestos-related impairment or disability (whether 'pleural' or 'bilateral interstitial disease') should not get paid" so that funds are preserved for claimants who are truly sick.⁷⁷

Even business analysts have recognized that future sick claimants will receive less in settlements as bankruptcy trusts continue to reduce payouts and deplete their funds by paying unimpaired claimants.⁷⁸

E. Certain Plaintiff Lawyers May Allocate Settlement Funds without Full Disclosure to Their Clients and Delay Payment on Sick Claims to Leverage Their "Inventory"

Certain plaintiff lawyers may breach their fiduciary duty to their clients by failing to disclose basic information about the lawsuit and allocation of settlement monies to other plaintiffs in their "inventory." Sick plaintiffs often must wait for their settlement money while the plaintiff lawyer uses the sick claims to settle the nonsick claims. Some plaintiff lawyers will not consider settling the sick claims unless the defendant pays on the unimpaired claims. Whether the plaintiff lawyer, in the absence of a settlement offer for his unimpaired claims, actually presents the settlement offer to his sick client, as he is bound to do by lawyer ethics, is open to question.

In February of this year, a group of 2,645 asbestos plaintiffs from Pennsylvania, Ohio, and Indiana filed a class action in Pennsylvania federal court against a group of law firms and lawyers in Mississippi, Texas, and North Carolina alleging that the lawyers had defrauded them.⁷⁹ Specifically, the asbestos claimants contend that the lawyers and law firms recruited them for inclusion in "mass actions" in Mississippi and then "betrayed them."⁸⁰ According to the federal complaint, the lawyers "viewed their clients as mere inventory that could generate enormous legal fees with relatively little effort."⁸¹

The plaintiffs allege that the lawyers told them nothing about the lawsuits or the massive settlements, misallocated settlement funds based on undisclosed criteria such as geography, and paid them a few thousand dollars for their injuries while the lawyers amassed tens of millions of dollars in fees and inflated expenses.⁸² As a dramatic example of the inequity of jumbo consolidations and settlements, the plaintiffs contend that they never would have approved the settlement had they known that their lawyers gave other similarly situated clients significantly more settlement money, as much as eighteen times more (e.g., \$252,000 vs. \$14,000), simply because the other clients lived or worked in Mississippi.⁸³

The frequency of mass inventory settlements and the number of claimants involved make these allegations alarming, particularly since courts often do not routinely supervise inventory deals. Judges must consider carefully the extent to which they monitor the distribution of settlement funds associated with cases in their courts.

F. Peripheral Companies, Innocent Employees, and Shareholders Also Are Victims in the Asbestos Litigation

Workers that are sick from asbestos exposure clearly are the most needy and deserving of compensation. But other, indirect and less visible victims exist as well. Innocent employees and shareholders of companies only peripherally related to asbestos have been harmed significantly by the financial collapse of their businesses due to asbestos liability.

Virtually all of the original, "traditional" asbestos manufacturers are bankrupt. Counter-intuitively, the number of "nontraditional" asbestos defendants is increasing, even though asbestos and asbestos-containing products were largely removed from the workplace almost thirty years ago. Since the 1980s, the number of asbestos defendants has ballooned from approximately 300 to several thousand today.⁸⁴ Any company that manufactured an asbestos-containing product, even if it only contained a trace amount, or that had a small amount of asbestos on its premises in one or two isolated locations, is a potential target in this litigation. Some estimate that almost half the companies on the Dow Jones index will face some form of asbestos liability.⁸⁵

The new wave of asbestos targets includes distributors who sold the products as middlemen between manufacturers and contractors, contractors who worked with asbestos-containing materials, businesses that had asbestos-containing products in their buildings, automobile manufacturers, telephone companies, computer makers, manufacturers of electrical wire and welding rods, consumer product retailers and even food and wine makers. Most of these defendants never manufactured asbestos; yet they are forced to reallocate funds to asbestos claims and away from job growth, research and development, and

other economic investments. Like asbestos payments by traditional defendants, most of the funds paid by newly targeted companies are consumed by lawyers and claimants who are not sick.

Today, it has become commonplace to hear household names involved in asbestos suits. In April 2000, a jury rendered a \$34 million verdict against a division of Royal Dutch/Shell oil company. Shell never manufactured an asbestos-containing product, but, like other oil companies, used such a product in its refineries.⁸⁶

Other companies like Campbell's Soup and Procter & Gamble are viewed as deep pockets as well. Both were added to a pending complaint in California Superior Court in San Francisco, alleging that asbestos was found at company factory sites.⁸⁷ In another San Francisco court, a former insulator has sued Dow Jones & Company, publisher of the *Wall Street Journal*, claiming asbestos exposure at a *Journal* printing plant.⁸⁸

Sears, Roebuck & Company, one of the first major retailers to be named as a defendant in asbestos-related litigation, is being sued by a former salesman who claims that the floor tiles and roofing products he purchased from Sears in the 1940s caused his cancer.⁸⁹ Many of these peripheral defendants, like many of their employees and even the federal government, did not know that asbestos was a dangerous product when it was most commonly used. Yet they face asbestos liability because the most culpable companies who manufactured asbestos—those who allegedly knew the dangers of asbestos before the general public knew—have all declared bankruptcy.

The automobile industry also is not immune. Nontraditional asbestos defendants such as Ford Motor Company and Chrysler Corporation are alleged to have exposed workers to asbestos-containing automobile parts, such as brake pads and linings. Ford, for example, never manufactured or produced asbestos-containing materials; yet it faced \$1.7 billion in asbestos liability as of December 2001, two-thirds more than its approximately \$590 million in liability from the Firestone tire recall and rollovers of its Explorer sport utility vehicles.⁹⁰ Federal-Mogul, an auto parts maker who filed for bank-

rupture in October 2001, expects to pay \$550 million in asbestos liability in 2004, up from an estimated \$338 million in liability in 2000 and \$89 million in 1990.⁹¹

Crown Cork & Seal is another example of a peripherally involved company that never manufactured asbestos-containing materials. It did not even use asbestos-containing materials in its business. This company's limited connection to the asbestos industry was its purchase of Mundet Corporation to supply its cork bottle caps in the early 1960s.⁹² Unfortunately, Mundet Corporation also had an insulation business, which was sold 93 days after the purchase.⁹³ For the 93 days of ownership, Crown Cork & Seal expected to pay more than \$100 million for asbestos litigation in 2001 alone.⁹⁴ The company recently cut 700 jobs in an attempt to reduce costs.⁹⁵

The rate of new claims is partially dependent upon the number of new defendants sued to pay those claims.⁹⁶ Claims have surged as companies file for bankruptcy and plaintiff attorneys feel the pressure to accelerate the filing of claims against newly identified, solvent defendants. Some employees have lost jobs as businesses attempt to cut expenses to account for significant asbestos costs. Innocent shareholders' retirement funds have evaporated after their companies' stock prices plummeted from asbestos liability.

Take Federal Mogul. By the end of 1998, immediately after the 100-year-old company made the mistake of acquiring a company with asbestos liability, the value of Federal Mogul stock in the 401(k) accounts of its 22,000 U.S. employees reportedly was worth \$85 million.⁹⁷ Then Federal Mogul was targeted as a major asbestos defendant. As bankruptcy threatened by August 2001 solely because of asbestos claims, the value of the stock in retirement accounts had fallen to \$15 million, a \$70 million decline.⁹⁸ Innocent workers, loyal to their company, lost millions of dollars of their hard-earned retirement savings to asbestos settlements that were largely allocated to unimpaired claimants and their lawyers.

In sum, claimants who are sick because of asbestos exposure are the most deserving of compensation for their injuries, although they are

not the only victims in the asbestos litigation. Employees and shareholders of companies that never made asbestos and are only peripherally related to asbestos have suffered as well. These citizens, both asbestos claimants and innocent third parties, rely upon our system of justice to produce rational results in asbestos litigation on the basis of an accurate assessment of the facts. While our Judicial System has failed in that goal, the judiciary has the authority and means to improve drastically its management of these asbestos cases.

IV. A JUDICIAL FIX: STATE AND FEDERAL COURTS HAVE TOOLS TO REMEDY THE BROKEN ASBESTOS LITIGATION SYSTEM

Judges must restore order and fairness to the asbestos litigation. While some courts have failed to manage asbestos cases effectively, I remain convinced that state and federal judges have the ability and resources to help stop the current perversion of the Judicial System. Indeed, I believe that it is the judge's *duty* to fashion judicial solutions when Congress fails to act and miscarriages of justice stand uncorrected. Then, and perhaps only then, will Congress recognize that it has abdicated its responsibility to implement meaningful reform and pass legislation to complement the judiciary's efforts.

The media frequently report on the asbestos litigation *crisis*—whether in the form of another asbestos-related bankruptcy of an otherwise healthy business, plummeting stock prices of companies threatened by more lawsuits, or million-dollar verdicts for healthy plaintiffs in certain jurisdictions. While this unstable and deteriorating situation qualifies as a crisis, it is not an *epidemic*—i.e., a widespread and expanding problem in every state and federal court. The distinction is important and helps determine precisely what type of judicial activity and oversight could be most effective. Many judges, such as Judge Weiner, have faced the problem of deciding asbestos cases fairly and efficiently and largely solved it. Fundamental rules of procedure and evidence do not require change, but they must be fairly and uniformly *enforced* across the country.

Failures of judicial administration in the asbestos litigation are localized failures in a limited number of jurisdictions. Because certain courts attract most of the cases, they have a disproportionate effect on the asbestos litigation as a whole. The concentration of asbestos plaintiffs in these jurisdictions will continue as long as such courts hear the claims of plaintiffs who are not sick and fail to enforce basic rules of fairness. Thus the crisis begins in a minority of courts, but the adverse economic effects spread nationwide.

Reform both from inside and outside these jurisdictions can remedy the problem. Reform may commence by judges applying the same rules to asbestos cases as to any other tort dispute—by way of example, insistence on proof of injury and causation, protection of litigants' due process rights, and recognition of the court's role to act as gatekeeper against illegitimate medical opinions. All courts, including both state and federal appellate courts, must scrutinize cases in problematic jurisdictions for violations of constitutional rights, rules, and procedures. Appellate courts should feel an obligation to act more forcefully and intervene in those problematic jurisdictions where trial courts repeatedly disregard litigants' rights.

The following options provide judges with various approaches to consider when managing their asbestos dockets. These alternatives, many of which have been implemented and/or tested in some manner, are designed to restore basic rights and normalcy to the asbestos litigation that are fundamental in other contexts. These suggestions are not meant to be mutually exclusive or exhaustive; it is hoped that they will stimulate judges to implement other pragmatic reforms that better ensure rationality and justice in the compensation of asbestos victims.

A. Return to Traditional Tort Principles: Insistence on Proof of Injury

Paying claimants who are not sick, an amount in the aggregate that totals hundreds of millions—if not billions—of dollars, is perhaps the most controversial and inequitable characteristic of the asbestos litigation. Traditionally, the tort system would turn away claimants with no

medically significant evidence of injury. The asbestos litigation is an exception, however.

Courts in some jurisdictions, such as in Pennsylvania,⁹⁹ Texas,¹⁰⁰ and other states,¹⁰¹ have expressly limited claims in the absence of asbestos-related impairment. Similar to these courts, my own view is that without some objective, physical impairment, a person has not suffered legal injury and should not be entitled to maintain an asbestos lawsuit. Yet there remain some trial judges who allow workers who have been exposed to asbestos, but who are not sick and may never become sick because of asbestos exposure, to maintain actions for damages. The legal theory is that exposure to asbestos has caused changes in the lungs of these plaintiffs, and while these changes do not affect the ability of these plaintiffs to lead normal, healthy lives, the changes do amount to "legal injury." Accordingly, some claimants who otherwise would not sue unless they became sick may be compelled to file a lawsuit to avoid having their claims barred by the applicable statute of limitations.

In January 2002, Judge Weiner in the federal MDL litigation articulated a sensible strategy for directing compensation away from nonsick plaintiffs toward seriously ill individuals—while simultaneously protecting the rights of the nonsick to receive their day in court if and when they actually manifest some asbestos-related injury.

Judge Weiner alleviated the artificial pressure to file suit by tolling the statute of limitations for claimants who were not impaired. He placed the cases administratively on an inactive docket subject to reinstatement, but indicated that unimpaired claimants would have their day in court when and if they ever developed an asbestos-related disease. Judge Weiner's strategy protects the interests of unimpaired and impaired claimants alike by preserving funds for the truly sick while protecting potential future claims of individuals who may become severely symptomatic years from now. In this manner, if a person exposed to asbestos becomes ill in the future, money will more likely still be available to compensate him or her—rather than already having been exhausted on payments to masses of nonsick plaintiffs. Judge Weiner accepted his duty as a judicial officer by observing in his

ruling: "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."¹⁰²

He further noted that claims based solely on mass X-ray screenings often are brought on behalf of individuals who "are asymptomatic as to an asbestos-related illness and may not suffer any symptoms in the future." Accordingly, Judge Weiner recognized that merely responding to such claims created "substantial transaction costs" that had the effect of "depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs." Ultimately, as a condition of case reinstatement, Judge Weiner placed the burden on plaintiffs to establish that asymptomatic claimants actually suffer from an asbestos-related disease.¹⁰³

Judge Weiner's ruling requiring a minimum level of medical evidence before allowing cases to proceed is a new judicial tool in the asbestos litigation, but certainly not the first of its kind in the court system generally. In other mass toxic tort contexts, pragmatic judges have imposed deadlines, soon after case filing, by which plaintiffs must submit evidence reasonably supporting their allegations of injury and causation. These orders (known as "Lone Pine" orders, so named after the first case in which they were used) typically require plaintiffs to supply basic information that they should have obtained prior to filing suit, such as a reliable physician's diagnosis of the alleged injury and evidence that the defendant caused it.¹⁰⁴ Failure to comply with the order, or submission of insufficient or unreliable medical evidence, has been grounds for summary dismissal of mass toxic tort claims.¹⁰⁵

Like Judge Weiner, these judges have exercised their inherent docket management authority to filter out frivolous cases and ensure that legal claims have an evidentiary basis before allowing significant and costly discovery. For example, in one such case involving alleged lead poisoning from construction activities, a Texas trial court ordered that certain plaintiffs submit expert medical reports within a ninety-day window. When the expert reports established only that the plaintiffs had conditions "consistent with lead poisoning" and failed to rule out alternative causes of injury, the court found the medical opinions

unreliable and dismissed the claims before close of discovery, a decision affirmed on appeal.¹⁰⁶ Judges should not allow the asbestos litigation to escape this type of evidentiary scrutiny that courts routinely require in other tort cases.

Similarly, in the medical malpractice context, a number of state legislatures require plaintiffs to file with their complaints expert medical affidavits attesting to the defendant's alleged malpractice. Georgia, for instance, requires the plaintiff's expert to set forth the alleged negligent acts and the specific factual bases for such claims. Connecticut, Florida, Michigan, Minnesota, Missouri, and Nevada all require the plaintiff to conduct similar prefiling due diligence and factual investigation into expert opinions before filing malpractice claims. Reliable medical evidence is essential to ensuring a fair system of compensation for asbestos victims, interested third parties, and defendants.

Judge Weiner's ruling also highlights the practical reality of the asbestos litigation: judges must prioritize cases if they intend to process them fairly and according to constitutional due process requirements. In 1997, the Supreme Court overturned an attempt to resolve large groups of asbestos cases by means of a class action, which effectively required such cases to be decided one-by-one, or at least in small groups of plaintiffs. Yet there could never be enough judges, courthouses, or juries to decide the claims made by the thousands of plaintiffs who are not sick. It is a physical impossibility.

Judge Weiner's ruling recognizes that courts must make difficult decisions about which cases are heard and in which order. His decision may be particularly helpful to state judges, who have the burdensome task of managing the vast majority of asbestos cases. Certain state courts in Illinois, Maryland, and Massachusetts have adopted similar case management strategies by prioritizing claims of sick plaintiffs and placing claims of the nonsick on inactive dockets until an actual impairment develops.¹⁰⁷ Even in those states where healthy plaintiffs are entitled to show "legal injury," courts still have the inherent authority to manage their dockets to hear the claims of sick plaintiffs first.

None of this is to say that these measures will resolve the asbestos litigation in the absence of broader judicial and legislative reform. As long as the same troublesome jurisdictions continue to accept groups of out-of-state cases by the nonsick and compromise basic due process rights, plaintiff lawyers will flock to them, perhaps even more so as additional courts adopt sensible case prioritization practices and adhere to traditional evidentiary requirements.

In sum, Judge Weiner's exercise of his inherent authority over the court's docket is a promising road map for state and other courts to re-establish the requirement of "injury" in asbestos cases—in such a manner that protects the rights of both unimpaired and sick claimants in the future. Widespread adoption of this strategy, especially in certain jurisdictions in Mississippi, Texas, and West Virginia, would be a significant improvement in judicial administration of asbestos cases.

B. Return to Traditional Tort Principles: Insistence on Proof of Causation

The traditional tort requirement of causation, like injury, has been disregarded in the asbestos litigation arena, exposing defendants to liability for asbestos claims unrelated to their operations. The *New York Times* recently noted that "many companies now facing asbestos lawsuits did not make asbestos or use it heavily in their products."¹⁰⁸ Some plaintiff lawyers sue hundreds of these peripheral defendants without first determining if each company exposed their clients to asbestos. The notion that a company should be liable for asbestos-related injuries that they did not cause is contrary to traditional tort law as well as fundamental fairness.

Judges have the authority to question litigants about why they file thousands of claims against thousands of defendants, and to require plaintiff counsel to support their complaints. Judges should expect and receive an evidenced answer that verifies that each plaintiff (or a co-worker) can identify each defendant's product before the court commits to expending judicial resources to manage these claims. By compelling litigants to fulfill their duty to ensure reasonable evidentiary support for their allegations when filing complaints, cases are

more likely to be meritorious and resolved rationally. While not a judicial panacea, a greater commitment to oversight at the time of filing likely would improve judicial economy in the long term and enhance the courts' ability to ensure fairness in the management of asbestos cases. Judicial use of "Lone Pine orders" (discussed *supra*) and similar case management tools would be an effective start. Currently, there are few enforced barriers to entry for even the most frivolous claim.

Without preflight verification of product identification or other causation evidence, defendants, in a reversal of the way in which a normal tort case is resolved, must conduct costly discovery just to *disprove* causation. Federal Rule of Civil Procedure 11 and state analogues were designed to prevent the bringing of allegations that lack evidentiary support. Such rules work only if courts enforce them, which rarely occurs in asbestos litigation.

A recent case in Mississippi provides a good example of the results that can be accomplished by a pro-active judiciary.¹⁰⁹ In this case, Jasper County Circuit Court Judge Robert Evans appointed a Special Master, who ordered plaintiffs' counsel to provide core disclosure information for each of the 2,500 plaintiffs. This core disclosure was to include their names, social security number, work history, work-sites with years of exposure, disease, date of diagnosis, diagnosing physician, and a listing of the products to which each plaintiff allegedly was exposed. As a result of this order, one week later plaintiffs' counsel filed his/her own motion to dismiss approximately 2,200 of the 2,500 plaintiffs. In all likelihood, plaintiffs' counsel was ill prepared to substantiate the claims and was counting on an easy settlement.

C. Ensuring Reliable Medical Evidence of an Asbestos-Related Disease

1. The Court's Duty as Gatekeeper

The reliability of medical evidence in the asbestos litigation may be the single most important consideration in ensuring just and accurate

settlements and verdicts. In other contexts, courts have increasingly served as gatekeepers to assess the significance of medical testimony and evidence. The Supreme Court's decision in *Daubert* almost ten years ago confirmed the responsibility of trial judges to determine if expert testimony is reliable and helpful. It is especially important for courts to exercise this function in asbestos cases, given the wide variance in the amount and scope of medical evidence proffered in support of such claims.

a. "Consistent with" Diagnoses Are Insufficient

Large numbers of asbestos claims are settled on the basis of X-rays reviewed by "B-readers" who claim that the X-ray findings are "consistent with" asbestosis. Two physicians specializing in pulmonary and occupational lung disease recently attested in court pleadings filed before Judge Weiner that a statement that an X-ray is "consistent with" asbestosis is not a complete or reliable medical diagnosis. These experts have recognized that, in addition to X-ray findings, B-readers may make reliable diagnoses of asbestosis only if they physically examine the patient, conduct pulmonary function tests, review the patient's complete occupational and medical history, analyze latency periods, and eliminate more probable causes of chest abnormalities.

Otherwise, abnormalities on a patient's chest X-ray easily may be diagnosed improperly as interstitial fibrosis. Moreover, even if a patient does have interstitial fibrosis, there is not necessarily a reasonable medical certainty that the condition is asbestosis. Many other medical conditions may appear as interstitial fibrosis on an X-ray, a conclusion accepted by the medical community and by at least one federal court that has considered such medical evidence in detail.¹¹⁰ A "diagnosis" based solely on a chest X-ray is incomplete; such abnormalities are just as consistent with old age, smoking, obesity, lupus, and other medical conditions.

In the nonasbestos arena, courts regularly—indeed uniformly—reject a "consistent with" diagnosis as a basis for showing medically cognizable injury.¹¹¹ Yet in the asbestos context, cases with this non-

diagnosis masquerading as a medical finding routinely go forward. There is no basis for such disparity.

Accordingly, medical opinions that an X-ray is "consistent with" asbestosis sounds like a diagnosis but is medically noncommittal. Even though courts possess gatekeeping authority to require parties to produce medically accurate and complete evidence of asbestos disease, they often approve settlements and Trust disbursements based solely on such limited medical statements and opinions.

b. Mass Litigation Screenings Must Be Discouraged

Many asbestos cases supported only with X-ray interpretations are generated through mass litigation screenings in mobile X-ray vans. The purpose of these screenings often is to generate lawsuits, not to provide screened claimants with medical treatment or advice. These mass screenings often are not attended or supervised by a physician, nor do physicians typically prescribe the X-rays for claimants or report the screening results to the claimant. Many screened workers never even speak with a doctor, much less meet one in person or benefit from a physical examination. The attorney's office, not the doctor, typically calls the claimant and informs him or her whether the screening was "positive."

These mass litigation screenings have been derided by the Association of Occupational and Environmental Clinics (AOEC) as "medically inadequate screening tests" that "do not conform to the necessary standards for screening programs conducted for patient care and protection." The AOEC believes that an "appropriate screening program for asbestos-related lung disease includes properly chosen and interpreted chest films, reviewed within one week of screening; a complete exposure history; symptom review; standardized spirometry; and physical examination." Other essential factors include, among other things, "timely physician disclosure of results to the patient, appropriate medical follow-up and patient education." According to the AOEC, omission of these preventive aspects in the clinical assessment of asbestos-related lung disease "falls short of the standard of care and ethical practice in occupational health."

The recruitment of plaintiffs through questionable mass litigation screenings is not new. In a case involving hundreds of tire worker claims against now-bankrupt Raymark generated by screenings in the mid-1980s (discussed *supra*), independent academic researchers concluded that "possibly 16, but more realistically 11, of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform mineral."¹² A Kansas federal judge, reviewing the same evidence, commented that screening procedures in that case had produced "a mockery of the practices of law and medicine."¹³

The increase in new asbestos cases results at least partially from these mass X-ray screenings. Yet there appears to be no medical purpose for these screenings even as thousands of potential claimants are subjected to X-ray radiation. I believe that X-rays are best left to the practice of medicine and that courts must carefully scrutinize any such medical "evidence" allegedly supportive of asbestos claims.

2. Use of Neutral Physician Panels to Review X-rays and Make Proper Medical Diagnoses

In asbestos cases, highly compensated experts often make pivotal, subjective interpretations of chest X-rays that, due to the nature of these mass suits, frequently are not subject to meaningful review by the court or an adversary. Notably, when scrutinized, the results of these mass X-ray readings often are shown to be erroneous. With billions of dollars at stake based on such expert opinions, the need for accuracy is essential to a proper distribution of limited asbestos funds.

An effective method to eliminate such bias and to ensure the accuracy and fairness of medical evidence is for courts to select neutral physician panels to review X-rays and render proper medical diagnoses. Judges have the authority to appoint neutral experts. Federal Rule of Evidence 706, for example, allows a federal court to appoint experts "on its own motion." In the late 1980s, the late federal Judge Carl Rubin, in an extremely rare but logical strategy, retained ten neutral experts to review the medical records of sixty-five asbestos claimants who had filed suit in his court.¹⁴ The experts were subject to deposition on their opinions and testified at sixteen trials over a

three-year period. Judge Rubin adopted this approach after noticing definite trends in asbestos cases filed in his court: the plaintiffs' experts always diagnosed asbestosis, while the defendants' experts rarely if ever found the disease.

In 1991, Judge Rubin reported the results of the court's expert panel. The plaintiffs' experts had diagnosed all the claimants with non-malignant asbestos-related diseases. However, the court-appointed experts disagreed with the plaintiffs' experts in a statistically significant two-thirds of the cases, finding that 42 of the 65 claimants did not have an asbestos-related condition.¹⁵ Judge Rubin concluded that Rule 706 may be essential to governing a trial and guarding against a "Battle of the Experts" whereby the jury makes a final determination based on subjective factors, such as the charm, wit, and appearance of a witness. He resolved to use Rule 706 in future asbestos cases where appropriate, so long as certain common-sense conditions were fulfilled, such as appointment of impartial experts.

Both state and federal courts should consider the use of neutral physician panels to ensure the reliability of medical evidence allegedly supportive of asbestos claims. The risks of exaggerated claims of asbestos disease by plaintiff physicians, or understated claims of disease by defendant physicians, have been sufficiently documented in the Manville and Tireworkers Medical Audits to warrant concern about the objectivity of paid medical experts in the asbestos litigation. If courts were truly interested in improving the accuracy of asbestos litigation outcomes, as they should be, this rather straightforward option would be a widely effective means of achieving that end.

D. Other Court Tools to Restore Judicial Integrity in the Asbestos Litigation

Courts have a variety of other resources on which to draw if their objective is to restore fairness and justice in the compensation of asbestos claimants. The following examples are illustrative.

1. Monitor Contingency Fees

Courts have the authority—I would say duty—to monitor and limit contingency fees to preserve a greater proportion of funds for deserving claimants. Hard-working lawyers, without question, deserve fair compensation for representing their clients. But asbestos cases are quintessential “mature” torts where the formula for building cases is well established. Almost all asbestos cases settle in large blocks with relatively little individual treatment of claims, and with minimal risk of nonrecovery to the lawyers. Given these truths, it is an injustice that lawyers routinely receive 33% to 40% of each recovery, often aggregating to millions of dollars, while sick and needy claimants receive less than they deserve.

Judge Weinstein, who supervises the Manville Trust, has observed that unreasonable and excessive contingency arrangements may exist in asbestos litigation. For example, in the rare case where attorneys’ asbestos fees were reduced from 33% to 25%, Judge Weinstein observed the routine nature of legal services in the context of large settlements:

In any mass tort case, there is an opportunity for a small number of attorneys, each individually representing large numbers of potential claimants, to secure for themselves huge attorneys’ fees under individual contingency contracts that bear little or no relation to the actual work to be done or the risks in the case. The problem is particularly acute in the context of a stipulated settlement such as the instant one, where subsequent legal work on behalf of most individual claimants will be relatively routine, mechanical and almost certain to result in recovery.¹¹⁶

As bankruptcy after bankruptcy is filed and the finite pool of resources grows smaller, judges must reassess the appropriateness of huge contingency fees that largely go unquestioned.

2. Effective Use of the Bankruptcy Forum

Bankruptcy has become an unfortunate reality of the asbestos litigation, but it also provides a unique opportunity for bankruptcy jurists to resolve asbestos cases equitably. Asbestos-related bankruptcies typically result in the establishment of an asbestos trust that pays pending and future asbestos claims against the bankrupt entity. The court and trustees are obligated to develop reliable in-take criteria by which claims are assessed and paid. Therefore, bankruptcy courts are positioned to adopt those evaluative techniques that have worked in the nonbankruptcy context, such as appointment of independent medical experts to assess alleged medical impairment (e.g., Judge Rubin) and disqualification of unreliable expert “diagnoses” based solely on mass litigation screenings (e.g., Judge Weiner).

Bankruptcy courts also have the authority to appoint neutral trustees to manage the trust, an important component of ensuring a fair and just distribution of the bankruptcy assets. The merits of selecting neutral trustees should be obvious. Yet certain members of the plaintiffs’ bar, which often dominate the creditors’ committee in bankruptcy, may attempt to influence the trustees’ selection. Bankruptcy judges must be vigilant in safeguarding the independence of the trustees on whom the court must rely so heavily.

Certain bankruptcy courts have adopted other useful strategies to evaluate asbestos claims. In the Raymark bankruptcy, for example, unimpaired claimants are not compensated unless they become sick, much like the rule followed by Pennsylvania courts. In the Johns-Manville bankruptcy, the Manville Trust audited claims to verify medical diagnoses by plaintiff experts, concluding that thousands of claimants had either no asbestos-related disease or a less severe condition than alleged. Lawyers for some claimants eventually sued the Trust, asserting that the Trust’s governing documents did not permit its medical audit policies. That litigation effectively limited the Manville audit program, but its effectiveness while active is a reminder to bankruptcy judges that audit authority is a valuable tool that should be given to trusts upon their creation. Different bankruptcy trusts could benefit by sharing such information on specific cases (claimants

typically have suits against multiple bankrupt defendants) and by alerting each other to docket management techniques that improve efficiency and fairness.

The bankruptcy court's insistence on reliable evidence of an asbestos-related disease also has a collateral, but immensely important, consequence for both claimants and the bankrupt debtor: ensuring that the debtor complies with its insurance contracts. Insurance coverage often provides a substantial amount of funds eventually paid to asbestos claimants, while also enhancing the debtor's prospects of emerging from bankruptcy. By requiring plaintiffs to submit reliable evidence of injury and causation, the bankruptcy court achieves two objectives: (1) it allows the debtor to fulfill its continuing duty to obtain quality documentary proof necessary to trigger policy coverage, and (2) it preserves the bankrupt estate's insurance assets for claimants who are legitimately sick now and in the future.

In the end, bankruptcy courts will have a significant impact on the direction and eventual resolution of the asbestos litigation. Whether that resolution will come this decade depends largely on the ability of bankruptcy and state judges to succeed where prior courts have failed.

3. Limit Punitive Damages Awards

Courts have the power to assess the appropriateness of punitive damages on the rare occasion cases are tried. The original asbestos manufacturers have declared bankruptcy, leaving more and more peripheral companies as asbestos defendants. The message of deterrence has been conveyed successfully: hide the dangers of a product and risk the solvency of an entire industry. While punitive damages certainly may be appropriate for a select few of these peripheral companies, defendants face the very real threat of sustaining duplicative and redundant punitive damages awards.

Judges possess substantial ability and discretion as a matter of law to prevent a given defendant from being assessed multiple punitive damages awards arising out of the same conduct. Courts must consider whether punitive damages have served their purpose in this litigation

and whether such damages would be better allocated to compensating sick claimants. Limitations by judges on the threat of punitive damages awards also will help lower the incentive to file claims on behalf of nonsick claimants. Moreover, punitive damages awards coupled with burdensome state appellate bonding requirements essentially have prevented higher court review of many asbestos actions. This lack of appellate review is another basis for limiting future exposure to punitive awards.

4. Reinstantiate *Forum Non Conveniens*

It is no coincidence that asbestos lawsuits cluster in patterns that are completely unrelated to where injured plaintiffs reside or where their injuries occurred. Plaintiff-favorable jurisdictions are chosen for lawsuits without a demonstrated connection between the jurisdiction and the filed claim. This trend has so distorted the judicial system that some localities have more asbestos claimants than they do residents. A reinstitution of the doctrine of *forum non conveniens* would go a long way toward providing more individualized justice for both plaintiffs and defendants.

5. Prevent Joinder, Consolidation, and Discovery Abuses

A final option for restoring judicial integrity in the asbestos litigation relates to the joinder, consolidation, and discovery abuses discussed in Section III, *supra*. The courts have the ultimate obligation to ensure that litigants' due process rights are respected—regardless of docket pressure. While liberal use of joinder and consolidation rules initially was perceived to provide a judicial solution to the asbestos litigation crisis, relaxing those rules has done little to stem the seemingly endless supply of claims by the unimpaired. Judges risk undermining basic and long-standing legal rules by continuing this tendency to group together dissimilar claims that should be managed and tried separately. Joinder and consolidation may provide temporary relief from asbestos cases, but that benefit is not, in my view, worth the damage inflicted on our legal traditions.

State judges, of course, bear the brunt of determining how to give individualized consideration to thousands of cases, a seemingly impossible task. I submit, however, that compromising legal rules, no matter how pragmatic or justified, cannot be our first line of judicial defense to a type of litigation that has defied resolution. Indeed, federal courts should feel obliged to intervene on due process and equal protection grounds if state courts are too inundated to apply state procedural rules in accordance with constitutional requirements. I remain convinced that our collective experience and judicial wisdom can arrive at a better solution, one that protects the integrity of our judicial institution while ensuring fairness to all parties in the asbestos litigation.

V. CONCLUSION

The judiciary has a vital role to play in solving the asbestos litigation crisis. The sheer number of cases, unlike any type of previous litigation, has compelled courts to value expediency in resolving claims at the expense of fairness and procedural safeguards designed to protect litigants' rights. That strategy has failed: claims are reaching record levels, more cases are being filed by individuals who are unimpaired, bankruptcies continue to mount, and limited defendant funds are compensating lawyers and the least injured claimants instead of truly sick victims.

In my view, jurists have the responsibility and authority to improve the way our Judicial System manages asbestos cases. The goal is not without obstacles. However, while this litigation has confounded courts, litigants, and academics for decades, I submit that solutions exist to the subversion of justice in these cases. Indeed, it is our duty to find them.

I agree with Senior United States Circuit Court Judge Joseph F. Weis, Jr., of the Third Circuit Court of Appeals, who in 1993 wrote:

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. 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.¹⁷

Strength of imagination, courage to enforce the law under extreme pressure, and commitment to the judicial oath are qualities of our judiciary that I believe remain intact. Now more than ever, our Judicial System needs state and federal judges to utilize their talents to restore integrity and reason to the asbestos litigation. I have confidence that they are up to the task.

¹ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

² See Letter from Christopher Edley, Jr., Professor of Law, Harvard Law School, to Robert Raben, Assistant Attorney General, at 3 (Nov. 19, 1999).

³ *Id.*

⁴ *Id.*

⁵ See Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (Institute for Civil Justice, Rand Corp., Aug. 2001).

⁶ *Id.* at 2.

⁷ *Id.* at 12.

⁸ Summary of the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 2 (Mar. 1991).

⁹ *Id.* at 14.

¹⁰ *Id.* at 26.

¹¹ *Id.* at 27.

¹² *Ortiz*, 527 U.S. at 865.

¹³ See Raji Bhagavatula et al., *Asbestos: A Moving Target*, 102, No. 5 A.M. BEST'S REVIEW 85 (Sept. 1, 2001) (estimating \$275 billion in cumulative asbestos liability); see also Michael Angelina & Jennifer Biggs, *Sizing Up Asbestos Exposure*, 16, No. 20 MEALEY'S LITIGATION REPORT: ASBESTOS 32-38 (Nov. 26, 2001) (estimating \$200 billion); *Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost \$200 Billion*, BUSINESS WIRE, June 12, 2001; Lisa Giron, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1 (noting that \$200 billion in estimated asbestos liability exceeds costs associated with Superfund, Hurricane Andrew, and the September 11 terrorist attacks).

¹⁴ See, e.g., Eric Roston, *The Asbestos Pit: An Old Issue Is Back and the Lawsuits Are Killing Shares*, TIME, Mar. 11, 2002.

¹⁵ Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 4, 2002, at 154.

¹⁶ Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

¹⁷ Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (quoting Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 384, 393 (1993)).

¹⁸ Order, *In re Joint E. & S. Dist. Asbestos Litig.*, No. 4000, 82B11656 (BRL), 2001 WL 146436, at *1 (E.D.N.Y. Nov. 7, 2001).

¹⁹ Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.*, MDL 875 (E.D. Pa. Jan. 14, 2002).

²⁰ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, App. C (E. & S.D.N.Y. 1991), vacated on other grounds, 982 F.2d 721 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993), see, e.g., ANDREW CHURG, NEOPLASTIC ASBESTOS-INDUCED DISEASE, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 339 (2d ed. 1998) ("Benign pleural disease, particularly plaque, is still seen with considerable frequency, but it generally has little or no functional import."); W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 455 (3d ed. 1994) ("Whether calcified or not, pleural plaques alone are symptomless.");

²¹ Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 CARDOZO L. REV. 1819, 1853 (1992).

²² RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS, at 2 (1985); see also VICTOR ROGGLI, ET AL., PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 176 (Little, Brown and Co. 1992) ("The great majority of individuals with pleural plaques alone have no symptoms or physiologic changes.");

²³ *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990).

²⁴ CHURG, *supra* note 20, at 339.

²⁵ DOLL & PETO, *supra* note 22, at 2.

²⁶ Parloff, *supra* note 15.

²⁷ Gerard Altonji et al., *Asbestos Claims Surge Set to Dampen Earnings for Commercial Insurers*, A.M. BEST SPECIAL REPORT, at 5 (May 7, 2001).

²⁸ See Hensler, *supra* note 5, at 6, 29.

²⁹ See Michael E. Angelina & Jennifer L. Biggs, *Asbestos Claims: Is This the Beginning or the End?* TILLINGHAST-TOWERS PERRIN REPORT 15 (Presented at the Casualty Actuaries of the Mid-Atlantic Region 2001 Regional Meeting May 30, 2001) (reproducing disease mix chart of filings with the Manville Trust in 2000).

³⁰ Memorandum by Interested Attorney (S. Kazan), at 3-4, *In re Joint E. & S. Dist. Asbestos Litig.*, 90 CV 3973 (JBW) (E.D.N.Y. 2001).

³¹ Letter from Steve Kazan to Ron Motley et al., at 1 (Oct. 24, 2001) (attached as exhibit to Memorandum by Interested Attorney, *supra* note 30).

³² Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

³³ See Parloff, *supra* note 15; Trial Tr., *Simeon Johnson v. AC&S*, Civ. No. 2000-181 (Cir. Ct. Holmes, Miss. 2001).

³⁴ *Id.*

³⁵ Letter from Manville Trustees to Judges Weinstein and Lifland, at 4 (Dec. 5, 2001).

³⁶ Hearing Tr. at 40-41, 47-48, *In re Kentile Floors*, No. 92-46466 (Bankr. S.D.N.Y. Apr. 30, 2001).

³⁷ See Parloff, *supra* note 15.

³⁸ See Second Am. Compl., G-I Holdings v. Baron & Budd et al., No. 01, Civ. 0216 (RWS) (S.D.N.Y. Jan. 25, 2002).

³⁹ See Aff. of Patricia Houser ¶¶ 14-17, *In re Manville Personal Injury Settlement Trust Med. Audit Procedures Litig.*, 98 Civ. 5693 (Mar. 31, 1999).

⁴⁰ See A.R. Localio et al., *The Manville Personal Injury Settlement Trust X-Ray Audit: An Assessment of the Identification of the Underlying Disease Process Implications for Medical Review by Certified B-Readers*, Biostatistics Section, Dept. of Health Evaluation Sciences, Penn State Univ. College of Medicine & Center for Clinical Epidemiology and Biostatistics, Pennsylvania State University (Feb. 24, 1998).

⁴¹ See Aff. of Patricia Houser, *supra* note 39, ¶ 44.

⁴² See Memorandum from Patricia Houser to Manville Trustees (May 13, 1998) (attaching table with complete data).

⁴³ *Id.*

⁴⁴ See R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32, No. 11 J. OCCUPATIONAL MED. 1088-90 (Nov. 1990).

⁴⁵ *Id.* at 1089.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1090.

⁴⁹ Lisa Girion, *supra* note 13 (quoting Tillinghast-Towers consulting actuary); see also Gerard Altonji et al., *supra* note 27, at 5 ("[I]t is common practice for [plaintiff] attorneys to package at least one 'meso' [cancer] claim together with numerous other claimants and to threaten suit on the 'meso' claim(s) if payment demands for the entire package are not met.");

⁵⁰ See *In re Arriola Energy Corp.*, 74 B.R. 784, 790-91 (S.D. Tex. 1987).

⁵¹ See Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001.

⁵² See Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, Jackson-Clarion Ledger, June 17, 2001; *Mississippi Jury Returns \$150M Verdict Against AC&S, Dresser Industries*, 3M Corp. 16, No. 19 MEALEY'S LITIGATION REPORT: ASBESTOS 4 (Nov. 9, 2001).

⁵³ See Parloff, *supra* note 15.

⁵⁴ See Harris Interactive, *U.S. Chamber of Commerce State Liability Systems Ranking Study* (Jan. 11, 2001).

⁵⁵ *Id.*

⁵⁶ See MISS. CODE ANN. §§ 11-11-3, 11-11-11 (2001); Miss. R. Civ. P. 82(c).

⁵⁷ See MISS. CODE ANN. § 11-11-11; Miss. R. Civ. P. 82(c).

⁵⁸ See Mitchell, *supra* note 52.

⁵⁹ See *American Bankers Ins. Co. v. Alexander*, Nos. 98-IA-00046-SCT, 97-IA-01271, 2001 WL 83952, at **1-6 (Miss. Feb. 1, 2001) (affirming decision of, *inter alia*, trial judge in Claiborne County to permit joinder of 1,371 plaintiffs in an insurance fraud case); see also Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, NAT'L L.J., Apr. 27, 2001 (discussing *American Bankers*).

⁶⁰ See Miss. R. Civ. P. 42(e).

- ⁶¹ *Id.*, cmt. ("The [trial] court has complete discretion within the bounds of justice and its jurisdiction.")
- ⁶² *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (statement of the Honorable Conrad L. Mallett, Jr.).
- ⁶³ *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. (July 1, 1999) (statement of Prof. Christopher F. Edley, Jr.).
- ⁶⁴ *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).
- ⁶⁵ *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993).
- ⁶⁶ *See In re North Am. Refractories Co.*, 53 S.W.3d 917, 920 (Tex. App. 2001), *op. withdrawn & superseded on different grounds*, No. 09-01-270-CV, 2001 WL 1517920 (Tex. App. 2001).
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
- ⁶⁹ *Id.*
- ⁷⁰ *See, e.g., Susan Warren, As Asbestos Mess Spreads, Sickest See Payouts Shrink, Relatively Healthy Plaintiffs Swamp Courts, Sending Companies into Chapter 11*, WALL ST. J., Apr. 15, 2002; *Queena Sook Kim, Asbestos Trust Says Assets Are Reduced As the Medically Untimpaired File Claims*, WALL ST. J., Dec. 14, 2001.
- ⁷¹ *See, e.g., Bill Burke, A Pittance for Their Pain, VIRGINIAN-PILOT and LEDGER-STAR*, May 10, 2001.
- ⁷² *Id.*
- ⁷³ *Hearings on H.R. 1283* (Edley Statement), *supra* note 63.
- ⁷⁴ Letter from Manville Trustees, *supra* note 35, at 2.
- ⁷⁵ *The Fairness in Asbestos Compensation Act of 1999: Hearings on S. 758 Before the Senate Judiciary Comm.*, 106th Cong. (Oct. 5, 1999) (statement of the Honorable Conrad L. Mallett, Jr.).
- ⁷⁶ Administrative Order No. 8, *supra* note 19.
- ⁷⁷ Memorandum by Interested Attorney, *supra* note 30, at 4.
- ⁷⁸ *See Merrill Lynch Asbestos Panel Presentation* (Executive Summary), Dec. 18, 2000; *see also* Hensler et al., *supra* note 5, at 12-13.
- ⁷⁹ First Am. Compl. ¶ 3, *Hübler v. Taylor*, C.W. No. 02-0304 (W.D. Pa. Mar. 1, 2002).
- ⁸⁰ *Id.*
- ⁸¹ *Id.*
- ⁸² *Id.* ¶¶ 3, 73-110.
- ⁸³ *Id.*, *see also* Matt Moore, *For Some Who Were Part of Asbestos Settlement, Questions Linger*, ASSOCIATED PRESS, Feb. 14, 2000 (stating that some plaintiffs in the settlement "are questioning why the monetary awards were based more on geography than sickness").
- ⁸⁴ *See Angelina & Biggs, supra* note 29, at 17.
- ⁸⁵ *See For U.S. Law Firms, Asbestos Has Evolved into a Profitable Industry over the Past 30 Years*, BUSINESS, Feb. 10, 2002; *see also* Hensler et al., *supra* note 5, at 11.
- ⁸⁶ *See F.T. McCarthy, Still Killing: Asbestos Claims: Asbestos Strike[s] Again*, ECONOMIST, Aug. 19, 2000.

⁸⁷ *See* Richard Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial*, WALL ST. J., Mar. 5, 2001.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See Ford Motor Co. Facing Billions in Safety-Related Suit Claims*, ATLANTA JOURNAL-CONSTITUTION, Mar. 24, 2001.

⁹¹ *See* Paul Sherer, *New Credit Aids Federal-Mogul in Asbestos Battle*, WALL ST. J., Jan. 4, 2001.

⁹² *See* Monte Burke, *An Affair to Remember: Crown Cork owned an asbestos company for 93 days in the 1960's. The purchase price just went way up.*, FORBES, June 11, 2001; *see also* Pa. House Declines to Pass Amendment to Bill to Limit Asbestos Liability 16, No. 11 MEALEY'S LITIGATION REPORT: ASBESTOS 8 (July 6, 2001); *Pennsylvania Governor Signs Bill Limiting Crown Cork & Seal Asbestos Liability* 16, No. 22 MEALEY'S LITIGATION REPORT: ASBESTOS 10 (Dec. 21, 2001).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See* Darrell Hassler, *Crown Cork & Seal Shuts Six Plants, Cuts 700 Jobs*, BLOOMBERG NEWS, Feb. 8, 2002.

⁹⁶ *See* Altonji et al., *supra* note 27, at 3.

⁹⁷ *See* Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, BLOOMBERG NEWS, Feb. 4, 2002.

⁹⁸ *Id.*

⁹⁹ *See* Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996).

¹⁰⁰ *See* Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999).

¹⁰¹ *See, e.g., Bernier v. Raymark Indus.*, 516 A.2d 534 (Me. 1986); *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987).

¹⁰² Administrative Order No. 8, *supra* note 19.

¹⁰³ *Id.*

¹⁰⁴ *See* Lore v. Lone Pine Corp., No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (not designated for publication).

¹⁰⁵ *See, e.g., Acuna v. Brown & Root Inc.*, 200 F.3d 335, 338-40 (5th Cir. 2000) (affirming dismissal of more than 1,600 uranium personal injury claims after plaintiffs failed to comply with trial court's pre-discovery orders requiring them to establish certain elements of their claims through expert affidavits).

¹⁰⁶ *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591-93 (Tex. App. 2001); *see also* Cottle v. The Superior Court of Ventura County, 3 Cal. App. 4th 1367, 1387 (Cal. Ct. App. 1992).

¹⁰⁷ *See, e.g., Mark Behrens & Monica Parham, Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 13-16 (2001).

¹⁰⁸ *Berenson, supra* note 16.

¹⁰⁹ *See* Robert Stephens v. Combustion Engineering, Civ. No. 11-0010 (Cir. Ct. Jasper, Miss., _____ 2002).

¹¹⁰ *See, e.g., Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 WL 72588, at *8 (D. Kan. May 30, 1990).

¹¹¹ See, e.g., *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 769 (3d Cir. 1994); *Turpin v. Merrell Dow Pharm.*, 959 F.2d 1349, 1359-60 (6th Cir. 1992); *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1165-68 (S.D. Fla. 1996); *Emigh v. Consol. Rail Corp.*, 710 F. Supp. 608, 612 (W.D. Pa. 1989); *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1223, 1250 (E.D.N.Y. 1985); *Carter v. United States*, 593 F. Supp. 505, 514-15 (W.D. Mich. 1984).

¹¹² *Reger et al.*, *supra* note 44.

¹¹³ *Raymark*, *supra* note 110.

¹¹⁴ See Carl B. Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35 (Oct. 1991).

¹¹⁵ *Id.* at 39.

¹¹⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 878 F. Supp. 473, 558 (S.D.N.Y. 1995), *aff'd in part and vacated in part*, 100 F.3d 944 (2d Cir. 1996), 100 F.3d 945 (2d Cir. 1996), and 78 F.3d 764 (2d Cir. 1996); see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 74 (Northwestern Univ. Press. 1995) ("Plaintiffs' counsel like [mass settlements] because they generally do not reduce their percentage fee per case so that, because of the large settlement amounts, their lawyers' hourly fees jump spectacularly. An audit of the Baltimore asbestos cases, for example, might show a net fee on the order of thousands of dollars per hour.")

¹¹⁷ *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 Fiberglass Corp. v. Dunn*, 510 U.S. 1031 (1993).

ABOUT THE AUTHOR

Griffin B. Bell is a senior partner in the law firm of King & Spalding.

Judge Bell was born in Americus, Georgia, on October 31, 1918, and attended public schools and Georgia Southwestern College. From 1941 to 1946, he served in the U.S. Army, attaining the rank of major. In 1948, he graduated *cum laude* from Mercer University Law School in Macon with an LL.B. degree. He has received the Order of the Coif from Vanderbilt Law School and honorary degrees from Mercer University and several other colleges and universities.

From 1948 to 1961, he practiced law in Georgia, joining King & Spalding in 1953 and becoming its managing partner in 1958.

Judge Bell was appointed by President John F. Kennedy to the U.S. Court of Appeals for the Fifth Circuit in 1961. Judge Bell served on the Fifth Circuit for fifteen years until 1976, and during that time was a director of the Federal Judicial Center. In December 1976, President Jimmy E. Carter nominated him to become the 72nd Attorney General of the United States. Judge Bell received the oath of office from Chief Justice Warren E. Berger in January 1977 and served as Attorney General until August 1979.

During 1980, Judge Bell led the American delegation to the Conference on Security and Cooperation in Europe, held in Madrid. In 1981, he served as Co-Chairman of the Attorney General's National Task Force on Violent Crime. He received the Thomas Jefferson Memorial Foundation Award in 1984 for excellence in law.

Judge Bell served on the Secretary of State's Advisory Committee on South Africa from 1985 to 1987. He also was a Director of the Ethics Resource Center for several years and in 1986 served as its Chairman of the Board. From 1986 to 1989, Judge Bell served as a member of the Board of Trustees of the Foundation for the Commemoration of the United States Constitution. In 1989, he accepted an appointment as Vice Chairman of President George H.W. Bush's Commission on Federal Ethics Law Reform. During the Independent Counsel's investigation of the Iran-Contra Affair, Judge Bell represented President Bush.

In his private practice, Judge Bell has represented clients in all phases of trial and appellate litigation. He has conducted numerous investigations, including internal reviews for E.F. Hutton's Board of Directors concerning fraud charges, and an independent review of the

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Exxon *Valdez* oil spill in Alaska commissioned by Exxon Corporation's Board of Directors.

Most recently in 2002, Judge Bell served on Secretary of Defense Donald Rumsfeld's ad hoc Advisory Committee on new rules governing military tribunals. He also completed his service on the Webster Commission, which in March 2002 issued its report on FBI security programs and Russian spy Robert Hanssen.

Judge Bell continues to practice law and is active in issues involving the United States Judicial System.