IN THE SUPREME COURT OF MICHIGAN

NO. 124213

IN RE PETITION FOR AN ADMINISTRATIVE ORDER

****

REFERENCE MATERIAL SUBMITTED BY

THE COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, MICHIGAN MANUFACTURERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES, MICHIGAN CHAMBER OF COMMERCE, MICHIGAN LUMBER AND BUILDING MATERIALS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, ALLIANCE OF AMERICAN INSURERS, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, MOTOR & EQUIPMENT MANUFACTURERS ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION, AND WASHINGTON LEGAL FOUNDATION

IN SUPPORT OF PETITION TO ESTABLISH A COURT RULE OR ADMINISTRATIVE ORDER CREATING A STATEWIDE INACTIVE ASBESTOS DOCKETING SYSTEM

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VOLUME III

Victor E. Schwartz
Mark A. Behrens
Philip S. Goldberg
SHOOK, HARDY & BACON L.L.P.
600 14th Street, N.W., Suite 800
Washington, D.C. 20005-2004
Tel: (202) 783-8400

Frederick R. Damm (Bar No. P12462)*
CLARK HILL PLC
500 Woodward Avenue, Suite 3500
Detroit, MI 48226-3435
Tel: (313) 965-8300
* Counsel of Record

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2. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

3. *In re USG Corp.*, No. 01-2094, Mem. Op. and Order (Bankr. Del. Feb. 19, 2003).

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34. *Owens-Illinois v. Amstrong*, 591 A.2d 544 (Md. Ct. App. 1991), *appealed on other grounds*, 604 A.2d 47 (Md. 1992).

35. *Bowerman v. United Illuminating*, No. X04-CV-0115436-S, 1998 WL 910271 (Conn. Super. Ct. Dec. 15, 1998).

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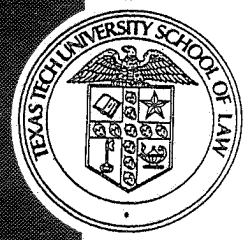

TEXAS TECH LAW REVIEW

VOLUME 33 2001 NUMBER 1

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STEWARDSHIP FOR THE SICK: PRESERVING ASSETS FOR ASBESTOS VICTIMS THROUGH INACTIVE DOCKET PROGRAMS

by Mark A. Behrens and Monica G. Parham***

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I. INTRODUCTION

The bankruptcies in 2001 of Federal-Mogul Corp., USG Corp., W.R. Grace & Co., and G-I Holdings, Inc., formerly known as GAF Corp. ("GAF"),

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* Mark A. Behrens is a partner in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C., and an Adjunct Professorial Lecturer in Law at The American University, Washington College of Law. He received his B.A. in Economics in 1987 from the University of Wisconsin-Madison and his J.D. in 1990 from Vanderbilt University, where he served as Associate Articles Editor of the VANDERBILT LAW REVIEW.

** Monica G. Parham is Of Counsel at the law firm of Crowell & Moring LLP in Washington, D.C. She received her B.A. in Political Science with Honors and Distinction and Phi Beta Kappa from the University of North Carolina at Chapel Hill in 1990 and her J.D. in 1993 from Yale Law School, where she served as a Senior Editor of the YALE LAW AND POLICY REVIEW.

and the bankruptcies in 2000 of four otherwise solvent companies saddled with asbestos litigation—Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc.—have once again highlighted the urgent need for creative and fair solutions to the national asbestos litigation problem.[1] Owens Corning, the company best known for its "Pink Panther" ads and Fiberglas® insulation, went to great lengths to create an innovative National Settlement Program to address asbestos-related liability in an attempt to stay afloat.[2] The company threw in the towel, however, after plaintiffs' attorneys who did not enter into the settlement plan continued to bring suits and demand larger and larger payments.[3] "After settling about 240,000 claims for about $1.7 billion, [Owens Corning], seeing no relief coming, filed for bankruptcy."[4] Likewise, GAF believed its options were exhausted when "despite settling more than 500,000 claims to the tune of $1.5 billion, there was no ebb in the tide of personal-injury claims."[5] In fact, GAF's general counsel said there had been a "dramatic increase in the number of claims" against the company in 2000.[6]

It was the same story at W.R. Grace, which reported that the pace of asbestos claims being filed against the company had skyrocketed, "with 81% more claims filed in [2000] than in 1999."[7] In the fourth quarter of 2000, the number of claims filed against Grace "more than doubled over the year-earlier period, and the rate continued to accelerate in the first quarter" of 2001.[8] The chairman of Federal-Mogul, which manufactures engine bearings, pistons, gaskets, and seals for automobile makers and the spare-parts market, stated that "[t]he decision [to file for Chapter 11 protection] was based on the fact that asbestos liabilities were not going to diminish. In fact, they were going

1. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, 16 MEALEY'S LITIG. REP.: ASBESTOS, No. 6., Apr. 20, 2001; *Asbestos Liability System Needs Immediate Overhaul*, NAT'L UNDERWRITER, Apr. 9, 2001, at 18; Patricia Callahan, *USG Files for Chapter 11 After Referring to Senate's Power Shift as Latest Setback*, WALL ST. J., June 26, 2001, at A4; Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, WALL ST. J., Dec. 21, 2000, at B4; Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12; Mitchell Pacelle, *Federal-Mogul Files in Bankruptcy Court After Estimate for Asbestos Liability Soars*, WALL ST. J., Oct. 2, 2001, at B11; Mark D. Plevin et al., *Don't Bankrupt Asbestos*, LEGAL TIMES, Mar. 19, 2001, at 68; Susan Warren, *W.R. Grace Seeks Bankruptcy Protection In the Face of Asbestos-Related Litigation*, WALL ST. J., Apr. 3, 2001, at B8.

2. *See* Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, *supra* note 1, at B4.

3. *See* Joseph B. White & Jim VandeHei, *Owens Corning Files for Chapter 11, Citing Escalating Asbestos-Liability Claims*, WALL ST. J., Oct. 6, 2000, at A3.

4. Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, *supra* note 1, at B4.

5. *See* Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, *supra* note 1, at B12.

6. *Id.*

7. Warren, *supra* note 1, at B8; *see also* Susan Warren, *Grace Considers Chapter 11 Filing Amid Rising Asbestos Litigation*, WALL ST. J., Jan. 30, 2001, at A4 (noting a substantial increase "in asbestos related injury claims in 2000 over 1999").

8. Warren, *supra* note 1, at B8.

to grow."[9]

Other companies are likely to follow the lead of W.R. Grace, GAF, and Owens Corning, joining the over thirty employers "already in bankruptcy protection due to potential asbestos exposure."[10] Bankruptcy likely means the loss of management positions, as well as a possible stigma for the managers themselves. The employees of companies that go bankrupt also can pay a big price. Some employees will lose their jobs or have their salaries cut. Employees, including hundreds or thousands of hourly workers, can lose their investments in the company's stock. Other groups that have invested pension funds in the debtor's stock can lose.[11]

In addition, bankruptcies put "mounting and cumulative financial pressure on the remaining defendants [in asbestos cases], whose resources are limited."[12] They also jeopardize the ability of current and future claimants to obtain full and prompt compensation for their injuries.[13] As the United States Court of Appeals for the Third Circuit recently wrote: "The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating . . . . The continued hemorrhaging of available funds deprives current and future victims of rightful compensation."[14]

Serious concerns about the asbestos compensation system have existed for some time.[15] A decade ago, things had already reached such epidemic proportions that the Chief Justice of the United States Supreme Court appointed a special Ad Hoc Committee of the United States Judicial Conference to study the problem and recommend possible solutions.[16] The Ad Hoc Committee summarized the "most objectionable" aspects of the asbestos litigation environment as follows:

> Dockets in both Federal and State courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over again; transaction costs exceed the victims' recovery by nearly two to one;

9. Pacelle, *supra* note 1, at B11.

10. *See* Gregory Zuckerman, *Specter of Costly Asbestos Litigation Haunts Companies*, WALL ST. J., Dec. 27, 2000, at C1; *Federal-Mogul Corp. Declares Bankruptcy, Cites Asbestos Suits*, 23 No. 2, ANDREWS ASBESTOS LITIG. REP. 3 (Oct. 11, 2001).

11. *See* Dunn v. Hovic, 1 F.3d 1371, 1403 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993); Patrick J. Hagan et al., *Totalling Up the Costs of Asbestos Litigation: Guess Who Will Pay the Price*, 9 TEMP. ENVTL. L. & TECH. J. 1, 14 (1990).

12. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993).

13. *Id.* at 393.

14. *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom.* Collins v. Mac-Millan Bloedel, Inc., 121 S. Ct. 2216 (2001).

15. *See generally* Judicial Conference Ad Hoc Committee on Asbestos Litigation, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 1991) [hereinafter "Judicial Conference Report"].

16. *See id.*

exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[17]

Unfortunately, in the years following the Ad Hoc Committee's report, "the already grim situation has deteriorated."[18] The number of asbestos-related matters filed in federal and state courts continues to spiral out of control.[19] The number of pending cases doubled in the six years from 1993 to 1999, from 100,000 cases to more than 200,000 cases throughout the country.[20]

The increasing caseload is not due to lack of trials and settlements; it is the result of a flood of new claims into the judicial system.[21] In the experience of just one company, Owens Corning had "been the target of 460,000 asbestos personal injury claims" from the beginning of the litigation to the time that the company filed for Chapter 11 protection in October of 2000.[22] From 1997 through 1999 new filings against some defendants ranged from 40,000 to over 60,000 per year.[23]

The substantial increase in the number of new asbestos claims does not correlate with either an increase in the number of individuals exposed to products containing asbestos, or with an increased prevalence in asbestos-related diseases.[24] Indeed, "[b]ecause of the increased awareness of dangers

17. *Id.* at 2-3.

18. *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 29 (July 1, 1999) (testimony of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Prof. Edley Testimony]; *see also id.* at 79 (quoting Dean Paul R. Verkuil, Cardozo Law School: "The rate of new filings and the growing number of pending cases vividly demonstrate a basic fact—the asbestos litigation problem is not getting better, it is getting worse.") [hereinafter Verkuil Testimony].

19. *See* Patricia G. Houser & David T. Austern, *Manville Personal Injury Settlement Trust*, *in* MEALEY'S ASBESTOS CONFERENCE 416 (1999) (showing that 500,000 claims are estimated to be filed against the Manville Personal Injury Settlement Trust over the next 50 years).

20. Prof. Edley Testimony, *supra* note 18, at 4. This figure may be conservative. *See* H.R. REP. NO. 106-782, at 18 (2000) (citing SEC filings). In their Form 10Q filings "with the Securities and Exchange Commission for the third quarter of 1999, Armstrong World Industries reported 182,000 pending claims, GAF Corporation reported 114,000, USG Corporation reported 100,000, W.R. Grace & Co. reported 102,894, and Kaiser Aluminum reported 110,599." *Id.* at 18 n.7. During the first nine months of 2000, the Manville Trust—established as part of Johns Manville's bankruptcy reorganization plan after that company sought bankruptcy protection in the early 1980s—received 39,500 new claims, which was more than the total annual filings in 1999. *See Manville Personal Injury Settlement Trust Report* (Oct. 30, 2000), *reprinted in* 11 ANDREWS' ASBESTOS 4 (Nov. 9, 2000).

21. *See* H.R. REP. NO. 106-782, at 18 (2000) (stating that "the rate of settlements and trials was not keeping up with new filings"); *see also* Judicial Conference Report, *supra* note 15, at 8 (noting that in 1991, in the federal system, nearly two new asbestos actions were filed for every action terminated).

22. *See* White & VandeHei, *supra* note 3, at A3.

23. *See* H.R. REP. NO. 106-782, at 18 (2000). Armstrong World Industries reported receiving 40,200 new claims for the first three quarters of 1999 and 71,000 claims for all of 1998. *Id.* at 18-19 n.8. Kaiser Aluminum reported 29,700 new claims for the first three quarters of 1999 and 22,900 claims for 1998. *Id.* GAF Corporation reported 42,200 new claims during the first three quarters of 1999, and W.R. Grace & Co. reported 20,629 new claims during that same period. *Id.*

24. *See In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993).

and new government regulations, use of new asbestos essentially ceased in the United States in the early 1970's."[25] Yet, new asbestos filings "continue to skyrocket."[26]

The explosion is mostly due to new filings by unimpaired claimants[27]—"people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be."[28] Individuals who have little or no physical impairment now account for as much as eighty percent of all new asbestos-related filings.[29] Many of these claimants feel compelled to file lawsuits because of fears that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable.[30] As Dr. Louis Sullivan,

25. *See id.* Almost immediately after its creation in 1970, the Occupational Safety and Health Administration (OSHA) promulgated an initial regulation limiting asbestos exposure. *See* 36 Fed. Regs. 10,466, 10,506 (table G-3) (May 29, 1971) (codified at 29 C.F.R. § 1910). Soon thereafter, OSHA revised its regulations to limit asbestos exposure even further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23,207 (Dec. 7, 1971) (emergency temporary standard); 37 Fed. Reg. 11,318 (June 7, 1972) (final standard) (codified at 29 C.F.R. § 1910). OSHA's asbestos regulations became progressively more restrictive, effectively precluding the use of asbestos in most commercial applications. *See also* American College of Chest Physicians, *Statement on the Principles of Asbestos Litigation*, *at* http://www.chestnet.org/public.affairs/asbestos.html (last visited Feb. 14, 2001) (stating that "presently, the risk of asbestos exposure is negligible").

26. *See* Prof. Edley Testimony, *supra* note 18, at 5.

27. *See Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 748 (working in conjunction with unions, plaintiffs' lawyers have "arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaques"); Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass x-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); *Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 1st & 2d Sess. 100 (Oct. 24, 1991) (testimony of Professor Brickman) ("The existence of tens of thousands of such claims is accounted for by mass screenings of industrial workers financed by plaintiffs' lawyers and usually done with the active assistance of local union officials. Often, mobile x-ray vans brought to plant sites are used for the screenings."). *See also* Patrick Lysaught, *Forces Shaping Mass Tort Litigation: Strategies for Defense Counsel*, 67 DEF. COUNS. J. 165, 165 (Apr. 2000) (noting the growing use of the Internet by plaintiffs' lawyers to recruit new asbestos claimants).

28. Prof. Edley Testimony, *supra* note 18, at 5; *see also In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (finding 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"); RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985) (stating that, "[t]he benign conditions of the pleura that are produced by asbestos are seldom of any lasting importance").

29. *See* Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, *supra* note 1, at B12 (reporting that "as many as 80% of [G-I Holdings'] asbestos settlements are paid to unimpaired people"); *see also Eagle-Picher Indus.*, 718 F. Supp. at 1057 (stating that "many claimants are functionally asymptomatic when suit is filed"); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1853 (1992) (stating that claims by the unimpaired "account[ed] for 60-70% of new asbestos claims filed").

30. *See* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND

former Secretary of the Department of Health and Human Services, testified before Congress, there are "mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation."[31] As leading commentators have noted, however, "[w]hile there are understandable legal and emotional reasons why these premature suits are being filed in huge numbers, their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."[32]

Mass filings by unimpaired claimants exacerbate the serious problems that plague the current asbestos compensation system.[33] These problems include the following: (1) the diversion of limited (and diminishing) resources away from claimants who are (or will be) sick to unimpaired, but earlier-filing, claimants;[34] (2) long delays caused by too many claims pouring into the tort system, and the desperate need for swift compensation for plaintiffs with substantial or even fatal impairments;[35] and (3) high transaction costs which waste resources that could be used to compensate sick claimants.[36] Inactive docket programs provide a solution to some of these problems.[37]

Inactive docket programs, also known as deferral registries or pleural registries, are judicially-managed docketing systems that allow claims of impaired claimants to be heard more promptly by deferring the claims of

EXPENSES 5 (Rand Inst. for Civil Justice ed., 1984). The period of time between the appearance of the first markers of asbestos exposure and the onset of asbestos-related impairments is often lengthy. *See id.* "Generally, 15 to 40 years elapse between asbestos exposure and disease manifestation." *Id.*

31. *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 43 (July 1, 1999) (statement of Louis Sullivan, M.D., Immediate Past Secretary, Department of Health and Human Services) [hereinafter "Sullivan Testimony"]; *see also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1011 (1985) ("[P]erhaps anticipating the impact of statutes of limitation and the single judgment rule on [asbestos] claims should harm materialize [in plaintiffs] in the future, or perhaps bewitched by the idea of recovery for the mere fear of future illness, courts left the gate open and the caseloads surged.").

32. Edley & Weiler, *supra* note 12, at 393; *see also In re* Asbestos Prod. Liab. Litig. (No. VI), 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996) (stating that "[o]nly a small percentage of the cases filed have serious asbestos-related afflictions" and, as a result, they "are prone to be lost in the shuffle with pleural and other non-malignancy cases").

33. *See Asbestos Prod. Liab. Litig. (No. VI)*, 1996 WL 539589, at *1.

34. *See* Edley & Weiler, *supra* note 12, at 393 (stating that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment and that many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"); *see also In re* Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 935 (Bankr. E. & S.D.N.Y. 1991) (indicating pleural claims accounted for 54.4% of all claims involving the Manville Trust).

35. *See* H.R. REP. NO. 106-782, at 10 (2000).

36. *See Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 749 (estimating that, by 1991, transaction costs will represent 70% of all funds expended in asbestos litigation while only 30% of the funds will be used to compensate victims).

37. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 (1992).

unimpaired claimants to an "inactive docket" until the individual develops an actual impairment.[38] These plans have obvious benefits for impaired claimants, who are able to move "to the front of the line" and not be forced to wait until earlier-filed claims by unimpaired individuals are resolved.[39] Removing the long delays that are characteristic of many asbestos cases can be especially important to impaired claimants,[40] particularly if the individual has a fatal disease, such as mesothelioma, or is an older person, which is frequently the case.[41] Inactive docket programs also benefit unimpaired individuals by protecting their claims from being time-barred should an asbestos-related disease later develop.[42] This would address a primary engine driving the filing of many claims by unimpaired claimants.[43]

In addition, inactive docket programs conserve scarce financial resources that are needed to compensate sick claimants—resources that are now chewed up in discovery and in legal fees to litigate "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."[44] Plaintiffs and defendants would be relieved of such costs under an inactive docket plan because all discovery would be stayed until the claimant manifests impairment and his or her claim is removed from the inactive docket to the active trial docket.[45]

There are other benefits to inactive docket programs. By removing unimpaired claims from active dockets, these plans can reduce the specter of more employers being driven into bankruptcy, thereby helping to ensure that adequate resources remain for impaired claimants in the future.[46] Such docketing plans also may slow the increasing trend of "peripheral" defendants

38. *Id.*

39. *See In re* Patenaude, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied*, 531 U.S. 1011 (2000) (stating that "the sick and dying, [and] their widows and survivors should have their claims addressed first") (citation omitted).

40. *See* Judicial Conference Report, *supra* note 15, at 11 (stating that the average duration of asbestos cases exceeds other types of cases).

41. *See* KAKALIK, *supra* note 30 (noting that the average asbestos claimant surveyed was 57 years old).

42. *See supra* notes 38-39 and accompanying text.

43. *See In re* Asbestos Cases, 586 N.E.2d 521, 523 (Ill. App. 1991) (acknowledging that many currently unimpaired claimants nonetheless bring asbestos-related claims "because they are aware of the latent and progressive nature of asbestos-related disease, and because they fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability").

44. Schuck, *supra* note 37, at 555; *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 n.1 (1999) (stating that "transaction costs exceed the victims' recovery by nearly two to one"); *id.* at 867 (Breyer, J., dissenting) (repeating the fact that "of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 632 (1997) (Breyer, J., concurring in part and dissenting in part) (noting the disparity in costs expended compared to payments made to victims).

45. *See* Schuck, *supra* note 37, at 555.

46. *See supra* note 1 and accompanying text.

being dragged into asbestos litigation.[47] These new defendants are diverse, ranging from oil companies to automobile manufacturers to small businesses; they have only attenuated connections to asbestos.[48] Courts, likewise relieved of having to address claims by the unimpaired, can dedicate greater resources to those most in need of judicial assistance—claimants truly impaired with asbestos-related diseases and other claimants in the tort system.[49] Unlike some reform proposals, under an inactive docket program, no plaintiff loses a cause of action; once someone becomes sick, his or her claim can proceed.[50]

This article provides an overview of inactive docket programs and summarizes the core components of such plans.[51] It also examines the experiences of the courts that have utilized inactive docket programs as a means of addressing the asbestos litigation crisis and proposes a model for wider application of these docketing systems.[52] This article concludes that properly managed inactive docket programs may provide an important partial solution to the ever-growing "elephantine mass of asbestos cases."[53]

II. KEY COMPONENTS OF INACTIVE DOCKET PROGRAMS

While details vary across jurisdictions, inactive docket programs generally contain the following elements: (1) a docketing procedure, wherein unimpaired claimants are put onto an inactive or deferred track, during which time applicable statutes of limitations are tolled and discovery is stayed;[54] (2) guidelines based on standard, objective medical criteria for assessing individual claimants to determine their medical status and providing for those claimants manifesting impairment to be removed from the inactive docket;[55] and (3) an ordering mechanism for cases removed from the inactive docket and placed on the active docket.[56]

47. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1; *The Asbestos Blob*, WALL ST. J., July 2, 2001, at A14.

48. *See* Warren, *supra* note 47, at B1; *see also* Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1 (discussing how many "household names" have become defendants in asbestos litigation); *Lawyers Torch the Economy*, WALL ST. J., Mar. 6, 2001, at A14 (stating that "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing").

49. *See* discussion *infra* Part II.

50. *See* discussion *infra* Part II.A.2.

51. *See* discussion *infra* Part II.

52. *See* discussion *infra* Parts IV, V.

53. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999); *see also infra* Parts V, VI (providing a proposed model inactive docket plan as a problem-solving device).

54. *See* discussion *infra* Part II.A.

55. *See* discussion *infra* Part II.B.

56. *See* discussion *infra* Part II.C.

A. Giving Priority to Impaired Claimants While Ensuring That Unimpaired Claimants Are Not Deprived of Their Right to Pursue Claims When They Get Sick

1. Creating the Inactive Docket

The first step in establishing an inactive docket program is to determine which claims to initially place on the active and inactive dockets.[57] Perhaps because the majority of current filings involve unimpaired claimants, inactive docket plans generally start by placing all claimants on the inactive docket until impairment is established.[58] Another approach would be to allow claimants with mesothelioma to be placed directly on the active docket while other claimants would be deferred until impairment is established.[59]

These approaches are preferable because they are the simplest and easiest to manage. This is important, since the goal of the inactive docket system is to minimize complexity and administrative costs.[60] However, one can imagine more complex systems that may involve multiple tracks. A more complex scheme might classify claims into the following four categories: (1) unimpairing conditions; (2) asbestosis and other non-malignant, impairing conditions; (3) mesothelioma; and (4) asbestos-related cancers.[61] These categories could be further refined by dividing some or all of them into several levels of impairment or defining them on the basis of multiple criteria.[62] The purposes of having an inactive docket plan militate against these complex approaches.[63]

57. *See* Schuck, *supra* note 37, at 571.

58. *See id.*

59. *See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 44 (1999) (written statement of Alex G. Little, M.D., past president, American College of Chest Physicians, in support of H.R. 1283). Mesothelioma "is usually associated with a history of asbestos exposure"; whereas "[l]ung cancer has several known causes" and "[c]onsiderable evidence exists to suggest that such 'other' cancers in fact are not caused by asbestos." *Id.*

60. *See* Schuck, *supra* note 37, at 572.

61. *See* H.R. 1283, 106th Cong. (1999). Similar criteria were incorporated into legislation that came out of the United States House Committee on the Judiciary in 1999. *See* H.R. REP. NO. 106-782, at 7-8 (2000). However, the proposed legislation did not place unimpaired claimants into a separate category. *See id.* Rather, it placed claimants into one of four categories with varying levels of compensation due to each, namely the following: (1) non-malignant conditions, principally asbestosis; (2) mesothelioma; (3) lung cancer; and (4) certain other cancers, such as colorectal cancer. *Id.* at 11-12. A claimant who did not meet these standards by default fell outside of the legislation's compensation scheme, and was thus, for purposes of the legislation, unimpaired. *See id.* Within these broader categories, specific medical standards would be required, such as decreases in respiratory capacity as a result of asbestos exposure, clinical evidence of disease through utilization of chest x-rays and similar devices, pathological examination of lung or other relevant tissue, and in some instances, statements by qualified physicians that asbestos-related changes were a substantial contributing factor in causing pulmonary function abnormalities. *See id.*

62. *See* Schuck, *supra* note 37, at 570-71.

63. *See id.* at 572.

2. *Tolling Statutes of Limitations*

As stated, many unimpaired claimants bring actions in order to prevent applicable statutes of limitation from running against their claims.[64] Given the latency period of many asbestos-related diseases, the applicable statute of limitation might well expire during the twenty to thirty-year period between exposure, the development of markers of exposure, and the onset of an asbestos-related disease.[65] Thus, the most important component of the inactive docket is the tolling of applicable statutes of limitations.[66]

3. *Staying Discovery*

Discovery should be held in abeyance while a claim remains on the inactive docket.[67] Precluding discovery serves the end of judicial efficiency by not clogging courts with the administrative minutiae of cases that may not be heard for years, decreases the financial impact on defendants of having to go through often repetitive rounds of discovery with unimpaired claimants, and allows unimpaired claimants to conserve their resources until such time as their condition has progressed to the level of impairment.

B. *Removal of Cases Based upon Objective Medical Finding of Impairment*

A removal process, wherein cases may be moved to the active docket, should circumstances warrant such a move, is another key component of the inactive docket system.[68] The conditions under which removal is permitted should be clearly specified in any order creating an inactive docket.[69] Under the removal process, claimants should be permitted to move their cases from the inactive docket to the active docket only if they present credible medical evidence that their condition has progressed to the point of impairment according to objective medical criteria.[70] For the system to be successful, the

64. *See supra* note 43.
65. *See supra* note 30 and accompanying text.
66. *See* Sullivan Testimony, *supra* note 31, at 43 (stating that waiver of statutes of limitation "is one of the most important policy aspects to ensure that individuals suffering from asbestos-related illnesses receive fair and adequate compensation").
67. *See* Schuck, *supra* note 37, at 571 n.116.
68. *See id.* at 572.
69. *See, e.g.*, Appendix *infra* pp. 20-25.
70. *See* American College of Chest Physicians, *Statement*, *supra* note 25 (stating that uniform criteria is needed to distinguish "insofar as is scientifically and medically feasible, those individuals suffering from present asbestos-related impairment from those individuals who, although they have been exposed to asbestos, do not now suffer from asbestos-related impairment"). Organizations such as the American College of Chest Physicians, one of the largest organizations of chest physicians in the world with over 15,000 members specializing in cardiopulmonary health, have supported the utilization of

criteria must be enforced strictly.[71] If loopholes are permitted, the wall that is intended to exist between claims by impaired individuals on the active docket and claims of unimpaired individuals on the inactive docket will be little more than a cheesecloth that unimpaired claimants can pour through to become "activated."[72] Such a system would deplete assets needed to compensate sick claimants.

C. *Assigning a Place for Impaired Claimants Removed to the Active Docket*

Once a previously inactive claim is removed to the active docket, the docketing plan must address the position that case should occupy on the active docket.[73] This ordering mechanism could take one of a number of forms. One approach would be to place those individuals most severely afflicted with an asbestos-related disease first in line.[74] Thus, an impaired claimant with mesothelioma would be placed in front of an impaired claimant with asbestosis.[75] Another approach would be to place the claim at the position it would have held on the active track if it had been placed on the track on the day the suit was originally filed.[76] Another possibility is to treat the activated claim the same as any other claim filed for the first time, whether based on an asbestos-related impairment or any other injury.[77] The claim would assume a place on the active docket consistent with other product liability and civil actions filed with the court that same day.[78]

III. SPECIAL ISSUES: FEAR OF INJURY AND MEDICAL MONITORING CLAIMS

Fear of injury (or infliction of emotional distress) and medical monitoring claims, which seek recovery in the absence of a present physical injury, may pose the "most serious practical obstacle" to the smooth and effective running of a sound inactive docket plan.[79] These claims present difficult public policy issues for a number of reasons.[80] First, as a general matter, the legitimacy of such claims is questionable and open to serious

uniform medical criteria to ensure equitable treatment of individuals exposed to asbestos. *See id.*
71. *See id.*
72. *See id.*
73. *See* Appendix *infra* pp. 20-25.
74. *See, e.g.*, *In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Administrative Order No. 3 (E.D. Pa.) (Sept. 8, 1992) (Weiner, J.) [hereinafter Admin. Order No. 3].
75. *See id.*
76. *See, e.g.*, Schuck, *supra* note 37, at 572.
77. *See id.*
78. *See id.*
79. *Id.* at 575.
80. *See, e.g.*, Temple-Inland Prods. Corp. v. Carter, 993 S.W.2d 88 (Tex. 1999).

debate.[81] These claims also present their own public policy concerns.[82] Second, claims seeking recovery in the absence of physical impairment go right to the "nettle of the problem"—these claims present the very issues that inactive docket programs exist to remedy.[83] Regardless of how one feels about fear of injury or medical monitoring claims, the unavoidable fact is that there is a limited amount of money available to compensate those individuals injured by asbestos, and that pool of funds may be exhausted at some point.[84] A respected scholar put it this way:

> As between the claims of the already impaired and the claims of those who are not now (and may never become) sick, but who genuinely fear becoming so, society should accord higher priority to the former. The issue here is not the validity of some cancerphobia claims, but their temporal priority in the sequencing of litigation and in the distribution of resources to those who are injured and need relief.[85]

The crisis in the current system will only be exacerbated if fear of injury and medical monitoring claims are permitted.[86] People who suffer actual asbestos-related injuries may be unable to obtain basic compensation for their injuries if funds are further depleted for individuals who have no present physical injury, and may never become sick.[87] The funds that exist should go to those who are sick.[88] As one federal judge has explained:

> There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants . . . . Allowing today's generation of exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.[89]

81. *See* Metro-North Commuter R.R. v. Buckley, 521 U.S. 424, 444 (1997) (holding in part, that under the Federal Employers' Liability Act, a railroad worker who had been exposed to asbestos, but had no present physical disease, could not recover medical monitoring costs as a separate injury); *id.* at 430 (rejecting "fear of disease" claim brought by a person who was exposed to asbestos, but had no physical injury); Mark A. Behrens & Phillip R. Anderson, *State Supreme Courts Retreat from Medical Monitoring Causes of Action*, L.J. NEWSLETTERS PROD. LIAB. L. & STRATEGY, Vol. XX, No. 5, Nov. 2001, at 1.

82. *See, e.g.*, Terry C. Gay & Paige F. Rosato, *Combating Fear of Future Injury and Medical Monitoring Claims*, 61 DEF. COUNS. J. 554, 562 (1994); George W. C. McCarter, *Medical Sue-Veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 283 (1993); Victor E. Schwartz et al., *Medical Monitoring—Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057 (1999).

83. *See* Schuck, *supra* note 37, at 575.

84. *See id.*

85. *Id.* at 575-76.

86. *See id.*

87. *See id.*

88. *See id.*

In light of these concerns, jurisdictions adopting an inactive docket for asbestos cases should not recognize fear of injury or medical monitoring claims in the absence of impairment.

IV. INACTIVE DOCKETS HAVE BEEN SUCCESSFUL

Fortunately, inactive docket programs do not have to be developed out of wholecloth. There are a number of jurisdictions where the device is currently utilized with success, as discussed below.

A. Massachusetts

The Massachusetts Inactive Asbestos Docket was created in September of 1986 through an amendment to an order creating a statewide consolidated asbestos docket.[90] The docket was envisioned as a mechanism by which plaintiffs who had been diagnosed with asbestos-related pleural diseases could toll all applicable statutes of limitations regarding their claims, or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy.[91] Furthermore, while on the inactive docket, cases are exempt from discovery.[92]

The Massachusetts Inactive Docket does not specify criteria to be applied in determining whether a case should be moved from the Inactive to the Active Docket.[93] If, however, a claimant and counsel feel removal is warranted, they may file a complaint in the Consolidated Docket.[94] In cases where removal is not agreed to, the judge overseeing the Docket makes the final removal determination.[95] The judge tasked with overseeing the Inactive Docket has, however, made clear to all litigants that he expects pleural cases to be placed on the Inactive Docket in order to further the Docket's goal of reducing expenditures of court time and resources trying purely pleural actions.[96] Accordingly, there have been relatively few instances of contested removals. Indeed, while placement of pleural cases on the Inactive Docket is

89. Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991).

90. *See* Commonwealth of Mass., Middlesex Superior Court, "Massachusetts State Court Asbestos Personal Injury Litigation Order," Sept. 1986 (on file with the authors).

91. *See id.*

92. *See id.* Similarly, pleural cases originally filed on the consolidated docket may be transferred to the inactive docket on plaintiff's motion and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

not mandatory, most of the primary plaintiffs' counsel involved in Massachusetts state court litigation have opted to file substantially all of their pleural cases on the Inactive Docket. As a result, the number of cases on the Active Docket has been significantly reduced, as has the amount of money spent on settlements with unimpaired claimants.

B. Cook County (Chicago), Illinois

The Circuit Court for Cook County, Illinois, led by Judge Dean M. Trafelet, likewise instituted a pleural registry system in March 1991.[97] In so doing, the court recognized that the current system posed problems for all litigants.[98] Plaintiffs and their attorneys filed cases involving no present impairment out of fear that the statute of limitations would expire before the plaintiffs' diseases progressed to a stage that was medically recognized as impaired. Defendants expended substantial sums appearing in and defending against such claims.[99]

Under the Cook County Plan, each claimant must file an Asbestos Personal Injury Information Sheet.[100] All cases in which an asbestos-related cancer or mesothelioma are alleged may proceed directly with the filing of a complaint on the Active Docket.[101] All claims registered by persons who claim a history of asbestos exposure and demonstrate objective asbestos-related physical findings (such as pleural plaques), but who either do not meet the minimum criteria for impairment as defined in the Order, or who have not manifested an asbestos-related cancer as described in the Order, are placed on the registry.[102] These claimants remain on the registry until and unless removed in accordance with procedures specified in the Order.[103] While on the registry, claims are exempt from discovery, and "shall not 'age' for any purpose."[104]

97. *See In re* Asbestos Cases (Cir. Ct., Cook Cty., Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters) (on file with the authors).

98. *Id.* at 2-3.

99. *Id.*

100. *Id.* at 7. All claims must be filed individually, as the Order prohibits claims on behalf of groups of classes of claimants. *Id.* at 15.

101. *Id.* at 8.

102. *Id.*

103. *Id.* at 10. Cases are removed in two ways, the first essentially permits dismissal of an action, and the second is designed to encompass a change in the claimant's medical condition. *Id.* A claimant may be voluntarily removed from the registry upon filing a certificate by counsel stating that the claimant is withdrawing his or her claims. *Id.* Thereafter, the tolling of pertinent timeliness provisions ceases. *Id.* A case may also be removed pursuant to the filing of a Request for Removal, along with accompanying documents and medical certifications establishing impairment. *Id.* Defendants have the opportunity to object to removal; however, the court makes the ultimate removal determination. *Id.* at 12. Once removal has been approved, the claimant proceeds to file a complaint on the Active Docket. *Id.*

104. *Id.* at 14-15.

C. Baltimore, Maryland

The Circuit Court for Baltimore City established an Inactive Docket in 1992.[105] Under the order, every claim is initially placed on the Inactive Docket, though certain claims are eligible for immediate removal.[106] For a claim alleged to be eligible for removal from the Inactive Docket, either immediately upon filing or subsequently due to changed circumstances, claimant's counsel is required to file a Request for Removal and the documentation necessary to show that the claim meets the "minimum criteria for removal," as defined within the order.[107] A defendant has fourteen days to object to the removal of any claim or claims from the Inactive Docket.[108] If the court orders the removal of a claim from the Inactive Docket, the clerk of the court is directed to place the court on the active civil docket for Baltimore City, or transfer the matter to the appropriate jurisdiction.[109] All claims that are not specifically removed remain on the Inactive Docket. A claimant whose case has been assigned to the Inactive Docket for at least twenty-four months and who does not meet the minimum criteria for removal, but contends that he or she has a compensable asbestos-related injury, may file a Petition for Removal with the administrative judge of the Circuit Court for Baltimore City.[110] Any defendants objecting to removal are thereafter given an opportunity to respond.[111] Within thirty days of the expiration for filing responses, the administrative judge must enter an order which may, in the court's discretion, establish a discovery schedule and set a hearing date.[112] After the hearing, an administrative judge may select up to ten cases, depending on the number of petitioners, and place those cases on the active civil docket to establish a test case to determine whether the plaintiffs' conditions have met the "minimum criteria for removal" and constitute compensable injuries.[113]

D. Federal Multidistrict Panel

Pursuant to the federal multidistrict litigation statute, the Judicial Panel on Multidistrict Litigation has transferred all asbestos personal injury

105. *See In re* Asbestos Personal Injury and Wrongful Death Asbestos Cases, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases) (on file with the authors).

106. *Id.*

107. *Id.* at 8.

108. *Id.*

109. *Id.*

110. *Id.* at 10.

111. *Id.* at 10-11.

112. *Id.* at 9.

113. *Id.* at 10-11.

litigation in the federal courts to MDL No: 875 (the federal "MDL panel").[114] The MDL panel is managed by Senior United States District Judge Charles R. Weiner of the Eastern District of Pennsylvania.[115]

While the MDL panel overseeing federal asbestos litigation did not establish an inactive docket per se, Judge Weiner did, through Administrative Order No. 3, implement a process prioritizing asbestos-related diseases for settlement purposes "to give a priority to malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury."[116] Under Administrative Order No. 3, a select number of cases were identified and placed into one of four disease categories.[117] In each case, plaintiff's counsel was required to have a written medical opinion by a board-certified specialist indicating that exposure to either asbestos or products containing asbestos was a contributing cause to the claimant's condition.[118] Cases in which the claimant suffered from mesothelioma or lung cancer were thereafter given priority with respect to review, settlement, or further litigation.[119] Through utilization of the ordering device, thousands of cases involving non-impaired claimants were dismissed without prejudice.[120] Accordingly, the plan that was established in Administrative Order No. 3 helped to meet the MDL court's goal of creating a device through which "broad based negotiations designed to reduce the docket backlog" could occur.[121]

V. A PROPOSED INACTIVE DOCKET PLAN FOR COURTS OR LEGISLATURES

The attached proposed model inactive docket plan incorporates and expands upon many of the concepts embodied in inactive docket orders currently in place.[122] The plan would pass constitutional muster,[123] and could

114. *See* 28 U.S.C. § 1407(a) (1993).

115. *See* Admin. Order No. 3, *supra* note 74.

116. *Id.* at 1. As the Third Circuit explained, Administrative Order No. 3 established that "in attempting to resolve cases through negotiation, cases of mesothelioma and lung cancer with asbestosis will be addressed. . . on a priority basis." *In re* Patenaude, 210 F.3d 135, 140 (3d Cir. 2000). The order also reflected the court's ultimate goal of establishing an inactive docket covering cases that involved non-malignant conditions other than asbestosis. *Id.*

117. Admin. Order No. 3, *supra* note 74, at 1. The disease categories were: (1) mesothelioma, living and deceased; (2) lung cancer, living and deceased; (3) other malignancies, living and deceased; and (4) asbestosis, total disability deceased or total disability living. *Id.*

118. *Id.*

119. *See id.*

120. *See In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Order of Oct. 16, 1997 (E.D. Pa.) (dismissing approximately 3,200 non-impairment claims without prejudice with all applicable statutes of limitation tolled).

121. *See* Admin. Order No. 3, *supra* note 74.

122. *See* Appendix *infra* pp. 20-25.

123. The constitutional underpinnings of inactive dockets have been well-documented by one of the principal commentators in the area. *See* Schuck, *supra* note 37, at 587-93 (discussing how inactive

be accomplished either by state trial courts (pursuant to their inherent authority to control their own dockets)[124] or through legislation at the federal or state levels.

Under the proposed model inactive docket plan, all asbestos claims would start on the inactive docket.[125] While on the inactive docket, the applicable statutes of limitations would be tolled, and discovery would be stayed.[126] This would address the current pressure on unimpaired claimants to bring early actions due to concerns about the running of state statutes of limitations.[127] It also would shorten delays for impaired claimants (as well as other claimants in the civil justice system), and reduce transaction costs in asbestos litigation.[128]

Through a petition and review process, all cases meeting objective medical criteria developed by the American Thoracic Society would be removed to the court's active docket.[129] This threshold assessment would ensure that all asbestos claims in the covered jurisdiction would be evaluated under the same medical standards, providing more accuracy and fairness for all involved.[130] Cases removed to the active docket would proceed as filed.[131]

docket plans comport with the right to a jury trial, full access to the courts, due process, takings issues, equal protection, and overall federalism concerns). *See also* Verkuil Testimony *supra* note 18, at 17-36 (discussing constitutional aspects of proposed federal asbestos litigation).

124. *See* Burns v. Celotex Corp., 587 N.E.2d 1092, 1094 (Ill. App. Ct. 1992) (holding that the order invoking provisions of Cook County's deferred docket order was "a traditional exercise of the court's authority to control its docket"); *In re* Asbestos Cases, 586 N.E.2d 521, 524 (Ill. App. Ct. 1991) (dismissing a challenge to Cook County, Illinois' inactive docket and finding that "the registry is a tool whereby the court may prioritize the litigation of cases already filed and [is] an example of the court exercising its inherent authority to control its docket); *see generally* Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936) (discussing a court's inherent power to control its docket pursuant to its own judgment).

125. *See* Appendix *infra* p. 21.

126. *See* Appendix *infra* pp. 21, 23.

127. *See* Appendix *infra* p. 20.

128. *See* Appendix *infra* p. 20.

129. *See* Appendix *infra* p. 21.

130. *See* Admin. Order No. 3 *supra* note 74, at 1. Utilization of uniform, standard, generally accepted scientific and medical criteria also comports with the United States Supreme Court's admonition that courts act as "gatekeepers" against "junk" science. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596-97 (1993); *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150-53 (1999) (holding that the *Daubert* factors do not apply just to scientists but also to engineers and other experts). The use of pseudo or junk science has been a particular problem in asbestos litigation. *See In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1566 (D. Haw. 1990) (noting that asbestos-related cases were often diagnosed based on "subjective declarations of shortness of breath, tiredness and general lassitude" rather than objective clinical findings); Raymark Indus. Inc. v. Stemple, No. 88-1014-K, 1991 WL 100820 (D. Kan. May 6, 1991) (finding that medical screeners routinely disregarded standards set by the American Thoracic Society and reported asbestos-related injuries despite the fact that their screenings had no clinical significance).

131. *See* Appendix *infra* p. 21.

VI. CONCLUSION

The recent bankruptcies of several large employers, and the fact that over thirty companies have declared bankruptcy due to asbestos liability costs, establishes that the current asbestos compensation system is broken and badly in need of an immediate fix.[132] The system is overburdened and continues to worsen as more claims pour in.[133] Current asbestos litigation is also too costly, and contains incentives that reflect unsound public policy.[134]

Unimpaired claimants feel compelled to file actions because of fears that statutes of limitation will bar their claims if they do not file soon after the first markers of exposure become detectable.[135] These claims exacerbate the serious problems that exist in the asbestos tort system.[136] As new claims flood into the courts, they cause further delays for persons with substantial or even fatal impairments that may have an urgent need for compensation.[137] Claims by the unimpaired also waste resources that should be used to compensate sick claimants.[138]

Inactive docket programs provide a fair and sound partial solution to some of the most serious problems in the current asbestos compensation system.[139] These dockets exist in a number of jurisdictions and have been successful.[140] Often, they have been developed in cooperation with both plaintiff and defense counsel.[141] We propose a model inactive docket program that draws strong support from these plans.[142] Our model plan permits courts to manage the increasing burden of asbestos litigation.[143] The plan could be accomplished either by state trial courts utilizing their inherent authority to control their own dockets, or through federal or state legislation.[144]

The plan focuses judicial resources, as well as the resources of asbestos defendants, on matters involving individuals who are actually impaired due to asbestos exposure.[145] At the same time, the model plan protects unimpaired claimants by tolling the applicable statutes of limitation for any case placed on the inactive docket; this is to ensure that timely filed claims are not

132. *See supra* notes 1-10 and accompanying text.
133. *See supra* notes 12-23 and accompanying text.
134. *See supra* notes 12-17, 27-32 and accompanying text.
135. *See supra* notes 27-36 and accompanying text.
136. *See supra* notes 27-36 and accompanying text..
137. *See supra* note 38 and accompanying text.
138. *See supra* note 44 and accompanying text.
139. *See supra* notes 45-50 and accompanying text.
140. *See* discussion *supra* Part IV.A-D.
141. *See supra* text accompanying notes 94-95.
142. *See* discussion *supra* Part V.
143. *See* discussion *supra* Part V.
144. *See supra* note 124 and accompanying text.
145. *See* discussion *supra* Part II.A.1.

barred.[146] Transaction costs would be reduced on premature or meritless claims because discovery would be stayed for all claims on the inactive docket.[147] Once impairment is established pursuant to fair and accurate scientifically accepted medical criteria, claimants would be able to remove their claims from the inactive docket to the active docket, where they would proceed as filed.[148]

146. *See* discussion *supra* Part II.A.2.
147. *See* discussion *supra* Part II.A.3.
148. *See* discussion *supra* Part II.B.

APPENDIX—MODEL INACTIVE DOCKET PROPOSAL
[*INSERT COURT NAME*]

IN RE: *[INSERT STATE NAME]* ASBESTOS EXPOSURE LITIGATION	)))))	Master Case No. _____

CASE MANAGEMENT ORDER
ESTABLISHING AN INACTIVE DOCKET
FOR ACTIONS INVOLVING ASBESTOS EXPOSURE

The Court enters the following Order this _____ day of _____, 200_ for all cases involving exposure to asbestos or asbestos-containing products that are presently pending or hereafter filed in this Court. Except where otherwise noted below, the [*insert state name*] and local Rules of Civil Procedure apply to these actions with the same force and effect as they would in any other action.

Introduction

1. The nature of asbestos litigation and the sheer volume of cases handled by courts across the country demonstrate the need to manage asbestos cases uniquely. Due to concerns about having their claims time-barred by applicable statutes of limitation, persons exposed to asbestos often file suit prior to the onset of any impairment or disability. Many courts and commentators have recognized that priority should be given to those asbestos claimants who are sick or dying over those who are unimpaired. *See generally* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1 (2001) (calling for adoption of inactive docket programs); Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 553 (1992) (discussing the problem of long delays in asbestos litigation); *In re Patenaude*, 210 F.3d 135, 139-40 (3d Cir.), *cert. denied*, 531 U.S. 1011 (2000) (summarizing the use of an Inactive Docket and other court procedures to give priority to "the sick and dying, their widows and survivors"); *In re Asbestos Prods. Liab. Litig.*, No. CIV.A.2MDL 875, 1996 U.S. Dist. LEXIS 6199, at *15 (E.D. Pa. May 1, 1996) (listing some of the states using Inactive Dockets in asbestos cases).

2. Accordingly, pursuant to its inherent power to control its docket, and in order to preserve and accelerate recovery for those truly injured, this Court hereby establishes an "Inactive Docket" for all actions involving allegations of alleged exposure to asbestos.

General Provisions

3. All current and future asbestos exposure-related cases are hereby assigned to the "Inactive Docket." This order hereby tolls the applicable statutes of limitation for any case placed on the Inactive Docket as of the original date of the filing of the complaint upon all defendants named in the original complaint.

4. Only cases meeting objective criteria of generally accepted medical standards related to asbestos exposure will be moved to the active docket. *See* American Thoracic Society, "The Diagnosis of Non-Malignant Diseases Related to Asbestos," 1986 *Am. Rev. Respir. Dis.* 363-68; American Thoracic Society, "Lung Function Testing: Selection of Reference Values and Interpretative Strategies," 1991 *Am. Rev. Respir. Dis.* 1202-18.

5. Cases on the Inactive Docket will not be subject to other Orders of this Court relating to asbestos exposure litigation or to any discovery so long as they remain on the Inactive Docket.

6. Once a case is activated, all dates and deadlines set forth in other Orders of this Court relating to asbestos exposure litigation or the [*insert state name*] Rules of Civil Procedure will apply as if the Complaint had been filed on the date of the Court's activation Order.

7. "Future claims" shall be defined as all claims for asbestos exposure filed and served in this court after the date of this Order.

8. A "Board-certified pulmonary specialist" or "Board-certified internist" means a physician currently actively licensed to practice medicine in one or more of the states of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).

9. A "certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored x-ray interpretation course.

10. "ILO grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis" (1980).

11. "Chest x-rays" means chest films taken in four views (PA, Lateral, Left, and Right Oblique) that are graded quality 1 for reading according to the ILO criteria. All chest x-rays must be read by a certified B-reader.

12. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing, and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and which are performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. § 718.103 and Appendix B thereto or in the ATS guidelines in 144 *American Review of Respiratory Disease* 1202-

18 (1991). A Board-certified pulmonary specialist must interpret all pulmonary function testing. Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, *Clinical Pulmonary Function Testing*, 2d Edition, Intermountain Thoracic Society (1984). Predicted values for diffusing capacity shall be those published by Miller, et al., 127 *American Review of Respiratory Disease* 270-77 (1983) and shall take appropriate account of smoking history and exposure to silica.

13. A "Board-certified pathologist" shall mean a physician currently actively licensed to practice medicine in one or more states who holds primary certification in anatomic pathology or combined anatomic or clinical pathology from the American Board of Pathology and whose professional practice is principally in the field of pathology and involves regular evaluation of pathology materials obtained from surgical and/or post-mortem specimens.

14. The "minimum criteria for activation" shall be defined as follows:

a. Chest x-rays which, in the opinion of a certified B-reader, show small irregular opacities of ILO grade 1/0; *and* pulmonary function testing that, in the opinion of a Board-certified pulmonary specialist or internist, shows either:

(i) FVC less than or equal to 80% of predicted with FEV-1/FVC greater than or equal to 75% (actual value), *or*

(ii) TLC below 80%

or

b. Chest x-rays which, in the opinion of a certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; *and* pulmonary function testing that, in the opinion of a Board-certified pulmonary specialist or internist, shows either:

(i) FVC less than or equal to 80% of predicted with FEV-1/FVC greater than 70% (actual value), *or*

(ii) TLC below 80%

or

c. Chest x-rays which, in the opinion of a certified B-reader, to a reasonable degree of medical certainty, show asbestos-related bilateral diffuse pleural thickening graded C2 or greater on the ILO scale *and* which includes the blunting of at least one costophrenic angle *and* pulmonary function testing that, in the opinion of a Board-certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either:

(i) FVC less than 75% of predicted with FEV-1/FVC greater than 70% (actual value), *or*

(ii) TLC less than 75% of predicted value with FEV/FVC greater than 70% (actual value).

or

d. If a claim does not otherwise meet clinical criteria for activation, and if representative lung tissue is available, a report by a Board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is otherwise uninvolved with any other process (*e.g.*, cancer or emphysema) demonstrate a pattern of peribronchiolar or parenchmal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of fibrosis.

or

e. A diagnosis of cancer which is demonstrated by a medical report of a Board-certified internist, pulmonary specialist, oncologist, or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

or

f. Where the claimant is deceased, and as an alternative to the above, a medical report evidencing an appropriate diagnosis of pathological asbestosis greater than Grade 1B as defined in the *Archive of Pathology and Laboratory Medicine*, Asbestos-Associated Diseases, Volume 106, No. 11, Appendix 3 (Oct. 8, 1982).

Placement On, and Removal From, The Inactive Docket

15. Each plaintiff's counsel bringing a future claim shall, regardless of the disease process alleged, file a Complaint and an Inactive Docket Claimant Information Form (Form 1) with the Court and effect service on each person or entity named as a defendant in accordance with the [*insert State name*] Rules of Civil Procedure and law relating to service of complaints. Filing fees will be paid only with respect to the filing of the lawsuit, and not with respect to the filing of the Inactive Docket Claimant Information Form (Form 1).

16. The filing of the Inactive Docket Claimant Information Form (Form 1) with the Court shall constitute placement of the claim on the Inactive Docket. Claims on the Inactive Docket will not be subject to the provisions of discovery rules or this Court's Case Management Order for Asbestos Exposure-Related Liability Actions for so long as they remain on the Inactive Docket. Upon the death of an Inactive Docket Claimant, proper notification of death and substitution of parties will suffice for new notification as to any potential wrongful death claim.

17. All filings shall be on an individual basis. No claims on behalf of a group or class of persons shall be permitted.

18. For each such future claim alleged by the claimant to be immediately eligible for removal from the Inactive Docket, or which the claimant later alleges is eligible for removal because circumstances have

changed, claimant's counsel shall also file with the court a Request for Removal (Form 2), and the documentation necessary to show that the claim meets the "minimum criteria for removal" set forth in Paragraph 14 above. The Request for Removal (Form 2) and the supporting documentation for each claimant shall be served on all defendants for that claim.

19. Within fourteen (14) days of the submission required by Paragraph 18 above, any defendant objecting to the removal of any claim or claims from the Inactive Docket shall set forth those objections by motion. These written objections shall be filed with the Court and served on claimant's counsel and all defendants. The claimant will have eleven (11) days to file a reply. The reply shall be filed with the Court and served on all parties. The Court will appoint an independent expert to review these filings and the Court will then decide the issue based upon the court appointed expert's opinion and the papers submitted by the parties. Hearings will be conducted only if the Court so orders on its own motion, or if, the Court, in the exercise of its discretion, grants a party's request for a hearing.

20. If no defendant files an objection, the Court shall enter an order directing that the case be removed to the Active Docket.

21. No case shall be deemed to have been removed from the Inactive Docket until so ordered by this Court. Upon removal from the Inactive Docket, the Clerk of Court shall promptly provide a copy of the removal order to all parties to the case.

22. No defendants shall be prejudiced by a plaintiff's failure to include the defendant's name on plaintiff's service list for a case in which that defendant has been named as a party. Plaintiffs are required to accurately list each named defendant on the service list and provide this list to defense liaison counsel at the time the case is filed. If a plaintiff fails to serve a defendant named in a case, the Inactive Docket shall not toll the statute of limitation as to that defendant.

23. A defendant who does not receive notice of a request for removal may assert any objections it may have to removal of the claim from the Inactive Docket once it receives notice of the removal of the claim from the Inactive Docket.

24. All future claims not removed shall remain on the Inactive Docket, but shall be subject to removal in the future if the "minimum criteria for removal" established by Paragraph 14 above are satisfied at that time. All such claims that remain on the Inactive Docket shall be considered inactive claims.

Miscellaneous Provisions

25. The terms "non-impaired" and "asbestos-related" are used in this order solely as a means of separating cases and ordering them for disposition, and the fact that such terms are employed in this order shall not be deemed an

admission by any person or entity, or serve as a basis for a finding of liability against any person or entity. The existence of an Inactive Docket, or the fact that a claim is or is not on the Inactive Docket, shall not be admissible in any proceeding for any purpose, except for a proceeding concerned with the placement or removal of claims on the Inactive Docket. In addition, the use by the Court of any standard measurement for testing or the reporting of test results shall not be deemed an adoption or endorsement of that particular standard by the Court or the rejection of any alternative standard, but reflects only the selection of a reasonable system to help ensure that uniform standards are applied.

26. The fact that a claimant satisfies the exit criteria for non-malignant lung changes shall not be construed as an admission or determination that the claimant in fact has an asbestos-related condition, nor shall the exit criteria be cited, referred to, or otherwise used at trial of any case for the determination of whether a plaintiff in fact has an asbestos-related condition. Rather, such criteria are established only for the purpose of determining when a claimant may remove a claim to the Active Docket.

27. Placing a claim on the Inactive Docket is not to be considered as an admission by any claimant that the claimant has not developed an asbestos-related condition.

28. The Clerk of Court shall assign a docket number with an inactive status code to each claim placed on the Inactive Docket, which shall be the docket number and inactive status code assigned when the case was filed. When a case is removed from the Inactive Docket, it shall be given an active status code.

29. The filing by any defendant of any papers in connection with objecting to a request by a claimant to exit the Inactive Docket, or the appearance by any defendant at a hearing ordered by the Court in connection with such a request shall not be deemed an "appearance" submitting to personal jurisdiction in the event the claim is placed on the Active Docket and proceedings commence.

So ordered:

_____ _____

The Honorable_____ Date

FORM 1

[INSERT COURT NAME]

IN RE: *[INSERT STATE NAME]* ASBESTOS EXPOSURE LITIGATION	)	Master Case No. _____
[insert name of plaintiff], Plaintiff, v. *[insert name of defendant]*, Defendant.	)	Civ. Act. No. _____

INACTIVE CIVIL DOCKET PLAINTIFF INFORMATION FORM

Date_____

1. Claimant's Name_____
   Last First Middle
2. Claimant's Address_____
   _____
   _____
3. Claimant's Social Security Number_____
4. Claimant's Date of Birth_____
5. Claimant's Marital Status: Married ___ Single ___ Widow(er) ___ Divorced ___
6. **If the Claimant is a different person than the person whose alleged injurious exposure to asbestos gives rise to this claim, give the following information concerning the alleged exposed person:**
   Name_____
   Last First Middle
   Date of Birth_____
   Date of Death (if applicable)_____
   Cause of Death (if applicable)_____
   Social Security Number_____

Claimant's relationship to alleged exposed person:

_____

7. Claimant/Alleged Exposed Person's occupation when exposed to asbestos:
   _____
8. Claimant/Alleged Exposed Person's beginning and ending dates (month/year to month/year) of exposure to asbestos:
   From: _____ To: _____
9. Specific asbestos related condition claimed to exist (check all that apply):
   Non-malignant Pleural Changes _____ Dx Date _____
   Asbestosis _____ Dx Date _____
   Mesothelioma _____ Dx Date _____
   Bronchogenic (Lung) Carcinoma _____ Dx Date _____
   Other Cancer (specify site) _____ Dx Date _____
   Other Condition (specify) _____ Dx Date _____
10. The following material is attached in support of the claim that the conditions indicated in paragraph 9 above are asbestos related (include all required by the Rule):
    Chest X-ray Report _____ dated _____
    Pulmonary Function Test _____ dated _____
    Pathology Report _____ dated _____
    Report of Pulmonary Specialist _____ dated _____
    Report of B-Reader _____ dated _____
    Report of Cancer Specialist _____ dated _____
    Other (specify) _____ dated _____
11. Certification: I hereby certify in accordance with the provisions of _____ that I am counsel for the above-named claimant, that the information set forth to support the claim being filed herein is true and correct, that payment for this claim or one substantially similar to it as to this claimant has not been received from any entity which could be listed as a defendant, and that there is no other claim or proceeding pending in this or any other jurisdiction on behalf of the claimant or exposed person listed herein which is substantially similar to the present claim in its factual allegations.

_____
Signature of Claimant's Counsel

FORM 2

[*INSERT COURT NAME*]

IN RE: *[INSERT STATE NAME]* ASBESTOS EXPOSURE LITIGATION	)	Master Case No. _____
[*insert name of plaintiff*], Plaintiff, v. [*insert name of defendant*], Defendant.	)	Civ. Act. No. _____

REQUEST FOR REMOVAL FROM INACTIVE CIVIL DOCKET

Date_____

1. Claimant's Name _____
   Last First Middle
2. Date Original Complaint was filed: _____
   Inactive Docket Number: _____
3. I hereby request removal of the above-captioned case from the inactive civil docket.
4. The specific asbestos related condition(s) claimed is/are:
   _____
5. The reason(s) for this request is/are as follows (here state the specific reasons for removal, specifying which criteria have been satisfied and why the criteria have changed):
   _____
   _____
   _____
   _____
6. Attached are copies of tests, reports, opinions, and/or raw data supporting removal to the active docket in accordance with Attachment A, Paragraph 15 of the Court's Case Management Order Establishing an Inactive Docket.
7. I certify that the foregoing information is true and correct.

_____
Signature of Claimant's Counsel

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15 HVJLPP 541
(Cite as: 15 Harv. J.L. & Pub. Pol'y 541)

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Harvard Journal of Law and Public Policy
Spring, 1992

*541 THE WORST SHOULD GO FIRST: DEFERRAL REGISTRIES IN ASBESTOS LITIGATION

Peter H. Schuck [FNa1]

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H. Schuck

Most commentators agree that tort litigation today is a highly unsatisfactory system for resolving claims arising out of workers' exposure to asbestos. [FN1] Specific proposals for reforming asbestos litigation, however, are almost always controversial-- both in the obvious political sense that the interested parties disagree about them, and in the more objective sense that the proposals inevitably entail some difficult tradeoffs among competing, ***542** widely-shared social values. [FN2]

The reform that I present here--that courts with large asbestos caseloads mandate deferral registries [FN3]--will also be controversial. Deferral registries are judicially-managed docketing and calendaring systems that alter the priority of trials of asbestos cases, deferring the claims of unimpaired asbestos claimants and permitting them to return to the active docket only when they develop an actual impairment or when the claims of the already-impaired plaintiffs have been heard. Ideally, registries would be created in a coordinated fashion under the guidance and authority of a legislature or a judicial conference. If necessary, however, federal district courts (and presumably state courts as well) could properly create these registries on their own initiative.

Several distinctive features of asbestos litigation militate in favor of a deferral registry. These include: (1) the great variability of the strength of claims at the time of docketing; (2) the high transaction costs of litigating asbestos claims; (3) the desperate need of many ill claimants for swift compensation; (4) the diversion of many of the available resources to unimpaired (but earlier-filing) claimants; and (5) the capacity of registries to preserve and marshal those resources more fairly and effectively on behalf of all claimants, rather than those who happen to get to them first.

Given these features of asbestos litigation, we should not be surprised to learn that some plaintiffs' and defendants' lawyers, encouraged by some trial judges, have voluntarily agreed to defer some of their asbestos claims so that other, more serious ones can be tried earlier. [FN4] Most courts, however, including ***543** some with very large asbestos caseloads, still have not established registries. This failure to institute registries where they would seem most serviceable probably reflects a number of factors. Some trial lawyers may oppose registries for strategic reasons, while some trial judges may doubt whether they can mandate them in the absence of the parties' consent. Finally, some lawyers, judges, and litigants may not understand how registries actually operate.

This article seeks to illuminate the strategic considerations, dispel any doubts about judicial authority, and draw upon the operational experience of existing registries to demonstrate their merits from both policy and fairness perspectives. The article consists of four parts. Part I provides necessary background concerning asbestos litigation. After noting certain problematic aspects peculiar to this litigation and summarizing available medical knowledge, I argue that, in light of the political branches' failure to address the formidable problems of efficiency

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and fairness raised by this litigation, the courts must devise strategies of their own to manage those problems more effectively.

Part II details the special features of asbestos litigation that make it so difficult to manage. I analyze four distinct types of individual and social costs--transaction costs, delay costs, horizontal inequity costs, and other queuing costs--that are associated with this litigation. These costs, I argue, are greatly magnified by the traditional first-in, first-out (FIFO) priority rule for bringing cases to trial.

In Part III, I describe the essential elements of a deferral registry system and contend that such a system, as an alternative to the FIFO priority rule, can significantly reduce these costs. Additionally, I explain why reliance upon voluntary creation of such registries is unlikely to be an effective response.

In Part IV, I urge that Congress and state legislatures mandate deferral registry systems by statute or, failing such action, that the Judicial Conference do so by rule. I also consider whether federal trial courts already possess the legal authority to mandate registries on their own--that is, without benefit of ***544** either statute or the parties' agreement. After reviewing a variety of potential constitutional and other legal objections to either statute-based or rule-based deferral registries, I conclude that ample legal authority now exists for both approaches.

I. ASBESTOS LITIGATION AND THE NEED FOR COURT-INITIATED REFORMS

When asbestos fibers are inhaled, [FN5] they may lodge and accumulate in the lungs, where they may contribute to various pathological conditions, discussed below. Long-term asbestos exposure, scientists agree, can contribute to a variety of conditions ranging from non-impairing physiological changes that are undetectable without clinical testing, to serious, sometimes fatal, diseases. Because of poor data on exposure levels and limited knowledge about precise dose-response relationships, estimates of future asbestos-related illness and death are uncertain. [FN6]

Five conditions should be distinguished for present purposes. Moving from the least to the most serious, these are: (1) pleural plaque; (2) pleural thickening; (3) asbestosis; (4) lung and certain other cancers; and (5) mesothelioma (a rapidly-fatal form of cancer). [FN7] As explained in Parts II and III, the distinction ***545** between pleural plaques and other asbestos- related conditions is particularly salient to the proposal to use deferral registries to reform asbestos litigation. [FN8]

The five major asbestos-related conditions differ along a number of dimensions. Pleural plaques [FN9] have been described as "discrete, elevated, opaque, shiny, rounded lesions, . . . diffuse or nodular," of the parietal pleura [FN10] or diaphragm. [FN11] They strongly indicate asbestos exposure. [FN12] Pleural thickening [FN13] includes certain types of lesion of the visceral pleura. [FN14] Unlike ***546** plaques, pleural thickening may have non-asbestos causes. [FN15] Asbestosis [FN16] involves non-malignant lesions of the lung tissue itself, varying from small areas of basal fibrosis to a diffuse, fine fibrosis. [FN17] This condition may be diagnosed clinically and functionally, [FN18] or pathologically. [FN19] Each of these three conditions manifests a range of developmental patterns, [FN20] local and diffuse extents, [FN21] clinical significance, and prognosis. [FN22] Malignant mesothelioma, a usually rapidly-fatal form of cancer, [FN23] is caused ***547** almost exclusively by asbestos. [FN24] Lung cancer can also be caused by asbestos, a risk greatly compounded by smoking. [FN25] Whether asbestos exposure is associated with other types of cancer remains a matter of considerable debate in the medical and legal communities. [FN26]

Among non-malignant conditions, the most important distinction for present purposes is between claimants who are functionally impaired at present, and those who are not. Impairment is usually defined in terms of a combination of chest x-ray and pulmonary function (breathing test) results. [FN27] The medical literature indicates that claimants with pleural plaques unaccompanied by asbestosis are ordinarily symptomatically ***548** unimpaired. [FN28] Some studies have associated pleural plaques with comparatively modest breathing decrements, [FN29] but many such studies have been criticized on various grounds. [FN30] It is clear that diffuse

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pleural thickening and some of its variants can produce significant impairments, [FN31] although thickenings are less common than plaques. [FN32] Asbestosis " s ymptoms include shortness of breath, coughing, fatigue, and vague feelings of sickness. When the fibrosis worsens, shortness of breath occurs even at rest. . . . In severe cases, death may be caused by respiratory or cardiac failure." [FN33]

Reliable data establishing the number of unimpaired asbestos***549** claimants are difficult to obtain because the degree of functional impairment of the exposed population is unknown; because the number of pleural plaques, diffuse pleural thickening, and asbestosis depends upon many variables; [FN34] and because the relative incidence of these three conditions among the total exposed population is also unknown. [FN35] Despite these uncertainties, the number of unimpaired claimants is almost certainly large. [FN36] More generally, recent claims experience and medical studies suggest that the disease mix of claims may be becoming less severe, presumably because of declining exposure levels over time and the delayed effects of protective regulations adopted years ago. [FN37]

***550** Another important unknown concerns the proportion of unimpaired claimants who will suffer asbestos-related impairments in the future. [FN38] Pleural plaques are certainly markers of prior asbestos exposure, but the existing studies provide no evidence that they independently cause any progression of further asbestos-related conditions. [FN39] As for asbestosis, the evidence suggests that once the disease is contracted, the symptoms tend to become progressively more serious with continued occupational exposure. In some cases, this progression occurs even after exposure ceases. [FN40]

As a result of the conditions caused by asbestos exposure, roughly 100,000 suits for asbestos-related personal injuries are currently pending, about two- thirds of them in the state courts. [FN41] The number of new federal court filings increased steadily during most of the 1980s, although it declined in 1989 and 1991. [FN42]

***551** In 1990, the asbestos litigation caseload reached such crisis proportions that the Chief Justice of the United States appointed a special ad hoc committee of the Judicial Conference to report on the magnitude of the problem and to recommend possible solutions. This committee's report, issued in March 1991, called for Congress to adopt legislation to forestall the "impending disaster." [FN43] This concern was evidenced even more dramatically several months later when the Judicial Panel on Multidistrict Litigation, which in the past had refused to order a national consolidation of federal court asbestos cases, abruptly reversed its position. It has since transferred more than 27,000 cases for pre-trial purposes to Judge Charles Weiner in the Eastern District of Pennsylvania, leaving him with broad discretion to adopt new strategies for managing this caseload. [FN44] As discussed in Part II, the problems inherent in asbestos litigation are by no means confined to the immense caseload and the burden imposed by sheer numbers.

***552** The courts have been left to grapple with these problems with little help from other governmental institutions. Individual states are manifestly incapable of offering any kind of systematic response to the proliferation of asbestos-related diseases or to tort litigation's inability to deliver prompt and effective justice to the parties affected. [FN45] Congress, which could develop a more comprehensive approach, has studiously avoided doing so with respect to either compensation or mass asbestos litigation management. [FN46]

No great mystery surrounds the reasons for Congress's inaction. Asbestos claims present a particularly difficult social policy problem, [FN47] precisely the kind from which most politicians will shrink. Any meaningful solution would require cooperation or acquiescence among influential portions of the business community, organized labor, and the plaintiffs' bar. It might require the federal government to accept a financial and managerial role in solving the problem that would have great political and fiscal implications. To count on Congress to initiate legislation in the face of such divergent forces is to place one's faith in tooth fairies. If the possibility of a comprehensive Congressional solution to the asbestos litigation crisis seems remote, the more limited remedy of establishing or authorizing deferral registries seems eminently feasible.

Federal regulatory agencies have been more responsive to the problem. The Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA) have each been regulating asbestos almost from their inception ***553** twenty years ago. [FN48] Although the agencies' regulations will prevent much

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asbestos-related disease, most of the asbestos claims with which the courts must deal now and in the near future result from exposures that occurred long ago, before the regulators addressed this problem. If present arrangements continue, many of the cases that are already in the pipeline will take decades to reach the courts.

If the asbestos litigation crisis is to be effectively managed, then, it is the courts that must do the managing. In doing so, moreover, they will have to rely largely on the tools and resources that they already possess. The obligation of the courts to take greater initiative in this matter does not arise out of any duty to address problems that the political branches are too timid to confront. Rather, it arises from a judicial duty to render justice in cases that come before them bearing legally cognizable claims.

II. THE PROBLEM

By any reasonable standard and from any detached vantage point, the current system of tort litigation is a singularly incompetent mechanism for remedying the personal injuries that asbestos plaintiffs suffer. [FN49] This system imposes unnecessarily high costs on individuals who have already suffered enough, and on the society that seeks to compensate them swiftly, fairly, and efficiently. It is trite but unfortunately true that the only real beneficiaries of this system are the lawyers on both sides who litigate these claims. [FN50]

The problem can perhaps be best understood by considering four different kinds of costs created by asbestos litigation. These are: transaction costs, delay costs, horizontal inequity ***554** costs, and other queuing costs. Although I refer to them all as costs, they include not only what economists would call efficiency (or welfare) losses but also unfairness effects.

A. Transaction Costs

The costs associated with litigating, adjudicating, and (if it is found to be valid) paying a claim--the costs of the lawyers, courts, and claims administrators--are often called transaction costs. [FN51] Some such costs, of coursw, would have to be borne by any system in which entitlements must be proven to be recognized. By any standard, however, the transaction costs of asbestos litigation are extraordinarily high. [FN52]

The recent Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation described these costs as "unconscionable" in terms both of individual trials and aggregate litigation. It referred to one federal court trial in Cleveland involving only four plaintiffs but between forty-one and fifty-eight lawyers; according to the judge's estimate, this trial generated transaction costs of between $3 million and $7 million. [FN53] Aggregate transaction costs may form as much as seventy percent of asbestos litigation costs. An analysis of contemporary asbestos claims, specifically those pending against the Manville Trust in April 1991, [FN54] led the court to conclude that " b ased ***555** on information now available, including overheads, insurance costs and expenditures for courts, . . . the percentage available to plaintiffs is probably close to 30 cents for every dollar expended." [FN55]

These costs are incurred, of course, for claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be). Even in the case of valid claims and justified awards these costs are profoundly troubling. Although transaction costs are always necessary to achieve social goals, many of the costs generated by asbestos litigation are simply deadweight losses, pure social waste that imposes costs with few offsetting benefits. These costs, moreover, are distributed in perverse, regressive ways that increase the wealth of plaintiffs' and defendants' lawyers and their satellite experts and support staffs at the expense of asbestos- injured workers at the lower reaches of the income distribution.

Finally, excessive transaction costs are a needless drain on the private funds available for compensating asbestos claims. As of July 1991, approximately fourteen former manufacturers of asbestos products had filed for bankruptcy. [FN56] This number does not include the numerous smaller distributors that have been targeted in the

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wake of absent manufacturers and who have in turn become insolvent. Even the remaining manufacturers in the industry could come under additional financial pressures if present litigation trends continue. [FN57] Although the ***556** remaining defendants may still have insurance that covers much of their liability, the recent flurry of bankruptcies strongly suggests that this coverage may be inadequate for some. [FN58] Principles of joint and several liability that apply in a majority of jurisdictions, when coupled with the bankruptcy of companies that accounted for a very large fraction of the industry's market share, [FN59] suggest that some of the defendants who are still solvent may be subject to liabilities larger than either they or their insurers anticipated and larger than their own activities warranted.

The most recent round of "tort reform" statutes that limit joint and several liability have only marginally reduced these financial pressures. [FN60] In general, the new provisions do not apply retroactively to claims accruing or filed prior to their date of enactment or effectiveness, which implicates a substantial fraction of asbestos claims. For example, although the California statute abolishes joint and several liability for non-economic damages (which includes most of the damage awards in asbestos cases), the statute applies only to cases accruing after June 4, 1986. [FN61] According to some asbestos defendants, this excludes an estimated 35% of the 7300 pending cases from the reform. [FN62]

The recent Manville Trust settlement in some ways magnifies these uncertainties. Some asbestos defendants fear that the settlement may further reduce their ability to take advantage of the statutory reforms of joint and several liability, while limiting ***557** the availability of other possible defenses. [FN63] These cumulating possibilities create an overhang of contingent liabilities. This seems likely to impair the companies' access to the capital markets, further increasing their operating costs.

The question of whether sufficient assets will be available to pay valid asbestos claims in the future is obviously critical. This will depend upon the number of claims, their quality, the size of awards, [FN64] the particular companies against whom judgments are entered, plaintiffs' and defendants' litigation costs, [FN65] disease detection technology, and other factors. Because these variables are uncertain, the future trajectory of asbestos claiming is also uncertain. [FN66]

Some asbestos defendants may not possess enough money to pay present and, if trends continue, future claimants the current litigation value of their claims. [FN67] Any gap between those claims and the assets available for payment will grow steadily as more claims are filed, especially if more defendants become insolvent. [FN68] This means that parties in the asbestos litigation are competing with their own lawyers for access to the same rapidly shrinking fund. Behind the rhetoric of the lawyer-client relationship lies a grim reality: the lawyers and their clients are engaged in a tragic, zero-sum game. [FN69]

***558** B. Delay Costs

Asbestos litigation is remarkably protracted. As the Judicial Conference Report noted, its average duration far exceeds the eighteen-month standard, which federal laws prescribe as a target; [FN70] instead, the period between filing and disposition of such cases was almost thirty-one months between 1983 and 1989. [FN71] Cases often take a good deal longer than this. [FN72] Some of the delay simply exacerbates the kinds of transaction costs already discussed. An example is the cost that lawyers must bear in carrying cases for long periods of time without payment, costs that are reflected indirectly in plaintiffs' lawyers' contingent fees and defendants' lawyers' charges to their clients. Delay also imposes other, and in some ways more worrisome, kinds of costs. Delay increases uncertainty about legal outcomes, which in turn impedes settlements, insurance determinations, individual and business planning, investment in capital markets, and other socially desirable activities that cannot be undertaken in the absence of reasonably predictable outcomes. [FN73]

Even more troubling, perhaps, is the fact that delay, particularly ***559** in the context of asbestos litigation, raises a risk that recoveries will not occur until they can no longer do the claimant much good. Many plaintiffs die of asbestos-related diseases before their cases reach trial, and even those who survive the protracted proceedings may

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have to suffer their disabilities without the resources to which their claims entitle them. [FN74] Furthermore, in jurisdictions in which pre-judgment interest is not awarded, delay deprives successful claimants of the time value of money.

C. Horizontal Inequity Costs

Asbestos litigation treats asbestos claimants in ways that violate the strong norm of "horizontal equity," an important element of fairness. This norm has two postulates. The first and more fundamental one is that like cases should be treated alike. In asbestos litigation, however, essentially similar cases often receive unequal treatment. The second and reciprocal postulate is that unlike cases should not be treated alike; yet in practice, essentially dissimilar asbestos claims often receive equal treatment. I devote more attention to the second, as it is particularly tractable to the registry approach discussed in Parts III and IV.

Similar Cases, Unequal Treatment. Disparities in outcome among similar cases are endemic to a tort system that relies so heavily upon ad hoc juries, differently skilled trial lawyers, and costly evidence. [FN75] Such variations are magnified in the context of mass asbestos litigation, which involves the processing of approximately 100,000 pending claims in a large number of jurisdictions in a socially heterogeneous country such as the United States. While some disparities are unavoidable, those in asbestos litigation seem to exceed any reasonable bounds. In 1985, Rand researchers studying the then-completed asbestos cases in ten courts with large asbestos caseloads concluded that "similarly injured workers are treated quite differently." [FN76] This ***560** situation has not improved since then. [FN77] As recently as May 1991, the courts presiding over the disposition of the Manville Trust noted that "enormous" disparities in outcomes among similar asbestos cases continue to occur. They described trials as "much like a lottery with substantially higher verdicts in New York City, East Texas and parts of California than other parts of the country." [FN78]

Such a strong, persistent pattern of disparate outcomes in similar cases obviously offends our most fundamental notions of fairness. For that reason, this pattern is profoundly demoralizing to many asbestos claimants and their families. To the extent that the general public perceives this pattern, the demoralization is bound to be more widespread, discrediting our system of justice. More speculatively, it seems likely to inculcate a "lottery" mentality on the part of those exposed to asbestos and their lawyers, encouraging them to bring many claims of doubtful validity that may divert the courts' attention from more substantial claims. [FN79]

Dissimilar Cases, Equal Treatment. Asbestos cases are docketed, like civil litigation generally, more or less in the order in which the plaintiffs' lawyers file and prosecute the cases during the pre-trial and trial phases. This "first-in, first-out" (FIFO) priority ***561** is so familiar that we take it for granted, especially because it has considerable superficial appeal in any claims processing system. Temporal priority, after all, rewards those who take the trouble and initiative to assert their claims with dispatch. Thus it creates desirable incentives to obtain information and to act upon it. Absent some more compelling, neutral criterion of priority, FIFO seems as good as, if not better than, any other system.

Still, FIFO is nothing more than a convention. It ordinarily meets our needs, but in asbestos litigation (which is anything but ordinary) FIFO can and often does have quite unfortunate consequences. Two features that are characteristic of, if not wholly unique to, asbestos litigation create special problems: the rapidly diminishing pool of assets available for victim recoveries and the great and perhaps growing variation in the value of claims that are now pending and, if current trends continue, are likely to be filed in the future.

It is especially striking how strongly these two characteristics undermine the moral and efficiency justifications for the FIFO rule. The shrinking asset pool available from defendants has already been discussed and needs little elaboration. If FIFO remains the rule, to the extent that the asset pool is smaller than the claims' value, some claimants will receive their full entitlement while others filing in the same jurisdiction and possessing equal or stronger claims will receive little or nothing. This disparity of outcomes will occur for no better reason than that they were exposed later, contracted their disease later, learned of their disease later, selected a lawyer who filed the

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claim later, or were grouped by their lawyer with a batch of other claims scheduled for later settlement. In such a situation, it seems manifestly unfair to treat claims so differently by distributing the asset pool on the basis of such arbitrary, adventitious, and morally irrelevant factors. Only if we were unable to identify any more compelling criterion might we be justified in continuing to apply the FIFO rule.

Fortunately, we are not in this bind because a second characteristic of asbestos litigation--the great variability in claims value--suggests that a better priority criterion is available. Because this variability is central to the argument against FIFO processing and in favor of registries, it requires more extensive discussion.

***562** For present purposes, the value of an asbestos-related claim is simply the expected monetary value of that claim to the plaintiff in the current litigation market. It is equivalent to the expected jury award that the claim will produce [FN80] discounted by a number of factors--the litigation costs that the plaintiff and his lawyer must incur to obtain the judgment, [FN81] the value of the time required to accomplish this, and the probability that some or all of the judgment will not be collectible from the defendant(s). This discounted value should be equivalent to the claim's current settlement value. [FN82]

Which variables determine the value of different asbestos-related claims? [FN83] According to the professional staff at the Center For Claims Resolution, almost all of the variation in claims value reflects eight factors: (1) the severity of current symptoms; (2) the prospect of more serious symptoms in the future; (3) the plaintiff's age; (4) his smoking history; (5) his asbestos exposure history, including the product type and the length and intensity of exposure; (6) the availability of certain defenses, such as the statute of limitations, comparative or contributory fault, state of the art; (7) the jurisdiction where the claim is to be tried; and (8) how the claim will be tried, such as whether the claim is part of a mass consolidation in which punitive damages may be assessed. [FN84]

These variables can occasionally interact in ways that result in certain unimpaired plaintiffs receiving higher jury awards than certain impaired plaintiffs, [FN85] but the most important variable is the severity of current symptoms. Although relatively few ***563** pleural plaque claimants are impaired according to established medical criteria, [FN86] they do occasionally recover substantial jury awards. [FN87] It is not clear why juries award damages to plaintiffs who are not yet, and may never become, impaired. Some of these awards may actually be for emotional distress associated with fear of asbestos-related disease. [FN88] Some may be intended to compensate exposed individuals who are assumed (not always correctly) to have incurred some expense to file their claims. Some may reflect the jury's prediction (which as we have seen cannot now be substantiated) that presently unimpaired plaintiffs will become impaired later. Others may reflect the jury's belief that, contrary to the weight of medical evidence, even pleural plaques are generally impairing. Still others may reflect a desire to punish defendants who distributed asbestos products. Finally, some may be simply irrational.

The striking variability in claim severity (and in claim value, notwithstanding these jury awards for pleural plaques)--most importantly, the difference between the presently impaired and the presently unimpaired asbestos claimants--seriously weakens the case for FIFO treatment of all claims. The FIFO rule does not presuppose that all claims are the same, of course, but it does imply that the only difference among cases that should be relevant to priority is the time when the claims were filed.

My earlier critique of FIFO is strengthened greatly, moreover, when one considers the reasons that presumably lead asbestos plaintiffs to file when they do--and most particularly, the reasons why so many of them file before they suffer actual impairment. In jurisdictions that treat unimpairing pleural conditions and subsequent impairing conditions as a single cause of action for statute-of-limitations and single-judgment-rule (sometimes called the rule against splitting causes of action) purposes, plaintiffs probably file early to avoid a subsequent bar. Coupled with a single-judgment rule, the statute of limitations creates a poignant, inescapable dilemma for the ***564** unimpaired asbestos claimant. Such claimants must file a pre-impairment claim knowing that they may recover little or nothing unless an impairment appears by the trial date (hardly a contingency one would hope for); once this claim is litigated, moreover, he ordinarily will be barred from suing for a subsequently manifested impairment. [FN89] Even in the majority of jurisdictions where subsequent cancer is now considered a distinct disease and a separate cause of action for single-judgment-rule and statute-of-limitations purposes, [FN90] a registry would preserve

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subsequent manifestations of non-cancer conditions that the single-judgment rule and the statute of limitations might otherwise bar. [FN91]

Another probable reason for the large number of unimpaired claims relates to the practice of some labor unions and plaintiffs' lawyers who engage in aggressive claim-solicitation campaigns on a mass basis designed to multiply the number of filed cases, thereby increasing the pressure on defendants to settle cases wholesale. [FN92] Whatever the merits and ethics of such practices, [FN93] they are likely to produce an indiscriminate aggregation of cases by the lawyers such that the variation in claim values within case batches is relatively large. [FN94]

***565** Although these rationales for pre-impairment filing advantage such claimants under the FIFO rule, they have nothing to do with the factors--the seriousness of the claimants' injuries and the value of their claims--that should be relevant to case-processing priorities in a context of highly variable claim values. In contrast, many asbestos claimants who file relatively late in the game, and thereby receive a lower priority under the FIFO rule, presumably do so because of the latency periods associated with more serious impairments, especially mesothelioma, [FN95] that tend to be longer than those necessary to produce pleural plaques. [FN96] This suggests that applying a FIFO rule in this context is not merely irrational; it is actually perverse. It implies that the claims that present the most serious, fully developed pathologies, the highest litigation values, and the most urgent cases for immediate resolution through trial or settlement, are precisely the claims that FIFO systematically disadvantages.

The unfairness of this perverse operation of FIFO in the context of asbestos litigation can also be demonstrated by applying philosopher John Rawls' vivid test for a just rule: it is one that people would choose behind a so-called "veil of ignorance" that prevents them from knowing how the rule would affect them personally. [FN97] Few, if any, individuals would favor a FIFO rule if, ignorant of their own position in the asbestos litigation queue, they knew only that (1) many workers have been exposed to asbestos, (2) asbestos exposure can be dangerous or even lethal, and (3) impairment often takes many years to occur. [FN98] Instead, one strongly suspects, such individuals would favor a rule that gave at least temporal, if not substantive, priority to the most seriously injured and deferred the claims of the presently unimpaired. [FN99]

***566** The horizontal equity gains that a registry would yield are even more striking when compared to consolidation, which is the leading non-FIFO docket- clearing technique that courts employ. Consolidation, to which some overburdened courts have recently turned out of desperation, [FN100] involves the aggregation of numerous asbestos claims into a single trial or a small number of group trials. The potential for horizontal inequity here is twofold. First, the criteria by which cases are chosen and grouped for consolidation are likely to be crude and categorical compared to the actual variability of the underlying claims. [FN101] Second, the jury awards are also likely to be similarly crude and categorical. [FN102]

Yet another source of horizontal inequity in the present system, probably the most important because it is surely the most common, relates to the way in which asbestos cases are settled. Typically, the lawyers for both sides agree to settle batches of cases (say, thirty to fifty at a time). The strategic considerations animating the lawyers on both sides to agree to defer some claims while batching and settling others are complicated and contingent. They include concerns about claims quality, reputation, cash flow, proximity of trial dates, time value of money to lawyers and clients, insurance coverage, [FN103] and other factors. [FN104] ***567** Whatever the precise reasons may be, the batches ordinarily consist of a mix of claims involving very different conditions and different levels of impairment, and including a substantial fraction of unimpaired claims. The lawyers, however, agree upon a single lump-sum settlement amount for the whole batch, which defendant(s) must pay. It is then up to the plaintiffs' lawyer to decide how she will allocate that sum among her many clients in that batch, a decision in which the defendants play no part. [FN105]

D. Other Queuing Costs

Because the FIFO rule generates the kinds of horizontal inequities that I have already discussed, it produces several other types of queuing costs as well. The FIFO rule tends to reduce the value to plaintiffs of any given

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recovery by creating a systematic mismatch between the opportunity to recover and the need for recovery. This mismatch occurs because the value of any given sum of money to the person who receives it depends on when he receives it. The unimpaired asbestos claimant may be able to sue now but will have a greater need for the money later, if and when more serious disabilities develop. In contrast, the claimant who waits to sue until an impairment appears and he needs the money may be too late to recover anything.

The FIFO rule also generates considerable waste in the form of litigation by plaintiffs who are presently unimpaired and who will never become impaired. These cases, which are now thought to be numerous, are not simply premature; they should never have been brought, and the transaction and other costs which they occasion need never have been incurred. [FN106] It is true that under a FIFO rule, one cannot know in advance which particular unimpaired claimants will remain unimpaired. ***568** Ignorance in this regard is hardly an argument in favor of the FIFO rule; instead, it constitutes a strong indictment of it. Current scientific opinion strongly suggests that this category represents a very large number of cases [FN107] and thus is the source of great social waste. One should therefore prefer a priority rule that, unlike FIFO, minimizes that waste. The registry system discussed in Part III furnishes such a rule. [FN108]

III. A PARTIAL SOLUTION: THE DEFERRAL REGISTRY

Although it is impossible to quantify the aggregate transaction, delay, horizontal inequity, and queuing costs produced by the FIFO rule, these costs are certainly large enough to cause grave public concern. More to the point, deferral registries can significantly reduce them.

Such registries already exist in about a dozen federal districts, including some (though not all) districts with very large asbestos caseloads. [FN109] These registries were established through different modes, involving some combination of private ***569** agreement and court order, but the consent of the parties has generally played an important, at times essential, role in setting up the systems. Most registries have been consenual at their inception with negotiations and stipulations subsequently embodied in binding court orders. [FN110] In addition, the plaintiffs' lawyers largely administer the systems through their decisions about which cases to defer voluntarily and about which deferred cases to reactivate. The court is most likely to be involved at this later stage, although even the reactivation decisions may not require much court supervision.

A consensual basis for registries, however, is manifestly inadequate. Existing registries cover only a small fraction of the asbestos caseload. This quite limited use is not surprising, even recognizing that they can have important benefits for both impaired and unimpaired plaintiffs and their lawyers (that is, cases involving impairment can be tried first, while the other cases can be deferred until an impairment occurs and recovery for impairment has been justified), and for defendants and their lawyers (they can minimize transaction costs and avoid paying those who are not, and will never become, asbestos-impaired). Limited registry use is unsurprising because some asbestos litigants retain overriding tactical objections to registries. [FN111] Most of the resistance has come from plaintiffs' lawyers but some defendants (albeit ones with a relatively small share of the caseload) have also objected. [FN112] Most important, a court's authority ***570** to establish deferral registries over counsel's objections has not yet been established.

Although the details of the existing registries differ, they share a common goal--to supplant the FIFO-based priority of presently unimpaired claimants with a priority that favors claimants who are already impaired--and a common structure. There are three essential elements of a fully-developed registry scheme: assessment, classification, and a multi-track docket and calendar system.

1. Assessment. For a registry to work, an assessment of claimants' asbestos-related health status must be made at some point--at the point of the initial impairment classification, at the point at which reactivation is sought, or both. In existing registries, plaintiffs' attorneys voluntarily submit cases for deferral; thus the assessment issue ordinarily will not arise until the attorney seeks to have the case restored to the active trial docket.

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Whenever it occurs, the assessment could be conducted in a number of ways. It could be based, for example, on certification by the plaintiffs' lawyers or by medical experts designated by the parties or by the court. An assessment might be required of all claimants or confined to some defined sub-set. Accurate assessments could be encouraged through a variety of mechanisms such as credentialing or assurances of neutrality.

2. Classification. Whether a registry is voluntary or mandatory, a system for classifying claimants' health status into diagnostic categories on the basis of the assessments is needed. The classification categories could be structured in a variety of ways with the categories being more or less numerous and refined. [FN113] A complex scheme might classify them into four categories (that is, unimpaired, asbestosis, mesothelioma, and cancer), and these categories could be further refined by dividing ***571** some or all of them into several levels of impairment, or defining them on the basis of muttiple criteria--for example, level of impairment, degree of anatomical abnormality, and length and intensity of exposure. [FN114]

Because the main purpose of a registry is to economize on costs, including administrative costs, a simple classification system would appear to be most attractive. The most straightforward, easily-administered scheme would divide claimants into two categories--impaired and unimpaired--and that is essentially what most of the existing registries do. [FN115]

3. Multi-Track Docket/Calendar System. If two categories were used, the court would establish and administer a two-track docketing and calendaring system. The court would assign unimpaired claims to a slow or "on hold" track on which they would remain pending evidence of impairment, while assigning impaired claims to a fast track for trial. [FN116] As noted above, the system could in principle provide for more than two tracks; a more refined classification of cases and a more differentiated ***572** sequencing of cases for trial would be necessary. Again, the need to minimize complexity and administrative cost militate in favor of fewer tracks.

For those claims relegated to the slow track, defendants must waive any defenses based upon the passage of time or changed conditions since the initial filing of the claim. [FN117] In this context, the registry provisions should be especially clear about the particular claims and conditions that the registry is preserving against both the statute of limitations and the single- judgment rule. [FN118] Tolling of the limitations period is essential to deferral, which in turn usually seems preferable to dismissal. [FN119] For this reason, the court should probably effectuate the deferral by issuing a stay rather than by dismissing the case outright. [FN120]

Once cases are initially assigned to a particular track, their position within the track could be based upon the conventional FIFO rule. Alternatively, it could be based upon their severity as determined by an assessment and classification. [FN121] The system could also provide for certain "exceptional circumstance" or "good cause" exceptions to the priority rule applied to a given track. As discussed immediately below, it must also provide for the positioning on the fast track of previously-deferred cases that later manifest an impairment.

The order establishing the registry must specify the conditions under which a claim on the slow or "on hold" track can ***573** move back to the fast track. [FN122] Certainly, subsequent evidence of an impairment that would have initially qualified the claim to remain on the fast track ahould result in its immediate reassignment to the fast track. The criteria of impairment, of course, might be defined in a number of different ways. [FN123]

The order should also address the issue of the position that a case, previously deferred but now reactivated, should occupy on the fast track. One possibility is to give it the same FIFO-based position that it would have occupied vis-a-vis other fast track claims given the date on which it was oroginally filed. Another is for the case to go to the end of the fast-track line. Other intermediate alternatives can readily be imagined. [FN124] In this connection, a significant consideration is that even if the reactivated case were placed at the end of the fast-track line, the case may still get to trial faster than if there had been no registry. In states awarding prejudgment interest for personal injury claims, [FN125] courts must also decide how registry filing interacts with the date when retroactive interest begins to accrue. [FN126]

***574** Finally, the system could be designed to recognize certain other justifications, apart from impairment, for

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moving a slow track case back to a faster track. Deferral of unimpaired asbestos claims is an exception, albeit an important and valid one, to the legal system's general presumption in favor of FIFO case processing. Society might decide, however, that there are special circumstances in which the policy in favor of deferral should yield to other policies, perhaps equitable in nature, that favor a return to FIFO. It might decide, for example, that elderly claimants [FN127] or those who can show that delay might jeopardize important evidence [FN128] should have their day in court sooner rather than later, even if they are still unimpaired.

A number of other issues must be resolved in advance if the system is to have broad public support. Five issues seem particularly important: scientific accuracy and change; cancerphobia claims; medical monitoring claims; the risk of insolvent defendants; and legal structure.

Scientific accuracy and change. How accurate will the system be when general diagnostic criteria are applied to the clinical features of individual claims? [FN129] How responsive will the system be to future developments in scientific data and methodology? This is essentially a problem that concerns the system's assessment and classification standards and procedures. These must be sufficiently flexible and precise to accommodate and incorporate new technical developments, especially as the changes bear upon earlier detection, pleural changes, levels of impairment, ***575** and the relationship among them. [FN130]

Cancerphobia claims. How should the system deal with claims based not upon a present functional impairment but rather upon a present fear of future impairment? The most notable example, of course, is a claim for "cancerphobia," the fear of contracting cancer in the future. This condition is now compensable in most jurisdictions, usually under the more general rubric of infliction of emotional distress. [FN131] Cancerphobia claims are difficult to refute, especially in the pre-trial stage. Virtually all asbestos-exposed but unimpaired workers can plausibly assert a cancerphobia claim at an early stage of the litigation, and in fact almost all of them do so. [FN132] Although some of these claims may well turn out to be specious, it is necessary to make a categorical decision about how the registry will treat such claims.

Cancerphobia constitutes perhaps the most serious practical obstacle to the creation of a registry. To the extent that juries are awarding damages for cancerphobia as an immediate harm, claimants will surely feel themselves disadvantaged by being placed on a deferred track and will demand the right to retain the FIFO-based priority they enjoy under the existing system. But if all unimpaireds who assert cancerphobia claims remain on the fast track, there will be virtually no claims left to defer to the slow track. The registry will become pointless and its potential advantages will vanish. [FN133]

This is the nettle of the problem and we must grasp it one way or the other. As between the claims of the already impaired and the claims of those who are not now (and may never become) ***576** sick, but who genuinely fear becoming so, society should accord higher priority to the former. [FN134] The issue here is not the validity of some cancerphobia claims, but their temporal priority in the sequencing of litigation and in the distribution of resources to those who are injured and need relief.

Medical monitoring claims. The cancerphobia phenomenon is related to another difficult issue: how should a registry system deal with unimpaired plaintiffs' claims for medical monitoring, which are increasingly being recognized, particularly in non-asbestos contexts. [FN135] One might argue that the very premise of a registry--that future impairment should return claimants to the faster track--underscores the value of detecting future deterioration in the medical conditions of the presently unimpaired, especially the presently unimpaired who can nevertheless establish cancerphobia. As a practical matter, moreover, claimants are unlikely to forego voluntarily a cause of action that forces defendants to pay for this detection.

On the other hand, medical monitoring does entail risks and costs, and is justified only in certain circumstances. [FN136] The purpose of medical monitoring is to use screening to detect latent diseases at a stage early enough to improve medical outcomes, either because the prognosis is better when the disease is treated early or because the disease may be treated with less risky or costly methods if caught early. Yet some evidence suggests that these conditions are not met in the case of asbestosrelated ***577** diseases. In many cases, effective screening procedures

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are not yet available, and in others early detection does not improve the prospects of cure. [FN137] Where this is true, it seems difficult to justify expending the diminishing resources available for compensation in this particular way.

In jurisdictions that permit medical monitoring recoveries despite these objections, however, it may be necessary to design the registry system so that defendants pay some or all of these costs in certain categories of cases. In defining these categories, an effort should be made to limit this kind of relief to those claimants, if any, for whom medical monitoring is likely to be cost-justified. [FN138]

Insolvent defendants. A compelling argument for the registry is its capacity to reduce the risk of future insolvency to the remaining asbestos manufacturers, a risk that the status quo magnifies. [FN139] How, then, should a registry manage the risk that a defendant will become insolvent during the time it takes for the impairments of presently unimpaired, slow-track claimants to develop?

This is a difficult problem, but the inability to devise a completely satisfactory solution should not foreclose the establishment of a registry. The risk of defendants' insolvency will exist in any event; the only question is which claimants must bear it. The registry's answer is that those who are presently unimpaired should bear the risk. [FN140]

***578** Legal structure. As indicated earlier, all existing registries have been established by consent, most of them formalized in court orders. Other things being equal, consensual remedies should be preferred, because they can be tailored to the preferences of the parties and to local conditions, rather than having to conform to specifications prescribed by a general rule imposed by a distant rulemaker. In the unique area of asbestos litigation, however, other things are not at all equal. First, the advantages of having diverse docketing and calendaring systems for asbestos cases seem slight compared to the disadvantages. Asbestos is clearly a national (indeed, an international [FN141]) problem. Creating registries in some states and districts but not in others would greatly exacerbate the already significant problems of forum- shopping and inter-jurisdiction disparity. These problems are especially worrisome in asbestos litigation because of the large number of states in which the asbestos defendants do business; this allows plaintiffs the option to sue in almost any state and to choose between the state and federal courts in that state. [FN142] More generally, limiting registries to those to which the parties consent would undervalue the enormous social interests at stake in asbestos litigation, interests that transcend the parties' private stakes.

Even if asbestos litigation were not a national phenomenon, consent-based registries would not fully address the problems discussed in Part I. From a social perspective it is difficult to see any strong policy argument against a properly designed and operating system, but from the narrower perspective of individual parties and their lawyers, [FN143] there may be sound tactical ***579** reasons to oppose a registry. Unanimous consent to a registry, then, is more likely to be the exception than the rule--as its limited use so far suggests. [FN144]

Few asbestos lawyers, I suspect, would quarrel with the general proposition that the more seriously injured claimants should get to trial first. Many of them nevertheless object to a registry center on four specific grounds: [FN145] limited resources, defenses, carrying costs, and overbreadth.

Limited resources. Lawyers opposing registries often cite the inadequacy of the resources available for the satisfaction of asbestos claims. Plaintiffs' lawyers emphasize the risk that presently unimpaired claimants who are deferred to a registry will find only insolvent defendants when their impairments finally appear and their cases are restored to the active, fast-track calendar. Defendants' lawyers may or may not agree that their clients' resources are inadequate to cover valid claims. Some, however, stress a different but related risk--that a registry, by giving priority to the most serious cases first, will frustrate their strategy of trying the weakest claims first, winning early victories, and increasing the pressure on plaintiffs' lawyers to settle. Instead, they argue, a registry will concentrate the highest plaintiffs' verdicts and defense litigation costs up front and increase pressure on defendants to settle. This will simply exacerbate their cash flow problems, pushing them into premature insolvency. Defendants prefer that weak cases be dismissed outright and early. [FN146]

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***580** Ironically, the limited funding available for asbestos compensation is actually the strongest possible argument in favor of a deferral registry. A registry is designed to ensure that those funds are allocated to the most serious claims first. To the extent that it avoids litigation of the many unimpaired cases that will never mature into impairments, it will increase the funds available to compensate genuine injuries. In any event, it will distribute the existing funds more fairly and efficiently.

Number of claims. Some defendants' lawyers note that a registry would increase the number of claims in several ways. They fear that a registry, by making it less risky for claimants to file prematurely, would stimulate plaintiffs' lawyers to engage in the mass solicitation of cases that would not otherwise have been filed. On the other hand, the incentives to file asbestos claims under the existing system are already so great that a registry seems unlikely to attract many additional ones. By ensuring that the unimpaired cases will be tried later, a registry may discourage the filing of claims, or at least significant litigation expenditures on them, until an actual impairment appears.

Carrying costs. Even claims deferred by a registry impose on the parties (and in the case of plaintiffs, on their lawyers) a variety of costs: filing; monitoring; periodic reporting to court; maintaining expert witnesses; the risk of stale evidence; establishing and maintaining financial reserves; increased liability insurance premiums; communication with clients, insurers, and perhaps stockholders; and the adverse effect on business and investor confidence generated by the extensive "contingent liabilities" carried in defendants' accounting records. [FN147]

***581** Here again, however, a registry compares quite favorably with the existing system. Carrying costs are inescapable for cases that are tried later. A registry does not change this fact; it only alters the order in which cases are processed. Indeed, to the extent that it discourages the filing or processing of weak or premature claims, a registry will reduce carrying costs. Moreover, a registry should cause the most serious cases such as mesothelioma claims to be tried earlier, before the claimant dies and his heirs are deprived of whatever evidence the decedent might have presented himself.

IV. LEGAL ISSUES

If, as I have argued, deferral registries represent a sound, indeed essential reform in asbestos litigation, and if the parties cannot be expected to establish them in all circumstances where they are socially desirable, Congress should enact a statute requiring federal courts and encouraging [FN148] state courts to establish them by consent if possible, but by court rule or order if necessary. Failing Congressional action, the Judicial Conference of the United States should adopt a uniform rule governing registries (perhaps allowing some local variation) in the federal courts, while state legislatures should require registries for the state courts, perhaps using the offices of the National Commission on Uniform State Laws to minimize state-by-state variation.

In the remainder of this part, I analyze the legal arguments likely to be raised against legislatively-mandated or judicially-mandated registries implemented by courts, which challenge the court's authority on a variety of non-constitutional and constitutional grounds. I conclude that a well-designed registry should withstand these challenges.

A court that seeks to mandate a registry without benefit of a specific registry statute could invoke a number of sources of legal authority. These include: (1) existing general statutes; (2) some Federal Rules of Civil Procedure; (3) the court's general rule-making authority; (4) the court's inherent power to control its own docket; (5) the authority of the Judicial Panel on Multidistrict Litigation (JPML or MDL); and (6) analogous judicial ***582** actions. Even assuming that the court-mandated registry were authorized by one or more of these sources or indeed by a registry statute, it could of course still be challenged on several constitutional grounds. In the last two sections of this paper, I discuss the sources of judicial authority and the question of constitutionality.

A. Sources of Judicial Authority

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General statutes. In recent years, Congress has explicitly confirmed the district courts' authority to establish their own calendaring priorities. In a 1984 statute, for example, it directed each federal court to "determine the order in which civil actions are heard and determined." [FN149] This requirement that courts set their own priorities was recently applied to uphold the authority of a court rule that assigned the lowest priority to diversity cases. [FN150]

Even more recently, Congress provided further authority and encouragement for courts swamped with asbestos cases to take innovative steps to conserve scarce judicial resources. In 1990, the Civil Justice Reform Act required each district court to implement a "civil justice expense and delay reduction plan," to be developed after consultation with an advisory group or by the Judicial Conference. [FN151] The Act provides that each district court
shall consider and may include . . . systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of ***583** the case . . . [FN152]

It also authorizes, inter alia, the use of court-designed "mediation, minitrial, and summary jury trial" techniques. [FN153] Registries, I shall argue, are considerably less problematic than these Congressionally-approved techniques. [FN154]

Federal Rules of Civil Procedure. Rule 1 of the Federal Rules of Civil Procedure provides that the Rules should "be construed to secure the just, speedy, and inexpensive determination of every action." This clause is to be applied in construing other rules, [FN155] including Rule 40, which requires further local rules for assigning cases for trial in "such . . . manner as the courts deem expedient . . . ." Registry filing would have to comply with state law tolling principles with respect to statutes of limitations; commencement of an action by filing a complaint under Federal Rule 3 is insufficient for this purpose if, for example, state law also requires service. [FN156] After tolling requirements are met, however, Rule 1 could be applied to alter the sequence of subsequent proceedings. [FN157] Cases could be deferred as a matter of trial scheduling. [FN158]

***584** The reference in Rule 1 to "speedy" determinations should pose no problem for a registry that defers certain cases for the sake of hastening the trial of others. [FN159] A deferral registry is a form of schedule or calendar, of which Rule 79(c) requires courts to direct the preparation. Rules 16(b)(4) and (5), which govern scheduling and planning, require courts to enter a scheduling order, including trial dates and "any other matters appropriate in the circumstances of the case." The scheduling order is to be preceded by consultation with the parties, with or without a conference, except where exempted by local rules. The Advisory Committee notes that this requirement "permits each district court to promulgate a local rule under Rule 83 exempting certain categories of cases in which the burdens of scheduling orders exceed the administrative efficiencies that would be gained." [FN160] The Committee also expected that "district courts undoubtedly will develop several prototype scheduling orders for different types of cases." [FN161] A deferral registry tailored to the special features of asbestos cases would constitute such a prototype. [FN162]

General rule-making authority. The federal courts are empowered to "prescribe rules for the conduct of their business consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court [under section 2072] . . . ." [FN163] Although the issuance of new rules requires that ***585** courts comply with certain procedures, [FN164] some existing local court rules that govern calendaring priorities may well authorize court-mandated registries without the necessity for issuing new rules. [FN165]

Inherent judicial power to control docket. The Supreme Court has stated that a court possesses "the inherent power to control its own docket." [FN166] This power includes the incidental power to stay actions pending the outcome of relevant judicial or other proceedings. [FN167] Courts also have the power to dismiss cases pursuant to "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." [FN168] In the context of a registry, however, this power to dismiss, as distinguished from merely deferring, may require the court to protect the plaintiff's right to refile without a statute of limitations bar. [FN169]

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MDL and transferee court's authority. Congress established the Judicial Panel on Multidistrict Litigation [FN170] to "provide centralized management under court supervision of pretrial proceedings to assure the 'just and efficient conduct' of such ***586** actions." [FN171] In July 1991, the MDL Panel ordered the transfer of all federal court asbestos cases to the Eastern District of Pennsylvania for coordinated pre-trial management. [FN172] While the MDL Panel did not establish a deferral registry itself, it left to the transferee court the decision about whether, and in what form, to create it. The analysis presented here demonstrates that the transferee court may indeed do so.

Analogous judicial actions. In other settings, some courts have in effect-- and without benefit of specific statutory authority--rejected the conventional FIFO rule for claims processing in favor of a calendaring system based upon the relative severity of claimants' injuries. Although these precedents are not identical to the asbestos situation, the parallels are sufficiently close to provide some analogical support for mandating a non-FIFO priority rule in asbestos cases.

In the Agent Orange litigation, for example, the Second Circuit upheld in all relevant respects the District Court's order implementing a distribution plan that made payment only in the case of death and permanent, total disability claims, despite the existence of a large volume of other claims, many of which were filed earlier, involving less severe injuries. [FN173] More recently, in the order certifying a national class in the consolidated Manville bankruptcy proceeding, the courts (over the opposition of certain parties [FN174]) established a two-tier payment system, ordering that " p riority in terms of scheduling the timing of payment will be given to those most seriously injured." [FN175] ***587** The courts were strongly influenced by the fact that the Manville Trust's mindless use of the FIFO rule had yielded disastrous results in terms both of equity and efficiency. [FN176]

Another analogy is to interpleader, a remedy that is now authorized by statute, [FN177] by rule, [FN178] and under the court's equitable power. [FN179] In certain circumstances, a party facing multiple but similar claims on a limited fund can place that fund in escrow in the court and move for simultaneous trials. In the asbestos litigation, defendants face multiple claims on a limited fund; the court should be able to calendar the trial of those claims in a way, such as a deferral registry, that preserves the fund while avoiding inconsistent, inequitable outcomes.

B. Constitutional Issues

A constitutional challenge to a court-mandated deferral registry could advance a number of different claims. These claims would be based upon: (1) the right to jury trial; (2) First Amendment protection of advocacy of legal rights; (3) Due Process and Takings Clause protection of access to courts and of property rights; (4) Equal Protection Clause limitations on classifying claims; and (5) federalism concerns, assuming that a registry mandated by Congress or a federal court applied to asbestos cases in state courts as well as federal courts. I shall argue, however, that a well-crafted registry could circumvent these challenges.

Jury trial. Opponents could argue that for a court to apply the criteria for registry deferral would require it to make findings of fact which, under the Seventh Amendment, are within the exclusive province of a jury. They would presumably cite cases such as Armster v. United States District Court, [FN180] which held unconstitutional a categorical suspension of civil jury trials following an Administrative Office of the United States Courts advisory that budget constraints prevented the empaneling of any civil juries until the new fiscal year began. The Armster court, however, emphasized that the case involved a "wholesale ***588** non-discretionary suspension of the civil jury trial system and a blanket moratorium on all civil jury trials for a three and one-half month period" for purely fiscal reasons. [FN181] The court carefully distinguished that situation from one of overloaded dockets. In the latter, it noted, individual district courts enjoy wide discretion to control their dockets through deferral of some trial dates without implicating Seventh Amendment rights.

The federal appeals courts have consistently upheld against Seventh Amendment, access to court, Due Process, and Equal Protection challenges, several other trial deferral and diversion techniques mandated by statute or by local court rule. They have done so even though these techniques would seem to be more constitutionally

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vulnerable than a registry, and even in diversity cases. [FN182]

Perhaps the closest analogy is the medical review panel established by a number of states to screen medical malpractice claims before they can be tried in court. [FN183] Like registries, these schemes defer trial; they do not deny it. Unlike registries, however, they generally defer all such claims, forcing claimants to incur additional expenditures before they can clear the screening process. Moreover, the schemes were not created for the efficiency and fairness reasons that justify registries.

Court-mandated compulsory arbitration rules for certain types of cases have similarly been upheld despite the fact that they delay access to a jury trial and entail costly proceedings at the arbitration level. [FN184] Schemes involving mandatory referral ***589** to non-binding mediation, [FN185] and mandatory summary jury trials [FN186] have also been upheld. [FN187]

It is true that for a mandatory registry scheme to work, the court (or a court adjunct such as a master) must--absent agreement among the parties--make a finding that the claimant is presently unimpaired, a finding that relates to the merits of the claim and involves a factual determination of a kind that juries must ordinarily make. [FN188] It might be argued that this consideration triggers a Seventh Amendment or other constitutional violation.

Such an argument, however, proves too much. Courts must often make determinations at the threshold on factual issues ***590** that go directly to the merits. [FN189] Although determinations on standing or jurisdictional amount, for example, [FN190] may in the end be decisive, the courts nevertheless are required to make them at the threshold. It is enough that such findings are deemed preliminary and non-binding on the jury should the case go forward. [FN191] If courts may, without constitutional objection, dismiss claims on the basis of such threshold findings, they surely possess the power to make such findings for the far more limited purpose of establishing trial priorities. [FN192]

Access to courts. In a variation on the jury trial theme, opponents could argue that a registry violates their First Amendment right to "vigorous advocacy" of their legal claims, citing cases such as NAACP v. Button. [FN193] A registry, however, does not deny access, much less use the criminal law to discourage it, as in Button. It merely defers trial based upon a rational priority criterion; in that sense it is more nearly akin to a time, place, and manner restriction on protected speech. [FN194]

Property rights. Opponents might argue that causes of action for asbestos- related injury (and presumably defenses to such claims) are forms of property protected by the Due Process and Takings Clauses of the Fifth Amendment against procedurally unfair or uncompensated restrictions. [FN195] " W hatever the precise ***591** nature of the right of access to the courts, it is clear that due process is established if the statutory procedures provide an opportunity to be heard in court at a meaningful time in a meaningful manner." [FN196] A properly-designed registry [FN197] would preserve this opportunity; indeed, it may be essential if this opportunity is actually to be "meaningful."

A registry trial calendar rule--or a rule that tolls the statute of limitations, where possible [FN198]--for presently unimpaired claimants whose claims are deferred, could do so retroactively, that is, for claims that were filed prior to the creation of the system. Even this feature, however, would probably survive challenges based on Due Process, Equal Protection, or Takings grounds. [FN199]

Equal protection. Opponents might contend that a registry, by treating asbestos claimants differently than other personal injury claimants, violates the Equal Protection principle. This kind of argument has often been rejected by courts in analogous situations. [FN200] Except where fundamental rights are concerned--not the case with priority-setting in asbestos litigation--the classification of cases need only be rational. [FN201] As noted earlier, a priority scheme based upon the seriousness of injury is manifestly rational. Moreover, the courts have upheld such schemes against constitutional challenges, including ***592** Equal Protection claims, in the context of statutorily-created medical malpractice screening panels [FN202] and court rules imposing compulsory arbitration, summary jury trial, and mediation requirements. [FN203] Similar challenges have also been rejected in state

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courts. [FN204] Indeed, the courts have viewed the purposes of preventing complex litigation from overwhelming the docket, and assuring swifter relief for the most serious claims--the central goals of registries--as essential to vindicating the horizontal equity values of Equal Protection. [FN205] Nowhere is this more apparent than in asbestos litigation, whose uniqueness the courts have often recognized. [FN206]

Federalism concerns. The foregoing analysis firmly establishes ***593** the validity under the United States Constitution [FN207] of a mandatory registry implemented either in federal courts pursuant to a federal statute or federal court rule or in state courts pursuant to a state statute or state court rule. In contrast, an attempt by Congress or the federal judiciary to impose a registry upon state courts would raise genuinely vexing federal constitutional questions. [FN208] If Congress also asserted a substantial federal interest in state court asbestos litigation, however, these questions would be less difficult. Congress might do so, for example, by legislating a federal statutory right to recover for asbestos-related injuries or by altering the substantive or remedial law of asbestos claiming. [FN209] A putative federal interest would of course have to be grounded in congressional authority under Article I, [FN210] but such an interest could likely be found in the massive effects of the asbestos litigation on the economy and courts, and the causal links between the litigation and the numerous bankruptcies in the industry, matters of constitutionally-mandated congressional competence.

V. CONCLUSION

The policy arguments in favor of using deferral registries to help regulate the flood of asbestos claims in the courts are overwhelming, while the legal impediments to mandating registries are insubstantial. At stake are important public interests in the fair and efficient management of asbestos litigation. Although some plaintiffs' and defendants' lawyers have agreed ***594** to establish deferral registries in certain jurisdictions, counsel are unlikely to fully represent these interests. Legislators and judges therefore should act to protect them.

The asbestos litigation is of course unique in many respects. Among the factors that have caused this litigation to traumatize the civil justice system are the unprecedented number of claimants and defendants, the protracted time periods involved, the tragic toll of death and disability suffered, and the often ruinous liabilities entailed. Absent these factors, a procedural device like the deferral registry would not be so urgently needed.

Still, alternative trial-rationing devices such as deferral registries might well be justified in some contexts other than asbestos litigation. In a judicial system in which access to a proximate trial date is an increasingly scarce and valuable resource, the traditional FIFO rule for allocating this value seems less and less compelling. Even supposing that there are good reasons to retain FIFO as the norm for calendaring cases for trial, other social values may sometimes trump those reasons and demand exceptions to the FIFO rule. Where speedy trial dates cannot be given to all criminal cases, for example, no one would suggest that courts should be obliged to try misdemeanors before felonies just because the lawyers prefer it that way or because the indictments were filed in that order.

Similarly on the civil side, the conjunction of unusual factors--overwhelming caseload pressures, great heterogeneity among claims, a reliable methodology for distinguishing among them according to some generally accepted criterion of urgency, such as present impairment, and a conviction that privately-determined trial priorities are wasting scarce resources and violating norms of equal treatment--should lead to a search for different trial priorities in asbestos cases and in other kinds of mass tort litigation. Where lawyers' and parties' incentives to litigate cases in a particular order diverge sharply from society's interests in using different priorities to fulfill a broader conception of justice, legislatures and courts should insist that society's interests prevail.

[FNa1]. Simeon E. Baldwin Professor of Law, Yale Law School. Professor Schuck wrote on this subject at the request of the Center For Claims Resolution (CCR), a non-profit claims resolution facility representing twenty companies involved as defendants in the asbestos litigation, and his work was funded by the CCR. The views expressed here, however, are Professor Schuck's alone and do not necessarily reflect those of the CCR or of its

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members. Robin Shifrin, Yale Law School class of 1993, provided superb research assistance. Geoffrey C. Hazard, Jr. and Stephen B. Burbank kindly commented on earlier drafts.

[FN1]. The defects of asbestos litigation have already generated a considerable literature from legal scholars, judges, policy analysts, and journalists. See, e.g., AMERICAN LAW INST., COMPLEX LITIGATION PROJECT, ch. 2. (Tent. Draft No. 1, 1989); 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, ch. 13, part VI, 375-81 (1991); DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG., REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Mar. 1991) [hereinafter JUDICIAL CONFERENCE REPORT]; JAMES S. KAKALIK, COSTS OF ASBESTOS LITIGATION (1983); JAMES S. KAKALIK, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984); Lester Brickman, The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?, 13 CARDOZO L. REV. 1819 (1992); Francis E. McGovern, Toward a Functional Approach for Managing Complex Litigation, 53 U. CHI. L. REV. 440 (1986); Roger H. Transgrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69; Jack B. Weinstein and Eileen B. Hershenov, The Effect of Equity on Mass Tort Law, 1991 U. ILL. L. REV. 269; Amy Singer, Leon Silverman, $4.5 Million, His Clients $2.5, AM. LAW., Oct. 1990, at 58.
I stress the word "today." There can be little doubt that earlier asbestos litigation played a constructive, indeed essential, role in enabling workers to establish the crucial facts and legal theories regarding the relevant issues, including manufacturers' knowledge, general causation, and warning. Those pioneering efforts were so successful that many of these fact-eliciting and law-elaborating functions have now largely been achieved. See, e.g., In re Joint E. & S. Dist. Asbestos Litig.; In re Johns-Manville Corp., Findlay v. Blinken, 129 Bankr. 710 (E.D.N.Y. & S.D.N.Y. & Bankr. S.D.N.Y., June 27, 1991), amended, No. 90-3973 (Aug. 5, 1991), argued, No. 91-5068 (2d Cir., Feb. 24, 1992) [hereinafter In re Asbestos Litigation]. Although certain issues in some asbestos cases remain hotly contested--for example, specific causation of certain diseases in particular types of workers, and whether different warnings would have avoided the injury--the fact-eliciting and law-elaborating functions that remain no longer outweigh the deficiencies of the current litigation process. Even if asbestos litigation were still needed to perform these essential functions, fairer and more efficient management systems could be devised.

[FN2]. For a recent example, see Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & COM. 1 (1990) (analyzing ALI proposal for wisdom and constitutionality and concluding that suggested procedural changes would precipitate unjustifiable substantive changes).

[FN3]. These are sometimes called "pleural" registries in recognition of the fact that most of the claims that would be deferred involve some non-impairing changes to the pleurae, the outer linings of the lung. Because the registry idea need not be limited to pleura-related claims, I use a more generic label. Deferral may also be accomplished by conferring an inactive "status" in which a case is administratively closed, even if no formal "registry" docket is maintained. The "registry" label includes this less frequent alternative.

[FN4]. See, e.g., Stipulation Regarding Voluntary Dismissal of Cases upon Certain Conditions at 1, In re Massachusetts Asbestos Litigation, M.M.L. Nos. 1-5 (D. Mass., Nov. 7, 1985) and Joint Motion of Plaintiffs and Manufacturing and Distributing Defendants to Amend Pre-trial Order No. 4 Regarding Inactive Asbestos Docket at 1, In re Massachusetts Asbestos Litigation, M.M.L. Nos. 1-5 (D. Mass., Nov. 7, 1985) (establishing deferral registry with consent of parties) [hereinafter Boston Stipulation and Boston Amendment, respectively]; First Amended Order to Establish Registry For Certain Asbestos Matters, In re Asbestos Cases (Ill. Cir. Ct., Nov. 7, 1991) [1990] [hereinafter Cook County Order].

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[FN5]. Asbestos is the generic term used to describe a group of fibrous metasilicate minerals, including chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite. 29 C.F.R. § 1926.58(6) (b) (1991). The chemical composition and structure of asbestos confers remarkable properties of flexibility, tensile strength, and resistance to acid or fire. Consequently, for more than a century, asbestos has been used to insulate buildings, ships, steam engines, boilers, piping, ironing board covers, and brake linings, to name just a few of its applications. It has also been used as an ingredient in cement. See In re Asbestos Litigation, 129 Bankr. 710, 735-36. In light of asbestos's unique properties and varied uses, a large number of industrial and commercial workers in the United States and elsewhere have been occupationally exposed to it. The precise number of occupationally exposed workers in the United States is uncertain, but estimates have ranged from seven to fourteen million alive circa 1980. Estimates of "substantial" exposures range from 70,000 to four million. Derek E. Lilienfeld et al, Projection of Asbestos Related Diseases in the United States, 1985 to 2009 (Part I Cancer), 45 BRIT. J. INDUS. MED. 283, 285-86 (1988) (reviewing earlier estimates of exposure and projected mortalities).

[FN6]. Most of the commonly-cited estimates of mortality and morbidity are based upon the projections published a decade ago in IRVING J. SELIKOFF, DISABILITY COMPENSATION FOR ASBESTOS-ASSOCIATED DISEASE IN THE UNITED STATES 84-85 (1982). Those estimates were recently noted in JUDICIAL CONFERENCE REPORT, supra note 1, at 2, and 129 Bankr. at 126, and discussed in id., app. b at 926-31.

[FN7]. See also Frances Lew et al., High Frequency of Immune Dysfunctions in Asbestos Workers and in Patients with Malignant Mesothelioma, 6 J. CLINICAL IMMUNUNOLOGY, 225, 225-32 (1986) (comparing deficiencies in immune cells, ratios, or activity among mesothelioma patients and other asbestos workers without malignancies, correlating exceptions with longevity of some mesothelioma patients, and speculating that asbestos causes immunosuppression).

[FN8]. Although asbestos-related conditions have received enormous attention from scientists in recent years, many important variables and relationships are not yet well understood. Partly for this reason, some of the definitions, measurement systems, and classification schemes relating to the asbestos problem are still not standardized. Thus when different researchers define terms differently, their findings may not be comparable even when they ostensibly use the same terms. Because so much turns upon precisely how asbestos claims are defined, measured, and classified, these variables remain highly controversial.
These are not simply scientific and methodological disputes. They implicate many of the important issues that arise in asbestos litigation, such as the diagnosis and prognosis of condition and harm, the testing methods used, the degree of impairment observed, the causal inferences drawn, the projection of future claims and claims values, and the way in which medical reports and clinical and epidemiological studies are interpreted and generalized. Legal issues such as statutes of limitations and procedural safeguards are also implicated by these choices. For this reason, the design and workability of a deferral registry will also be affected. The registry must specify, for example, which asbestos-related conditions will be deferred, how they will be defined, how functional impairment will be measured, how claims will be classified, and the circumstances under which deferred claims may later be returned to active status. These are difficult choices, and they are inevitably arbitrary to some extent.

[FN9]. Pleural plaques are also described in the medical literature as "circumscribed pleural fibrosis." See Ruth Lilis et al., Pulmonary Function and Pleural Fibrosis: Quantitative Relationships with an Integrative Index of Pleural Abnormalities, 10 AM. J. INDUS. MED. 145, 146 (1991).

[FN10]. The pleurae are a double membrane surrounding the lung between the lung and chest wall. The inner layer, adjacent to the lung tissue, is called the visceral pleura. The outer layer, in close contact with the inner, is called the parietal pleura.

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[FN11]. American Thoracic Soc'y, The Diagnosis of Nonmalignant Diseases Related to Asbestos, 134 AM. REV. RESPIRATORY DISEASE, 363, 363-64 (1986) (presenting official statement of American Thoracic Society).

[FN12]. See RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2 (1985) ("Calcified pleural plaques . . . are strongly indicative of exposure"); Gunnar Hillerdal, Pleural Lesion and the ILO Classification: The Need For a Revision, 19 AM. J. INDUS. MED. 125, 129 (1991) ("Pleural plaques are practically pathognomonic for asbestos exposure.").

[FN13]. Pleural thickening is also described in the medical literature as "diffuse pleural fibrosis." Lilis et al., supra note 9, at 147.

[FN14]. See Hillerdal, supra note 12, at 127 ("The main radiological difference is that the pleural plaques are always sharply demarcated against the lung parenchyma [tissue], while the visceral lesions blend more diffusely with it."); see also id. at 125-30 (noting a condition commonly preceding diffuse pleural thickening, benign pleural effusion [collection of fluid in the potential space between the pleurae]; and identifying five variants of visceral pleural lesion).

[FN15]. See id. at 129 ("Other types of pleural lesions [besides plaques] are more non-specific and need not have any connection with exposure to asbestos. However, in many instances, it is possible to exclude other causes with reasonable certainty. Grossly asymmetrical lesions . . . are rarely due to asbestos.").

[FN16]. Asbestosis, thus defined, is also described in the medical literature as a form of "parenchymal interstitial fibrosis." E.g., American Thoracic Soc'y, supra note 11, at 364; see also 29 C.F.R. § 1910.1001, app. H (III) (1991) (setting forth OSHA medical surveillance guidelines).

[FN17]. See American Thoracic Soc'y, supra note 11, at 364. These fibroses may or may not be accompanied by large air spaces caused by asbestos fibers. See id.

[FN18]. See id. at 364, 367 (basing clinical diagnosis on seven factors).

[FN19]. See John E. Craighead et al., The Pathology of Asbestos-Associated Diseases of the Lungs and Pleural Cavities: Diagnostic Criteria and Proposed Grading Schema, 106 ARCHIVES OF PATHOLOGY AND LABORATORY MED. 544, 559 (1982) (containing Report of Pneumoconiosis Committee of College of American Pathologists and National Institute for Occupational Safety and Health, basing pathological diagnosis on two factors, but without criteria of actual impairment).

[FN20]. "[Pleural] plaques typically show very gradual development. With time, the plaques can calcify." Hillerdal, supra note 12, at 126. "Diffuse pleural thickening has a similar prolonged latency; however, its development is closely associated with previous pleural effusions." David A. Schwartz, New Developments in Asbestos-Induced Pleural Disease, 99 CHEST 191, 191-92 (1991) (review article).

[FN21]. "Exceptionally," pleural plaques may be "very extensive, widely calcified and cuirass-like . . . ." W. RAYMOND PARKES, OCCUPATIONAL LUNG DISORDERS 244 (2d ed. 1982). Pleural thickening may also

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be "focal or diffuse." American Thoracic Soc'y, supra note 11, at 364; cf. Hillerdal, supra note 12, at 126 (questioning significance of current classification of plaques by width and extent while noting danger of confusing large plaques with diffuse pleural thickening).
Pleural thickening has been defined as diffuse when the "pleural density extend[s] over at least one-fourth of the chest wall . . . ." Theresa C. McLoud et al., Diffuse Pleural Thickening in an Asbestos-Exposed Population: Prevalence and Causes, 144 AM. J. ROENTGENOLOGY 9, 11 (1985); see also American Thoracic Soc'y, supra note 11, at 364 (Pleural thickening "varies from a thin milky white discoloration . . . to a peel encasing the lung.").
The various extents of pneumoconioses [dust disesases of the chest, including asbestosis] are expressed by the radiological ratings of the International Work Office (IWO) (formerly International Labor Office). Lung fibroses are classified with two digits, respectively representing the best and second-best estimates of the NIOSH-certified chest x-ray B-reader, each estimate on a scale from 0 to 3. Extent and severity of diagnosis thus increase from 0/0 (normal) to 0/1; 1/0; 1/1; 1/2 . . . 3/3. See INTERNATIONAL LAB. OFFICE, GUIDELINES FOR THE USE OF ILO INTERNATIONAL CLASSIFICATION OF RADIOGRAPHS OF PNEUMOCONIOSES (1980).

[FN22]. See infra notes 37-40 and accompanying text.

[FN23]. See ANDREW CHURG & FRANCIS H.Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 288 (1988) ("Asbestos causes mesothelioma of both pleura or peritoneum, and probably of the pericardium as well"); see also 29 C.F.R. § 1910.1001 app. H (III) (1991) (OSHA guidelines) (Mesothelioma "[s]ymptoms . . . include shortness of breath, pain in the walls of the chest, or abdominal pain.").

[FN24]. Gunnar Hillerdal & A.W. Musk, Pleural Lesions in Crocidolite Workers from Western Australia, 47 BRIT. J. INDUS. MED. 782, 783 (1990). But see CHURG & GREEN, supra note 23, at 288-89 (discussing epidemiological studies whose causal findings are particularly strong in the case of amphibole fibers but citing questions and methodological difficulties in the case of chrysotile).

[FN25]. See ASBESTOS: SMOKING AND DISEASE 141-70 (David M. Burns & John M. Pinney eds., 1982) (reviewing multiplicative effect of smoking, in relation to period and intensity of smoking and asbestos exposure); CHURG & GREEN, supra note 23, at 289 ("In contrast to carcinoma of lung, where cigarette smoking commonly plays a role, and asbestosis, where smoking may increase incidence or progression of disease, smoking appears to have no effect on mesothelioma incidence."). But see Janet M. Hughes & Hans Weill, Asbestosis as a Precursor of Asbestos-Related Lung Cancer: Results of a Prospective Mortality Study, 48 BRIT. J. INDUS. MED. 229, 229-33 (1991) (comparing incidence of lung cancer among smokers exposed to asbestos with incidence among non-exposed smokers, finding increased incidence with asbestosis but not in its absence).

[FN26]. Compare 29 C.F.R. § 1910.1001 app. H (II) (1991) (OSHA guidelines) ("[W]ell-conducted epidemiological studies . . . have shown a definite association between exposure to asbestos . . . and an increased incidence of lung cancer, pleural and peritoneal mesothelioma, gastrointestinal cancer and asbestosis. . . . Exposure . . . has also been associated with . . . increased incidence of esophageal, kidney, laryngeal, pharyngeal, and buccal cavity cancers.") with CHURG & GREEN, supra note 23, at 319 (noting confounding or alternative causal factors such as misdiagnosis, alcohol, smoking, and diet, in cases of ovarian, esophageal, laryngeal/esophageal, and stomach/colon cancers, respectively) and Richard Doll & Julian Peto, Other Asbestos-Related Neoplasms, in ASBESTOS-RELATED MALIGNANCY 94 (Karen Antman & Joseph Aisner eds., 1987) ("Neither the epidemiological data so far published nor the biological evidence is sufficiently compelling to convince us that misdiagnosis or chance is not the simplest, and most plausible explanation of the facts observed for cancer of any other site other than the lung, pleura, or peritoneum.").

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[FN27]. For example, the Cook County, Illinois deferral registry provides that claims may be restored to the trial calendar if the claimant's chest x-ray has an IWO rating of 1/0 or greater, and pulmonary function studies (as given and interpreted by a board-certified pulmonologist) showing a total lung capacity (TLC) of less than 80% of predicted, or showing an oxygen-diffusing capacity of less than 70% of predicted, and an FEV-1/FVC (ratio of forced expiratory volume in one second to forced vital capacity) ratio of 75% of predicted or greater. A claim may also be restored if the claimant's chest x- ray has an IWO reading of 1/1 or greater and an oxygen-diffusing capacity on the pulmonary function study of below 80% of predicted. Cook County Order, supra note 4, at 9-10.

[FN28]. See, e.g., CHURG & GREEN, supra note 23, at 234 ("asbestos- associated benign pleural changes are mostly radiographic and pathologic findings that only infrequently have significant symptoms or functional consequences. . . ."); DOLL & PETO, supra note 12, at 2; IRVING J. SELIKOFF & DOUGLAS H.K. LEE, ASBESTOS AND DISEASE 192-93 (1978) ("[p]leural changes add little to the symptomatology of the patient"); Edward A. Gaensler et al., Lung Function with Asbestos-Related Circumscribed Plaques, in 1 PROCEEDINGS OF THE VIITH PNEUMOCONIOSES CONFERENCE 696, 697 (1988) (finding "circumscribed plaques have no measurable effect on function").

[FN29]. See Lilis et al., supra note 9 (grading pleural conditions and reporting, inter alia, gradual decrements of forced vital capacity (FVC) with increasing gradation of circumscribed pleural fibrosis, adjusting for duration from onset of exposure, parenchymal abnormalities, and smoking); Schwartz, supra note 20, at 193-96 (citing studies).

[FN30]. See Gaensler et al., supra note 28, at 696 (criticizing earlier studies associating plaques and decrement for failing to clearly distinguish plaques and thickening; advocating adequate controls for smoking, age, and employment). Cf., e.g., David A. Schwartz et al., Asbestos-Induced Pleural Fibrosis and Impaired Lung Function, 141 AM. REV. RESPIRATORY DISEASE 321 (1990) (attributing 11% FVC reduction to circumscribed pleural plaques, but claiming only "marginal" statistical and "potential" clinical significance due to "small number of study subjects"; controlling for smoking within previous five years only).

[FN31]. E.g., Gaensler et al., supra note 28, at 697-98 ("Diffuse thickening, unlike plaques, cause[s] a significant loss of lung function . . . strongly related to extent and thickness. . . . Rounded atelectasis [local, folded lung tissue] . . . also may be associated with functional impairment."); Schwartz, supra note 20, at 194 ("effect of diffuse pleural thickening on decrements in FVC is approximately twice as great as . . . with circumscribed pleural plaques"). Compare Gaensler et al., supra note 28, at 697 ("studies of benign asbestos effusion showed that . . . often recurring bloody effusions frequently result in marked functional impairment and fibrothorax [fibrosis between the pleurae] sometimes so severe as to require decortication [surgical removal]") with Hillerdal, supra note 12, at 127 ("benign pleural effusion . . . can be symptomless and unnoticed by the patient").

[FN32]. See Gary R. Epler et al., Prevalence and Incidence of Benign Asbestos Pleural Effusion in a Working Population, 247 JAMA 617 (1982) (reporting 0.2%-7% incidence of benign pleural effusion, varying with exposure); Gaensler et al., supra note 28, at 697 (finding incidences of 23.6% pleural plaques, 14.4% asbestosis, and 3.5% diffuse pleural thickening in mixed occupational group); see also note 35 infra; cf. S. David Rockoff et al., Visceral Pleural Thickening in Asbestos Exposure: The Occurrence and Implications of Thickened Interlobar Fissures, in PROCEEDINGS OF THE VIITH PNEUMOCONIOSES CONFERENCE 1200-01 (1988) (finding 40% excess prevalance of pleural thickening of fissure among asbestos workers studied but implying no relationship to generalized diffuse pleural thickening or impairment).

[FN33]. 29 C.F.R. § 1910.1001 app. H (III) (1991) (OSHA guidelines).

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[FN34]. Some studies have reported varying incidence of asbestos-related conditions in different industries. See M.R. Becklake, Occupational Lung Disease--Past Record and Future Trends Using Asbestos Cases as an Example, 6 CLIN. INVEST. MED. 305 (1983) (reporting varying asbestosis prevalence from 3.8% in docking to 16.2% in chrysotile textile manufacturing); M.R. Becklake, Asbestos-related Pleural Disease: Distribution and Determinants in Exposed Workforces and Impact on Health (unpublished manuscript, presented at DRI Asbestos Medicine Seminar, San Diego, California, Oct. 1989) (finding incidence of plaques of 3%-16% in mining and milling, 5%-21% in secondary manufacturing, 9%-58% in insulation and construction work, and 6%-60+% in docking and shipyards). Some other variables that may affect incidence surely include the duration and intensity of exposure, and the time period between exposure and clinical observation. For mesothelioma, the types of asbestos fibers have also been implicated. See CHURG & GREEN, supra note 23, at 289 (noting that amphiboles, especially crocidolite, cause much higher incidence of mesothelioma than chrysotile).

[FN35]. Compare Lilis et al., supra note 9, at 5 (finding diffuse pleural thickening in 18% of asbestos insulator workers with pleural fibrosis) with Hillerdal & Musk, supra note 24, at 782 (observing plaques in 13.1%, and diffuse thickening in 30%, of Australian crocidolite workers claiming compensation although not specifying periods of exposure, timing of observation, or selective effect of thickening impairment on claim patterns).

[FN36]. Some studies estimate that from 25% to 75% of all claims are unimpaired. See Thomas E. Willging, Trends in Asbestos Litigation 51-52 (1987). One estimate emerges from the negotiations to restructure the Manville Trust, which classified 54.4% of reported pending cases as "pleural." In re Asbestos Litigation, 129 Bankr. 710, app. C. at 936 (Memorandum from Mark A. Peterson to Judge Jack B. Weinstein (May 7, 1991)). Assuming that 80% of these claims are pleural plaques only, see Lilis, supra note 35, and that all pleural plaques are unimpaired, at least 44% of the total would be unimpaired. (This ignores the pleural thickening cases that are also unimpaired). The CCR estimates that over one-half of the current pending claims are unimpaired claims. Letter from John Aldock, Esq., Shea & Gardner, Special Counsel to Center for Claims Resolution to Peter H. Schuck (Nov. 21, 1991) (on file with author) [hereinafter CCR Letter]. In addition, of the 1000 claims pending when the Cook County registry was established, almost one-half (462 cases) have been placed on the deferral registry. In re Asbestos Cases, Mulligan v. Keene Corp. and Allied Signal, Inc., No. 1-91-1305, slip op. at 5-6 n.3 (Ill. App. Ct. Dec. 27, 1991).

[FN37]. See, e.g., In re Asbestos Litig., supra note 1, 129 Bankr. 710, app. C at 945; Gaensler et al., supra note 28, at 697 (reporting rapid decline in prevalence of asbestosis and increase of plaques, partly attributed to lower exposure threshold for plaques and increased detection); Herbert Seidman & Irving J. Selikoff, Decline in Death Rates Among Asbestos Insulation Workers 1967-86 Associated with Diminution of Work Exposure to Asbestos, in ANNALS OF NEW YORK ACADEMY OF SCIENCES 300, 309 (1990) (finding reduced exposure levels during this period); Hans Weill & Janet M. Hughes, Asbestos as a Public Health Risk: Disease and Policy, 7 ANN. REV. PUB. HEALTH 171, 180-85, Table 3; CCR Letter, supra note 36, at 1. Apparent trends in aggregated data, however, are difficult to interpret if data categories of different sizes are affected by different variables.

[FN38]. Compare Irving J. Selikoff et al., Predictive Significance of Parenchymal and/or Pleural Fibrosis for Subsequent Death of Asbestos Associated Diseases (unpublished manuscript on file with author) (observing over 27 years that pleural fibrosis signified four-fold increase in death rate from asbestosis, lung cancer, and mesothelioma for asbestos workers, concluding that "pleural fibrosis on chest x-rays, as a result of asbestos exposure, is by no means a benign condition, in terms of risk of death of asbestos-related disease") with CHURG & GREEN, supra note 23, at 246 (criticizing results of 10 earlier studies associating plaques and other asbestos-related conditions for confounding effects of smoking) and Edward A. Gaensler, Asbestos-Related Pleural Plaques: Much Ado About Very Little, H-25 (Oct. 1991) (unpublished paper on file with author) (criticizing 14 earlier studies for failure to distinguish plaques from diffuse thickening and failure to control for smoking, latency, or exposure).

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[FN39]. Compare Selikoff et al., supra note 38, at 10 (explaining increased risk signified by pleural fibrosis as "to a considerable extent due to effects of the exposure . . . and not necessarily to consequences of the fibrosis") with Gaensler, Much Ado, supra note 38, at H-25 ("sometimes observed excess of cancer cases [in plaque cohorts] was a reflection of the exposure and not necessarily related to the presence of plaques.").

[FN40]. 29 C.F.R. § 1910.1001 app. H (III) (1991) (containing OSHA guidelines). Gaensler reports progression in less than 20% of asbestosis cases observed over more than a decade. Edward A. Gaensler et al., Progression of Asbestosis, in PROCEEDINGS OF THE VIITH INTERNATIONAL PNEUMOCONIOSIS CONFERENCE (1988); see also Selikoff et al., supra note 38, at 6, 11 (reporting significance of asbestosis greater than pleural fibrosis in predicting asbestos-related fatalities).

[FN41]. Letter from Judge Marshall A. Levin to Judge John F. Nangle and the J.P.M.L. (May 24, 1991) (on file with author). As of March 31, 1991, nearly 31,000 actions were reported pending in federal districts by the Statistical Division of the Administrative Office of the United States Courts. Admin. Off. U.S. Cts., Civil Cases Commenced, Terminated, and Pending During Twelve-Month Periods Ending June 30, 1990 and 1991, Table C2 (Asbestos) (current unpublished data available from Statistical Division, Admin. Off. U.S. Cts.) (1984-90 data reprinted in In re Asbestos Litig., 129 Bankr. at 745) [hereinafter Admin. Off. data]).

[FN42]. Admin. Off. data, supra note 41, at Table C2. As of June 30, 1990, 33,182 cases were pending in the federal courts. During that year, 13,687 new claims were filed, an increase of 60% over 1989 and a record in both absolute and percentage terms. Fewer than 6000 were terminated. As of June 30, 1991, 30,806 such cases were pending. Only 7150 new cases were filed and more than 15,000 were terminated. Id. Federal court filings alone are of limited value in gauging the volume of asbestos litigation since plaintiffs may be filing in state courts instead, a possibility heightened by the deliberations and decision of the Judicial Panel on Multidistrict Litigation concerning transfer and consolidation of asbestos cases. See infra notes 44,208 and accompanying text.
Writing early in 1991, the Judicial Conference concluded that the number of claims "has not begun to crest." JUDICIAL CONFERENCE REPORT, supra note 1, at 7. On the other hand, the experience of the Center For Claims Resolution suggests that the number of impaired claims may well have crested. CCR Letter, supra note 36, at 1. This experience presumably reflects the effects of lower occupational exposures beginning in the 1970s due to regulations issued then, which have since become steadily more restrictive. See Seidman & Selikoff, supra note 37, at 301.

[FN43]. JUDICIAL CONFERENCE REPORT, supra note 1, at 1.

[FN44]. Opinion and Order, In re Asbestos Products Liability Litigation (No. VI MDL-875), 771 F. Supp. 415 (J.P.M.L. 1991) (order transferring cases); MDL Panel Adds 3,896 More Cases, Bringing Number of Cases Transferred to 27,880, Asbestos Product Liability Litigation, MDL Rep. (McGuire Pub.) 4 (Oct. 15, 1991). Cases already on some form of registry may or may not have been transferred, depending on their status. Telephone Interview with Dorothy Cusker, Law Clerk to Chief Judge Michael A. Telesca, W.D.N.Y. (Jan. 30, 1992) (inactive cases were transferred); Telephone Interview with Allen Wallace, Law Clerk to Judge Robert L. Vining, Jr., N.D. Ga. (Jan. 30, 1992) (stating that cases with inactive status were administratively closed and not transferred); see 771 F. Supp. at 424 n.11 (requesting notification of actions resolved or in trial by transferor district clerks to facilitate exclusion from transfer by J.P.M.L.). For recent pretrial proceedings in Judge Weiner's court, see, e.g., Pretrial Order No. 3, In re Asbestos Products Liability Litig. (No. VI, MDL- 875) (E.D. Pa. filed Jan. 7, 1992) (establishing "short form" summary judgment procedure over objections); Administrative Order No. 2, In re Asbestos Products Liability Litig. (No. VI, MDL-875) (E.D. Pa. filed Feb. 24, 1992) (ordering information on cases for settlement conferences; staggering required lists in categories for mesothelioma, other malignancies, and asbestosis).

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[FN45]. Here I leave aside such innovations as legislated liberalization of statutes of limitations. See, e.g., Cal. Civ. Pro. Code § 340.2(a) (West 1979) (extending statute of limitations for asbestos diseases until plaintiff is disabled). While important, such changes are essentially marginal to the problem.

[FN46]. The Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. §§ 2641-2656 (1988), provides for inspection and other actions concerning asbestos-containing materials in U.S. public schools, but the Act affects neither compensation for personal injuries nor litigation management. Congress's action in black lung legislation has been subject to criticism as well. Cf., e.g., Mark E. Solomons, A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues, 83 W. VA. L. REV. 869 (1981); Developments in the Law-- Toxic Waste Litigation, 99 HARV. L. REV. 1631, 1642-44 (1986) (criticizing diagnostic presumptions in Black Lung program). See generally Donald DeCarlo, The Federal Black Lung Experience, 26 HOW. L.J. 135 (1983). But see JUDICIAL CONFERENCE REPORT, supra note 1, at 42 (dissenting statement of Hogan, J.) (endorsing applicability of Congressional Black Lung-type legislation to asbestos cases).

[FN47]. Even legal scholars, who are relatively well-informed, politically unconstrained, and objective, have not been able to agree upon the proper approach. See, e.g., Epstein, supra note 2.

[FN48]. See, e.g., 29 C.F.R. § 1910.1001 (1991) (concerning general occupational exposure to asbestos); 29 C.F.R. § 1926.58 (1991) (regulating asbestos exposure in construction work). OSHA first regulated asbestos in 1971, 36 Fed. Reg. 10,466 (1971), and has revised its regulations many times since. See 36 Fed. Reg. 23,207 (1971); 37 Fed. Reg. 11,318 (1972); 51 Fed. Reg. 22,612 (1986); and 55 Fed. Reg. 29,712 (1990) (proposed rule). Major portions of EPA regulations, 54 Fed. Reg. 29,460 (1989), that would have prohibited, at various times in the next few years, the "manufacture, importation, processing, and distribution in commerce" of virtually all asbestos-containing products under authority of section 6 of the Toxic Substances Control Act of 1976, 15 U.S.C. § 2601 (1988), were invalidated by the Fifth Circuit. Corrosion Proof Fittings v. EPA, 1991 U.S. App. LEXIS 24922 (5th Cir. Oct. 18, 1991).

[FN49]. See supra note 1.

[FN50]. One might also include the journalists and academics who spend their time chronicling the system and (largely) denouncing it.

[FN51]. The phrase appears to have been wrenched from what may have been its original setting in R. H. Coase's seminal article, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960), where it referred to the sum of get-together costs, decision and execution costs, and information costs. See generally Robert C. Ellickson, The Case for Coase and Against "Coaseanism," 99 YALE L.J. 611, 614-15 (1989). Analysts of mass tort litigation, however, have appropriated it for a different usage.

[FN52]. The adjective "high" invites the rejoinder, "Compared to what?" My short response is, "Compared to almost any alternative compensation system that one can imagine, including some that, mutatis mutandis, are already in place." See, e.g., WILLIAM L.F. FELSTINER & ROBERT DINGWALL, ASBESTOS LITIGATION IN THE UNITED KINGDOM 2, 25 (Am. Bar Found. Working Paper No. 8807) (concluding that British combined asbestos litigation costs are unlikely to exceed 35% of recovery, but that system is "much less effective at mobilizing possible cases and there are indications of a significant pool of uncompensated victims"); Paul C. Weiler, Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime, 50

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OHIO ST. L.J. 825, 848-49 & n.64 (1989) ("administration and litigation expenditures of product liability consume more than three times the share of the claims dollar than do WC [worker's compensation] benefits"). Again, the high costs of asbestos litigation may well have been justified in its earlier phases, but at some point in the past, its social benefit-cost ratio almost certainly turned unfavorable. See supra text accompanying note 1.

[FN53]. JUDICIAL CONFERENCE REPORT, supra note 1, at 12-13. The Judicial Conference Report cites other examples of exceedingly costly individual trials as well. See id. at 13.

[FN54]. The analysis revised the often-cited 1984 Rand Institute of Civil Justice estimate that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs, i.e., witness and attorneys' fees, of which 37 cents represents defendant litigation costs. Only 39 cents were paid to the asbestos plaintiffs. There is no indication that the situation has improved." Id. at 13 (footnote omitted).

[FN55]. In re Asbestos Litig., supra note 1, 129 Bankr. 710, 749 (citing James S. Kakalik, Variation in Asbestos Litigation Compensation and Expenses 91 (1984)); cf. 128 Bankr., app. c at 952 (Memorandum from Mark A. Peterson to Judge Jack B. Weinstein, May 7, 1991).
The court went on to state that defendants' total costs for future as well as pending claims approximate "minimum costs of $19.6 billion and costs of $26 to $28 billion under the more plausible assumptions." 129 Bankr. at 907. It also found that "[a]s much as 20 billion dollars of this sum would be eaten up in transaction costs." Id. at 908. While these particular estimates are open to serious dispute, the court's perceptions that these costs were far too high and that successful asbestos claiming has become more or less routine, led it to limit, inter alia, plaintiffs' attorneys' fees against Manville, the largest asbestos defendant. The court limited such fees to 25% of each award, a ceiling regarded as excessive but necessary to obtain the attorneys' agreement to the settlement. Id. at 863.

[FN56]. These include Johns-Manville, Raymark, Eagle-Picher, H.K. Porter, Celotex, Carey Canada, Forty-Eight Insulations, Unarco, Nicolet, Amatex, Huxley, Pacor, Standard Asbestos, and D.I. Distributors.

[FN57]. See Suzanne L. Oliver & Leslie Spencer, Who Will the Monster Devour Next?, FORBES, Feb. 18, 1991, at 78 (discussing successor liability exposure of Keene Corporation and others).

[FN58]. Much of the remaining coverage, moreover, is excess insurance. Some of this excess coverage, unlike primary coverage indemnifies only for "ultimate net loss"; in such cases, defendants' attorneys' fees count against the policy limits. See infra note 103.

[FN59]. See, e.g., In re Asbestos Litig., supra note 1, 129 Bankr. at app. a (calculating Johns-Mansville's 30% share of damages on average before bankruptcy).

[FN60]. Almost half of the states have abolished or altered the doctrine of joint and several liability in all or some contexts. See, e.g., Ariz. Rev. Stat. Ann. § 12-2506 (West 1982) (abolishing for both negligence and strict liability claims occurring on or after January 1, 1988); Ohio Rev. Code Ann. § 2315.19(D) (Page 1991) (abolishing for noneconomic damages in negligence cases in which there is either contributory begligence or implied assumption of risk). See generally Cornelius J. Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 Wash. L. Rev. 233, 239-42 (1986) (surveying state laws); James J. Scheske, Comment, The Reform of Joint and Several Liability Theory: A Survey of State Approaches, 54 J. Air L. & Com. 627, 636-50 (1988).

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[FN61]. Cal. Civ. Code § 1431.2 (West Supp. 1991).

[FN62]. See Mem. of Co-Def. Beneficiaries in Opp. to Certif. of Settlement Class and Approval of Proposed Settlement at 49-58, In re Asbestos Litig., 129 Bankr. 710.

[FN63]. Section H of the settlement precludes direct suits against Manville and the Trust, third-party actions for contribution, impleading by co- defendants, and the introduction of evidence alleging Manville's share of liability. It also grants set-off rights for co-defendants only when plaintiffs have settled with the Trust. These limitations may prevent defendants from establishing the preconditions for taking advantage of the joint and several liability reforms. Judge Weinstein's efforts to clarify some of these matters have not been altogether successful. See 129 Bankr. at 869-905.

[FN64]. This will reflect, inter alia, injury severity, plaintiffs' attorneys' fees, medical costs, availability of punitive damages, legal rules, and local jurors' attitudes.

[FN65]. This will reflect, inter alia, how courts manage asbestos litigation and regulate attorneys' fees.

[FN66]. See supra notes 41-43 and accompanying text.

[FN67]. See 129 Bankr. at 751 ("Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency . . . ." (citations omitted)).

[FN68]. This statement assumes that the current efforts to inculpate new, financially secure categories of more "peripheral" defendants, id. at 747, will not be altogether successful.

[FN69]. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953). The most obvious conflict--that between the plaintiffs and the defendants' lawyers--is of course endemic to an adversary system and need hardly be remarked. More interesting is the conflict that exists between plaintiffs as a group and plaintiffs' lawyers as a group. This conflict arises to the extent that juries inflate recoveries to take account of the contingent fee that jurors know plaintiffs must pay, and to the further extent that recovery by one plaintiff today reduces the assets available for others tomorrow (regardless of which lawyers represent them). But the most direct, troubling conflicts exist at the level of an individual plaintiff's lawyer and her own clients. Given the limited assets, early recoveries by a lawyer's clients will reduce the funds available for her other clients who happen to reach trial later. See Brickman, supra note 1, text and notes 45-60 (analyzing critically plaintiffs' attorney contingent fees); Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. REV. 29 (1989). In addition, the lawyer must decide how to allocate the recovery among impaired and unimpaired clients. Asbestos defendants and their lawyers face a somewhat different conflict. Although these defendants are well-informed, sophisticated, competitive purchasers of legal and other professional services, and although at least some of them are reportedly exercising increasingly tight controls over their litigation expenses, see Brickman, id. at n.58; David Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 799, 824-26 (1992), those who are in bankruptcy have somewhat less incentive and capacity to monitor those expenses. In such situations, closer court or creditor scrutiny of those expenses may be necessary to prevent excessive charges. A registry would relieve lawyers of these conflicts to some extent.

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[FN70]. Judicial Improvements Act of 1990, Title I: The Civil Justice Reform Act of 1990, 28 U.S.C.A. § 473(a)(2)(B) (West Supp. 1991) [hereinafter Civil Justice Reform Act]; see also Joseph F. Sullivan, Backlogs Snarl Civil Court in New Jersey, N.Y. TIMES, July 1, 1991, at B2 (reporting that civil docket backlog in New Jersey violates American Bar Association standards).

[FN71]. JUDICIAL CONFERENCE REPORT, supra note 1, at 11.

[FN72]. For Philadelphia asbestos cases, see LEGAL INTELLIGENCER, Aug. 5, 1991, at 20-21 (presenting Asbestos Civil Trial List showing cases recently listed for trial that were filed in 1982 and 1983).

[FN73]. On the role of uncertainty in settlements, see, e.g., George L. Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 U. CHI. LEGAL F. 161, 195; Peter H. Schuck, The Role of the Judges in Settling Complex Cases: The Agent Orange Example, 53 U. CHI. L. REV. 337, 346 (1986).

[FN74]. JUDICIAL CONFERENCE REPORT, supra note 1, at 12.

[FN75]. See summary of data in Randall R. Bovbjerg et al., Valuing Life and Limb in Tort: Scheduling "Pain and Suffering", 83 NW. U. L. REV. 908, 919- 24 (1989); W. Kip Viscusi, Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?, 8 INT'L. REV. L. & ECON. 203, 203-20 (1988). For an example of the effect of clever lawyering, see, e.g., Lawrence I. Shulruff, On Trial: A Videotape of a Disabled Girl's Day, N.Y. TIMES, Jan. 4, 1991, at B14 (discussing effect of videos on jury awards).

[FN76]. HENSLER ET AL., supra note 1, at 116.

[FN77]. For example, verdicts reported in 6 Mealey's Litig. Rep.-Asbestos (Mealey's Pub.) in 1991 for pleural claims ranged from zero to as high as $750,000 (Apr. 5, 1991 at 25-26; Apr. 19, 1991 at 8-9, 11-12; June 7, 1991 at 35); for asbestosis claims ranged from zero to $1.5 million (Apr. 5, 1991 at 31-32; Apr. 19, 1991 at 6, 14-15, 18); and for mesothelioma claims ranged from zero to $5.1 million (Apr. 19, 1991 at 4-7). It should be noted that the information that Mealey's receives and reports about the specific diseases involved may be very imprecise or even inaccurate. See In re Asbestos Litig., supra note 1, 120 Bankr. 648, 680 (tabulating provisional levels of maximum and anticipated midpoint payments, such as pleural claims, $30,000 (max), $12,000 (mid); asbestosis, $75,000 (max), $35,000 (mid); and mesothelioma, $350,000 (max), $146,000 (mid).

[FN78]. In re Asbestos Litig., supra note 1, 129 Bankr. 710, 749 (contrasting consolidated trial verdicts in New York City: 20 plaintiffs, 20 defense verdicts; 35 plaintiffs, $65 million plus punitive damages; 64 plaintiffs, 13 defense verdicts and 51 plaintiffs' verdicts for $35 million).

[FN79]. The claims filed by tireworkers, who generally did not work with asbestos products but who claim exposure based on the presence of asbestos products such as asbestos insulation or brakes in the tire plants, exemplify the phenomenon. Some claims have been dismissed for lack of any reliable diagnosis of asbestos-related disease. See, e.g., Slaughter v. Southern Talc Co., 919 F.2d 304, 308 (5th Cir. 1990) (dismissing 421 out of 451 claims). Others have resulted in significant plaintiffs' verdicts. See, e.g., Trials: First Tire Worker Verdicts Go to Plaintiffs, Mealey's Litig. Rep.- Asbestos (Mealey's Pub.), at 11-12 (Feb. 2, 1990). Others have produced large verdicts followed by new trials granted by the trial judge for lack of evidence of impairment. See,

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e.g., Blue v. Fibreboard Corp., Asbestos Litig. Rep. (Andrews Pub.) 22728, 22728-30 (Cal. Super. Ct. Feb. 19, 1991, Mar. 1, 1991) (Mar. 14, 1991).

[FN80]. This expected jury award could be calculated on the basis of a frequency distribution of possible jury awards for that claim. This distribution would range from the highest possible award to a defendant's verdict (zero recovery), and would assign a discrete probability to each of these possible outcomes.

[FN81]. For the plaintiff, this would of course include the contingent fee, discounted by the (small) possibility that the court would reduce it.

[FN82]. In a different litigation system, of course, a claim's value would be higher or lower, depending upon whether those system differences generally favored plaintiffs or defendants. If the system were more efficient in eliminating deadweight losses, the new claim value might leave both plaintiffs and defendants better off compared to the old system.

[FN83]. For purposes of this discussion, I assume that the analysis is for a given jurisdiction; thus I do not include the considerable variation in award values for similar claims among different jurisdictions. See supra text accompanying notes 75-79.

[FN84]. CCR Letter, supra note 36, at 1-2; cf. Special Master's Report, In re Asbestos Litig., In Proceedings for Reorganization under Chapter 11 (NYAL Index No. 4000) (Nov. 3, 1990), at 11-12 (describing statistical model for extrapolating future claims against Manville Trust on basis of injury, age, living status, and jurisdiction).

[FN85]. See, e.g., verdicts reported, supra note 79.

[FN86]. See supra notes 28-30 and accompanying text. Indeed, in a recent Pennsylvania lower court case in which plaintiff's medical expert testified that his asbestos-related pleural thickening was "asymptomatic", the court held there was no cognizable cause of action as a matter of law. Czekaj v. Johns-Manville, No. 4-78 (Phila. Ct. C.P. Nov. 6, 1991).

[FN87]. See, e.g., 5 Mealey's Litig. Rep.-Asbestos (Mealey's Pub.), at 21 (Jan. 18, 1991) ($33,000 verdict); Verdicts Returned Against Manville Fund in Pa., 6 Mealey's Litig. Rep.-Asbestos (Mealey's Pub.), at 45 (June 7, 1991) (verdicts of $50,000 each).

[FN88]. See infra notes 131-34 and accompanying text.

[FN89]. See, e.g., Michael D. Green, The Paradox of Statutes of Limitations in Toxic Substances Litigation, 76 CAL. L. REV. 965, 984-87 & n.91, 1001-03 & nn.153, 157-59 (1988) (discussing problems of premature filing and damage assessment and describing reform jurisdictions that allow recovery for risk of future conditions, mitigate the single-judgment rule by allowing choice among separate causes of action for statute of limitations purposes, or allow a subsequent judgment for a distinct disease).

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[FN90]. See Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 117-21 (D.C. Cir. 1982) (citing cases); Wilber v. Owens-Corning Fiberglass [sic] Corp., 476 N.W.2d 74, 76 (Iowa 1991) (citing cases); VaSalle v. Celotex Corp., 515 N.E. 2d 684, 688 (Ill. App. Ct. 1987) (citing cases).

[FN91]. See, e.g., Boston Stipulation, supra note 4, at 2; Cook County Order, supra note 4, at 8. In jurisdictions where, in addition, a statute of repose runs from an earlier date, cancer claims arising after the repose period might ironically be barred if ruled a distinct disease. In such jurisdictions, a registry might also ease the effect of the statute of limitations bar even against cancer claims that arise after the limitations period has expired by serving as probative evidence of the seriousness of an earlier, registry- preserved condition.

[FN92]. See Raymark Indus. v. Stemple, No. 88-1014-K, 1990 WL 72588 at * 5-*10 (D. Kan. May 30, 1990) (describing mass solicitation and cursory diagnosis of 6000 tireworkers, and denying summary judgment to plaintiffs' attorneys and doctors sued for fraud); see also Oliver & Spencer, supra note 57, at 75-79.

[FN93]. See Raymark Indus. v. Stemple, supra note 92, at 15, 23-24 (discussing ethical violations).

[FN94]. Lawyers seeking to maximize the settlement value of a portfolio of claims would seem to have a strong incentive to batch them by mixing high-value and low-value claims in ways that make it difficult for their adversaries to discern the claims' variability.

[FN95]. See, e.g., CHURCG & GREEN, supra note 23, at 289 ("The latency period (time from first exposure to appearance of disease) for mesothelioma is usually long, extending from about 15 to 60 years and averages 30 to 40 years").

[FN96]. For this reason, many plaintiffs' lawyers who file pleural plaque claims then seek to delay their placement on the trial calendar. Confidential Interview with plaintiffs' counsel (Summer 1991).

[FN97]. JOHN RAWLS, A THEORY OF JUSTICE 136-142 (1971).

[FN98]. This may be true even if we relaxed the first assumption, that is, even if people knew that they themselves had been exposed to asbestos but did not know whether, or to what extent, they had been or would be injured as a result.

[FN99]. There is considerable empirical evidence to support this supposition. See, e.g., In re Asbestos Litig., supra note 1, 129 Bankr. 710, 780 (citing an informal survey of Asbestos Victims of America "including persons with all levels of disease, impairment, potential future claimants and those without impairment," that found that "even those without impairment favored not seeking compensation from the Trust at this time in favor of those who are disabled, dying and dead. They would rather wait and liquidate their claim against the Trust if and when they became impaired."); id. at 857-61, 776-77, 779-80 (establishing that most plaintiffs endorsed settlement in the Manville proceeding giving substantial priority to claims of the impaired). Many plaintiffs have also supported the Cook County registry, even defending it against challenge on appeal. See Brief of Plaintiffs-Appellees, Mulligan, at 14-17, Mulligan v. Keene Corp., No. 91-1305 (Ill. App. Ct. 1991).

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[FN100]. See, e.g., Brickman, supra note 1, at Part D (discussing use of class actions and consolidation in asbestos litigation).

[FN101]. In the Hawaiian asbestos litigation, for example, the consolidated trials of 30-40 plaintiffs include both extremely serious and relatively unimpaired cases due to the system of selecting cases for trial. Counsel for each side take turns choosing which cases they wish to include in the mass trial, plaintiffs' counsel naturally selecting high-value cases, defendants' counsel preferring low-value ones. The result is a heterogeneous batch of cases. Telephone Interview with Janelle London, Law Clerk to Judge Samuel Conti, N.D. Cal., Visiting Judge in D. Haw., June 1991.

[FN102]. See supra note 77. In the consolidated litigation of Cimino v. Raymark Industries, Inc., 751 F. Supp. 649 (E.D. Tex. 1991), claimants received identical awards within each of five disease categories in a 2000-plus claimant group, regardless of age, smoking history, exposure history, or any other important variable.

[FN103]. Coverage of defense costs varies among differently structured layers of insurance. Defendants whose coverage of defense costs is limited to their primary insurance may well favor deferring litigation. See supra note 58. Other defendants, however, may have an interest in exhausting coverage subject to deductibles as soon as possible, if a layer of unlimited coverage of defense costs lies beneath. Telephone Interview with Professor Eric Green, Special Master for federal asbestos litigation in Boston, Mass. (Sept. 15, 1991).

[FN104]. See supra text accompanying note 84 (discussing variables relevant to claim value).

[FN105]. See supra note 69.

[FN106]. There is mixed evidence concerning the extent to which registries in fact encourage early settlement of unimpaired claims. Judge Rya Zobel, who presides over the federal asbestos litigation in Boston, believes that the Boston registry generally does so. Telephone Interview with Judge Rya W. Zobel, D. Mass. (June 1991). Her Special Master, however, believes that this depends upon whether the registry is mandatory, the structure of insurance coverage, and other factors. Telephone Interview with Professor Eric Green, supra note 103.

[FN107]. See supra text accompanying note 36.

[FN108]. The FIFO rule also contributes to the incentives to file prematurely and the dilemma of the single judgment rule, discussed supra text accompanying notes 89-91. This may leave certain claimants inadequately compensated, which demoralizes both claimants and society and undermines the fairness of the legal system. To the extent that these rules fail to compensate the full damage sustained, they also reduce deterrence of undue risktaking on the part of industry. At this point in time, of course, additional deterrence of asbestos use would be superfluous.

[FN109]. These include the Northern District of California, the Northern District of Illinois, the Northern and Southern District of Mississippi, the Western District of New York, the Northern District of Ohio, and the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. State courts, often in the same locales, have followed suit (Cambridge, Massachusetts) or taken a similar lead (Cook County, Illinois).
In contrast, some of the districts with large asbestos caseloads but no deferral registries include the Eastern

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District of Pennsylvania, and the Eastern and Southern Districts of New York. The Southern District of New York employs a suspense calendar under Local Rule 20 for cases such as those delayed by a stay in bankruptcy or other case-specific reason. Asbestos cases have never been suspended, however, although they were separately classified on the pending calendar before the transfers to a joint docket with the Eastern District of New York and, under the subsequent J.P.M.L. Order to the Eastern District of Pennsylvania. Telephone conversation with Clifford Kirsch, District Executive, S.D.N.Y., Mar. 17, 1992. In the joint asbestos docket in the Eastern District of New York, deferral has been proposed by some parties, via the S.D.N.Y. suspense calendar or otherwise, but not instituted. Telephone conversation with Judge Charles Sifton, E.D.N.Y., Mar. 11, 1992. Distribution of payments from the Manville Trust is "structured to pay the most seriously-injured claimants first. In re Asbestos Litig., 120 Bankr. 648, 670; see text and note 175, infra. The Texas state courts also have not established registries and currently schedule cases for group trials according to filing date, although special provisions are made for critical cases of mesothelioma. Cf. Cimino v. Raymark, Inc., 751 F.Supp. 649 (E.D. Tex., 1990) (ordering average damage awards based on random verdict samples in five disease categories).

[FN110]. The Boston registries, for example, were established first by negotiated agreement and then, at counsels' request, by a pretrial order of the court made pursuant to the parties' agreement. Boston Stipulation, supra note 4, at 1; Boston Amendment, supra note 4, at 1. In other districts, such a stipulated agreement with 100% participation is difficult to achieve.
The registries in the state and federal courts in Cook County followed many meetings among counsel to achieve as much agreement as possible, and were then established by court orders, despite one appeal. Cook County Order, supra note 4, at 1; see also infra note 112; In re Asbestos Cases, Mulligan v. Keene Corp. and Allied Signal, Inc., No. 1-91-1305, 2-5, 10 (Ill. App. Ct. Dec. 27, 1991) (describing agreement process, dismissing appeal).
In the Northern District of Ohio, the registry was established directly by the court in the form of the Ohio Asbestos Litigation (OAL) order. OAL Order No. 120, OAL Priority Case Management System, In re Ohio Asbestos Litigation, (N.D. Ohio, Dec. 26, 1990) [hereinafter OAL Order 120].

[FN111]. See, e.g., supra text accampanying notes 92 and 103.

[FN112]. Consider, for example, the appeal of the Cook County Order by Allied Signal Corporation, a defendant sued by only two claimants; plaintiffs who supported the registry opposed the appeal. The appellate court dismissed Allied Signal's appeal for lack of jurisdiction. Mulligan, slip op. at 7- 10.

[FN113]. In Cook County, claims that allege an asbestos-related cancer or mesothelioma and pleural cases with deceased plaintiffs remain on the active docket, while other claims are deemed "inactive" and are placed on the registry. Cook County Order, supra note 4, at 7. To leave the registry, or to file a new complaint, present or future plaintiffs must allege one of several court-defined conditions, accompanied by an expert affidavit certifying the diagnosis. Id. at 9-10; see supra note 27.
In Boston, voluntary dismissal under Fed. R. Civ. P. 41(a) (2) is made on plaintiff's request, tolling the statute of limitations for "an asbestos- related pleural or parenchymal condition, disease or injury and/or the claims for injury or disease alleged . . . except for claims based upon wrongful death." Boston Stipulation, supra note 4, at 2.

[FN114]. A system of administrative or judicial review of the classifications might also be provided. The cost of the review might be borne by the party seeking review, with the cost shifted if that party is successful on review. In Cook County, the court reviews objections to deferral and removal to and from the registry on the papers, granting hearings only in its discretion. Cook County Order, supra note 4, at 7; see also infra note 197.

[FN115]. See, e.g., Cook County Order, supra note 4, at 5 (elaborating Cook County's definition of impairment).

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In the Northern District of Ohio, where a registry was established for two groups of cases, plaintiffs' counsel (a single attorney) classifies cases by disease category and suggests cases, mostly involving pleural plaque and pleural thickening diagnoses, for voluntary deferral. OAL Order 118, OAL Priority Case Management System at 2, In re Ohio Asbestos Litigation, (N.D. Ohio Dec. 12, 1990) [hereinafter OAL Order 118].

[FN116]. The significance of the difference between a slow track on which cases move (albeit slowly) and an "on hold" track on which cases are instead held in abeyance until an impairment appears depends largely upon court congestion in the jurisdiction. Another alternative is simply to dismiss unimpaired cases without prejudice to later refiling should evidence of impairment develop.
Existing registries reveal some variations on these themes. The Northern District of Ohio initially considered criteria for summary judgment or dismissal based on the sufficiency of medical evidence or on jurisdictional amount grounds under Fed. R. Civ. P. 56 and 12(b), and the use of Fed. R. Civ. P. 11 sanctions to deter the premature filing of claims. OAL Order 118, supra note 115, at 2. Where counsel agreed to deter filed cases voluntarily, the court originally would dismiss without prejudice under Fed. R. Civ. P. 41(a) (2) subject to reinstatement under Fed. R. Civ. P. 60(b) (6). But when plaintiffs' counsel objected that voluntary deferral of over 1000 cases did not constitute a voluntary dismissal under Fed. R. Civ. P. 41(a) (2), the court simply ordered these cases "terminated" subject to reactivation on plaintiffs' motion. OAL Order 120, supra note 110, at 3, 7.
In Boston, plaintiffs may join the registry directly by filing notice with the court without a filing fee and by also notifying defendants for insurance and statute of limitations purposes. Boston Amendment, supra note 4, at 2.

[FN117]. Under some existing registry plans, the formal filing and docketing of a complaint with the court is not necessary to comply with the statute of limitations. The mere registration of a deferred claim in the registry and notice to the defendant has been deemed to satisfy the "commencement" requirements for tolling the applicable statute of limitations. See Cook County Order, supra note 4, at 4. The system in Boston is similar; notice to the defendant of the claim's entry on the registry establishes the filing date for statute of limitations purposes and tolls the statute for "any asbestos- related injury, disease or condition stated . . . except for claims based upon wrongful death." Boston Stipulation, supra note 4, at 2; cf. infra text accompanying note 156.

[FN118]. See supra text accompanying note 90. The Boston Stipulation, supra note 4, at 2, is somewhat ambiguous in this respect, tolling the statute for "any claim" but then preserving defenses for diseases not alleged at first.

[FN119]. Cf. supra note 116.

[FN120]. See Bledsoe v. Crowley, 849 F.2d 639 (D.C. Cir. 1988) (finding that trial court abused discretion by dismissing case requiring arbitration rather than staying proceedings as plaintiff had requested).

[FN121]. Within any given track, claimants might be permitted to buy and sell their places on line in that track, which would have the virtue of giving priority to those claimants who value it most. This feature, however, might be objectionable on a number of ethical and policy grounds, including concerns about wealth disparties and about the risk that it would create excessively powerful incentives to file early. Cf. Brickman, supra note 1, at n.95 (describing claims trading among plaintiffs' attorneys).

[FN122]. In Boston's registry, a plaintiff who develops a more serious condition may file a request to transfer to the active docket if he originally filed a complaint and paid a fee; if he originally filed only a notice of claim, he must file a fee and complaint. This may be done once as a matter of course without leave of court. The original

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agreement among counsel and the court order that adopted it require no medical testimony to accompany reactivation requests. Settlement arrangements, however, sometimes require the plaintiff to produce a medical certification. Boston Amendment, supra note 4, at 2.
In the Northern District of Ohio, court orders have established committees and conferences to identify criteria for classification, procedures for expedited appeal and arbitration, and medical monitoring. OAL Order 120, supra 110, at 4-6; OAL Order No. 123, Mardoc Priority Case Management Implementation Order, In re Ohio Asbestos Litigation, (N.D. Ohio Jan. 4, 1991). To reactivate a case, plaintiff must make a motion demonstrating that his condition has "progressed." OAL Order 120, supra note 110, at 4.
The state court in Cook County requires claimants wishing to reactivate their claims to produce medical documentation of impairment, and mandates arbitration for cases proposed for reactivation that do not appear to rise to the value of $15,000. Cook County Order, supra note 4, at 10, 11. Mandatory arbitration has recently been authorized for federal courts. See infra note 184.

[FN123]. See, e.g., Cook County Order, supra note 4, at 5.

[FN124]. For example, the Cook County registry procedure allows an accelerated trial slot if a doctor's affidavit indicates likely death within a year. Cook County Order, supra note 4, at 11-12.

[FN125]. E.g., Mass. Gen. L. ch. 231, § 6B (1985) (calculating prejudgment interest from "the date of commencement of the action"); Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 §§ 2 & 6 (Vernon Supp. 1990) (effective Sep. 2, 1987) (calculating pre-judgment interest from 180th day after defendant's notice of claim or filing of suit if earlier, at rate prevailing when judgment entered).

[FN126]. See, e.g., Boston Stipulation, note 4 supra (stipulating that prejudgment interest would be calculated from date of refiling on active trial docket); order Regarding Calculation of Prejudgment Interest, DeYoung v. Owens-Corning Fiberglas Corp., No. 84-1123-z (D. Mass. 1991) (calculating prejudgment interest from date of amended complaint for mesothelioma claimant who had failed to comply with order to either defer earlier pleural claim or to file statement); Cimino v. Raymark, Inc., 751 F. Supp. 649, 654-56 (E.D. Tex. 1990) (calculating pre-judgment interest for post-1987 cases according to statute [note 125, supra] and from six months after last exposure in cases filed earlier) (citing Cavner v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985)).

[FN127]. Claimants reaching age 70 should be removed from deferral registries and given priority preference. See, e.g., Cal. Civ. Pro. Code § 36(a) (West 1984) (setting forth conditions establishing preference for case where movant has reached age 70); Rice v. Superior Court, 185 Cal. Rptr. 853, 854 (Cal. App. 2d 1982) (finding statute mandatory "irrespective of the circumstances leading to the motion for preference"). In Rice preference was renewed even after voluntary dismiasal. See also Koch-Ash v. Superior Court, 225 Cal. Rptr. 657, 658 (Cal. App. 2d 1986) (invalidating indefinite deferral of 70-year old).

[FN128]. Cook County's registry has an "exceptional circumstances" exception. Cook County Order, supra note 4, at 10.

[FN129]. See, for example, the technical assessment and classification criteria for the deferral registry in Cook County, Illinois, which relies both on standard x-ray classifications and on tests of pulmonary function. Id. at 9-10; see supra note 27.

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[FN130]. See, e.g., Hillerdal, supra note 12, at 125-30 (recommending numerous changes in current systems of diagnosis, classification, and measurement).

[FN131]. See, e.g., Herber v. Johns-Manville Corp., 785 F.2d 79, 83 (3d Cir. 1986) (describing New Jersey law). The elements of this cause of action differ across jurisdictions. In some jurisdictions, for example, some accompanying physical impairment or other manifestation is required. See, e.g., Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 507-09 (Pa. Super. 1984) (setting forth Pennsylvania law regarding infliction of emotional distress). See generally David C. Minneman, Annotation, Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery, 50 A.L.R. 4th 13 (1986) (discussing recovery for possibility of occurrence of future disease or for mental distress caused by fear of developing future disease).

[FN132]. CCR Letter, supra note 36, at 2.

[FN133]. One obvious solution is to create for cancerphobia claims a third, intermediate track between the fast and the slow ones. Yet precisely because virtually all unimpaireds now file such claims, this is really no solution at all. Given this fact, it need hardly be added that any such marginal advantage given to cancerphobia claims would further strengthen the already powerful incentives to assert them.

[FN134]. In addition, a registry that defers cancerphobia claims to a slower track may maximize the total resources available for recoveries to the extent that some of the weaker of those claims drop out before being litigated. To the extent that this saves resources, all claims involving existing loss-- including both present impairments and cancerphobia--would become more valuable.

[FN135]. See, e.g., In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829, 849-52 (3d Cir. 1990). Some asbestos cases do, however, mention medical monitoring. See, e.g., Herber v. Johns-Manville Corp., 785 F.2d at 80, 83. Some jurisdictions do not recognize a claim for medical monitoring in certain circumstances. See, e.g., Ball v. Joy Mfg. Co., 755 F. Supp. 1344, 1372 (S.D.W.Va. 1990), aff'd sub nom. Ball v. Joy Technologies Inc., 940 F.2d 651 (4th Cir. 1991) (finding no cause of action for medical monitoring under Virginia or West Virginia law where plaintiffs have shown only exposure to defendant's product); Potter v. Firestone Tire & Rubber Co., 274 Cal. Rptr. 885, 896-97 (Cal. Ct. App. 1990) (allowing no recovery for medical monitoring without evidence "that the cancer is reasonably certain to occur"), review granted, 806 P.2d 308 (1991).

[FN136]. In addition to the screening cost, early detection can increase emotional and other suffering in cases where the detection cannot alter the prognosis (e.g., incurable cancer), lead to overtreatment of borderline cases, produce false negatives that lead patients to ignore symptons and delay treatment, and produce false positives that cause unnecessary alarm and require invasive, risky follow-up tests to confirm. See, e.g., Philip C. Prorok et al., UICC Workshop for the Evaluation of Screening Programmes for Cancer, 34 INT'L J. CANCER 1 (1984).

[FN137]. See U.S. PREVENTIVE SERVICES TASK FORCE, GUIDE TO CLINICAL PREVENTATIVE SERVICES: AN ASSESSMENT OF THE EFFECTIVENESS OF 169 INTERVENTIONS, ch. 10 (1989) (screening asymptomatic persons for lung cancer by performing routine chest radiography or sputum cytology not recommended). OSHA regulations, however, do require medical surveillance of all employees exposed to asbestos above a certain level. 29 C.F.R. § 1910.1001(1) & app H (1991).

[FN138]. One policy approach in such cases--to limit the defendant's liability to a requirement that it purchase only

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"excess" health insurance coverage for the plaintiff's asbestos-related costs (that is, costs not already covered by the claimant's existing, primary health insurance policy, Medicare, or Medicaid)--appears to be impractical. CCR Letter, supra note 36, at 2.

[FN139]. See supra text accompanying notes 56-59.

[FN140]. It might seem desirable to permit plaintiffs to move for a bond securing a defendant's potential liabilities to the presently unimpaired if they can show that the defendant is probably liable but at significant risk of insolvency that threatens deferred claimants' ability to obtain payment of their claims. Under this approach, the court would evaluate this option, taking into account its cost (which would reduce the resources available for recoveries) and the benefit to plaintiffs, and the bond's level might also be periodically adjusted to reflect new scientific data and actual claims resolution experience. Although the resources available for recoveries would of course be reduced by the portion of the bond premium not related to the insolvency risk, unimpaired claimants as a group might be better off even if particular ones might be worse off. Unfortunately, this remedy appears to be impractical under present conditions. See CCR Letter, supra note 36, at 2.

[FN141]. See, e.g., FELSTINER & DINGWALL, supra note 52, at 2.

[FN142]. This option is limited only by the rather weak constraint of the Due Process Clause on securing personal jurisdiction over large corporate defendants. See, e.g., International Shoe v. Washington, 326 U.S. 310, 316 (1945) ; supra note 42; see also Letter from State Judges Asbestos Litigation Committee to the Judicial Panel on Multidistrict Litigation (May 24, 1991) (on file with author) (recognizing a need for coordinated solution among federal and state courts).

[FN143]. Any system that allows plaintiffs' lawyers to decide which of their cases are to be deferred will tend to aggravate a potential conflict of interest between them and their clients. The lawyers' control over which cases are deferred may encourage them to defer cases in which the plaintiff is already impaired but cannot readily prove causation--if, for example, he has a colon cancer rather than, say, mesothelioma. If these cases are as strong at this point as they will ever be, the plaintiffs may want them tried as soon as possible, while the lawyers may prefer to try the stronger cases first. See OAL Order 120, supra note 110, at 5-6 and case-list "B" (including cancer cases among deferred cases "considered . . . not sufficiently mature for trial because medical symptomatology or other proof is not presently available to adequately meet substantive or economical standards for the litigation process," but recommending alternative dispute resolution).
Even with a consensual registry, there are at least two ways to minimize this problem. First, attorneys can be required to obtain informed consent from their clients before deferring their cases. For example, an attorney for a significant number of plaintiffs in the Northern District of Ohio sent a letter to clients explaining pros and cons of joining the registry. Telephone Interview with Chris Malumphy, Law Clerk to Chief Judge Thomas D. Lambros, N.D. Ohio. Second, medical criteria can be specified as the sole grounds for deferral; see also supra Part III, 1 and infra note 188; cf. Brickman, supra note 1, at n.105 (contrasting diagnoses of attorney-and court-sponsored experts).

[FN144]. See supra text accompanying note 111.

[FN145]. The range of views is well represented by the briefs filed in response to Order to Show Cause, In re Asbestos Products Liability Litigation (No. VI MDL-875) (J.P.M.L. Jan. 17, 1991). Compare, e.g., Response of Wilentz, Goldman & Spitzer, PC to Order to Show Cause (filed Mar. 15, 1991) (opposing registry; representing

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plaintiffs in 24 actions, 17 labor and public interest organizations, and joined by at least 6 other plaintiffs' firms) with Response of the Center for Claims Resolution Defendants to Order to Show Cause (filed Mar. 18, 1991) (advocating registry; representing 20 defendants).

[FN146]. Some defendants' lawyers advocate the use of a court-appointed medical expert under Fed. R. Evid. 706 to screen cases, coupled with the use of Fed. R. Civ. P. 11 sanctions against plaintiffs' attorneys whose clients' injuries are not serious enough to meet the jurisdictional amount. It should be noted, however, that since a claimant with chest x-ray changes attributable to asbestos exposure generally states a claim under state law, summary judgment on that claim will not ordinarily be appropriate. See, e.g., Cathcart, 471 A.2d at 506-08 (finding "medically identifiable effect linked to her exposure to asbestos particles").

[FN147]. Registries may be useful to bankruptcy courts in classifying (by diagnosis and severity) and estimating the number of contingent claims and unliquidated claims. See 11 U.S.C. § 502(c) (1988). Moreover, to the extent that registries encourage earlier filings, see text in preceding paragraph and supra text accompanying notes 89-91, they could increase the number of claims eligible for payment and discharge in bankruptcy. See 11 U.S.C. §§ 726(a); 1129(b); 727(b); 1141(d). Encouragement of earlier filings could also increase the number of cases stayed under § 362(a) (6) and reduce the number of future claims. The status in bankruptcy of such future claims remains controversial. See DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 50-64 (2d ed. 1990) (discussing status of unmanifested tort injuries and contingent tort claims).

[FN148]. The constitutional impediments to congressionally-mandated registries in state courts are briefly discussed infra at note 187.

[FN149]. 28 U.S.C. § 1657 (a) (1988). The statute provides exceptions to court-established priorities for habeas corpus, recalcitrant grand jury witness, or injunctive relief actions, and for "good cause". "[G]ood cause' is shown if a right under the Constitution of the United States or a Federal Statute . . . would be maintained in a factual context that indicates that a request for expedited consideration has merit." Potential constitutional challenges to court-established priorities in the form of a deferral registry are discussed and rejected infra at note 187. Another provision of the same statute authorizes the Judicial Conference of the United States to modify these locally-established priorities in the interests of inter-circuit consistency. 28 U.S.C. § 1657(b) (1988). In Zukowski v. Howard, 115 F.R.D. 53, 55 (D. Colo. 1987), which denied a tort plaintiff's motion for an expedited trial date, the court noted that arguably only the Judicial Conference can review or modify the priorities established by local court rules.

[FN150]. Zukowski, 115 F.R.D. at 54.

[FN151]. Civil Justice Reform Act, 28 U.S.C.A. § 471 (West Supp. 1991).

[FN152]. Id. at § 473(a)(1).

[FN153]. Id. at § 473(a)(6)(B). Although the legislative history did not specifically mention registries, it emphasized the goal of making "an early assessment of each case" and endorsed "[s]ingling out different categories of cases for different procedural treatment." S. Rep. No. 416, 101st Cong., 2nd Sess. 23 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6826.

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[FN154]. See infra text accompanying notes 184-87.

[FN155]. See Shirley A. Wiegand, A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials, 69 OR. L. REV. 87, 104 (1990) (critizing basis for court mandate of summary jury trial under Rules 1 and 16(a); employing arguments superseded by Civil Justice Reform Act of 1990).

[FN156]. Walker v. Armco Steel Corp., 446 U.S. 740, 752-53 (1980) (holding that in diversity cases, state statute of limitations governs absent conflicting federal rule; Rule 3 not such a rule); cf. West v. Conrail, 481 U.S. 35 (1987) (finding that Rule 3 can toll statute of limitations in federal question case); Stephen Burbank, Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law, 63 NOTRE DAME L. REV. 693 (1988) (discussing aptness of federal rules for limitations law in most federal question cases). It is also debatable whether Supreme Court Rules may alter statute of limitations law under the Rules of Decision Act and Erie jurisprudence. See Stephen Burbank, Comment, Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1019-20 (1989) (arguing that under Rules Enabling Act, court rules may not make substantive policy choices such as tolling rules; disputing Carrington's view that federal rules authorize general if not claim-specific limitations law).

[FN157]. See Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (upholding court-mandated summary jury trial as authorized under Rule 16 as glossed by Rule 1); cf. Bolton v. Travelers Ins. Co., 475 F.2d 176, 178 n.3 (5th Cir. 1973) ("time periods allowed for answer and appearance are . . . clearly procedural").

[FN158]. On the relationship between registry filing and tolling the statute of limitations, see supra paragraph accompanying notes 89-91, 113, and 117.

[FN159]. Narrow application of the "speedy" provision has been rejected in another context, involving the delayed assessment of litigation costs. See Northcross v. Board of Educ., 611 F.2d 624, 635 (6th Cir. 1979); United States v. Hoffa, 497 F.2d 294 (7th Cir. 1974). To remove doubt, however, the word "speedy" might be changed to "timely," especially since the speed desideratum is probably implicit in Rule 1's existing requirement to secure "inexpensive" determinations.

[FN160]. Fed. R. Civ. P. 16(b) advisory committee's note.

[FN161]. Id.

[FN162]. Before the Civil Justice Reform Act of 1990, supra note 70, Fed. R. Civ. P. 16(a) was invoked to support other mandatory pretrial proceedings, but with some controversy. See Arabian American Oil Co., 119 F.R.D. at 448 (upholding summary jury trial); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46-48 (E.D. Ky. 1988) (discussing authorization for summary jury trial under Fed. R. Civ. P. 16); see also Robert B. McKay, Rule 16 and Alternative Dispute Resolution, 68 Notre Dame L. Rev. 818 (1988); Thomas D. Lambros, The Summary Jury Trial and Other Alternative Means of Dispute Resolution: Report to the Judicial Conference of the United States Committee on the Operation of the Jury System, 103 F.R.D. 461, 469 (1984) (grounding summary jury trial in Fed. R. Civ. P. 1 and Fed. R. Civ. P. 16). Although Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988) (holding mandatory participation in summary jury trial not authorized by Fed. R. Civ. P. 16) and Wiegand, supra note 155, are to the contrary, they are superseded by the Civil Justice Reform Act of 1990, supra note 70.

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[FN163]. 28 U.S.C. § 2071 (1988). Section 2072 authorizes the Supreme Court to issue rules of civil procedure.

[FN164]. Such rules must meet certain notice-and-comment and publication requirements, 28 U.S.C. § 207(b) (1988), and are subject to review, modification, or abrogation by the Judicial Conference, 28 U.S.C. § 2071(c)(2)(a) (1988). However, there is no requirement for a formal public hearing before such rules are adopted. 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3151, Rule 83, App. C (1973 & Supp. 1991), at 166.

[FN165]. See, e.g., Rule 50.6 in the Eastern District of New York, a district in which a large volume of asbestos cases are pending. Rule 50.6 authorizes district judges to calendar cases "in such order as seems just and appropriate," giving preference to certain categories of cases including "any other action if good cause is shown." Moreover, courts enjoy broad discretion in interpreting and applying their own rules adopted in the interest of efficiency. See, e.g., In re Adams, 734 F.2d 1094 (5th Cir. 1984) (upholding interpretation of local bankruptcy rule). A leading treatise, however, observes that "basic procedural innovations" may not be effected by local rule. 12 WRIGHT & MILLER, supra note 164, at § 3154, Rule 83, at 239 (citing Miner v. Atlass, 363 U.S. 641 (1960)).

[FN166]. American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937); see also Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2134-35 (1991) (affirming and extending this inherent power to control proceedings, even in situation in which existing rule and statute applied to the conduct in question).

[FN167]. American Life Ins. Co., 300 U.S. at 215; see Mulligan, slip op. at 2-5, 10 (Ill. App. Ct. Dec. 27, 1991) (holding registry order non- appealable, as ministerial prioritization based on internal court power).

[FN168]. Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) (upholding court's dismissal for attorney's failure to prosecute action); Mingo v. Sugar Cane Growers Coop., 864 F.2d 101, 102 (11th Cir. 1989) (holding same, but remanding for reconsideration).

[FN169]. See Burden v. Yates, 644 F.2d 503, 505 (5th Cir. 1981) (affirming power to dismiss for failure to prosecute action, but remanding since even dismissal without prejudice might bar plaintiff from refiling if statute of limitations has run). A dismissal designed merely to effect a deferral to a registry must be distinguished, of course, from a dismissal on a dispositive procedural ground or on the merits.

[FN170]. Multidistrict Litigation, 28 U.S.C. § 1407 (1988).

[FN171]. H.R. Rep. No. 1130, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1899.

[FN172]. See In re Asbestos Products Liability Litigation (No. VI, MDL- 875), 771 F. Supp. 415, 424 (J.P.M.L. 1991).

[FN173]. In re "Agent Orange" Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

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[FN174]. In re Asbestos Litig., supra note 1, Bankr. 710, 777-92 (discussing position of minority claimants, largely in opposition).

[FN175]. 129 Bankr. at 769. If the plan is upheld on appeal, payments of 45% of the value of asbestos-related claims settled with the Trust will be prioritized according to illness severity and pro-rated for the remaining 55%. "First level" priorities will be, in descending order, "extreme hardship" (financial or imminence of death), mesothelioma and other cancers, and (in FIFO order) serious asbestosis and deaths. "Second level" priorities will be, in descending order, "hardship", certain pleural and interstitial fibrosis (radiographically and functionally defined), claimants over 70, and (in FIFO order) other claims. Within each of the two levels, groups of claims may be paid out of order. In re Asbestos Litig., 120 Bankr. 648, 670-71; see also id. at 672-80 (governing medical progression, classification and evidence, financial structure and disbursement, dispute resolution, attorneys' fees, and amendments). The courts noted that many claimants, including many of the presently unimpaired, favored this approach even though it meant deferral of their claims. 129 Bankr. at 776, 77; see supra note 99.

[FN176]. See 129 Bankr. at 754-59.

[FN177]. 28 U.S.C. § 1335(a) (1988).

[FN178]. Fed. R. Civ. P. 22(1).

[FN179]. See Geoffrey C. Hazard & Myron Moskovitz, A Historical and Critical Analysis of Interpleader, 52 CAL. L. REV. 706, 750-63 (1964).

[FN180]. 792 F.2d 1423 (9th Cir. 1986); accord Hobson v. Brennan, 637 F. Supp. 173 (D.D.C. 1986).

[FN181]. Armster, 792 F.2d at 1428.

[FN182]. See, e.g., Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1st Cir. 1981); DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980); Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979).

[FN183]. See, e.g., Gronne v. Abrams, 793 F.2d 74, 77-78 (2d Cir. 1986) (upholding against Equal Protection challenge); Feinstein, 643 F.2d at 889- 90 (upholding against Seventh Amendment and state bill of rights challenge); DiAntonio, 628 F.2d at 291 (upholding against Seventh Amendment and Equal Protection challenge); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 433- 34 (N.D. Ind. 1979) (upholding against Seventh Amendment, Equal Protection, and Due Process challenges); aff'd 603 F.2d 646 (7th Cir. 1979); Davison v. Sinai Hosp., 462 F. Supp. 778, 781 (D. Md. 1978) (upholding against Seventh Amendment and state constitutional challenge), aff'd 617 F.2d 361, 362 (4th Cir. 1980). See generally PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL, 38-43, 183-87 & nn.94-129 (1991); Kristine C. Karnezis, Annotation, Validity and Construction of Statutory Provisions Relating to Limitations on Amount of Recovery in Medical Malpractice Claim and Submission of Such Claim to Pretrial Panel, 80 A.L.R. 3d. 583 (1977).

[FN184]. See, e.g., New England Merchants Nat'l. Bank v. Hughes 556 F. Supp. 712, 714 (E.D. Pa. 1983)

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(upholding arbitration rule against Seventh Amendment challenge); Kimbrough v. Holiday Inn, 478 F. Supp. 566, 567-72 (E.D. Pa. 1979) (same, discussing cases). See generally John F. Wagner, Annotation, Validity and Effect of Local District Court Rules Providing For Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms, 86 A.L.R. FED. 211 (1988).

[FN185]. Rhea v. Massey-Ferguson, 767 F.2d 266, 268-69 (6th Cir. 1985) (upholding against Seventh Amendment challenge).

[FN186]. See McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46 (E.D. Ky. 1988) (upholding against Seventh Amendment challenge). Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987), which found such a scheme unauthorized by Rule 16, has surely been rendered anachronistic by the Civil Justice Reform Act of 1990, supra note 70.

[FN187]. Many state courts have upheld similar pretrial schemes. See generally R.D. Hursh, Annotation, Constitutionality of Arbitration Statutes, 55 A.L.R. 2d 432 (1957); Karnezis, supra note 183. Some state courts have held such diversion and deferral schemes unconstitutional but generally on grounds inapplicable to deferral registries. Furthermore, amendments to such legislative schemes can and have been designed in response to holdings of unconstitutionality. See Wright v. Central DuPage Hosp. Ass'n, 347 N.E.2d 736, 741 (Ill. 1976) (stating in dictum that although statute unconstitutionally vested attorney and physician members of medical malpractice review panel with power to determine and apply substantive law, this did "not imply that a valid pretrial panel procedure cannot be devised"); see also Mattos v. Thompson, 421 A.2d 190, 196 (Sup. Ct. Pa. 1980) (stating in dictum that compulsory arbitration statutes were generally constitutional, though statistics revealed unconscionable delays in particular arbitration system held unconstitutional).
The Seventh Amendment jury right does not apply to the states, so constitutional challenges to pretrial diversion or deferral schemes have relied on state constitutional jury rights, with the schemes sometimes held unconstitutional but generally on grounds inapplicable to deferral registries. Program-specific factors held to violate state constitutional jury rights have included oppressive delays, replacement of jury trial, and the probable biased effect of panel decision on jury. See, e.g., Smith v. Barclay, 429 A.2d 438 (Pa. Super. 1981) (holding deferral program unconstitutional because of oppressive delay); Simon v. St. Elizabeth Med. Ctr., 355 N.E.2d 903, 907-08 (Ohio Cir. Ct. 1976) (finding that admission of arbitration decision as evidence at subsequent trial limited right to jury); Grace v. Howlett, 283 N.E.2d 474, 481 (Ill. Sup. Ct. 1972) (finding deferral program unconstitutional for supplanting jury trial).

[FN188]. It should be noted that under the consent-based registry systems, the courts have devised ways to avoid making such factual determinations. The principal one, of course, is to press plaintiffs' attorneys to decide which claims to defer. On the other hand, courts may not compel parties to stipulate facts. See J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976); see also Cook County Order, supra note 4, at 5, 12 (restricting descriptions of claims to use for registry purposes); cf. supra Part III 1 and note 143.

[FN189]. Perhaps the most important and commonplace example is a court's duty to make preliminary fact determinations so that it can then decide whether or not it possesses jurisdiction over a claim. 13A WRIGHT & MILLER, supra note 164, § 3536, at 535 (discussing jurisdiction to determine jurisdiction).

[FN190]. A defendants' lawyer in the Boston asbestos litigation has suggested this threshold determination as to jurisdictional amount ($50,000 in federal court diversity cases, 28 U.S.C. § 1332 (1988)) would be a way for federal judges to discriminate among claims according to severity. See 13A WRIGHT & MILLER, supra note 164, § 3707, at 1333-42 (discussing circumstances under which courts may determine amount in controversy in tort

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claims for jurisdictional purposes).

[FN191]. An even more striking example of threshold fact-finding is the preliminarily motion to suppress in which a judge must determine the voluntariness of a confession, an issue that will later go to the jury and may be central to its decision to convict or acquit.

[FN192]. Another analogy involves those threshold determinations that courts must make to apply a statute or court rule mandating docket priority for certain types of claims. See, e.g., Speedy Trial Act of 1975, 18 U.S.C. § 3161 (1988); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(D) (1988).

[FN193]. 371 U.S. 415 (1963) (holding unconstitutional state regulations barring certain forms of solicitation by lawyers).

[FN194]. See, e.g., Grayneal v. Rockford, 408 U.S. 104, 115 (1972) (stating that peaceful demonstrations are subject to reasonable time, place, and manner restrictions); Cox v. New Hampshire, 312 U.S. 569, 576 (1942) (holding that permit requirements for a parade were reasonable time, place, and manner restrictions).

[FN195]. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (finding access to administrative hearing is protected by Due Process clauses); Martinez v. State of California, 444 U.S. 277, 281-82 (1979) (stating that a state-created cause of action for wrongful death is a species of property protected by the Due Process clause).

[FN196]. State ex rel. Strykowski v. Wilkie, 261 N.W.2d 434, 444 (Wis. 1978) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)); see also Logan, 455 U.S. at 423, 430 n.5 (1982).

[FN197]. For example, the system should provide for at least administrative review of the determination of non-impairment. See supra note 114.

[FN198]. See supra notes 156-57 and accompanying text.

[FN199]. Legislation reforming statutes of limitation has been upheld against such challenges. See Douglas v. Hugh A. Stallings, M.D. Inc., 870 F.2d 1242, 1249-50 (7th Cir. 1989) (upholding as rational against Equal Protection and Due Process challenges the commencement of Indiana medical malpractice statute of limitations at injury occurrence, and the lowering of legal age of disability exemption from statute of limitations); Montagino v. Canale, 792 F.2d 554, 556 (5th Cir. 1986) (upholding against Due Process and Equal Protection challenges); Brubaker v. Cavanaugh, 741 F.2d 318, 321 (10th Cir. 1984) (upholding against Due Process and Equal Protection challenges); Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982) (upholding against Due Process challenge). But see Waller v. Pittsburgh Corning Corp., 5 Toxics L. Rep. (BNA) 365, 365 (D. Kan. 1990) (holding that statute of limitations creates a vested right of defense and that subsequent legislative expansion of limitations period violates Due Process).

[FN200]. See, e.g., supra note 183.

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[FN201]. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1440 and § 16-6, at 1451 (2d ed. 1988)

[FN202]. See supra note 183.

[FN203]. See supra notes 185-87. Similar challenges to some other kinds of "tort reform" measures have also been rejected.

[FN204]. Program-specific factors that state courts have held to violate Equal Protection or Due Process, include the passing of the malpractice crisis that engendered the legislation, confinement of the sole benefit of a scheme to defendants, inflexible time limits, probable bias of medical arbitration panel, failure to advise patient of panel composition, and optional non-participation for one party only. See, e.g., Hoem v. State, 756 P.2d 780, 784 (Wyo. 1988) (holding that medical review panel not rationally related to public health purpose and unequally benefitted medical profession while obstructing malpractice victims); Boucher v. Sayeed, 459 A.2d 87, 92-94 (R.I. 1983) (holding that non-binding medical review panel violated equal protection by irrationally conferring one-sided "salutary privileges" on medical profession and undermining deterrence); Jackson v. Detroit Memorial Hosp., 312 N.W.2d 212, 214 (Mich. App. 1981) (invalidating arbitration procedures with 60-day revocation period and mandating doctor or hospital administrator on panel); Aldana v. Holub, 381 So.2d 231, 236-38 (Fla. 1980) (invalidating statute mandating completion of medical malpractice mediation within 10 months without extension); Carter v. Sparkman, 335 So.2d 802, 805 (Fla. 1976) (upholding statutes pertaining to liability mediation panels).
Other program-specific factors that courts have held unconstitutional include delegation of judicial power to lay members of a medical review panel. See, e.g., DeLuna v. St. Elizabeth's Hosp., 540 N.E.2d 847 (Ill. 1989) (holding unconstitutional required leave of physician to file claim); Wright, 347 N.E.2d at 741 (holding unconstitutional for delegation of judicial power to attorney and physician members of panel). Other explicit state constitutional provisions have been invoked. See, e.g., Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (holding that limits on awards violated state constitutional right of access to courts); Grace, 283 N.E.2d at 481 (holding that compulsory arbitration provision for small claims violates state constitutional provisions for jury trial against the use of fee officers).

[FN205]. See, e.g., In re Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1011 (5th Cir. 1977) (discussing calculation of attorneys' fees); Davidson v. Allis-Chalmers Corp., 567 F. Supp. 1532, 1542 (Mo. 1983) (awarding attorneys' fees against plaintiff for filing a frivilous suit); cf. Zukowski v. Howard, 115 F.R.D. 53, 57 (D. Colo. 1987) (denying plaintiff's motion for an expedited trial because plaintiff did not demonstrate extraordinary hardship in comparison with other claims awaiting trial).

[FN206]. In re Asbestos Litigation, 829 F.2d 1233, 1235 (3d Cir.), cert. denied sub nom. Owens-Illinois v. Danfield, 485 U.S. 1029 (1988); JUDICIAL CONFERENCE REPORT, supra note 1.

[FN207]. Some of the issues arising under state constitutions are discussed supra at notes 187 and 205.

[FN208]. Henry M. Hart, Jr., The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." (quoted in FERC v. Mississippi, 456 U.S. 742, 774 (Powell, J., dissenting)). Cf. Administrative Order No. 2, In re Asbestos Products Liability Litig. (No. VI, MDL-875) (E.D. Pa. filed Feb. 24, 1992) (ordering preparation of information on all federal and state cases for settlement conferences); 6 Mealey's Litig. Rep.- Asbestos, Mar. 6, 1992, at 3-4 (describing "ballistic reaction" of

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plaintiffs' counsel to Judge Weiner's assertion of jurisdiction over information regarding state cases).

[FN209]. See, e.g., FERC v. Mississippi, 456 U.S. at 771 (1982) (rejecting Tenth Amendment challenge to statute imposing procedures on state regulatory agencies acting in a "pre-emptible field"); Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 363 (1952) (holding that a state may not dispense with jury determination of certain issues in Federal Employers' Liability Act cases in state courts); Lester Brickman, The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress, 13 CARDOZO L. REV. 1891 (1992).

[FN210]. The most likely sources of constitutional authority would appear to be Article I, Section 8. See, e.g., Zukowski, 115 F.R.D. at 55-56 (finding Article I, Section 8 authority for 28 U.S.C. § 1657 (1988), which directs court prioritization).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
	:	
USG CORPORATION,	:	**Jointly Administered**
a Delaware Corporation,	:	**Case No. 01-2094 (RJN)**
et al.[1]	:	
	:	
Debtors.	:	
	:	**MEMORANDUM OPINION**
	:	**and ORDER**
	:	

This document constitutes the Memorandum Opinion and Order of the Court. On November 27, 2001, pursuant to the provisions of 28 U.S.C. §292(b), the Honorable Alfred M. Wolin was designated and assigned to hold court in the District of Delaware to complete unfinished business in a number of bankruptcy cases. These cases carry with them an enormous volume of known and unknown asbestos claims. In one of these cases, the above-captioned In re USG Corp., Case No. 01-2094, the debtor (hereinafter "USG") has applied for certain case management initiatives in the form of a case management order directed towards estimation hearings of the approximately 190,000 asbestos personal injury claims pending against it pursuant to 11 U.S.C. §

[1] The Debtors are the following 11 entities: USG Corporation, United States Gypsum Company, USG Interiors Inc., USG Interiors International, Inc., L&W Supply Corporation, Beadex Manufacturing, LLC, B-R Pipeline Company, La Mirada Products Co., Inc., USG Industries, Inc., USG Pipeline Company and Stocking Specialists, Inc.

502(c). The salient point of the debtors' proposal is that they would be permitted to challenge the validity of the claims against them in the context of the estimation hearing.

USG contends that it possesses substantive defenses to many of the asbestos claims against it and to many of the asbestos claims anticipated to be made in the future. The Court is sensitive to the concerns behind the debtors' position. Much has been written about the so-called "unimpaired" claimants, those who have been exposed to asbestos and may bear clinically verifiable signs of that exposure, but who currently exhibit no outward symptoms interfering with the quality of their lives. With a finite amount of money available to pay claims, competition for payment is more than an academic question. That shareholders' equity may be extinguished to compensate those whom they believe suffered no tangible harm is a bitter corporate pill to swallow.

The Asbestos Claimants' Committee ("ACC"), and the Future Claimants' Representative ("FCR") view this type of merits-based estimation hearing as unnecessary and unduly burdensome. They proffer that an estimation of USG's present and future asbestos liability can be made on the basis of USG's pre-petition settlements and litigation history of asbestos-related personal injury claims and lawsuits. It is similarly distasteful medicine to tort claimants to hear that claims identical to those which

were either litigated to judgment or settled in the state tort system over the course of many years could be eliminated by an imaginative application of federal procedural rules.

A third fact looms over this controversy, however. It has been represented to the Court, and financial analyses dehors the record make it appear at least plausible, that USG is insolvent even if one only counts the claims of the very sick or deceased victims of asbestos exposure. As to these claimants, still according to the ACC and FCR, the debtors have no legitimate defense. Debtors, of course, insist that even these claimants should not recover. This much is clear, however -- if this subset of very sick or deceased claimants represents valid claims in excess of the net worth of the debtor, small benefit will be gained for immense cost of litigating the entire universe of claims, including the so-called "unimpaireds."

The Court is aware that the tension between the positions articulated by the parties concerning the proper mode of valuing the debtors' asbestos liability reveals a fundamental, perhaps the fundamental divide between them. Indeed, the issue may lie at the heart of all asbestos bankruptcies. It is important, therefore, that all understand with perfect clarity the Court's role in relation to this dispute.

The Court exists to assist the parties in resolving their differences. It does so by providing a framework within which

the parties can litigate those differences to a Court-imposed result or compromise them based upon the parties' expectation of a predictable outcome. In bankruptcy, where liabilities exceed the assets of the estate, the Court will assist the parties in apportioning the remaining assets among the legitimate claimants. But, if the debtor maintains that its creditors are not legitimate and that, properly analyzed, claims against it do not exceed its assets, the Court must assist as well.[2] The statements in counsels' briefs compel the Court to state the obvious. In an asbestos bankruptcy, the Court will, within the constraints of the law, reject unsubstantiated claims, bogus medical evidence and fanciful theories of causation. The Court will protect those who have been truly harmed.

As stated, this Court can do so only within the context of the law binding upon it and upon the claims before it. It is basic that federal bankruptcy jurisdiction does not oust state law governing claims on a debtor's estate. Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 20 (2000) ('basic federal rule' in bankruptcy is that state law governs the substance of claims").

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[2] Thus the mode selected is ultimately determined by parties. For example, the matter of In re Armstrong World Indus., also pending before this Court, a consensual solution is already well-advanced. In that and other cases, the value of asbestos liability is based upon the private parties' own assessment of that liability, as adjusted by mutual, self-interested compromise. The ultimate result is no less legitimate, however, than one imposed by the Court.

The Bankruptcy Code only creates a forum for dividing inadequate assets among competing claims; it says nothing about the law under which those claims arise. An unbroken line of authority holds that state law claims remain governed by state law, even after the debtor invokes federal bankruptcy protection.

This principle defines the extent of the Court's discretion. Matters concerning claims administration, including such issues as proof of claim forms and claims bar dates are governed by the federal Bankruptcy Code and Rules. In these areas the Court has some limited discretion. As to the application of federal or state substantive law to the merits of the claims themselves, the Court has no discretion. With these structural truths in hand, the Court now turns to the application at bar.

In In re USG Corporation, one sees these general truths played out in detail. The debtors argues that "[t]he vast majority of asbestos personal injury suits filed today are meritless nonmalignant claims of minor pleural plaques diagnosed by dubious methods." USG Brf. at 16. USG contends that its due process rights require that the Court examine the merits of these claims. The debtors contend that the so-called "unimpaired" claimants have no valid claims, that claimants cannot identify an USG product to which they were exposed, that lung cancer claimants have no diagnosis of asbestosis and thus cannot prove that their cancer is caused by asbestos, and that mesothelioma is

not caused by chrysotile asbestos, the type of asbestos used in USG products. The debtors believe that success on these defenses would eliminate sufficient claims so that the remaining asbestos claimants could be paid in full, USG Brf. at 36, and, presumably, leave value in the debtors' estates for existing equity holders.

The ACC responds with weighty arguments. The debtors propose to litigate their defenses in relation to a sample of one percent of claimants, and extrapolate the results over the entire claimant pool to arrive at an estimated total allowed claim. The ACC disputes that one percent of the claimant pool would produce a statistically reliable base for extrapolation, and contends that, in any event, this approach was expressly rejected by the Fifth Circuit as an unconstitutional impairment of the right to a jury. Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998). On the logistical front, the ACC points out that one percent of the debtors' 190,000 claimants is still an unmanageable 1,900 individual litigants, each of whom presumably would insist on exercising the full panoply of discovery and trial rights.

The ACC maintains that the debtors' proposal to use Daubert hearings and expert panels to attack the medical merits of the tort claims would pervert these devices from their legitimate use. What the debtors are really attempting, the ACC contends, is to re-litigate over a decade's worth of asbestos personal

injury litigation in the state courts, litigation which USG consistently either lost suffering heavy damage awards, or paid substantial sums to settle. The ACC suggests that the fact that USG has been paying such large amounts over so a long period of time to resolve its asbestos liability undermines its position that the claims against it now are without merit. At a minimum, they contend, this raises the possibility that, even if Daubert and expert panels properly could be used as debtors suggest, the debtors would lose anyway.

It has been represented to the Court, however, that USG may well be insolvent even if only those claimants with mesothelioma, lung cancer and other cancers are counted. If this is true, the implications for this application are grave. No one has denied that, were the Court to adopt the debtors' proposed course of substantive estimation, the cost in time and money from the debtors' estates would be substantial. The supermajority requirement of 11 U.S.C. § 524(g) grants the tort claimants undeniable power, power that would translate into long, hard fought and expensive litigation over every step of the debtors' plan were it to be put in place by the Court. The Court must be satisfied that there is a real benefit to be gained before it embarks on this course.

Thus, even assuming the legal merits of the debtors' position, the chance that the legitimate cancer claimants alone

may represent a liability in excess of the debtors' assets means that any benefit to be gained by adopting the debtors' case management proposal may be illusory. If USG is made insolvent by the cancer claimants alone, existing equity will get nothing under any plan of reorganization. The debtors-in-possession will have no stake, and presumably no interest, in pressing for the elimination of the majority of the claims they now argue are invalid. Any continued objection to a plan of reorganization by them, existing equity or even general unsecured creditors would be subject to cram down under 11 U.S.C. § 1129.

Moreover, it is far more practical to estimate the universe of cancer claimants by themselves than to undergo a merit-based estimation of all of the tort claimants.[3] Unlike for many of the so-called "unimpaireds," pathology reports or autopsy reports will exist to substantiate the harm suffered by the cancer claimants. Doctors' reports will usually be from treating physicians, not from persons engaged in mass screenings, a practice found so objectionable by the debtors. By focusing on those claimants who have indisputably been damaged, the Court need not, at this juncture of the case, delve into the troubled

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[3] The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in various jurisdictions. See Schuck, The Worst Should Go First: Deferral Registries In Asbestos Litigation, 15 Harv. J.L. & Pub. Pol. 541 (1992). Moreover, legislation has been proposed that embraces this principle.

and occasionally metaphysical controversy of the so-called "unimpaired" class of claimants.

The burden on the claimants may be minimized as well. Claim forms submitted pursuant to this Memorandum and Order may serve also as the claim against the 524(g) trust most assume will be established upon confirmation of a plan of reorganization. This will avoid onerous duplication of effort. Many cancer claimants have already filed claim forms in other bankruptcy cases. Potentially, these will serve as a ready source of information for the preparation of claim forms for this case. Upon a finding by the Court that these claims forms are adequate for its purposes, claim forms from other cases may be directly submitted here in lieu of a new form.

Upon the passing of a cancer-only bar date and processing of the claims submitted, the Court will hold an estimation hearing under 11 U.S.C. § 502(c). At this time, debtors will be permitted to present their defenses. The Court will not decide now the precise procedural device with which these defenses will be brought before the Court. Debtors may wish to attack certain medical evidence under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). They may wish to move for summary judgment on certain issues on a claims-wide consolidated basis pursuant to Federal Rule of Civil Procedure 42. The parties may be assured that the Court will

entertain such applications only to the extent they do not interfere with the claimants' constitutional and legal rights as prescribed by law and as set forth at length in their written and oral submissions to the Court.

To accomplish this end, the Court will make the following provisions. The debtors will, within thirty days of the date of this Memorandum Opinion and Order, submit to the Court a proposed Order creating a claims bar date for all persons with a claim against USG and its affiliates for personal injury arising out of asbestos exposure who can certify as follows:

> A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

The proposed order shall provide that those claimants who can certify that they possess a claim based upon the above-listed criteria shall be required to submit a claim form containing the following information:

1. Identifying Information (Injured Party)

   Name of injured party
   Social Security Number (SSN)
   Gender
   Date of birth
   Mortality status (living,deceased)
   If deceased, Was death asbestos related
   If deceased, date of death
   If living, mailing address
   If claimant has personal representative, state that person's

-name
-social security number
-Mailing address
-Relation to injured party

2. Counsel Information (Lead counsel only)

Law firm name
Attorney name
Telephone number
Mailing address

3. Dependents and/or Beneficiaries Information

Dependent/Beneficiary name
Dependent/Beneficiary date of birth
Dependent/Beneficiary relationship to injured party
Whether dependent is financially dependent

4. Alleged Asbestos-Related Injuries & Date of Diagnosis

Mesothelioma
Lung Cancer
Other Cancer
Required Supporting Documentation
Death Certificate (if deceased) with cause of death

5. Required Supporting Documentation

Certificate of Official Capacity (if claimant has a personal representative)
Medical Record Supporting the Alleged Diagnosis including:
physical exam results,
pathology reports
diagnostic reports
Statement of diagnosing physician regarding whether
whether he/she conducted a physical examination.
whether he/she treated the claimant
what factors the diagnosing physician relied upon in the diagnosis.

6. Smoking History

has the claimant ever smoked cigarettes, cigars, or pipes
has claimant ever used chewing tobacco or snuff
What was the frequency and duration of use

7. Occupational Exposure to USG Products

Date exposure began
Date exposure ended
Occupation during exposure
Description of job duties
Industry in which exposure occurred
Description of how USG product was used at the site
Employer or site owner
Site of exposure
Nature of exposure
USG product exposed to

8. Exposure to another person who was occupationally exposed

Date exposure began
Date exposure ended
Relationship to source individual
Nature of exposure
USG product exposed to

9. Asbestos Litigation

Has a lawsuit been filed on behalf of the claimant
Court where suit originally flied
Date originally filed
Verdicts against USG or any co-defendant
Has the claimant received settlement money from USG; if so, in what amounts
Has injured party received settlement money or verdict payments from other defendants (and amounts)

10. Employment Information

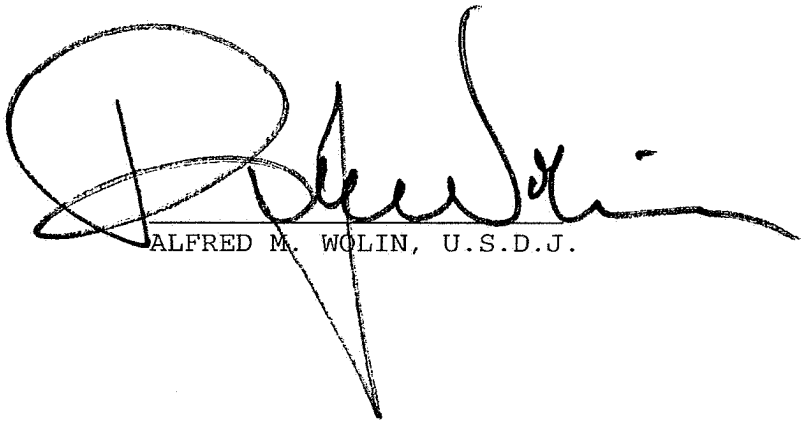
Current employment status
Amount of last annual wage
Date of last annual wage

Upon the bar date, the forms contemplated by this Order shall be submitted to a claims analysis and administration facility. The facility shall be selected by the Court following input from the parties. The facility shall process and analyze the claims to produce workable information to the parties that cannot be impeached for bias and will be in aid of further case

management initiatives.

Upon receipt of the debtors' proposed Order, the Court will afford all parties the opportunity to comment upon it. All discovery is stayed until further order of the court.

IT IS so Ordered this 19th day of February 2003.



ALFRED M. WOLIN, U.S.D.J.

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Swamped Courts Practice Plaintiff Triage

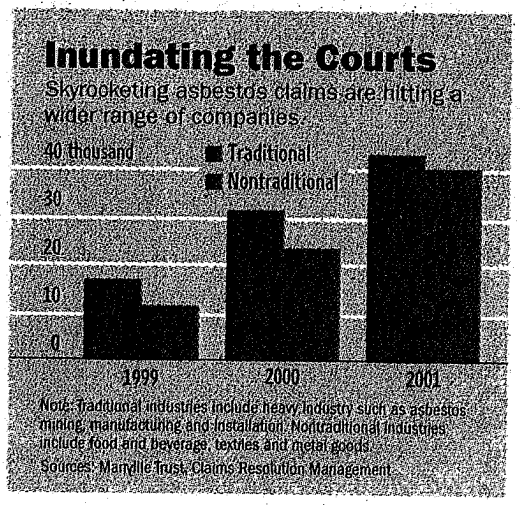
By SUSAN WARREN

IN A STATE COURT in Baltimore last year, Judge Richard Rombro had just one question after reviewing a jumble of medical tests on 76-year-old William Cole. "Is he sick?" the judge asked Mr. Cole's attorney.

Ultimately, the judge himself decided Mr. Cole wasn't sick—or, at any rate, not sick enough for his case to proceed at that time. Instead, the plaintiff's name was added to the court's "inactive docket," to be resuscitated only when the plaintiff presents medical evidence proving his injuries are incapacitating.

Like doctors in a disaster, Judge Rombro and other judges facing thousands of asbestos lawsuits are using a kind of courtroom triage. More than 200,000 asbestos cases are currently pending in the U.S., creating logjams that can force plaintiffs to wait years for a trial date. But the majority of those cases are coming from plaintiffs who have yet to show any incapacitation.

With the deluge showing no signs of abating, more judges are trying to decide who will get a quick trial and who might not get a trial at all. Courts in New York, Indiana, South Carolina, Oregon and Ohio are all grappling with the issue. "What we would like to do is identify those cases that have developed into full-blown serious illness and move those cases forward," says State District Judge Larry Patterson, who handles the asbestos docket in Greenville, S.C.



The problem is how to do that fairly, and what to do with cases where the plaintiff isn't yet suffering. The difficult nature of asbestos diseases complicates the matter. Many people exposed to asbestos may have lung damage that shows up on an X-ray but doesn't cause any other physical symptoms. Though some may eventually develop serious diseases, such as asbestosis or a fatal cancer, many will never get sick or will die of other causes.

As in Judge Rombro's court in Baltimore, other courts handling asbestos lawsuits use an "inactive docket" to winnow their case flow and preserve limited funds to pay those most in need. But plaintiffs' attorneys like Michael Edmonds, who represented Mr. Cole in Judge Rombro's courtroom, argue that the system robs people of their right of access to the courts.

A history of exposure to asbestos in ship-

Please Turn to Page B3, Column 1

Swamped Courts Practice Triage

Continued From Page B1

yards and steel mills underlay the case of Mr. Cole, who filed a claim after an X-ray showed lung scarring. His chief health complaint is shortness of breath. However, his breathing tests, measuring air flow and lung capacity, were normal.

A different kind of test—measuring how much oxygen is absorbed into the blood—was abnormal. Mr. Edmonds asked the judge to include that test in the court's criteria, but the judge denied the request. What's more, in his ruling moving the Cole case to the inactive docket, Judge Rombro chastised Mr. Edmond's firm for "attempting a piece-by-piece dismantling of the docket."

Judge Rombro noted in his decision that of the 14,713 cases placed on the Baltimore inactive docket since its 1992 inception, 40% were eventually activated for trial. That indicates, he said, "the docket is working." Mr. Edmonds disagrees. "We have people waiting [for their case to be heard] since 1993," he says. "You shouldn't have to die to get to court."

In Cleveland, the Cuyahoga County Court of Common Pleas found a solution all sides appear to be able to accept. Asbestos cases in the county exploded to about 30,000 from only 2,500 six years ago, says Cleveland defense attorney Laura Hong. At the same time, bankruptcy filings by companies facing increasing asbestos claims were quickly shrinking the amount of money available to compensate victims. After both plaintiffs' and defense attorneys agreed that the sickest plaintiffs should get priority, the Ohio state court in Cleveland decreed it would concentrate first on the sickest claims. Unimpaired cases remain on the active docket but are deferred until sicker cases are handled.

The issue is more contentious in New York City, where the very sickest asbestos cases already are given priority, leaving more than 20,000 less serious cases sitting on the docket. New York County Supreme Court Judge Helen Freedman gave up on getting opposing sides to agree on how to best handle the cases, and instead asked attorneys for written proposals.

Plaintiffs' attorneys suggested consolidating cases for trial into groups of 450, instead of the current 250. Defense attorneys wanted an inactive docket. After considering the arguments, Judge Freedman, in a Dec. 19 ruling, instituted a "deferred docket" where unimpaired claims would linger until they met specific medical criteria, including lung-function tests and X-rays.

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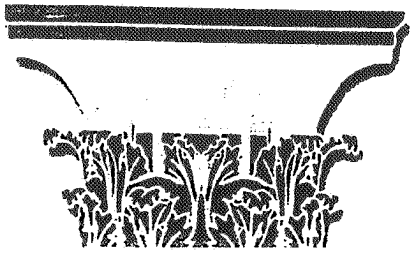
FEBRUARY 2002

Are Inactive Asbestos Dockets Easing the Flow of Litigation?

HarrisMartin Interview with Texas Attorney Jeffrey Simon

And:

Medical Journal Takes on SV40 Controversy



Also In This Issue:

- After Much Anticipation, President Bush Opts Not to Mention Asbestos Litigation
- MDL Judge Says Mass X-Ray Screenings Are 'Tantamount' to Race to Court
- New Jersey Man's Lawsuit Alleges SV40 in Polio Vaccine Caused Tumor

Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?

When wallboard manufacturer USG Corp. filed for bankruptcy protection last July, it created no smoke screens for its reason.

"The asbestos litigation system is clearly out of control," said the company's chief executive in the press report that coincided with its Chapter 11 filing. "Lawsuits continue to be filed at a high rate with no slowdown in sight, and most of the claims are filed by people who are not sick."

In fact, most — if not all — asbestos defendants that filed for Chapter 11 reorganization over the past year have noted the proliferation of unimpaired claims and the expenses resulting therefrom as the number one reason for seeking protection in bankruptcy court.

By some estimations, as many as 90 percent of new asbestos claims are filed by individuals who at the time have little or no physical impairment. And a number of those filing lawsuits on behalf of individuals currently exhibiting symptoms of asbestos-related impairment note that the apparent flood of such claims is robbing them of resources that continue to dissolve as more and more companies seek shelter from asbestos liabilities.

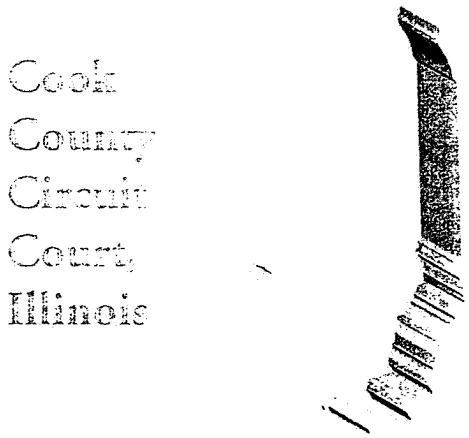
However, some in at least three of the nation's jurisdictions claim the solution, if one is necessary, rests in a decades-old procedure — The Inactive Asbestos Docket.

Inactive docket plans, extremis or "rocket" dockets, deferral or pleural registries as they are sometimes called, have for years addressed what has become referred to of late as the asbestos litigation explosion, those who employ them attest.

Nonetheless, most courts have been apprehensive to embrace them and the many who do are starting to ask why.

Inactive asbestos dockets were established in Illinois, Maryland and Massachusetts beginning in 1984. And a similar system has been put in place on the federal level. But none has been administratively implemented in nearly 10 years. Part of the reason, experts say, is that asbestos litigation is much different today than it was 10 years ago.

"A lot of attorneys filed cases back then that they simply wouldn't file today," says Jim Ryan, special master of the Middlesex County Superior Court asbestos docket, which has used the inactive docket for the better part of two decades. "It's an extremely useful tool here."



If there is a pioneer of the inactive asbestos docket, it's likely Judge Dean Trafelet, who is now a partner at the Chicago law firm of Hedlund, Hanley, Koenigsknecht & Trafelet.

In 1984, when Judge Trafelet was appointed to oversee the asbestos docket and the 9,000 cases that went along with the assignment, he knew he had to develop a plan to ensure that they were scheduled efficiently and, more importantly, fairly.

Judge Trafelet was aware that all 9,000 cases were unique, encompassing allegations of a variety of asbestos-related illnesses, some that required more urgent attention than others.

"I had experience in mass torts so it felt natural, but I knew that with asbestos there was a potential for a log jam," Judge Trafelet said. "I figured there's got to be a way."

With the knowledge that other courts had adopted military calendars that tolled statutes of limitations during the often times long stretches of military service, he sat down with his clerks and members of the plaintiffs and defense bars, listened, and devised a plan. Collectively, they all agreed to what Judge Trafelet referred to as the guts of a proposal that created an active docket for those who clearly exhibited an asbestos-related mesothelioma or other cancer and an inactive docket for those who showed evidence of exposure, but were not yet sick.

For placement on the inactive docket, claimants were required to file a certificate of authenticity, referred to officially as an Asbestos Personal Injury Information Sheet. The case wasn't assigned a docket number with the court, and although claimants were required to name their defendants, no discovery was commenced. Placement on the docket guaranteed that the cases would not "age," all statutes would be tolled until the case became active. And all claims had to be filed individually.

The claims would remain on the docket until it could be shown that their condition had progressed to the point where they met the minimum medical criteria arrived at by the parties.

In order for a case to be taken off the inactive docket, the claimant must petition the court and produce at least a chest X-ray with an International Labor Office, or ILO, reading of 1/0 or greater and a pulmonary function test that demonstrates either a total lung capacity of less than 80 percent or a diffusing capacity

for oxygen of less than 70 percent and a forced expiratory volume/forced vital capacity, or FEV-1/FVC ratio of 75 percent of predicted or greater. Or, the claimant must present with an ILO rating of 1/1 or greater and a pulmonary function test demonstrating a diffusing capacity below 80 percent.

"The medical criteria was the most difficult point to arrive at," Judge Trafelet said. "It was amended once or twice within the first year."

It was ultimately amended in 1991, and since then complaints have been scarce.

"Obviously in a situation such as this, you're going to have the constitutionality issue and whether the system is depriving someone of their day in court," said Ed McCambridge of Segal McCambridge Singer & Mahoney in Chicago. "But, we've worked out a good system that allows the [significant] injury cases to be before the court."

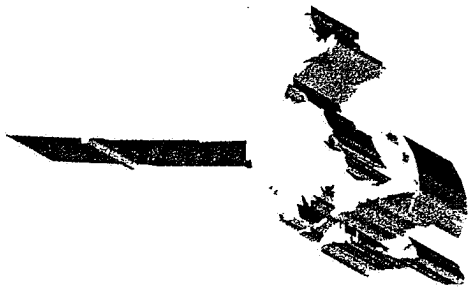
An average of five to seven cases come off the inactive docket in Cook County each year. Nearly all are mesotheliomas, which comprise about 50 percent to 60 percent of the court's active asbestos docket.

Before the inactive docket was installed, defendants often had to receive cases that in some instances weren't worth the expense of answering the complaint, Trafelet said.

For the plaintiffs, more and more of their potential clients were being made aware of their likelihood of exposure. And all it took was a trip to the radiologist to learn something wasn't right in their lungs.

Without the inactive docket, the plaintiffs' attorney would have to incur the expense of immediately working up a case for fear that the statutes would begin to run, when the case might not yet have much value, Judge Trafelet said.

"And, it gets the monkey off the defendants' backs because they don't have to spend something for nothing," he said



Middlesex County Superior Court, Massachusetts

Judge Hiller Zobel created the inactive docket in 1986 in Massachusetts, which like Illinois is a two-disease state that allows claimants to sue for one alleged asbestos-related injury and return to court years later if the exposure results in another.

Where Middlesex County's inactive asbestos docket differs, however, is that no specific medical criteria is applied in determining when a case should be definitively moved to the active docket. Judge Zobel ultimately decides when the removal is warranted.

No cases will be considered for removal, however, unless they're accompanied by a motion for good cause shown and are supported by a physician's affidavit that the plaintiff has either developed a malignant, asbestos-related condition or experienced a change in a non-malignant, asbestos-related condition.

According to the order that created the inactive docket, changes in asbestotic condition must also be supported by an ILO B-reading of 1/1 or above and pulmonary function test (PFT) results of FVC(actual) less than 80 percent and FEV/FVC greater than actual 70 percent; or an ILO reading of 1/0 and PFT results of FVC (actual) less than 80 percent and FEV/FVC (actual) greater than 75 percent and diffusing capacity (DLCO) less than 75 percent.

Where a plaintiff is deceased, an appropriate diagnosis of pathological asbestosis greater than Grade 1B, as defined in the *Archive of the Pathology and Laboratory Medicine*, Asbestos-Associated Diseases, Volume 106, No. 11 appendix 3 (Oct. 8, 1982) is accepted.

When Zobel took over the asbestos docket, he said he made it his mission that no asbestos case would sit on his docket for longer than three years. He also made it clear that pleural cases would be placed on the inactive docket.

"It's really a very good system that has worked out, and it remains largely devised and managed by the parties involved," Judge Zobel said.

According to Richard Kirby of Lecomte, Emanuelson, Motejunas & Doyle in Quincy, Mass., the inactive docket was once much more active than it is today. Plaintiffs, according to Kirby, have begun focusing on the more serious asbestos disease claims, as opposed to non-malignancy claims, mostly because juries in the Northeast and more specifically in Boston, are more conservative than in other parts of the country.

"You can get money on pleural cases in other states," Kirby said, noting that the recent increase in the number of cases filed across the country is likely the result of courts in other jurisdictions not focusing on the more serious injury cases. "Pleural cases just don't have the same value here."

Baltimore City Circuit Court, Maryland

A little farther South, in Baltimore City Circuit Court, the inactive docket has been in place since 1992, when Judge Joseph H. H. Kaplan signed an order establishing one.

All claims in Baltimore are initially placed on the inactive docket, and some are immediately

Continued on page 70

Inactive Dockets

continued from page 3

eligible for removal. In order for a claim to be immediately removed from the docket, or if removal is warranted because of a change in condition, plaintiffs' counsel are required to file a request for removal and the documentation necessary to show that the claim meets the minimum criteria for removal.

Like dockets in Massachusetts and Illinois, the minimum criteria include a showing of irregular opacities of ILO grade 1/0 and pulmonary function testing that shows FVC less than 80 percent of predicted with FEV-1/FVC greater than 68 percent or TLC of less than 80 percent of predicted.

Those showing a ILO grade of 1/1 or greater must also exhibit either FVC of less than 80 percent of predicted with FEV-1/FVC greater than 65 percent or TLC less than 80 percent of predicted. Cases of bilateral asbestos-related pleural thickening that has an ILO grade of B2 or greater is also eligible if an FVC less than 80 percent of predicted with FEV-1/FVC greater than 68 percent or a TLC of less than 80 percent can be shown. Other cases where a diagnosis of asbestos-related cancers are eligible for removal.

Once removal is formally requested, defendants have 14 days to object to the petition and can request an independent medical examination. Within 30 days, the court can establish the scope and time for completion of any discovery relevant to claims made in the removal petition and set a hearing date.

Any claim that resides on Baltimore's inactive docket for longer than two years and does not meet the minimum criteria for removal, but contends the alleged condition is asbestos-related, may file a petition to remove the case after the two-year period has expired. Those cases are then consolidated into groups of 10. A test case, upon petition by plaintiffs, is then chosen for the purposes of determining whether conditions not meeting the minimum criteria for removal constitute compensable injuries.

Regardless of the ease with which the inactive docket has proceeded in three states, those who have employed the measures are also quick to doubt whether other states will adopt the plan soon, if at all.

After all, it's been nearly 10 years since the last inactive docket was installed.

"I don't see any downside for creating one anywhere else," Ryan said. "But will they do it in, say, Texas?" asked Ryan. "I don't know."

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Legal Backgrounder

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Vol. 17 No. 13

February 22, 2002

ASBESTOS LITIGATION CRISIS REQUIRES POLICYMAKERS' ATTENTION

by

Richard O. Faulk

Courts are experiencing an explosion of asbestos litigation. Between 1993 and 1999, the number of pending cases nationwide doubled. Analysts predict that up to 700,000 more cases will be filed by 2050. The number of future claimants could reach two million.

The crisis is fueled by filings by unimpaired claimants, aggressive personal injury lawyers, the tendency to promote efficiency over fairness, and the willingness to permit multiple punitive damages awards for conduct that ended decades ago. Resources are being depleted that that should go to "the sick and dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 121 S. Ct. 2216 (2001) (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 565 (2000)).

To date, at least 43 companies have been driven into bankruptcy by asbestos. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. In 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. all declared bankruptcy. More filings are likely. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 16, No. 6., Apr. 20, 2001. These bankruptcies are squeezing so-called "peripheral defendants" — companies sued to make up for insolvent "traditional defendants."

These combined forces have resulted in a "domino effect." Payments to the unimpaired have encouraged more claims, depleting the assets of "traditional defendants." Each new bankruptcy puts "mounting and cumulative" pressure on the remaining solvent defendants and accelerates the bankruptcy process. Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) [hereinafter Edley & Weiler]. New defendants are sued to make up for the shares of bankrupt defendants; new defendants themselves begin to collapse under the weight of new claims, and the process goes on.

This system is bad for almost everyone, particularly sick claimants. Without changes, claimants who become ill later may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant and pro-defendant.

The Explosion of Asbestos Lawsuits. When asbestos lawsuits emerged in the 1970's, no one predicted

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Richard O. Faulk is Chair, Environmental Practice Group, of the law firm Gardere Wynne Sewell, LLP, Houston, Texas. He is the author of a January 2002 paper for the Texas Public Policy Foundation, *The Growing Asbestos Litigation Crisis in Texas: Immediate Action is Needed*, 3 Veritas 16. The author acknowledges the assistance of his partner, Jose A. Berlanga, and Mark Behrens of Shook, Hardy & Bacon, Washington, D.C. ***The views expressed here are those of the author and do not necessarily reflect those of the Washington Legal Foundation. They should not be construed as an attempt to aid or hinder the passage of legislation.***

that courts thirty years later would face a worsening crisis. Production and use of new asbestos products largely ceased in the United States in the early 1970's, and the large latency period between exposure and manifestation of asbestos-related diseases led many to believe that the litigation would be a declining problem. Unfortunately, this has not proven true.

Unimpaired Claimants Fuel The Explosion. Most new asbestos claimants — as much as 90 percent — are only mildly impaired or are not sick at all. *See Transcript of Dec. 10 Tel. Conf.* (Dec. 10, 2001), *available at* <http:\\www.halliburton.com> (stating that 90 percent of asbestos claims against Halliburton are by unimpaired claimants); Quenna Sook Kim, *G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (reporting that "as many as 80% of [GAF's] asbestos settlements are paid to unimpaired people."). They are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease are likely never will be." *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). Many of these claimants sue to avoid being time-barred if they do not file after the first markers of exposure are detected. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. On the Judiciary*, 106th Cong., at 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary of the Department of Health and Human Services). But "their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now." Edley & Weiler, at 393.

Judge Weiner, who oversees the asbestos multidistrict proceedings, explains that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re Asbestos Prods. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (E.D. Pa. Sept. 12, 1996). Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured.

A look at just one state confirms this view. In November, 2001, a Texas jury awarded $3 million to three plaintiffs exposed to asbestos at an aluminum plant. *See Texas Jury Awards $3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001). "Their attorney said the verdict was reached even though the plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past asbestos exposure." *Id.* Only months earlier, another Texas jury awarded 22 plaintiffs $35 million for "future physical impairment" and "future medical costs" although it is likely that these claimants will never become seriously ill. *Two Asbestos Defendants Hit With $35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

Claims by the unimpaired clog the court system, causing delays for sick claimants and others in the justice system. Perhaps most troubling, "[t]he continued hemorrhaging of available funds deprives current and future victims of rightful compensation" for real injuries. *See Collins*, 233 F.3d at 812.

Courts Partly to Blame. Courts are partly to blame. Faced with an "elephantine mass of asbestos cases," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), many judges have focused on promoting efficiency and expediting resolutions. It was hoped that this process would put money in the hands of the sick promptly, reduce transaction costs, and ultimately clear the docket. Instead, the situation is worse. As one professor has written: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. The courts increase demand for new cases by high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997). *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) ("The more successful judges become at dealing 'fairly and efficiently' with mass torts, the more

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ISBN 1056 3059

and larger mass tort filings become.").

How Can States Respond? States should give serious consideration to how they can take action to preserve assets for impaired claimants. By doing so, they can reduce pressures on remaining defendants and slow the spread of the litigation. Helpful reforms include: (1) establishing inactive docket plans, also known as a pleural registries or deferral registries; (2) abolishing multiple punitive damages in asbestos cases; and (3) fair share liability reform.

1. Inactive Docket Plans. Inactive docket programs allow impaired claimants to be heard promptly by "deferring" claims of unimpaired claimants to an "inactive docket" until actual impairment develops. Under these plans, individuals without objective medical criteria are placed on a docket where statutes of limitations are tolled, and all discovery stayed. Claims are re-activated when claimants present credible medical evidence of impairment. Impaired claimants thus move "to the front of the line."

Removing long delays is important, particularly for older claimants and those with fatal diseases. The program also benefits unimpaired individuals by protecting claims from being time-barred. This reform defuses limitations concerns underlying claims by many unimpaired individuals. Transaction costs would be substantially reduced because no discovery is conducted of unimpaired claimants.

Inactive docket programs have existed for many years in Massachusetts, Illinois, and Maryland. They have proven to be fair and workable, and should be adopted elsewhere. *See* Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001).

2. End Punitive Damages Overkill. In the asbestos context, punitive damages no longer serve the purposes of punishment and deterrence. Indeed, future claimants may suffer the most. Punitive damages recoveries "threaten fair compensation to pending and future claimants and threaten the economic viability of defendants." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 32 (Mar. 1991). This is true even when cases are settled, because of the *in terrorem* effect punitive damages have at the settlement table.

Texas juries have returned punitive verdicts in asbestos cases frequently. Examples from 2001 include:

•Five plaintiffs were awarded $130 million, including $70 million in compensatory damages and $60 million in punitive damages.

•$55 million was awarded to a man with mesothelioma, including $12 million in compensatory damages to the plaintiff, $5.5 million for his wife, $14 million for the couple's children, plus an additional $15 million in punitives (later reduced to $2.75 million).

•A defendant was hit with an $18 million damage award, including $15 million in punitives, for a single asbestosis claim.

•A jury awarded $11.1 million, including $3 million in punitives, against two defendants.

With awards of this magnitude, it is no surprise that plaintiffs' lawyers seek punitive damages in every case.

Some courts are moving to protect assets to cover later claims. Recently, the U.S. Court of Appeals for the Third Circuit approved a decision to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial. The court concluded: "It is responsible public policy

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to give priority to compensatory claims over exemplary punitive damage windfalls." *In re Collins*, 233 F.3d , at 812. Courts in Maryland, and Pennsylvania have severed, deferred, or stayed indefinitely asbestos punitive damage claims. In New York, some judges have severed and indefinitely deferred punitive damage claims in asbestos cases. Other states should follow this lead.

3. Fair Share Liability Reform. The rule of "joint and several liability" provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. Joint liability is unfair, because it puts full responsibility on those who are only marginally at fault. Joint liability contributes to the spread of asbestos litigation.

Most states have abolished or modified the principle of joint liability, but the laws are riddled with exceptions. In 1995, for example, the Texas legislature abolished joint liability, except for defendants found to be "greater than 50 percent" at fault. In asbestos cases, however, joint liability continues to apply to any defendant whose fault is determined to be "equal to or greater" than 15%. For example, AC&S Inc. was recently ordered to pay a former Navy machinist and his wife $3.1 million in damages in an asbestos case, even though AC&S was found only 20% responsible.

At a minimum, states should consider abolishing joint and several liability for defendants who are less than 50% responsible. States may even consider moving to a pure "fair share" proportionate liability system in all tort cases, as some jurisdictions have already done.

Conclusion. It is time to take a fresh look at the asbestos litigation environment and address the serious problems of today, particularly those caused by huge numbers of filings by unimpaired claimants, the drain on resources caused by multiple punitive damages awards, and the need for additional fair share liability reform. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

> It is time – perhaps past due – to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. 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.

Dunn, 1 F.3d at 1399 (Weis, J., dissenting).

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Legal Backgrounder

Washington Legal Foundation
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2009 Massachusetts Ave., NW
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Vol. 18 No. 31 July 25, 2003

CLEARING UNINJURED PLAINTIFFS FROM THE TORT SYSTEM: THE ROAD TO A SOLUTION

by

Frederick C. Dunbar and Denise Neumann Martin

It is now well accepted that the way the tort system handles personal injury mass torts is in need of repair.[1] One of the most obvious and alarming signs is that unfounded claims — claims without any medical impairment — continue to be filed and paid in large number. Such claims are notorious and ubiquitous in the history of asbestos litigation, but asbestos is no exception: claims of this type have been documented in litigation involving Agent Orange, breast implants, Dalkon Shield and diet drugs.

Calls for tort reform have focused on the greed of the plaintiffs' bar. This view, however, is misguided: the breakdown results from a complex set of institutional failures that have received less attention. The institutions that share the blame include a small number of state court systems with pro-plaintiff procedures, legislatures in those same states that have been slow to adopt tort reform, Congress, which has until recently failed to heed repeated calls for tort reform, and a number of medical professionals that certify impairment where none exists.[2]

In the past few years, a number of favorable institutional changes may have begun to turn the tide of asbestos litigation. Bankrupt trusts have enacted or proposed to enact more stringent criteria. State and federal courts have begun to create inactive dockets that stay the payment of claims if and until a compensable injury

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[1] *See, e.g., Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591 (1997); American Bar Association Commission on Asbestos Litigation, *Report to House of Delegates, Recommendation,* Feb. 2003 ("ABA Report, 2003"); Rothstein, Paul S., *What Courts Can do in the Face of the Never-Ending Asbestos Crisis,* MISS. LAW J., Fall 2001 ("Rothstein, 2001"); Bell, Griffin B., *Asbestos Litigation and Judicial Leadership,* National Legal Center for the Public Interest, 2002; American Academy of Actuaries, *Overview of Asbestos Issues and Trends,* Public Policy Monograph, Dec. 2001.

[2] ABA Report, 2003. Rothstein, 2001. Carroll, Stephen J., et al., *Asbestos Litigation Costs and Compensation,* Rand Institute for Civil Justice, 2002 ("Carroll, et al., 2002"). White, Michelle, *Explaining the Flood of Asbestos Litigation,* NBER Working Paper 9362, Dec. 2002 ("White, 2002").

Frederick C. Dunbar is a Senior Vice President at National Economic Research Associates, Inc. where he specializes in, among other things, the economics of mass tort litigation. He has been an adjunct professor at Fordham Law School and Columbia University School of Law. **Denise Neumann Martin** is a Senior Vice President at National Economic Research Associates, Inc. and a member of the mass tort and product liability valuation practice area.

arises.

Encouragingly, such reforms have recently extended outside the asbestos arena, with a clamp down on the medical profession specifically. In late 2002, for example, a federal judge dismissed 78 plaintiffs from a class action involving the diet drug Fen-Phen because suspect doctors supported the claims of those plaintiffs. This decision could be another brick in the wall that will finally put a stop to unfounded claims.

The Problem: Evidence from Asbestos Litigation. At least as early as the mid-1990s, asbestos defendants were generally alarmed about fraudulent claims. In 1995, for example, it was reported that: "Doctors diagnose asbestosis based on occupation — not proof. Most significantly, 95 percent of claimants against Keene [Corp.] are not sick."[3] In 1996 and 1997, Owens Corning filed suits under the federal Racketeer Influenced and Corrupt Organizations Act against certain laboratories conducting pulmonary function testing ("PFT"), alleging that 40,000 of its recent claims involved plaintiffs whose tests were improperly administered or manipulated by the testing laboratory or otherwise inconsistent with proper medical practice.[4,5]

The ability of plaintiffs to find doctors, among other experts, who would testify to junk science was one of the reasons the Supreme Court was asked to determine the standards for admitting scientific testimony in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). The problem confronting a mass tort defendant, however, is that most of the claims will be made either in state court or in a bankruptcy trust with a trust distribution process negotiated without federal evidence rules.[6] These venues have allowed medical evidence that arguably would not stand up in federal court. Mississippi, for example, has been a favorite location for asbestos claims because of, among other reasons, the courts' inability to order independent medical examinations limits "defendants' ability to challenge asbestos plaintiffs' disease allegations."[7]

Substantial Proportion of Asbestos Claims Fail Audit. Although skeptics may view these observations as no more than the advocacy of a defendant, the same cannot be said of an audit of claims made on the Manville Asbestos Trust, an institution partially designed and influenced by the plaintiffs' bar. Beginning in 1995, a medical audit randomly selected pending claims alleging pleural disease, asbestosis, and lung and other cancers that were eligible for payment. The initial results, which were validated by statistics professors at Pennsylvania State University, were summarized in letters from the Executive Director of the Trust:

> [T]he failure rate at first review is around 60%, and the aggregate failure rate after two reviews is approximately 50%.[8]
>
> The dozen or so doctors that constitute the vast majority of diagnosticians being used have demonstrably dreadful audit records. . . These doctors are

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[3]Mealey's Litigation Reports: Asbestos, Jan. 6, 1995.

[4]Owens Corning 10Q, 11/5/98, at 27. Owens Corning 10K Annual Report, 3/15/99, at 84.

[5]Owens Corning 10K Annual Report, 3/20/97, at 61-62.

[6]Three pro-plaintiff states (Texas, Mississippi and West Virginia) and two high-claim states (New York and Ohio) accounted for over 66% of all national asbestos claim filings from 1998-2000, up from nine percent before 1998. Carroll, et al., 2002, at 32. "...[I]n the three most pro-plaintiff states of Mississippi, West Virginia and Texas, the expected return from trial increases by one to two million dollars compared to other states. Thus it is not surprising that all three of these states have become centers for asbestos litigation." White, 2002, at 24.

[7]Carroll, et al., 2002, at 35.

[8]Letter from Patricia Houser to Elihu Inselbuch, Sept. 15, 1995 (Bates #CRMC 0189508 (*Falise v. American Tobacco Co., et al.* ["*Falise*"])). *See also* Houser Deposition, at 193, lines 6-16; Memo to David T. Austern and Richard E. Flynn from Terry F. Lenzer and Kathy Lavinder, Re: Asbestos Settlement: Background Investigation of Doctors, Mar. 2, 1996 (Bates #CRMC 0189815-30 (*Falise*)).

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finding disease where there is none, with little regard for medical certainty or accuracy."[9]

In 1998, the Trust determined that it would require 100% x-ray submission for asbestosis claims for review by up to two B-readers.[10] The plaintiffs' bar then sued the Trust.[11]

National Economic Research Associates, Inc. found that of all the Manville claims up through 1995 that named a doctor, 45% of the asbestosis and 26% of the pleural plaque claims identified the same ten high volume doctors as had been identified by the medical audit. That research demonstrated that a gravitation toward the use of these high volume doctors has occurred over time, finding that these doctors supported 1% of all asbestosis claims against the Manville Trust in 1983, but 60% in 1995. One such doctor supported over 30% of *all* the asbestosis cases filed against the Manville Trust in 1995.

The Road to a Solution. A slow march toward a solution has begun to emerge, observed most prominently in the area of asbestos litigation. Encouragingly, this trend has been recognized and has begun to be replicated outside the asbestos arena.

Bankruptcy Trust Reform. On October 11, 1996, the Manville Trust announced that starting from December 2, 1996, it would require PFT results that adhered to American Thoracic Society ("ATS") standards on how the tests were to be administered to patients. The Trust agreed that all claims filed before December 2, 1996 would not be audited so they did not need to comply with ATS standards. In the seven weeks between the announcement and the implementation of the ATS standards, claimants filed 4,270 disabling asbestosis claims including 1,838 filed on December 2, 1996 alone. As evidence of the rule's impact, this rate was about 62 times higher than the average after December 2, 1996.

More recently, the Manville Trust has considered splitting into two trusts, one that would compensate malignant claims, the other non-malignant claims. The scheduled values, as well as the proposed cents on the dollar, paid to the malignant claims would be higher than to the non-malignant claims. While the 2002 Trust Distribution Plan still treats malignant and non-malignant claims the same with respect to cents paid on the dollar, the scheduled value for mesothelioma has been increased substantially relative to the other diseases. Other trusts still in the formation stages have considered implementing a structure that treats malignant and non-malignant claims differently.

State Courts Initiate Reform. In response to payments to unimpaired claimants, many state courts have placed these claims into an inactive docket, or pleural registry. For these claims, statutes of limitations are tolled. All proceedings for claims in inactive dockets are stayed, and claims are not moved into an active docket until impairment can be documented. Within the last six months, judges in Syracuse, Seattle, and Greenville, South Carolina adopted inactive dockets as a mechanism for managing caseloads.[12] Quantitatively, the biggest impact will come from New York where Judge Freedman, who handles the lion's share of that state's asbestos litigation, also recently adopted an inactive docket for all nonmalignant claims.

Federal Reform: MDL Asbestos Panel. A Multi-District Litigation ("MDL") panel manages and

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[9]Letter from Patricia Houser to Elihu Inselbuch, Esq., Oct. 23, 1997 (Bates #CRMC 0123381–CRMC 0123382 (*Falise*)); *see also* Individual Evaluation Manual, Claims Department, Mar. 1996 (Bates #CRMC 0013573 *(Falise)*).

[10]Memorandum to Manville Trustees from Patricia Houser, Re: Response to the Selected Counsel for the Beneficiaries, June 9, 1998 (Bates #CRMC 0191675-76 at 75, *Falise*). B-readers are specially trained medical personnel who review chest x-rays to look for abnormalities. The term B-reader comes from black lung disease, an affliction of coal miners caused by coal dust. The scale used by B-readers to describe abnormalities on a lung x-ray was originally developed as part of a special program for black lung benefits.

[11]Complaint, *James T. Adams, David W. Andrews, et al. v. Manville,* (Bates #CRMC 0116682-726 (*Falise*)).

[12]Behrens et al., 2003.

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processes personal injury claims brought in multiple Federal Districts. As at the state court level, the federal asbestos MDL panel has been periodically placing claims into inactive dockets for years. However, with the recent surge in claims filed by unimpaired individuals, this mechanism has played an increasingly important role in case management.

The MDL 875 docket operating in the Eastern District of Pennsylvania is exemplary. In January 2003, Judge Weiner of MDL 875 ordered that all nonmalignant claims assigned to the MDL docket and initiated through a mass X-ray screening would be subject to administrative dismissal without prejudice, with the tolling of all applicable statutes of limitations.[13] In the MDL 875 docket, plaintiffs must now provide evidence of impairment before claims are reinstated. In his order, Judge Weiner explained that, "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."[14] Judge Weiner transferred 5,500 actions to MDL 875's inactive docket on March 31, 1997 and another 976 cases on April 29, 1999.[15]

Reform Spreads Outside Asbestos: Diet Drugs Trust. Encouragingly, the trend toward limiting the filing and payment of unimpaired claims has begun to extend outside the asbestos arena, as evidenced by a recent ruling by Judge Bartles, who oversees the $2.55 billion American Home Products Settlement Trust relating to diet drugs.[16] First, he knocked out 78 claims, all coming from two law firms and two cardiologists alleging valvular heart conditions caused by using Fen-Phen; he also granted the settlement trust the authority to audit all claims from those lawyers and doctors; and he referred this matter to New York disciplinary authorities "for further review."

Some of the salient facts cited in the decision were: (1) over a ten month period one doctor had earned $750,000 from these two law firms; (2) an employee of the law firm, rather than the doctor, established the criteria for a finding of disease on the echocardiograms and filled out the medical history portion of the claim form; (3) the second doctor had a contingency fee arrangement with the law firm; finally, (4) yet a third doctor, brought in by plaintiffs' law firms to testify to the reasonableness of the findings of the other two, was found by the Judge to be evasive and not credible on the stand.

Conclusion. Just as institutions can create a crisis, they can also adapt and respond. As an example, in just six years, the lobbying machine of the medical profession has been able to get medical liability reform legislation passed in 24 states. The portrayal of doctors as innocent victims of the plaintiffs' bar in the medical malpractice setting, however, conceals an uncomfortable fact: some in the medical profession itself have been complicit in what it calls the tort system crisis. In fact, some medical professionals have been paid handsomely by these same plaintiffs' attorneys for their role in unfounded personal injury claims against non-medical defendants.[17]

Recent institutional changes should reduce the prevalence of unfounded claims supported by these suspect doctors. It is imperative that these institutions continue to respond, both inside the confines of asbestos litigation and in other emerging tort areas.

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[13]"MDL Judge Issues Order to Administratively Dismiss X-Ray Screening Cases," *Mealey's Litigation Reporter*, Vol. 17, Issue 1, 2003.

[14]*Id.*

[15]"Judge Weiner Lists 5,500 MARDOC Actions for Administrative Dismissal," *Mealey's Litigation Reporter*, Vol. 12, Issue 6. *See also Mealey's Litigation Reporter*, Vol. 14, Issue 7.

[16]*In re: Diet Drugs* (Phentermine, FenFluramine, Dexfenfluramine) Products Liability Litigation, MDL Docket No. 1203, Civil Action No. 99:20593, United States District Court for the Eastern District of Pennsylvania, 2002 U.S. Dist. LEXIS 23592.

[17]Although the medical profession sanctions doctors who testify against other doctors, there are no reports of sanctions against those who would give the same testimony against non-doctors.

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Is there life after death for tort reform in America?

PATTI WALDMEIR
LEGAL COUNSEL

Yes, I know: democracy is the worst form of government – apart from all the rest. But over the past few weeks, the existence of inferior alternatives has been scant consolation as we have watched democracy in the US fail to tackle one of the greatest economic, social and moral problems of our day: lawsuit abuse.

All year long, visions of tort reform have danced in the heads of members of Congress from both sides of the aisle, united in outrage at miscarriages of justice in class action lawsuits and asbestos litigation.

Now it looks as though they may have been hallucinating: the chances that Congress will pass legislation in either area before it in effect shuts down for a year of campaigning appear slim. Reports of the death of tort reform may be premature right now; but soon they may well not be.

So now may be the time for other institutions of democratic society – from courts to state legislatures to corporations – to figure out a back-up plan.

Federal legislators may think they have the luxury of inaction; but the rest of us know the cost of doing nothing.

Those costs were detailed in a recent report on the tort system – the US regime of personal injury and product liability law – from the Congressional Budget Office. The report recites a litany of shortcomings that have long plagued the system but have recently reached proportions that even lawmakers can no longer ignore: high legal fees, arbitrary damages awards, asbestos plaintiffs who are not ill – law that is on the verge of a nervous breakdown.

The report concludes that, with only 46 cents of every tort lawsuit dollar going to victims and the rest being spent on legal fees and other costs, "it is safe to say that the existing tort system is a relatively costly way to compensate victims".

But most Americans already knew that, from the simple evidence of their junk mail. The same week the report came out, my mailbox spat out a perfect example of the class action problem: a mass mailing to my former babysitter about a lawsuit involving exchange rates on overseas money transfers.

To settle the lawsuit (in which she is automatically a plaintiff, unless she objects) she gets a couple of $4 discount coupons for future money transfers – while the lawyers who brought the suit get $2.5m. Since the company involved no longer serves my sitter's home country, South Africa, the coupons are worthless to her. But counsel still gets paid.

Few in Congress would defend such a deal; but legislation to combat this and other forms of class action abuse failed in the Senate last month. So our least worst form of government has been unable, at least so far, to deliver us from the class action crisis.

Lawmakers could still pass a bill that would attack abuse by, among other things, forcing many class actions out of dodgy state courts and into the federal system. But it seems unlikely that Congress will find the time, in a headlong rush to a Thanksgiving recess, to tackle both class actions and the more immediately costly asbestos emergency.

Both Republicans and Democrats are loudly protesting their willingness to resolve both problems. But the harder they try to appear reasonable in public, the less likely they probably are to talk turkey in private. It is a sure sign of an impending failure, when everyone starts publicly dodging the blame for it.

So if there is, in the words of Griffin Bell, former attorney-general and judge, "no remedy in Washington", where does the solution lie? "It is the judge's duty to fashion judicial solutions when Congress fails," Judge Bell wrote in a recent pamphlet arguing that courts can tackle the asbestos crisis, with or without legislation.

His solution seems almost too simple to be true: courts should insist that everyone who sues for asbestos damages should be able to prove an actual injury – not just exposure that could one day lead to illness.

Claimants who are not now ill would be placed on an "inactive docket", where their right to sue would be preserved until they needed it – past the normal statute of limitations.

Since most asbestos claims now come from such "future claimants", removing them to an inactive docket would lighten the burden of asbestos litigation on the economy – and release funds to pay those whose illness is real, not just speculative. Some courts have managed to do this already, returning to the first principle of tort law: to have a claim, you must first have an injury. More could do so soon, if legislation proves impossible.

But the class action problem will be much harder to fix without legislation, says John Beisner of the law firm O'Melveny & Myers, a veteran of the Congressional class action wars. If judges can enact Plan B for the asbestos crisis, what is Plan B for class actions? "Plan B is Plan A," he says: legislation.

But at the moment, it seems likely that lawmakers will go home to their Thanksgiving turkey without tackling either of these crises. It is enough to make you lose your taste for democracy.

waldmeir@aol.com

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■ 'INACTIVE' DOCKETS

A battle over asbestos backlogs

States are moving sickest plaintiffs to the front.

By Dee McAree
STAFF REPORTER

A GROWING NUMBER of state courts are adopting measures to reorganize their backlogs of asbestos cases to ensure that the sickest plaintiffs have their cases heard first.

Some plaintiffs' lawyers are objecting to the move, saying that it denies plaintiffs with legitimate claims who are not yet showing signs of illness the right to pursue their suits.

The reorganization has been enacted in several courts, including those in New York City; Syracuse, N.Y.; Seattle; Boston; Chicago; and Baltimore. It entails creating "inactive dockets," which temporarily remove claimants from the active civil docket until they can show physical manifestations, such as cancer or a disability, to support an asbestos claim.

Michigan recently took center stage in the debate between plaintiffs' lawyers and asbestos defendants. Sixty asbestos defendants including the Dow Chemical Co. and the Kinney Vacuum Co., petitioned the Michigan Supreme Court to adopt an inactive docket.

In court papers, the petitioners say that the cost of past and future asbestos litigation—estimated at around $200 billion—has reached roughly the same amount it will cost to rebuild Iraq.

Claims by nonsick plaintiffs comprise 90% of asbestos litigation, they assert, and are forcing "traditional" asbestos defendants—companies that produced asbestos—into bankruptcy. More than 60 defendant companies have gone bankrupt, according to the petition, and asbestos victims and their survivors are recovering only fractions of their awards from bankrupt defendants.

"Manville is paying five cents on the dollar," asserted Mark Behrens, of the Washington office of Shook Hardy & Bacon, one of the authors of the amici brief filed in Michigan, referring to the bankrupt Johns Manville Corp., one of the largest producers of asbestos.

Judges are taking it upon themselves to manage their asbestos dockets, either with the creation of a formal registry like an "inactive docket," or by dismissing claims of nonsick plaintiffs without prejudice, and preserving their right to sue at a later date, Behrens said.

"It's competition for the same dollars," Behrens said. "Cancer victims' lawyers know there is not an infinite amount of money out there and every dollar that goes to someone who is not sick is a dollar less to compensate cancer victims."

Denying rights

Frederick M. Baron of Baron & Budd in Dallas, a firm with about half of its practice in asbestos, said that the measures are unfair, because people who pay their taxes and have legitimate claims recognized under state law will not be able to access their courthouse.

"Inactive dockets are code words for depriving people of their rights to access justice in the civil courts," Baron said. "Cutting out people's rights is the classic definition of tort reform."

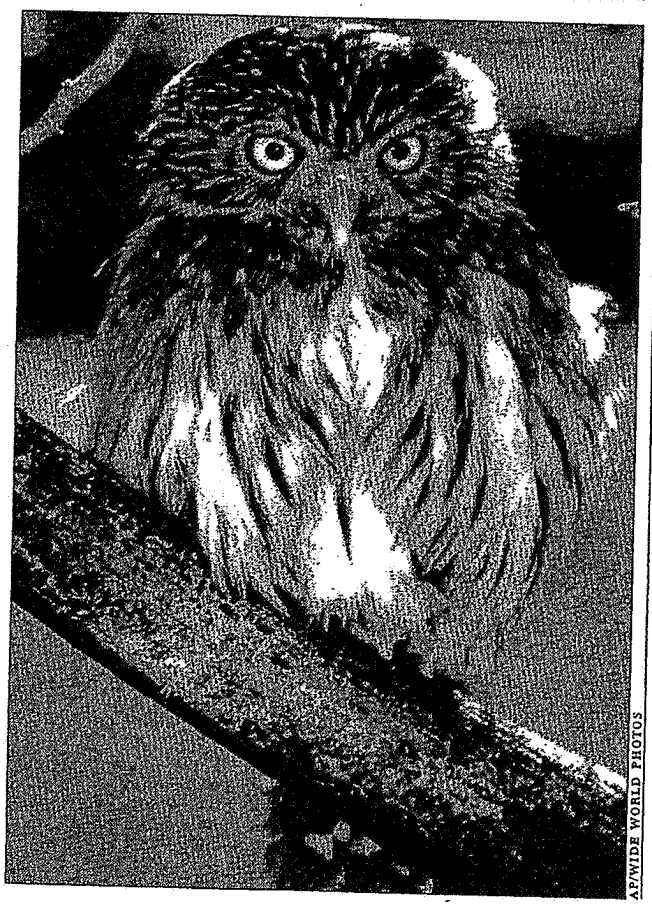
The Michigan petition is the first to ask a state supreme court for an inactive docket. On the federal level, the American Bar Association has filed a report to Congress endorsing a "medical criteria" approach. Similar to the inactive docket, the plan would establish a "minimum impairment threshold" that must be met in order to file an asbestos claim, while suspending the statutes of limitation on nonmalignant claims.

The most austere federal bill, the Fairness In Asbestos Injury Resolution Act of 2003, recommends inactive dockets, as well as the creation of a federally supervised trust fund to pay out asbestos claims. That bill, introduced by Senator Orrin G. Hatch, R-Utah, is expected to reach the Senate floor in October. NLJ

McAree's e-mail address is dmcaree@nlj.com.

SMALL OWL, BIG TROUBLE:

In a controversial ruling, the 9th U.S. Circuit Court of Appeals recently said that the U.S. Fish and Wildlife Service had arbitrarily designated the pygmy owl an endangered species. The ruling doesn't remove the owl's protection, but sends Nat'l Ass'n of Home Builders v. Norton, *No. 02-15212, back to a Tuscon, Ariz., federal court, where the agency will have to justify the listing. The suit was sparked by a dispute between conservationists and the association over area development.*



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Vol. 18, #3 March 7, 2003

Commentary

Two Forks In The Road Of Asbestos Litigation

By
Mark A. Behrens
and
Rochelle M. Tedesco

[Editor's Note: Mark A. Behrens is a partner in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. He practices in the firm's Public Policy Group and serves as counsel to the Coalition for Asbestos Justice, Inc., a nonprofit association formed by insurers to improve the asbestos litigation environment. Rochelle M. Tedesco is an associate in the law firm of Shook, Hardy & Bacon L.L.P. She practices in the firm's Public Policy Group and specializes in civil justice issues. The views expressed herein are the authors' own. Responses to this column are welcome. Copyright 2003 by the authors.]

Six years ago, the United States Supreme Court said that this country was in the midst of an "asbestos-litigation crisis."[1] Since that time, the litigation has grown worse. In fact, according to former United States Attorney General Griffin Bell, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections."[2]

The numbers tell the story. In the 1990s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.[3] In 2001 alone, plaintiffs filed at least 90,000 new cases.[4] Up to 700,000 more cases are expected by the year 2050.[5]

Several recent studies have concluded that the vast majority of new asbestos claimants — up to ninety percent — are not sick.[6] The Supreme Court has recognized that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment."[7] Many of these claimants may never develop an asbestos-related disease.

To date, at least 67 companies have been driven into bankruptcy. Almost one-half of these bankruptcies occurred within the past two years, according to the RAND Institute for Civil Justice.[8] And, the process is accelerating. As a result, plaintiffs' lawyers are actively looking for new "deep pockets" to sue. Lawsuits are now piling up against companies with only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners. Recent research by RAND shows that more than 8,000 companies now are named as asbestos defendants, up from only 300 in 1982.[9]

The impact on the economy is staggering. RAND estimates that $54 billion has been spent in the litigation — most of it going to lawyers or litigation costs.[10] Various estimates of the total future cost of the litigation range from $200 to $275 billion.[11] To put these sums into perspective, General Bell has explained that they exceed current estimates of the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."[12]

Columbia University Professor and Nobel-prize winning economist Joseph Stiglitz, Chairman of the Council of Economic Advisers during the Clinton Administration, recently estimated that as many as 60,000 people (many of them union workers) have lost their jobs and roughly 25% of their pensions as a direct result of the litigation.[13] A new study by NERA Economic Consulting predicts there will be as much as $2 billion in additional costs due to the indirect impacts of company closings.[14]

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Perhaps most disturbing, current trends in the litigation threaten payments to the truly sick. Indeed, lawyers who represent asbestos cancer victims, such as Oakland, California, attorney Steve Kazan, have expressed concern that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation.[15] Even Mississippi tort king Richard Scruggs has said, "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."[16]

Asbestos Litigation At The Crossroad

The current path of asbestos litigation is a dead-end road. The system is not working for courts, defendants, or the seriously ill. But what are courts to do?[17] What new paths exist? Two approaches have emerged, though not with equal success: mass consolidations and procedures to deal with the non-sick.[18]

Mass Consolidations

Some courts have turned to mass consolidations to clear their ballooning asbestos dockets. These courts have undoubtedly acted with the best of intentions – faced with overwhelming numbers of asbestos claims, they have worked to put money in the hands of the sick as quickly as possible, and also to clear crowded dockets. The situation was described by former Michigan Supreme Court Chief Justice Conrad Mallett, Jr.: "Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . 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."[19]

For example, a mass trial held in West Virginia last September involved approximately 8,000 plaintiffs seeking damages from hundreds of defendants.[20] According to West Virginia Supreme Court Justice Elliott Maynard, the plaintiffs had worked in dozens of occupations at hundreds of different work sites located in a number of different states over a sixty-year period.[21] They alleged many different conditions. It is likely some were not impaired at all.

Another mass trial held about the same time in Virginia involved 1,300 claimants and numerous defendants.[22] Again, the claims consolidated involved plaintiffs who worked in a number of different jobs, were exposed to asbestos for time periods ranging from a few months to several decades, and alleged a variety of conditions. The highly individualized nature of the many claims led the trial court to conclude "that consolidation of all of the cases would adversely affect the rights of the parties to a fair trial."[23] Nevertheless, the case proceeded to trial.

Justice Mallett's observation explains how courts may view such "mass joinders" as a quick way to resolve a very large number of cases. But, as it turns out, bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. Rather than making cases go away, it invites new ones.[24] As mass tort expert Francis McGovern of Duke Law School has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam."[25] Likewise, RAND recently concluded "it is highly likely that steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved."[26]

The consolidated trial is a blunt instrument. It does not allow individual claimants to be treated individually; everyone is thrown into the "courtroom Cuisinart." This raises serious due process issues and is constitutionally problematic. Such trials also foster payments to the non-sick, depleting assets needed to compensate the seriously ill. This occurs because consolidated actions

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produce coercive legal "blackmail settlements."[27] The effect is to speed the bankruptcy process and put greater pressure on solvent "attenuated defendants." Harvard Law School Professor Christopher Edley, Jr. has also pointed out that the sick often end up receiving smaller awards than they would if their cases were considered individually.[28]

Some courts may find it less facially offensive to join smaller numbers of cases, such as "10 packs," in an attempt to avoid the problems caused by the truly extraordinary mass trial. But, many of the serious legal and public policy problems that exist in jumbo consolidations remain in mini-consolidations. For example, unimpaired or mildly impaired claimants are still encouraged to file actions, because defendants continue to face heavy pressure to settle. Mini-consolidations also do nothing to slow the accelerating bankruptcy trend and resulting "dragnet search" for new peripheral defendants. And, payments to the truly sick remain threatened.

For these reasons, many courts are likely to decide that case consolidation is not the best course for the future resolution of asbestos claims.

Inactive Dockets

A growing number of courts have decided to take a different path; one that is more surgical in its approach to the asbestos litigation problems of today. These courts have focused on the "root cause" of the current crisis – mass filings by the unimpaired or only mildly impaired. These filings are largely responsible for the exploding asbestos dockets that many courts are now experiencing. Such claims are also a driving force behind mass trials.

More importantly, payments to the non-sick represent perhaps the most serious threat to the ability of the truly sick to obtain timely and proper compensation, now and in the future. As New York City Judge Helen Freedman recently concluded: "The large number of claims made by or on behalf of unimpaired or the minimally impaired impedes the ability of the much smaller group of seriously ill plaintiffs and decedents to recover for their injuries."[29] Filings by the unimpaired also have fueled the "dragnet" search for new defendants to be pulled into the litigation.

Why are so many unimpaired claimants electing to bring suit? A key reason is that many claimants fear their claims may be time-barred if they sue in the future. They are afraid that statutes of limitations laws may block their claim. Financial reasons are part of the answer too — as more companies declare bankruptcy, claimants may feel pressure to bring claims while defendants are still solvent.

To address these issues, courts increasingly are electing to give trial priority to the sickest claimants while acting to preserve the claims of people who are not sick today, but may develop an illness in the future.[30] Some courts have done so by adopting an inactive docket (also known as a pleural registry).[31] Claims of plaintiffs who allege exposure to asbestos, but who are not presently sick, are transferred to an "inactive" or "deferred" docket where they remain, and all proceedings (including discovery) are stayed, until the plaintiff can show, based on minimum objective medical criteria set forth by the court, that they are actually impaired or have developed an asbestos-related cancer. Other courts have decided to dismiss without prejudice claims brought by the non-sick, while tolling statutes of limitations to allow these individuals to refile their claims if they should develop an asbestos-related illness in the future.

Courts are looking to these plans to deal with the recent flood of claims brought by the unimpaired. They are also acting to help preserve assets needed to compensate future claimants by slowing the flow of money to the non-sick. For example, Judge Richard Rombro, who oversees the asbestos litigation in Baltimore, Maryland, recently concluded that "with the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos."[32]

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There are several benefits to an inactive docket or similar case management order system. First, sick claimants are not forced to wait in the civil justice system behind individuals who are not presently ill. In essence, the sick are moved "to the front of the line." Second, all statutes of limitations are tolled, so that plaintiffs need not worry that their claims will be time-barred if they do become ill in the future. Finally, such procedures help preserve resources needed to compensate the truly ill.

The inactive docket idea is not new. Such docket management plans have existed in Boston, Chicago, and Baltimore for over a decade.[33] And, according to a recent article, judges in all three areas believe that their plans are working well for all parties involved.[34]

Very recently, this approach has gained momentum elsewhere. Within the past few months, judges in New York City, Syracuse, Seattle, and Greenville, South Carolina, have joined the list of pioneering courts.[35] Other courts are currently exploring similar docket management solutions.

At the federal level, Senior United States District Judge Charles Weiner, who oversees the federal asbestos Multidistrict Litigation Panel, has ordered that all cases initiated through a mass screening be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.[36]

The Path Most Courts Will Choose

The current asbestos compensation system is not working. In the next year or two, more courts will reach this conclusion and stand at the same fork in the road that has been reached already by some of their colleagues. Any court that handles significant numbers of asbestos cases will reach the fork at some point.

When they get there, judges can follow the West Virginia and Virginia courts, and allow consolidation of individualized asbestos claims. Or, they can join the growing list of courts that have more carefully examined the current asbestos litigation crisis and its roots — and have tailored sound solutions to give priority to sick claimants while preserving the claims of individuals who have been exposed to asbestos but are not presently ill. Our prediction is that as courts examine both approaches, they will see the potholes in the consolidation road and will go the other way.

ENDNOTES

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

2. The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis,* Briefly, Vol. 6, No. 6, June 2002, at 2 (Nat'l Legal Center for the Pub. Interest monograph), *available at* http://www.nlcpi.org.

3. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary,* 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Prof. Edley Testimony].

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

5. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years,* 14 *Mealey's Litig. Rep.: Asbestos* 22 (June 18, 1999).

6. *See* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001), available at http://www.actuary.org/mono.htm.; Stephen Carroll *et al., Asbestos Litigation Costs and Compensation: An Interim Report* 20 (RAND Inst. for Civil Justice, Sept. 2002) [hereinafter RAND Rep.].

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7. *Amchem*, 521 U.S. at 631, (Breyer, J., concurring).

8. *See* Stephen Carroll & Deborah Hensler, *Facts and Figures About Asbestos Litigation: Highlights from the New Rand Study* (RAND Inst. for Civil Justice, Jan. 2003).

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

10. *See* RAND Rep., *supra* note 6, at 53.

11. *See id.* at vii; Biggs, *supra* note 6, at 4.

12. Bell, *supra* note 2, at 4.

13. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, at 42 (Sebago Assoc., Dec. 2002).

14. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities*, (NERA Econ. Consulting, Jan. 23, 2003).

15. *See Oversight Hearing on "Asbestos Litigation," Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise); *see also* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36.

16. *'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 *Mealey's Litig. Rep.: Asbestos* 39 (Mar. 1, 2002).

17. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do In The Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Bell, *supra* note 2.

18. Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).

19. *The Fairness in Asbestos Compensation Act of 1999: The Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court).

20. *See State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va. 2002).

21. *See State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring).

22. *See In re Hopeman Bros., Inc.*, 569 S.E.2d 409, 409 (Va. 2002) (Lemons, J., dissenting).

23. *Id.*

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

25. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997); *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995).

26. RAND Rep., *supra* note 6, at 26.

27. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (class action involving blood products).

28. *See* Prof. Edley Testimony, *supra* note 3, at 6-7.

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29. *In re New York City Asbestos Litig.*, Order Amending Case Management Orders dated Sept. 20, 1996 and amended as of July 23, 2001, at 1 (S. Ct. N.Y. Cty., N.Y. Dec. 19, 2002).

30. *See* Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1.

31. *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 553 (1992).

32. *In re Personal Injury and Wrongful Death Asbestos Cases*, Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria, No 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002).

33. *See In re: Mass. State Ct. Asbestos Personal Injury Litig.*, Order Establishing An Inactive Docket For Asbestos Personal Injury Cases, Consol. Docket (Middlesex Super. Ct. Sept. 1986) (as amended Sept. 22, 1994); *In re Asbestos Cases*, Order to Establish Registry For Certain Asbestos Matters (Cir. Ct., Cook Cty., Ill. Mar. 16, 1991); *In re Asbestos Personal Injury and Wrongful Death Asbestos Cases*, Order Establishing An Inactive Docket For Asbestos Personal Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

34. *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?* HarrisMartin Columns: Asbestos, Feb. 2002, at 2.

35. *See In re New York City Asbestos Litig.*, Order Amending Case Management Orders dated Sept. 20, 1996 and amended as of July 23, 2001 (S. Ct. N.Y. City., N.Y. Dec. 19, 2002); *In re Fifth Jud. Dist. Asbestos Litig.*, Amendment to Case Management Order No. 1 (S. Ct. N.Y. 5th Jud. Dist. Jan. 31, 2003); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties (Dec. 3, 2002); *In re: Wallace & Graham Asbestos-Related Cases*, Wallace & Graham Case Management Order (Greenville County, S.C. 2002).

36. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, (E.D. Pa. Jan. 16, 2002). ■

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11

Analysis&Perspective

U.S. District Court Judge Jack B. Weinstein's unique perspective on the on-going asbestos litigation crisis gives him a unique perspective on the solutions, both those which have failed, and those that could work.

Claimants have expanded from those who are seriously ill to those with noncancerous conditions to those who are functionally unimpaired but show minimal clinical signs of asbestos exposure, Judge Weinstein observes. That raises "renewed questions of whether there will be enough money to pay all claims likely to be filed."

The tort system has inherent limits, Judge Weinstein says; solutions must come from other sources. The best hope for resolution to the asbestos problem, Judge Weinstein says, may be through federal legislation. In this article, he outlines the tenets of a proposed legislative scheme.

Notes for Remarks on Asbestos: New Problems and Proposed Solutions

JUDGE JACK B. WEINSTEIN, SENIOR JUDGE OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, AND KATHERINE L. ASCHENBRENNER

I. The Asbestos Litigation Crisis

The senior author approaches the asbestos problem with sharp memories of the seventy or so asbestos cases he tried with juries. Those injured by asbestos worked as young men during World War II in the Brooklyn Navy Yard, building battleships and aircraft carriers urgently needed to defeat the Japanese; they labored in clouds of asbestos. Many then went on to serve as sailors, soldiers, and airmen. Years later they were dead or dying from cancer or frightened about asbestos in their lungs reported after X-rays. Navy doctors and others in government, private industry, and the unions knew of the dangers of asbestos but had done nothing to protect them.

These are expanded notes of the senior author for remarks given at a symposium, "Asbestos: What Went Wrong," held at the Bar Association of the City of New York on Oct. 21, 2002.

Jack B. Weinstein is Senior Judge, U. S. District Court, Eastern District of New York. Katherine L. Aschenbrenner is Law Clerk to Jack B. Weinstein.

The history of asbestos in this country has been marked by a failure to deal promptly and comprehensively with a series of related problems. The dangers of asbestos were known as early as the 1930s, but millions of industrial workers and other Americans continued to be exposed for decades to asbestos without adequate protection or warnings.

Few agencies or people merit medals for their role in this country's asbestos disaster.

The federal government did not act in time to regulate asbestos or to protect workers adequately. It failed to act promptly through an Environmental Protection Agency or an Occupational Safety and Health Administration until the 1970s.[1]

State legislatures and agencies were largely quiescent.[2]

So, too, were the relevant unions. Most of them were uninvolved in protecting their at-risk members.

[1] *See* Clean Air Act, 42 U.S.C. §§ 7401, 7412 (2002) (Congress designated asbestos as a hazardous air pollutant in the Clean Air Act as passed in 1970); 40 C.F.R. § 61 (2002) (Environmental Protection Agency emission standards for hazardous air pollutants, including asbestos); 29 C.F.R. § 1926.1101 (2002) (Occupational Safety and Health Administration ["OSHA"] standards on asbestos in construction); 29 C.F.R. § 1915.1101 (2002) (OSHA standards on asbestos in shipyards); 29 C.F.R. § 1910.1001 (2002) (OSHA standards on asbestos in general industry); *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 336 n.25 (2002).

[2] *See, e.g.*, Edmund J. Ferdinand, III, *Asbestos Revisited*, 5 Tul. Envtl. L.J. 581, 588 (1992) (commenting on the asbestos industry's manipulation of state legislatures).

A handful of doctors under Dr. Irving J. Selikoff at Mount Sinai conducted the devastating epidemiological studies and sounded warnings. They are free from all blame.

Except for minimal employee worker compensation, little if any attention was paid to the problem of compensation for those who had suffered, and would suffer, long-delayed injuries as a result of their unwitting exposure to asbestos. As a result, those injured by asbestos have relied primarily on the courts in suits against producers of asbestos-containing prodcts.[3]

The plaintiff bar has been extensively criticized for its conduct in asbestos litigation. In our opinion, plaintiffs' lawyers have, on the whole, acted responsibly and honorably. Plaintiffs' lawyers are frequently blamed for manufacturing the current and on-going crisis in asbestos litigation, but had it not been for the plaintiff bar noone would have acted. Plaintiffs' lawyers deserve credit for having done more to protect and compensate workers injured by asbestos and to deter further dangerous use than anyone else. Nor can defense counsel be faulted; in the main they acted ethically on behalf of their clients.

Plaintiffs' lawyers are frequently blamed for manufacturing the current and ongoing crisis in asbestos litigation, but had it not been for the plaintiff bar noone would have acted. Defense counsel also are absolved of fault: They largely acted ethically for their clients.

There are obvious problems inherent in leaving the asbestos crisis to be dealt with by general tort law in the court system. The deficiencies of our private tort-court system have been the subject of extensive critical discussion.[4] Yet plaintiffs' claims in asbestos have been accurately described as continuing, like a perpetually "unrolling carpet. At any moment . . . some are filed, some are resolved and some are yet to come."[5]

By the end of 2000, claims for compensation for asbestos related injuries had already cost industry and insurers well over $50 billion. It is estimated that such claims ultimately will cost businesses as much as $210 billion[6]—though this seems to us high by a factor of about two.

New Plaintiffs, New Defendants. The total number of asbestos lawsuits and the rate at which those lawsuits are being filed have increased rapidly in recent years, even though most industrial use of asbestos ended more than 30 years ago. Defendants have expanded from a core group of companies who processed asbestos or used it extensively to over 6,000 companies in virtually every type of industry in the United States.[7] Claimants have expanded from those who are seriously ill to those with noncancerous conditions to those who are functionally unimpaired but show minimal clinical signs of asbestos exposure such as pleural thickening barely evident in X-rays.[8]

These recent developments have given rise to renewed questions of whether there will be enough money to pay all claims likely to be filed.

As more than two score companies have been driven into bankruptcy by these claims, leading plaintiff lawyers, financed by substantial fees, have moved aggressively to bring in peripheral players—in particular, 1) plaintiffs, by using mass X-rays and B reader pro-plaintiff diagnoses paid for by lawyers, as well as through mass media advertising, and 2) defendants with little asbestos connection, like automobile manufacturers, who used asbestos in brake linings.[9]

Today, electronic filing permits multiple claims at almost no cost to the plaintiffs' bar. Legal fee generation in the asbestos litigation business is extremely efficient and remunerative to plaintiffs' and claimants' lawyers.

Federal Judge Charles R. Weiner, the Multidistrict Litigation (MDL) judge for all federal court asbestos cases, has had his fingers in the dyke for some years in an attempt to slow the flood of cases. He has had extensive opportunity to observe recent developments in asbestos cases. He writes:

> Since the original assignment of the matter in July, 1991, the number of cases has grown to approximately 105,000. We have closed over 75,000 cases which represents more than 9,900,000 claims. . . . The new defendants are not necessarily manufacturers, distributors, or installers of asbestos products but are peripherally involved. With 20 to 100 or more defendants named in every case, and frequently with more than one plaintiff, this translates into a myriad of new claims. . . .
>
> From the onset, we have given priority to the claims of the very sick and to the victims with malignancies. Groups settlements were and are critical to the movement of these cases. We have attempted to establish registries or deferred lists of cases to husband the resources that are available in order to protect future plaintiffs who may yet become victims. . . .
>
> Since the inception of the MDL consolidation, we have worked with all of the attorneys to encourage them to concentrate on the cases which involve malignancies and severe asbestosis claimants, and to defer the claims of those who at present have no evidence of impairment. Many of the attorneys have followed this path

[3] *See, e.g.*, Stephen J. Carroll, et al., RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002) (RAND Report 2002).

[4] *See, e.g.*, Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, National Legal Center for the Public Interest, June 2002.

[5] Record at 31, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (No. 97-1704) (Oral argument of Elihu Inselbuch, Esq. on behalf of respondents).

[6] RAND Report 2002, *supra*, at 78.

[7] *Id.* at 49-50.

[8] *Id.* at 19-21.

[9] *See, e.g.*, *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir. 1993); *Clutter v. Johns-Manville Sale Corp.*, 646 F.2d 1151 (6th Cir. 1981); *United States v. Midwest Suspension and Brake*, 824 F. Supp. 713 (E.D. Mich. 1993); *In re Tire Worker Asbestos Litig.*, 1991 WL 195557 (E.D. Pa. 1991); *Covington v. Abex Corp.*, 1990 WL 204688 (D.D.C. 1990); *DiSantis v. Abex Corp.*, 1989 WL 150548 (E.D. Pa. 1989); *Lowie v. Raymark Industries*, 676 F. Supp. 1214 (S.D. Ga. 1987).

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> . . . We have been able to close approximately 60 per cent of the claims and the remaining number of cases is in the area of 30,000. Agreements to close the cases have included both federal, state, and unfiled cases which grew out of a waiver of the statute of limitations by all the parties.[10]

Courts have taken varying approaches in response to the rapid rise in claims brought by unimpaired individuals. For example, Judge Weiner has held inactive without prejudice, tolling applicable statutes of limitations, MDL non-malignant cases until the claimants show evidence of an asbestos-related debilitating condition.[11] This MDL activity has diverted many cases from the federal courts to state courts since plaintiffs have the option of bringing their cases in the more receptive state courts. (In some locales, courts are said to be particularly considerate of asbestos plaintiffs.) The MDL system has not staunched the flow.

Some judges have considered denying voting rights in bankruptcy to individuals not presently demonstrating objective medical evidence of impairment.[12] In effect, this cuts non-disabling cases off from effective claims in bankruptcy.

Other state court judges have put non-disabling claims on an ultra slow track, moving forward only with the most serious cases.[13] One court has construed state law to reduce the burden on jointly liable defendants.[14] Still others have construed state substantive laws to exclude claims of those not functionally disabled.[15]

Recognizing Non-Disabling Claims. Plaintiffs' bar has been split on how non-disabling claims should be handled. Some responsible plaintiffs' and defendants' lawyers would stop recognizing them so that available funds could be used for mesothelioma or other serious diseases.

The problem with any approach denying or indefinitely postponing claims brought by functionally unimpaired claimants who show clinical or X-ray symptoms of asbestos exposure and disease, is that, under the rule of *Erie*,[16] state tort law determines whether the claims are actionable. Although a matter of some controversy, many of these claims are substantively valid under the law of many states.[17] In our opinion, non-impaired claims cannot be ignored where state law recognizes them, without violating the rule of *Erie*. It is still possible, however, to reduce the ratio of compensation paid to claimants who are not functionally impaired to better reflect the relative gravity of injury.

In general, the plaintiffs' bar has not been irresponsible. Even those who do not want to exclude non-disabling claims have now agreed to allow much higher relative payments for more serious diseases. In the Manville Personal Injury Settlement Trust, for example, the ratio has gone up from less than 10 to 1 to 30 to 1, with the agreement of most of the plaintiffs' bar, the Trust, and the Representative of Future Claimants; there is also some tightening up of the criteria for demonstrating an asbestos related disease, although the opportunity for fraud or exaggeration of dubious claims still remains substantial.

II. Possible Future

There are a number of possible legal reactions to asbestos.

A. Leaving Matters as They Are.

First, if the acceleration and expansion of asbestos lawsuits continues unaddressed, it is possible that almost every company with even a remote connection to asbestos may be driven into bankruptcy or at least suf-

[10] Letter from Charles R. Weiner, Judge, Eastern District of Pennsylvania, to Jack B. Weinstein and other judges (Oct. 15, 2002), filed and docketed in *In re Joint E. & S. Dists. Asbestos Litig.* (No. 90-3973) (E.D. & S.D. N.Y. 2002) and quoted with Judge Weiner's oral permission.

[11] *See* Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.* (No. MDL 875) (E.D. Pa. Jan. 16, 2002).

[12] *See, e.g.*, Debtors' Motion for a Declaration with Respect to Voting Rights of Certain Putative "Claimants", *In re USG Corp. et al.* (No. 01-2094) (Bankr. D. Del. Aug. 21, 2002).

[13] *See generally, e.g.*, Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech L. Rev. 1 (2001); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

[14] *See* Cerisse Anderson, *Asbestos Ruling Favors Solvent Defendants*, N.Y.L.J., Nov. 4, 2002, at 1 (Manhattan Supreme Court Justice Helen Freedman construes apportionment of liability to protect solvent defendants).

[15] Professor Aaron D. Twerski, Newell DeValpine Professor of Law, Brooklyn Law School, Statement at Symposium, "Asbestos What Went Wrong," held at the Bar Association of the City of New York (October 21, 2002). *See also* n.16, *infra*.

[16] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[17] *Compare* Unofficial Committee of Select Asbestos Claimants Supplemental Memorandum on SCB Proposed Trust Modifications, *In re Joint E. & S. Dists. Asbestos Litig.* (90 CV 3983) (E.D. & S.D. N.Y. Sep. 25, 2002) *with* SCB's Supplemental Response to Memoranda Regarding Amendments to the Manville TDP, *In re Joint E. & S. Dists. Asbestos Litig.* (90 CV 3983) (E.D. & S.D. N.Y., Oct. 4, 2002). *See also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery For Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002) (arguing that preinjury claims brought by plaintiffs exposed to asbestos for increased risk, negligent infliction of emotional distress, or medical monitoring are "radical departures from longstanding norms of tort law" and should not be recognized); RAND Report 2002, *supra*, at 19-20.

PSLR Seeks Articles

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fer serious financial difficulties. This is increasingly the case as more obvious defendants become bankrupt and aggressive plaintiff lawyers move on to fresh victims.

Although bankruptcy does have its advantages, it is not an entirely satisfactory solution. Reliance on it will cause many unnecessary business failures and result in many who will suffer from asbestos-related injuries being un- or under-compensated. The continued spread of asbestos litigation will leave a cloud hanging over the American economy. There will be a threat of loss of jobs in defendant companies and unnecessary harm to creditors and equity holders of stock.

A "litigation as usual" outcome is not satisfactory. It will lead to the inability of many workers and other claimants to receive adequate compensation for their asbestos related injuries. It will result in excessive transaction costs. It will inhibit useful corporate consolidations with companies that have the least hint of asbestos-relatedness.

New proposals for dealing successfully with asbestos litigation through the court system have been, and are, of limited utility.

B. Plaintiff Class Action

One new litigation-based strategy is a global class action brought by all claimants exposed to asbestos against all defendants connected to the asbestos industry. The class could be certified as a limited fund, non-opt out compensatory damage class on the ground that the massive threat to industry as well as claimants warrants an exercise of equitable power. A non-opt out punitive damage class could be simultaneously prosecuted.[18] Such a class action would be able to utilize national demographic and epidemiological data that could place realistic boundaries on total recoveries, provide for sensible distribution, and cut fees and transactional costs.

Total regulation of attorneys' fees even in non-class actions would provide the condition for a rational disposition reasonably protective of all those injured; this appropriate result would probably require empowering legislation.

Except in limited special circumstances, a plaintiff class action is unlikely to be brought because the continued possibility of large attorney's fees in individual litigation provides an adverse incentive to reducing total transaction costs. Mass cases, individually settled in bulk, provide much higher fees for plaintiffs' lawyers. In class actions the court regulates fees. Total regulation of fees even in non-class actions would provide the condition for a rational disposition reasonably protective of all those injured; this appropriate result would probably require empowering legislation.

[18] *See In re Simon II Litigation*,_ F.R.D. _, 2002 WL 31323751 (E.D.N.Y 2002).

The Supreme Court's decisions in *Amchem*[19] and *Ortiz*[20] leave a cloud over any global settlement.[21] In our view, the size of this cloud has been much exaggerated. A well designed class settlement or trial could succeed in providing closure to asbestos in this country.

C. Defendant Class Action

A second litigation-based possibility is an action, based on a theory of interpleader or an action to quiet title, brought by the industrial firms and other potential defendants against a non-opt out class of claimants. It would use a class action to reverse the litigation roles of plaintiffs and defendants.[22]

After a determination of total liability, the court would determine percentage liability and allocate funds through an administrative scheme. The data necessary to make these determinations could be obtained in part through an analysis of claims filed with existing bankruptcy trusts and projections of future disease manifestations calculated by these trusts and others. Demographic and epidemiological data is available.

Defensive actions by prospective defendants are unlikely to be brought because of fear. Plaintiffs' attorneys are perceived to be too powerful and too threatening to allow such a sensible resolution that would limit future fees.

D. Bankruptcy

One variation on this possibility of a defendants' initiative is to use bankruptcy proceedings and section 524(g) of Title 11 of the United States Code (the special asbestos provision) to attempt to achieve a global resolution without destruction of equity and the debt structure of defendants. This is a fairly radical circumvention of traditional bankruptcy rules. Before new defendants would consider this route they would need legislation to protect their investors. A prepackaged bankruptcy may be available in limited circumstances to safeguard parents of asbestos-tainted subsidiaries.[23]

E. Legislation

The best resolution to the asbestos problem may be through federal legislation. The hope of uniform state legislation to eliminate non-malignant claims does not appear to us to be realistic. The Supreme Court, in *Amchem Products, Inc. v. Windsor*[24] and in *Ortiz v. Fibre-*

[19] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

[20] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

[21] On asbestos litigation after *Amchem* and *Ortiz*, see generally Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 Tex. L. Rev. 1899 (2002); Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 Tex. L. Rev. 1925 (2002).

[22] *Cf. Ortiz*, 527 U.S. at 834-36, 848 (Rule 23(b)(1)(B) class action appropriate to resolve claims made against a fund facing limits other than those imposed solely by agreement of the parties which render it insufficient to satisfy all claims); *In re Simon II Litigation*, _ F.R.D. _, 2002 WL 31323751 at *106 (E.D.N.Y 2002); *In re The Exxon Valdez*, No. A89-0095-CV (HRH) (Consolidated), Order No. 180 Supp., at 8-9 (D. Alaska Mar. 8. 1994), *vacated as to amount of punitive award, In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

[23] Alison Langley, *ABB Proposes a Settlement for All Asbestos Lawsuits*, N.Y.Times, Nov. 2, 2002, at B2 (prepackaged bankruptcy of subsidiary to protect parent).

[24] 521 U.S.at 597-98.

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board Corp.,[25] once again emphasized the need for legislative intervention in the "elephantine mass of asbestos cases."[26]

The rapid rise in claims brought by functionally unimpaired claimants has made more apparent the desireability of comprehensive asbestos that will ensure that those who suffer from injuries caused by exposure to asbestos are fairly compensated. Senator Leahy responded to the Supreme Court's call for congressional action, holding a full Senate Judiciary Committee hearing on Asbestos Litigation on Sept. 25, 2002.[27]

Congress has the authority, under the Commerce Clause and the Bankruptcy Power, as well as the capability to deal with asbestos. It could set up a compensation scheme as the exclusive remedy for injuries resulting from exposure to asbestos on the theory that it was regulating events affecting the economy of the country and protecting the health and welfare of the people. It has acted in mass situations on occasion when traditional forms of litigation alone would have provided only an incomplete and unsatisfactory solution to harm suffered by large numbers of people.[28] The national legislature has the power to preempt state statutes and common law if necessary to achieve its purpose.[29]

The "tax" imposed for cleanup of major polluting sites offers some experience.[30] Black Lung and industry funded pollution clean-up programs have, however, proved very expensive. Congress probably will shy away from providing an ultimate deep pocket. Any legislation will have to sharply limit taxpayer impact.

Federal asbestos legislation should not, in our opinion, affect prior completed bankruptcies. Trusts in most of those cases already have been set up and the rights of claimants and industry have vested. The legislation should be designed to deal with those whose claims have not yet been adjudicated and with future asbestos claimants. Whether those whose suits or claims are pending but not decided should be included in any new federal scheme presents an open question; our preference would be to fold within the scheme all claims which have not been resolved by judgments. Partial past resolutions could be handled through set-offs.

A legislative scheme could effectively be set up under a federal administrative system as follows:

1) The federal legislative system would establish an exclusive remedy; there would be no right for either plaintiffs or defendants to opt out to enter the tort system. Allowing the system to be voluntary would risk the federal statutory alternative both becoming underfunded and being rejected by plaintiffs' lawyers.

2) An adjudicative administrative board would allocate administrative and compensation costs against prospective defendants and their insurers. Allocation would be based on a finding of percentage of probable culpability.

3) Compensation for claimants would be determined according to a social security-like scheme or be based upon a number of current bankruptcy administrative plans, with allocations to be predicated on a reasonable extrapolation from the tort system. Changing conditions would be monitored, permitting continuous adjustments of awards and liability for payment into a fund.

4) The government would guarantee payments in any individual year, up to a set (relatively modest) sum, with total payments out of prospective defendants' payments not to exceed another set sum per year. Since the federal government bears a large responsibility because of its failure to act to protect workers, particularly during World War II, its contribution would be appropriate.

5) Those who are not functionally impaired, those who are impaired primarily because of other exposures, and those who did not suffer occupational exposure should be excluded. The statute of limitations would be tolled until impairment could be shown.

6) The preemptive control of the federal government based upon the Supremacy Clause would trump state law, just as it does in tobacco, children's vaccines, and other matters.

7) Attorney's fees could be based on criteria similar to those used by the Social Security Administration—a 25 percent maximum of the claimant's award or such other lower figure as the administrative court determines to be appropriate.

Obviously there are many other acceptable legislative solutions. The details set out above are illustrative of the outline of one possible program.

III. Screening Program

A prerequisite to any successful resolution of the asbestos problem is an efficient and effective method for determining those who have an asbestos related "disease." A comprehensive screening program in and of itself is not objectionable, provided that screening is for real asbestos caused problems.[31] Spending large sums for widespread medical monitoring tends, in our opinion, except in unusual circumstances, to be wasteful of funds better spent on those who are impaired.[32]

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[25] 527 U.S. 815.

[26] *Id.* at 821.

[27] *Asbestos Litigation, Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary).

[28] *See, e.g.*, September 11th Victim Compensation Fund of 2001, Pub.L. 107-42, Title IV, 115 Stat. 237 (2001); National Childhood Vaccine Injury Act of 1986, 42 U.S.C.§§ 300aa-1 to 34 (2002) (establishing the National Vaccine Injury Compensation Program); Black Lung Benefits Act, 30 U.S.C. § 901 (2002); Price-Anderson Act (Atomic Energy Damages Act), Pub. L. 85-256, 71 Stat. 576 (1957); *see also* Jack B. Weinstein, *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices* 119-21 (1995).

[29] *Cf., e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176 (2d Cir. 2002) (holding that the Comprehensive Environmental Regulation, Compensation, and Liability Act's uniform standard for determining the accrual date for state law personal injury claims arising out of exposure to hazardous substances, although it effectively overrode state statutes of limitations, did not exceed Congress's Commerce Clause authority).

[30] *See* Comprehensive Environmental Regulation, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2002), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (Oct. 17, 1986).

[31] *Cf.* Breast and Cervical Cancer Mortality Prevention Act of 1990, 42 U.S.C. § 300k (2002) (authorizing the grant of funds to provide breast cancer screening for under served women).

[32] *But cf.* Pankaj Venugopal, *The Class Certification of Medical Monitoring Claims*, 102 Colum. L. Rev. 1659 (2002) (assuming viability of medical monitoring, opt-out right is un-

A prerequisite to any successful resolution of the asbestos problem is an efficient and effective method for determining those who have an asbestos related "disease." But we need more objective tests.

We need more objective tests. It is time that we received an opinion from an impartial and reliable national organization concerning better methods for determining asbestos-related injuries with potential alternatives and their feasibility. One possibility is to ask the National Academy of Science or a similar national organization with great prestige to undertake a study.

We also need a reliable opinion from such a group of when clinical evidence of asbestos-related exposure such as pleural thickening will become debilitating, the percentage of individuals showing such evidence who eventually will probably become functionally impaired as a result of their exposure to asbestos, and time lines for discovery of future disabilities. Such an understanding would help in a number of different ways. It would aid in making proper awards by existing bankruptcy trusts. It would provide a basis for future state and federal legislation. It would help courts determine liability and damages. It would permit insurers and insured to better plan for future payments.

IV. Conclusion

The time to resolve the asbestos problem and litigation crisis has come and is fast going. Should we not now address the failure in our medical-legal-entrepreneurial-political systems to effectively deal with asbestos caused diseases?

necessary because of equitable nature of the remedy under a Rule 23(b)(2) of the Federal Rules of Procedure class action).

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT

RE: MASSACHUSETTS STATE COURT ASBESTOS PERSONAL INJURY LITIGATION

ORDER

1. The pending motions by Thornton, Early & Naumes ("TEN") to transfer 101 cases to the so-called inactive bankruptcy docket, and by the Law Offices of Allan Rodman ("Rodman") to transfer 32 cases to that docket are Allowed; but it is Further Ordered, that prior to said transfer all unsettled claims against any non-bankrupt defendant remaining in any case shall be dismissed without prejudice, and that none of the said cases may be removed from the inactive bankruptcy docket unless the Court shall so order on motion for good cause shown.

2. The pending motion by Rodman to transfer 26 cases to the so-called inactive asbestos docket ("IAD") is Allowed, provided that all claims against Ericsson Radio Systems in any of those cases shall be dismissed before transfer. The pending motion by TEN to transfer 56 cases to the IAD is Allowed, but only as to any such case in which counsel file a certification (supported by a physician's affidavit, or other medical documentation agreed to be the parties) that plaintiff has a non-malignant, asbestos-related condition that does not meet the criteria contained in Attachment 1 hereto and it is Further Ordered, that no case so transferred may be removed from the IAD unless the Court shall so order if the interests of justice require, and in any event only on motion for good cause shown, the motion to be supported by (i) a physician's affidavit that plaintiff has either developed a malignant, asbestos-related condition or experienced a change in a non-malignant, asbestos-related condition so that it has come to meet the criteria set forth in the said Attachment 1; and (ii) a certificate by counsel that the change in plaintiff's condition was first discovered after the date the case was transferred to the IAD.

3. With respect to the motions to dismiss for failure to meet the disclosure deadlines in Pretrial Order No. 5, the Court, having now had the benefit of the Supreme Judicial Court's opinion in Rockdale Management Co. v. Shawmut Bank, N.A., 418 Mass. 596 (1994), modifies its verbal order of August 16, 1994 in the following particulars:

   a. As to any case in which the disclosure form or designation was filed within one week of the deadline, the Court will presume an absence of prejudice.

b. As to any case in which the said form or designation was filed later than one week, but sooner than 31 calendar days, after the said deadline, the Court will not presume prejudice or its absence.

c. As to any case in which the said form or designation was filed later than 30 calendar days after the said deadline, the Court will presume prejudice.

d. For purposes of this order, "presume" means that the pertinent fact of the filing date raises the designated presumption.

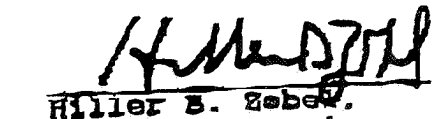
e. In each case, defendants have the burden of persuading the Court that the failure to meet the deadline prejudiced the defense or the Court, that is, either rendered preparation of the case for trial--under all the circumstances--materially less likely to produce a just, fair result, or materially impeded the orderly resolution of the extraordinary number of asbestos-related claims.

f. Defendants may, in support of their contentions, submit affidavits and proposed findings.

g. Should the Court determine, as to any case, that the failure to meet the deadline does not warrant "the severe option of dismissal," Rockdale Management Co. v. Shawmut Bank, N.A., supra at 599, the Court will nonetheless consider imposing direct sanctions (monetary or otherwise) against plaintiff's counsel, with the aim of deterring similar conduct in the future. Defendant's counsel may therefore propose appropriate action, supporting their proposal with affidavit evidence of costs incurred as a result of plaintiff's counsel's behavior.

4. The parties are directed to confer with the Special Masters to re-cast the Fall list in light of the changed number of cases still awaiting trial.

5. In the George DeSellier (90-1833) and Joseph Hogan (90-1482) cases, the pending motions to amend are allowed, it being the Court's understanding that allowing the motions will not prevent the cases from coming to trial before December 3, 1994.



Hiller B. Zobel,
Associate Justice,
Superior Court

Dated: September 22, 1994

ATTACHMENT 1

For asbestosis claims:

1. (a) An ILO B reading of 1/1 or above; and
   (b) PFT results of FVC (actual) <80% and FEV$_1$/FVC> (actual) 70%; or

2. (a) An ILO B reading of 1/0; and
   (b) PFT results of FVC (actual) <80% and FEV$_1$/FVC (actual) >75% and DLCO<75%.

3. In cases where the claimant is deceased, as an alternative to the above proof of asbestosis, an appropriate diagnosis of pathological asbestosis greater than Grade 1B, as defined in the Archive of the Pathology and Laboratory Medicine, Asbestos-Associated Diseases, Volume 106, No. 11, appendix 3 (October 8, 1982) will be accepted.

For asbestos-related pleural encasement claims:

A chest x-ray demonstrating asbestos-related bilateral pleural encasement and graded C2 or greater on the ILO scale including blunting of at least one costophrenic angle with (i) FVC (actual) <75% with FEV1/FVC ratio (actual) >70% or (ii) TLC <75% and FEV1/FVC ratio (actual) >70%.

COMMONWEALTH OF MASSACHUSETTS

EASTERN COUNTIES, SS.

SUPERIOR COURT
CIVIL ACTION

268

ASBESTOS TRANSMITTAL
KCF ✓ OI —
FED — STATE ✓
cc LGC DMF ACG JBS KEY SJ
DATE RECD 9/18/86

IN RE:
MASSACHUSETTS
ASBESTOS
LITIGATION

CONSOLIDATED DOCKET

ORDER
(Amending Pre-trial Order No. 4)

It is hereby ORDERED that Pre-trial Order No. 4 be amended in the several respects specifically set forth in the "Joint Motion of Manufacturing and Distributing Defendants and Plaintiffs to Amend Pre-Trial Order No. 4 Regarding Inactive Asbestos Docket", which motion was allowed by the court (Morse, C.J.) by letter dated September 4, 1986, to the Clerk Magistrate of Middlesex Superior Court.

Chief Justice of the Superior Court

Dated: September 12, 1986

COMMONWEALTH OF MASSACHUSETTS

EASTERN COUNTIES, ss. SUPERIOR COURT

IN RE: MASSACHUSETTS ASBESTOS LITIGATION	)	CONSOLIDATED DOCKET

JOINT MOTION OF MANUFACTURING AND DISTRIBUTING DEFENDANTS AND PLAINTIFFS TO AMEND PRE-TRIAL ORDER NO. 4 REGARDING INACTIVE ASBESTOS DOCKET

The manufacturing and distributing defendants and the plaintiffs, by their Liaison Counsel hereby move for the Court for an Order amending Pretrial Order No. 4 as hereinafter provided:

1. Pretrial Order No. 4 shall be amended by adding Paragraph XII, which shall provide as follows:

XII. INACTIVE ASBESTOS DOCKET

In addition to the consolidated docket there shall be a separate docket, which shall include: (1) those cases voluntarily dismissed pursuant to the terms of a Stipulation Regarding Voluntary Dismissal of Cases Upon Certain Conditions to be executed by the Plaintiffs and the Defendants (copy is attached hereto, marked Exhibit A) and (2) those claims initiated by the Notice of Claim Procedure, as provided in Paragraph XIII of this Order. Said separate docket shall be called the "Inactive Asbestos Docket" and shall be maintained by the Asbestos Docket Clerk.

2. Pre-trial Order No. 4 shall be amended by adding Paragraph XIII, which shall provide as follows:

XIII. NOTICE OF CLAIM PROCEDURE

A plaintiff may file an Affidavit of Notice of Claim with the Asbestos Docket Clerk who shall record it in the "Inactive Asbestos Docket", separate from the consolidated docket. No filing fee shall be paid.

The Affidavit of Notice of Claim shall contain the following information: (1) the names, addresses Social Security numbers and marital status of the plaintiffs; (2) a brief statement concerning the occupation and exposure history of the plaintiff; (3) a statement concerning the nature of the asbestos-related injury, disease or condition which the plaintiff alleges he or she has suffered; (4) the names of all entities with respect to which the plaintiff is giving notice of claim (hereinafter referred to as "Notice of Claim Defendants"); and (5) the names and address of each person served and the date of service.

Within 30 days of the filing of the Affidavit of Notice of Claim, the plaintiff shall serve a copy of the Affidavit of Notice of Claim upon each Notice of Claim Defendant by first class mail, postage prepaid and upon Defendants' Liaison Counsel.

Each Defendant shall file, with the Asbestos Docket Clerk, a designation of who is to be served with a copy of the Affidavit of Notice of Claim pursuant to the immediately preceding paragraph. The Asbestos Docket Clerk shall maintain these designations in the "Inactive Asbestos Docket." Service of an Affidavit of Notice of Claim upon the individual designated shall constitute sufficient notice pursuant to this section.

The filing of an Affidavit of Notice of Claim shall toll all applicable statutes of limitation regarding any claims of the plaintiff, his or her spouse, his or her children, his or her dependants or their estates, arising from the asbestos-related injury, disease or condition stated in the Affidavit of Notice of Claim except for claims based on wrongful death. Said tolling shall apply only with respect to The Notice of Claim Defendants.

Any claim initiated by the filing of an Affidavit of Notice of Claim shall be exempt from the discovery provisions of this Order, except that depositions may be taken in accordance with M.R.C.P. 27.

A claim may be removed from the "Inactive Asbestos Docket" by the filing of a complaint in the office of the Clerk as provided by Mass. R. Civ. P. 3. Service of the complaint shall be accomplished in the usual manner as provided in the Massachusetts Rules of Civil Procedure.

In the event that a complaint is filed and in the event that a verdict is rendered or judgment is made for the plaintiff, interest on the amount of damages shall be calculated from the date of the filing of the complaint, not from the date of the filing of the Affidavit of Notice of Claim.

The signing of this Motion constitutes the consent to each defendant to the Affidavit of Notice of Claim procedure set forth in paragraphs XII and XIII of the proposed amendment to Pre-Trial Order No. 4.

XIV. INACTIVE ASBESTOS DOCKET-FORMS

A. VOLUNTARY DISMISSAL AND TRANSFER

A statement requesting voluntary dismissal of plaintiff's claims, filed pursuant to the Stipulation Regarding Voluntary Dismissal of Cases Upon Certain Conditions refereed to in Paragraph XII above, shall be entitled "Statement Requesting Transfer to the Inactive Asbestos Docket" and shall be submitted in the form set forth in Exhibit B.

B. DIRECT PLACEMENT OF PREVIOUSLY UNFILED CLAIMS ONTO THE INACTIVE ASBESTOS DOCKET

A plaintiff filing an Affidavit of Notice of Claim pursuant to the Notice of Claim Procedure in Paragraph XIII above shall submit said Affidavit in the form set forth in Exhibit C.

THE DEFENDANTS,

By their Liaison Counsel,

Lawrence G. Cetrulo

Lawrence G. Cetrulo
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

Albert P. Zabin /acc

Albert P. Zabin
SCHNEIDER, REILLY, ZABIN, &
COSTELLO, P.C.
One Center Plaza
Boston, MA 02108
(617) 227-7500

Edward T. Dangel /acc

Edward T. Dangel, III, Esq.
DANGEL & SHERRY, P.C.
265 Franklin Street,
Suite 1000
Boston, MA 02110

Dated: September 3, 1986

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, copies of the foregoing to Liaison Counsel and to all parties to this action in accordance with the list of counsel on file with the clerk.

Lawrence G. Cetrulo

Lawrence G. Cetrulo
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

Dated: September 3, 1986

COMMONWEALTH OF MASSACHUSETTS

EASTERN COUNTIES, ss. SUPERIOR COURT

Plaintiffs
v.
Defendants

STATEMENT REQUESTING TRANSFER TO
THE INACTIVE ASBESTOS DOCKET

Pursuant to Paragraph XII of Pretrial Order No. 4, as amended, and the Stipulation Regarding Voluntary Dismissal of Cases Upon Certain Conditions, which Stipulation was approved by this Court on _____, all plaintiffs herein request a transfer of this case to this Court's Inactive Asbestos Docket and submit the following information:

1. Plaintiffs' Names and Addresses and Social Security Numbers:

2. Date of Filing of Original Complaint;

3. Specific Nature of the Alleged Asbestos-related Pleural or Parenchymal Condition, Disease, or Injury:

4. This case presently names the following defendants:

5. This case has not been placed on a trial list or assigned a trial date; and

8. All plaintiffs herein have consented to the filing of this Statement.

Plaintiff's Attorney: Name
Addresses
Telephone Number

Dated:

COMMONWEALTH OF MASSACHUSETTS

EASTERN COUNTIES, ss. SUPERIOR COURT

IN RE:	MASSACHUSETTS ASBESTOS LITIGATION	CONSOLIDATED DOCKET

AFFIDAVIT OF NOTICE OF CLAIM

Pursuant to Paragraph XIII of Pretrial Order No. 4, as amended, the following Affidavit of Notice of Claim is hereby made:

1. Plaintiffs' Names and Addresses and Social Security Numbers:

2. Statement Concerning the Occupation and Exposure History of the Plaintiff(s):

3. Statement Concerning the Nature of the Asbestos-related Injury, Disease or Condition Allegedly Suffered by Plaintiff(s):

4. Names of all entities with respect to which the plaintiff is giving notice of claim:

5. Name and address of each person served and the date of service:

Plaintiff's Attorney Name
Address
Telephone Number

DATED:

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage prepaid, copies of the foregoing to Liaison Counsel and to all parties to this action in accordance with the list of counsel on file with the clerk.

Lawrence G. Cetrulo

Lawrence G. Cetrulo
BURNS & LEVINSON
50 Milk Street
Boston, MA 02109
(617) 451-3300

Dated: 6/27/86

13

IN THE
CIRCUIT COURT OF
COOK COUNTY

IN RE:	*	
	*	
ASBESTOS CASES	*	Judge Dean M. Trafelet
	*	

ORDER TO ESTABLISH REGISTRY FOR CERTAIN ASBESTOS MATTERS

This Court has conducted hearings, taken evidence on the cause, development and consequences of latent diseases that occur due to exposure to asbestos and heard the arguments of counsel on the motion made by certain plaintiffs and certain defendants for the establishment of a judicially supervised Registry of certain types of claims. Based on the foregoing, the Court makes the following findings of fact and conclusion of law and enters its Order:

I. FINDINGS OF FACT

A. There are several different types of diseases or processes that have been associated with exposure to asbestos, including certain types of malignancies and certain non-malignant processes.

Asbestos can be a cause of non-malignant physical changes in the lung and in the pleura.

Asbestosis is a disease of the lung, which can progress with time from a non-impairing (or subclinical) stage to an impairing (or clinically diagnosable) stage. The precise criteria for the diagnosis of "asbestosis" is the subject of some dispute among physicians who specialize in the diagnosis and treatment of lung disorders. This Court has heard evidence on

the subject. This Court has adopted those minimum criteria for the purposes of this Order.

Asbestos can cause non-malignant changes within the pleura called "pleural plaques" and "pleural thickening". Medical experts generally agree that pleural plaques and pleural thickening can be evidence of exposure to asbestos but, except in extremely rare cases, they do not cause impairment.

B. The Court has the inherent power to control cases on its docket and to order the trial or disposition of these cases in a manner consistent with an economical allocation of judicial resources and with the parties' interests. The volume of asbestos-related personal injury claims now pending in the Circuit Court of Cook County presents a serious threat of calendar congestion to the Court. A substantial number of cases filed in this Court involve plaintiffs who claim significant asbestos exposure, but who are not now physically ill. In some of these cases, there may be a progression of an asbestos-related condition resulting in disability to the plaintiff. In others, the disease process will progress no further.

C. The plaintiffs and their attorneys have filed many cases that involve no present impairment, because they reasonably believe that the statute of limitations will expire before their diseases progress to a stage that is impairing.

D. Defendants have expended substantial sums in appearing, engaging in pre-trial discovery, and defending against such claims. Many have had their available resources severely

strained and believe that their resources can be better expended if focused on those cases that involve claims of actual and current conditions of impairment.

E. This Court has reviewed the methods employed by other court systems within these United States in their efforts to resolve the tension in latent disease claims between the right of a claimant to prosecute a claim at such time as he knew or should have known that he was injured by reason of the claimed tortious act or omission of another and the right of a defendant to protection against stale claims. The Court finds that a Registry under terms set forth herein below represents an appropriate balance between the respective rights of plaintiff and defendant.

II. CONCLUSIONS OF LAW

A. This Court has the inherent authority to manage and control its docket in order to achieve its constitutional mandate to adjudicate claims in accord with the common and statutory law and public policy of this State.

B. Commensurate with its inherent authority to establish and control its docket, this Court has the authority to set certain claims or potential claims in a deferred status until such time that the claim is appropriate for judicial attention and relief, and the use of such deferred Registry is proper when a claim involves an asbestos-related condition that has not progressed to a stage that the person has suffered actual impairment.

C. The registration of a deferred claim in the Court-supervised Registry to be known as the Asbestos Deferred Registry, and notice (as defined herein) to such person or entities who may be subject to suit at a later date will constitute public notice to such persons that is sufficient to satisfy the "commencement" requirements embodied in the statutes of limitations, e.g., Ill. Rev. Stat, ch. 110, §13-202, §13-203, and §13-209 and the statute of repose, Ill. Rev. Stat., ch. 110, §13-213.

D. The registration of a deferred claim within the Registry is not a "case in controversy", because the registrant does not seek monetary damages or other judicial relief. Accordingly, the Clerk of the Court need not require the payment of a filing fee by a registrant, and the registrant is not required to serve summons pursuant to Ill. Rev. Stat., ch. 110A Rules 101, et seq.

III. ORDER

A. It is ordered in accordance with the aforesaid Findings of Fact and Conclusions of Law, that the "Asbestos Deferred Registry" ("Registry") is hereby established as a repository for certain claims for asbestos-related personal injury that are deferred until such time, if ever, that such persons develop evidence of impairment consistent with the terms and conditions set our herein below.

B. It is further ordered that this Order is intended as a device to administer and direct the handling of claims for non-malignant diseases allegedly caused by exposure to asbestos.

Unless and only to the extent stated hereinafter, this Order shall not affect the manner in which claims for asbestos-related malignancies are filed and prosecuted.

C. It is further ordered that this Registry shall be administered by the Judges and Clerk of the Circuit Court of Cook County pursuant to such terms and provisions as follow.

TERMS AND PROVISIONS

1. The following provisions establish a Registry for all asbestos personal injury claims registered or to be registered in the Circuit Court of Cook County (referred to below as "claims"), the procedures by which claims are placed on and removed from the Registry, and provisions for ordering claims as they move from the Registry to the trial dockets of the Circuit Court of Cook County (the "courts").

a. The terms "impaired," "impairment," and "asbestos-related" are used herein solely as a means of separating claims and ordering them for disposition. The use of these terms in the context of this order, whether by plaintiffs, defendants or the courts, shall not be deemed to be a finding or admission that any physical conditions or changes are or are not asbestos related in a legal or factual sense, and shall not constitute to any extent a basis for a finding of liability against any person.

b. Similarly, the use and adoption by the Court of any standard measurement for testing or the reporting of test results shall not be deemed a final and conclusive adoption or endorsement of that particular standard by the courts or any counsel or the rejection of any competing or alternative standard, but reflects only the selection of a reasonable and consistent system to help ensure that uniform standards are maintained as between individual claims.

c. Whenever the provisions of this document require that the plaintiff or claimant's counsel make service of specified material, service shall be accomplished in the following manner: Plaintiffs' counsel shall file the original of the material with the Clerk of the Court, and shall include with such filing a certificate of service which shows the names, addresses and dates of service upon all other persons. Simultaneously with the filing with the Clerk, Plaintiffs' counsel shall serve a complete and legible copy of the material being filed upon Defendants by first class mail.

2. The requirements of Illinois Supreme Court Rule 137 shall apply to all papers filed by counsel or parties in connection with the Registry. All claims registered by persons who claim a history of asbestos exposure, and who can demonstrate an objective asbestos-related physical finding (such as pleural plaques), but who do not meet the minimum criteria for impairment defined herein, or who have not manifested a cancer certified as asbestos-related as described below, shall be placed upon the Registry, and shall remain on the Registry until and unless removed in accordance with the procedures established herein.

a. Upon motion of a claimant and notice to all Defendants, the Court may, in special circumstances and for good cause shown, permit a claimant who meets the criteria for exiting the Registry to remain on the Registry.

3. For the purposes of this order, "present claims" shall be defined as all lawsuits filed and served, but not actually on trial, in the courts as of the close of business March 26, 1991. All claims made in the courts beginning March 27, 1991, shall be considered "future claims."

4. Within ten (10) days of the entry of this order, each Defendant who is presently a party in any present claim shall, using the caption of the Asbestos Registry, file with the Clerk of the Court and serve upon all Defendants Counsel and all Plaintiffs' counsel with whom they have present claims pending a designation, by name, address and title, of the person who is to be served with documents and filings made in accordance with this

order. Notice of any changes of counsel will promptly be given to the Clerk and to plaintiff's counsel.

Present Claims

6. Within 90 days from March 26, 1991, each plaintiffs' attorney with present claims pending in the courts shall file with the Clerk of the Court (along with a certificate of service) and serve upon Defendants' Counsel a listing of all present claims, except for those which allege an asbestos-related cancer or mesothelioma. This listing of present claims shall be organized as follows:

a. A general listing of all such claims, alphabetically by last name, and for each claim providing also first name, date of filing, docket number, a listing of defendants named and served, exposure period, and asbestos-related condition alleged to exist; and

b. A Claimant Registry Information form, in the format attached hereto as Exhibit A, for all such claims; and

c. A draft order transferring to the Asbestos Registry each such claim.

d. For each claim alleged by the Plaintiff to be eligible for removal from the Registry, the documentation set forth in paragraph 12 below is required to support removal. All claims for which no request or documentation for removal is submitted shall remain on the Registry.

All present lawsuits in which an asbestos-related cancer or mesothelioma is alleged shall remain on the active docket. Lawsuits currently pending in which persons who filed suit based upon pleural thickening or pleural plaque are now deceased and whose survivors are now acting as representatives of the original plaintiff's estate shall not be placed upon the Registry.

7. Within 30 days of the plaintiffs' counsel's submissions to the Defendants' Counsel, any objecting Defendant shall file with

Plaintiffs' counsel and the Clerk of the Court a submission which states in not more than one page per claimant, any objections Defendant has concerning whether each claimant alleged by plaintiffs' counsel to be eligible for removal from the Registry meets the criteria established herein for removal. The Court will decide any disagreements on the papers thus submitted, and will issue an order determining which claims are removed from the Registry. Hearings will be conducted only if the Court, sua sponte, so orders, or if the Court, in the exercise of its discretion, grants any party's request for a hearing. All other claims will remain on the Registry but subject to removal in the future if other criteria established in this order are satisfied.

8. All present claims that remain upon the Registry after the proceedings described in paragraphs 6 and 7 above shall be considered "inactive" upon the conditions and with the reservations of rights contained in paragraph 10 of this order. All applicable statutes of limitations as to such cases shall be considered tolled as of the original date of filing to the extent of the alleged asbestos-related claims alleged in the pleadings up to that time, and as to the defendants named up to that time.

Future Claims

9. Each Claimant or plaintiffs' attorney filing a future claim shall, in the first instance file an Asbestos Personal Injury Information Sheet as in Exhibit B. Those cases which allege an asbestos-related cancer or mesothelioma certified by a qualified expert may proceed with filing a complaint on the active docket and obtaining service of process on all defendants named. For all other i.e., non-malignant claims, a claimant-Registry Form (New Claims) as in Exhibit C must be filed, with the Clerk of the Court. For these non-malignant claims, service will be made in accordance with paragraph 1.c upon the designated service person listed in paragraph 4 above for each entity who would be named as a defendant in the event a lawsuit were filed ("notice of claim defendants"). No filing fee shall be assessed or paid with respect to the filing of a Claimant Registry form, but the standard filing fee shall be paid in the event the claim is removed from the Registry and placed on the active docket in accordance with the provisions of paragraph 11. All future claims in which

an asbestos-related cancer or mesothelioma are alleged may be filed directly on the active asbestos docket, and the standard filing fee will be paid at that time.

10. The filing of an Asbestos Personal Injury Information Sheet and Claimant Registry Form and proper service upon the Clerk of the Court and Defendants' Counsel shall constitute placement on the Registry, and shall toll all applicable statutes of limitations as of the date of filing and service, regarding any claim of the claimant, claimant's spouse, children, dependents and their estates arising from the alleged asbestos-related condition(s) alleged in the Registry form, but only with respect to the notice of claim defendants.

11. If any claimant contends that his or her case is one which is immediately subject to removal from the Registry, then claimant's counsel shall file, along with the Claimant Registry Form, a Request for Removal and Leave to File a Complaint, in the form attached hereto as Exhibit D, with supporting documentation, and shall serve the original of Exhibit D upon the Clerk of the Court, and shall make service upon all notice of claim defendants in accordance with paragraph 1.c. Any objecting defendants shall, within 30 days of receipt of Exhibit D, file a document not exceeding two pages for each plaintiff stating Defendants' position concerning only the issue of whether the claimant meets the criteria established by this order for removal from the Registry. The Court shall promptly decide any conflict on the papers thus submitted, without a hearing, and shall enter an order determining the issue. The Court may, however, at its discretion and with or without a request from the parties, require a hearing. If the Court decides the issue in favor of the claimant, the case will be removed from the Registry and plaintiffs' counsel may file a complaint and pursue service of process as in any other case. The previous date of tolling established in paragraph 10 above will control issues concerning the statute of limitations as to notice of claim defendants and disease processes alleged in the Claimant Registry form and accompanying documents. However, nothing in this section or in this Registry order is intended to or shall be construed against any defendant to have waived the requirements for valid service of process, or to have obviated the necessity for personal

service when a complaint is filed. The duty to effect service of process shall not be triggered until the filing of the complaint.

Criteria for Removal From the Registry

12. Claims may be removed from the Registry in only the following ways:

a. A claimant may be voluntarily removed from the Registry upon the filing of a certificate by the claimant's attorney which states that the claimant is withdrawing his/her claims, and understands that all tolling of limitations will cease upon the filing of the certificate. The claimant's counsel shall file the original of such document with the Clerk of the Court and shall make service upon other parties in accordance with paragraph 1.c.

b. A claimant may file a Request For Removal in the form attached as Exhibit D along with the accompanying documents and the required certifications required by Exhibit D. The original of such Request and documentation will be filed with the Clerk of the Court and be served upon other parties in accordance with paragraph 1.c.

(1) The minimum criteria for exiting the Asbestos Registry pursuant to Paragraph 12(b) are as follows:

(a)(1) A chest x-ray with an ILO rating of 1/0 or greater, as read by a certified B-Reader; <u>and</u>

(2) A pulmonary function test performed under the supervision of and interpreted by a board-certified pulmonologist which demonstrates either:

(i) Total Lung Capacity below 80%

or

(ii) A diffusing capacity for oxygen of less than 70% of normal <u>and</u> an FEV-1/FVC ratio of 75% of predicted or greater.

<u>or</u>

(b) A chest x-ray with an ILO rating of 1/1 or greater as read by a certified B-reader <u>and</u> a pulmonary function test performed under the supervision of and interpreted by a board-certified pulmonologist which demonstrates a Diffusing Capacity below 80%.

<u>or</u>

(c) Upon exceptional circumstances and for good cause shown and upon notice to all parties, a party may by petition to the Court demonstrate actual impairment equal to or greater than that set forth in (1) and (2) above. Examples of the type of such evidence contemplated hereunder would include:

(1) Evidence of asbestosis determined pathologically, or

(2) Evidence that impairment due to interstitial fibrosis or pleural encasement is so severe that pulmonary function testing cannot be completed.

(2) The original request for removal with the accompanying mandatory documentation described above will be filed with the Clerk of the Court, and service upon other parties shall be made in accordance with paragraph 1.c. Within 30 days of the Claimant's filing, any objecting Defendant shall submit in a document not exceeding two pages, a statement of its position concerning whether the claim meets the minimum requirements for removal. The original of such response shall be filed with the Clerk of the Court, and copies served upon all counsel by first class mail.

(a) If the parties agree to removal, the Clerk will note the claim removed from the Registry, and the Claimant's counsel may proceed with filing a complaint and service of process.

(b) If the parties do not agree, the Court will determine the issue promptly upon the papers without a hearing, and will issue an appropriate order. The Court may, however, at its discretion and with or without a request from the parties, require a hearing.

(c) When an order is entered permitting the removal of a future claim from the Registry, the claimant shall file a complaint, the Clerk shall assign to the complaint a new Law Division docket number, and the complaint shall be placed on the active asbestos docket. As to present claims, plaintiff may serve those defendants who had appeared in the original action by service in accordance with paragraph 1(c) of this Order. In all other circumstances, service of process shall be effected in accordance with the provisions therefor contained in the Illinois Code of Civil Procedure and Supreme Court Rules.

(d) In any present case, any fees previously paid by any defendant, including appearance fees and jury demand fees, shall be deemed to apply to the new complaint filed by plaintiff upon exit from the Registry. In the event that no party named in the new complaint had filed a jury demand on the original complaint, any party may demand and pay the fee for a trial by jury in accordance with Illinois Code of Civil Procedure, §2-115.

(e) When a complaint is filed upon removal of the claim from the Registry, the presiding judge

of the independent calendar "In re: Asbestos Cases" shall determine if it is appropriate to assign the case to Mandatory Arbitration, pursuant to the Illinois Code of Civil Procedure, Ill. Rev. Stat. ch. 110 par. 2-1001A through 2-1009A, Supreme Court Arbitration Rules 86 through 95, Ill. Rev. Stat. ch. 110A, par. 86-95 and Rule 18 of the Circuit Court of Cook County. Notwithstanding this assignment, all motions shall be filed, noticed and presented on the independent calendar "In re Asbestos Cases," before the presiding judge of that calendar.

(f) If, in addition to the documentation required above for removal, the claimant attaches an affidavit from a treating or examining physician that the alleged asbestos related conditions which are alleged to be the basis for removal will more likely than not cause the death of the claimant within twelve (12) months from the date of the submission of the request for removal, the claimant may further request expedited discovery and trial. Service of such affidavits and request shall be in accordance with paragraph 1.c.

(3) The same pulmonary function and testing and/or chest x-ray information that was referenced in a Claimant's Exhibit A or C as a basis to file the original claim with the Registry may not be used in whole or in part as the foundation for a later request for removal from the Registry.

Miscellaneous Provisions

(A) The terms of this order may not be modified except by a stipulation signed by all parties and entered by the court, or by Order of the Court following notice to all parties of record.

(B) The fact that a claimant satisfies the exit criteria for non-malignant lung disease shall not be construed as an admission that he has asbestosis, nor shall the exit criteria be cited, referred to or otherwise used at trial of any case as diagnostic criteria for the determination of whether a plaintiff in fact has asbestosis. Rather, such criteria are established only for the purpose of determining when a claimant may activate a Registry claim into an action.

(C) Acting pursuant to this Order of Court, or placing a claim on the Registry is not to be considered as an admission of liability by any of the potential defendants, nor an admission by any claimant that he or she is not suffering any injury or disability from their asbestos related condition. The existence of the Registry, and the fact that the claim was placed on the Registry shall not be admissible in any subsequent case, except for the limited purpose of a judge determining whether the provisions of the Registry order were complied with in that particular case.

(D) All claims filed on or moved to the Asbestos Registry shall bear the caption "In re: Asbestos Registry," as well as the name of the claimant and all entities which would be named as a defendant in the event a lawsuit is filed ("notice defendants"). All claims on the Registry shall bear a Registry number assigned by the Clerk of the Court. The Clerk of the Court will enter on the Court's computer the claimant's name, current address and date of placement on the Registry.

(E) Any defendant not named on a claimant's Registry Form (Exhibit C) shall not be named or served as a defendant in the event the claim is placed on the active docket. However, nothing contained herein shall limit in any manner the rights of defendants to name additional parties as third-party defendants, in the event a claim is placed on the active docket.

(F) So long as claims remain on the Registry, they are exempt from discovery provisions of the Illinois and Circuit Court of Cook County rules, and they shall not "age" for any

purpose. When a claim is placed on the active docket, it shall receive a new number, assigned by the Clerk.

(G) All filings shall be on an individual basis. No claims on behalf of a group or class of claimants shall be permitted.

(H) For all future claims, a filing fee shall be assessed by the Clerk and paid at the time a claim is placed on the active docket. For all present claims, no additional fees (including filing fees, appearance fees or jury demand fees) will be assessed for a claim already on the active docket which is transferred to the Registry, or for a claim when it is transferred from the Registry to the active docket.

(I) With regard to future claims, or any present case for any defendant not already properly served, this Order shall not effect or modify the rules regarding service of process necessary in the event such a claim is removed from the Registry and a complaint is filed on the active docket. Proper personal service of all defendants named in such a complaint is required.

(J) Failure to give notice to any notice of claim defendant of placement of a claim on the Registry shall not toll the statute of limitations as to that defendant. A notice of claim defendant who has received notice of placement of a claim on the Registry but does not receive notice of a Request for removal from the Registry may assert any objections it may have had to removal from the Registry after the complaint has been filed and served.

(K) The filing by any defendant of any papers in connection with objecting to a request by a claimant to come off the Registry, or the appearance by any defendant at a hearing ordered by the Court in connection with such a request shall not be deemed an "appearance" submitting to jurisdiction in the event the claim is placed on the active docket and a lawsuit is commenced.

(L) Any amendments to this Order shall be prospective only.

(M) This Order shall be published in The Daily Law Bulletin and its provisions shall be incorporated into and made a part of the rules of the Circuit Court of Cook County. Notice of any proposed amendments to this Order shall be published in The Daily Law Bulletin. In the event the Court orders that personal notice of any amendments, late court orders or other matters to any claimant is required, service by the clerk by U.S. mail to claimant's attorney, or if no attorney is listed, to the last known address of the claimant as stated on the Registry form, shall constitute sufficient service. Copies of this Order and any amendments shall be available in the Clerk's office and the office of the judge presiding over the asbestos related personal injury cases.

(N) This Order shall be severable and if any portions of this Order are stricken or modified on appeal, it shall not diminish the effectiveness of this Order.

Judge Dean M. Trafelet

MAR 26 1991

Clerk of the Circuit Court 108

DATE

JUDGE DEAN M. TRAFELET

IN THE CIRCUIT COURT OF COOK COUNTY
ASBESTOS REGISTRY CALENDAR

IN RE: *
*
ASBESTOS REGISTRY * Case No. 91 L _____
* Registry No. _____

Claimant Registry Information Form - Pending Claim

1. Registrant's Name: _____
2. Former case number _____ ; Filed: _____
3. Registrant's Current Address: _____
4. Defendants named and served in original lawsuit: _____
_____
_____
_____
5. Registrant's Date of Birth: _____
6. Registrant's Social Security Number: _____
7. Registrant's Statement of Exposure: Plaintiff was occupationally exposed to asbestos-containing materials during the years _____ to _____ in the course of his employment as a _____ during which years he worked as a _____
(trade or occupation)
member of Local #_____ of the _____.
(Union)
8. Plaintiff's most recent chest x-ray dated _____ reveals:

a. Pleural plaques YES ☐ NO ☐
Pleural thickening YES ☐ NO ☐
b. Parenchymal abnormalities YES ☐ NO ☐
Profusion rating _____
c. If profusion 1/0 or greater, list pulmonary function test results:
Test Date: _____
TLC_____ DLCO_____ FEV-1_____ FVC_____ FEV-1/FVC_____

_____ _____
DATE CLAIMANT OR CLAIMANT'S ATTORNEY

Attorney's Name
Address

Attorney ID No.

EXHIBIT A

This form shall be completed for any person who, after March 26, 1991, seeks to file a claim for personal injury and damages caused by exposure to asbestos.

ASBESTOS PERSONAL INJURY INFORMATION SHEET

Claimant's Name _____.
Date of Birth ____/____/____.
Social Security No. ____-_____-____.
Current Address _____

1. I, _____, claimant or counsel for claimant herein, have read and am familiar with the provisions of this Court's Order dated March 26, 1991 regarding the classification of different types of claims for asbestos-related personal injury for the purposes of placement of any individual claim on the active trial docket or on the deferred asbestos Registry of the Circuit Court of Cook County.

2. _____ (Claimant's name) has been diagnosed on

_____ (date) by Dr. _____ as having:

(check appropriate box(es):

- ☐ a) Malignant pleural mesothelioma.
- ☐ b) Malignant peritoneal mesothelioma.
- ☐ c) Malignant lung cancer.
- ☐ d) Malignant gastrointestinal cancer.
- ☐ e) Other malignancy (specify) _____.
- ☐ f) Parenchymal changes consistent with asbestosis.
- ☐ g) Non-malignant pleural changes.
- ☐ h) None of the above.

3. If boxes 2(a), (b), (c), (d) or (e) are checked, have you received from a qualified expert an opinion that the cancer is causally connected to asbestos exposure? Yes ☐ No ☐.

If "yes," identify the qualified expert _____, and the Clerk will accept the filing of a complaint.

If "No," you must obtain such a report before proceeding with the prosecution of a claim.

Once the complaint is filed, you must place summons for service on all defendants named.

4. If you have checked box 2(f) [and not boxes 2(a), (b), (c), (d), or (e)], please state:

a) Your or your client's most recent chest x-ray was taken on ____/____/____ and revealed:

EXHIBIT B

i) Pleural plaques? ☐ YES ☐ NO
ii) Pleural thickening? ☐ YES ☐ NO
iii) Parenchymal changes consistent with pneumoconiosis? ☐ YES ☐ NO. With a profusion level on the ILO scale __/__.

b) If you answered yes to (iii) and the ILO rating is 1/0 or greater, list your or your client's most recent pulmonary function test results in the following categories: TLC _____; DLCO _____; FEV-1 _____; FVC _____; FEV-/1/FVC Ratio _____. Date of Testing: _____/_____/-_____. Please complete No. 5.

5. If you have checked boxes 2(f), (g) or (h), respond to the following: Based on my review of this Court's Order dated March 26, 1991, and the current evidence of impairment of myself or my client, I certify that this claim meets the criteria for:

☐ a) Filing as an active case in the Circuit Court, and I am filing such case.
☐ b) Filing on the Asbestos Registry.
☐ c) None of the above.

Dated _____

_____
Claimant's/Attorney's Signature

Attorney's Name
Address

Attorney ID No.

IN THE CIRCUIT COURT OF COOK COUNTY
ASBESTOS REGISTRY CALENDAR

IN RE: *
*
ASBESTOS REGISTRY * Case No. 91 L ____
* Registry No. _____

Claimant Registry Form - New Claim

1. Registrant's Name: _____
2. Registrant's Date of Birth: _____
3. Registrant's Social Security Number: _____
4. Registrant's Current Address: _____
5. Registrant's Statement of Exposure: I believe that I was occupationally exposed to asbestos-containing materials during the years _____ to _____ in the course of my employment as a _____ during which years I worked as a
(trade or occupation)
member of Local #_____ of the _____.
(Union)

Names of each company that would be sued as a defendant if the case was placed on the active docket: _____
_____
_____
_____

6. Registrant's Statement of Injury: On _____, 198__, I was informed by Dr. _____ that I have the following medical evidence of non-malignant, physical changes due to asbestos exposure. Chest x-ray dated _____/_____/_____ revealed:

a. Pleural plaques YES ☐ NO ☐
Pleural thickening YES ☐ NO ☐
b. Parenchymal abnormalities YES ☐ NO ☐
Profusion rating ____/____

EXHIBIT C

c. If profusion 1/0 or greater, list pulmonary function test results: Test Date:____/_____

TLC_____ DLCO_____ FEV-1_____ FVC_____ FEV-1/FVC_____

_____ DATE

_____ Registrant's/Attorneys Signature

Attorney's Name
Address

Attorney ID No.

IN THE
CIRCUIT COURT OF
COOK COUNTY

IN RE: *
*
ASBESTOS REGISTRY * Registry No. _____
*

Request for Removal From Asbestos Registry
and for Leave to File Complaint

1. Claimant's Name: _____
Last First Middle

2. Date original Claimant Registry Form was filed:

_____

3. I hereby request removal of the above-captioned claim from the Registry.

4. The specific asbestos related condition(s) claimed is/are:

_____

5. The reasons for this request are as follows (here state the specific reasons for removal, specifying which criteria have been satisfied):

_____

_____

_____

_____

_____

6. The following documentation required by the Registry order is attached "hereto in support of this request:

_____ dated_____

_____ dated_____

_____ dated_____

_____ dated_____

_____ dated_____

EXHIBIT D

7. I certify in accordance with Rule 137 of the Illinois Supreme Court Rules that the foregoing information is true and correct, and hereby request that the above-named claimant's case be removed from the Registry and that leave be granted to file a complaint.

Dated _____

_____
Signature of Claimant or Claimant's Counsel

Certificate of Service

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Chicago Daily Law Bulletin
Volume 137, No. 254
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December 30, 1991

COURT REJECTS CHALLENGE TO ASBESTOS 'REGISTRY'

Helen Lucaitis
Law Bulletin staff writer

A challenge to a court-ordered "asbestos deferred registry" that allows some asbestosis victims to have unlimited time to file claims has been rejected by the 1st District Appellate Court.

The Appellate Court said it was without jurisdiction to review the the registry order, which the court said is a non-final, non-injunctive administrative order that regulates the details of litigation before the Cook County Circuit Court.

Allied Signal, Inc., a defendant in two of the more than 1,000 asbestos cases in Circuit Court, challenged the registry order and claimed the Appellate Court had jurisdiction for the appeal because the order is injunctive in nature.

The registry was created in March 1991 by Cook County Circuit Judge Deann M. Trafelet as a way to help reduce congestion in the court. Trafelet said the registry is a "practical solution" for the court to control its docket.

The registry creates an inactive docket for plaintiffs diagnosed as having only slight evidence of asbestos-related disease. Others, who have more immediate injury claims, will be able to proceed in litigation.

'It's going to allow the very injured people to have their cases heard first," according to Kathy Byrne, an attorney with Cooney & Conway, which represents almost 200 claimants. "There are so many of these cases, the court has to prioritize," Byrne said. "It's a docket management order."

Allied Signal, represented by Patrick E. Maloney of Tressler, Soderstrom, Maloney & Priess, argued that the registry circumvents the state's statute of limitations and violates Signal's right to trial by jury, due process and equal protection.

But the Appellate Court ruled that the order is non-appealable because it does not affect the relationship of the lawsuit's parties outside the parameters of the litigation, according to the opinion, written by Justice James Murray. Presiding Justice Francis Lorenz and Justice Frank Gordon concurred. In re Asbestos Cases, Cornelius Mulligan, et al. v. Keene Corp., et al., No. 1-91- 1305.

"The main thrust of the argument was to have some certain date to got to court," Byrne said. "But this was docket management and the court has the power to manage its own docket," she said.

Both plaintiffs and defendants in the case asked the court in 1990 to create

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the deferred docket, according to Byrne.

"We worked very hard to get the registry," she said.

Allied Signal was the only defendant of more than 20 named in the suit to object.

The unpredictable nature of the asbestos-related illness is cramping litigation, according to lawyers involved in the litigation. Sufferers develop symptoms inconsistently, Byrne said.

"Without the registry, there would be no point to some of the litigation due to its unpredictable nature," Byrne said.

The registry mandates objective criteria claimants must possess, including breathing capacity and X-ray results. According to the Appellate Court, the registry allows "the more mildly affected claimants to preserve their rights but defer their claims to a point in time when, if ever, their injury becomes more pronounced."

"In Illinois, it's a landmark decision," according to Byrne who said she knows of no other litigation in the state involving an illness where parties on both both sides agree to an order like the registry.

But the idea of a registry is not new, she said. Illinois now joins courts in nine other states, including four federal district courts.

Maloney could not be reached for comment.

12/30/91 CHIDLB 1

END OF DOCUMENT

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C

Appellate Court of Illinois,
First District, Fifth Division.

In re ASBESTOS CASES (Cornelius Mulligan, et al., Plaintiffs-Appellees v. Keene Corporation, et al., Defendants-Appellees; Allied Signal, Inc., Defendant-Appellant).

No. 1-91-1305.

Dec. 27, 1991.

Defendant in pending asbestos litigation appealed order of the Circuit Court, Cook County, Dean M. Trafelet, J., which created deferred docket registry for asbestos-related personal injury claims. The Appellate Court, Murray, J., held that order establishing deferred docket registry was nonappealable, noninjunctive, ministerial or administrative order.

Appeal dismissed.

West Headnotes

[1] Appeal and Error 100(1)
30k100(1)

In determining whether court order may be deemed injunction for appeal purposes, it is substance, not form, that is controlling, and actions having force and effect of injunctions are appealable. S.H.A. ch. 110A, ¶ 307(a)(1).

[2] Appeal and Error 106
30k106

Order of circuit court establishing deferred docket registry for asbestos- related personal injury claims was nonappealable, noninjunctive, ministerial or administrative order; order did not affect relationship of parties outside parameters of litigation, order regulated procedural details of complex litigation, and registry was merely tool whereby circuit court could prioritize litigation of cases already filed and exercise its inherent authority to control its docket.

[3] Appeal and Error 106
30k106

[3] Trial 9(1)
388k9(1)

Although Appellate Court was without jurisdiction to review circuit court order establishing deferred docket registry for asbestos-related personal injury litigation, defendant in asbestos litigation was not left without opportunity for relief; defendant could move to sever its cases from registry, and if request for severance were denied, defendant could appeal from that order. S.H.A. ch. 110, ¶ 2-1006; ch. 110A, ¶ ¶ 304(a), 308.

****521 *292 ***563** Kathleen M. Gibbons, Tressler, Soderstrom, Maloney & Priess, Chicago, for defendant-appellant.

Cooney and Conway, Chicago, William R. Fahey, Kathy Byrne, of counsel, for plaintiffs-appellees.

Robert H. Riley, Barbara E. Hermansen, Catherine Masters Epstein, Heidi Dalenberg, Schiff Hardin & Waite, Chicago, for defendant-appellee, Keene Corp.

***293** Justice MURRAY delivered the opinion of the court:

Appellant, Allied Signal, Inc. (Signal) appeals from an order of the circuit court of Cook County which created an "Asbestos Deferred Registry" (Registry).

According to the 16-page order dated March 26, 1991, the registry is a court- supervised repository wherein certain asbestos-related personal injury claims filed in Cook County must be placed and kept on a deferred or inactive docket until such time, if ever, that the claimant develops a prescribed degree of impairment or disability arising from their contact with asbestos. Although the order affects several hundred plaintiffs and numerous defendants involved in more than 1,000 underlying actions already filed in Cook County, as well as all of the parties in the many actions expected to be filed, Signal is the only party appealing the circuit court's entry of the order establishing the registry. [FN1]

FN1. According to defendants-appellees' brief, Allied Signal, along with Illinois Fiber Specialty and A & M Insulation, objected to the entry of the order establishing the registry, but only Signal appealed. Additionally, it appears that Signal is the named defendant in only two (2) of the more than 1,000 asbestos-related cases pending in Cook County.

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Initially, Signal contends that the order establishing the registry is, in effect, an injunctive order and, as such, is appealable ****522 ***564** pursuant to Supreme Court Rule 307(a). (Ill.Rev.Stat.1989, ch. 110A, par. 307(a).) Additionally, Signal contends that the trial court abused its discretion in forming the registry because the registry circumvents the Illinois statute of limitations and statute of repose and because the registry violates Signal's rights under both the Federal and State constitutions by denying Signal its right to trial by jury, due process of law and equal protection under the law.

Before we address Signal's appeal we shall provide a brief procedural history of the matter before us and explain the evolution of the order being appealed from.

On December 30, 1987, a complaint was filed in the name of 134 plaintiffs against some 20 or more defendants, alleging injury as a result of exposure to asbestos. Subsequently, on May 24, 1988, plaintiffs' attorney filed a proposal asking the court to consider forming a "pleural registry," *i.e.,* an inactive docket system for those plaintiffs diagnosed as having only slight evidence of asbestos-related disease. The petition indicated that there was precedent in other jurisdictions for the formation of such a registry. It also suggested that the formation ***294** of such a registry would provide a "practical solution" for the court in its attempt to control its own docket and administer the large number of asbestos-related cases already in the system, as well as those expected to enter the court system. Further, the proposal indicated that the registry would provide a method whereby plaintiffs, who showed only some small sign of asbestos-related injury but who were forced to file a claim in order to preserve their rights, could defer their cause of action to such time, if ever, that their condition progressed to disability.

A number of defendants objected to the formation of the registry and they expressed their position to the court in a response memo dated May 26, 1988. At the same time these defendants filed a motion to dismiss the filed complaint, contending that the 134 plaintiffs were improperly joined in the single complaint. As a result, on July 5, 1989, plaintiffs' complaint was stricken with leave to refile.

On January 22, 1990, a first amended complaint was filed on behalf of 127 plaintiffs and once again, on June 28, 1990, certain defendants moved to dismiss. Nevertheless, counsel for other defendants, instead of joining the motion to dismiss, joined with counsel representing various plaintiffs in filing a motion on August 13, 1990, asking the court to establish a "deferred asbestos docket." The motion was the product of a unified effort of some plaintiffs' and defense attorneys involved in asbestos litigation to create a procedure that would allow for the best utilization of the court's time and resources in the management of asbestos personal injury cases. The motion included certain mutually agreed-upon, objective medical criteria that could be used to determine when a plaintiff should enter or exit a deferred docket.

Several parties filed a response to the motion, some in support of the motion and some in opposition to it. In addition, other attorneys filed with the court, for its review, copies of orders entered by other jurisdictions which had already created deferred asbestos dockets.

At a hearing held on January 3, 1991, the court expressed its inclination to agree to the establishment of a deferred docket and asked that counsel representing both plaintiffs and defendants meet and review the documents which established deferred dockets in New York and Baltimore so that an agreed order might be presented to the court which would establish the criteria for a deferred docket registry.

On March 26, 1991, an order "agreeable in substance" to nearly all the parties, was tendered to the court. After some discussion and fine-tuning of certain details of the order and over the objections of a few parties opposing it, the court agreed to sign the 16-page order, ***295** which established a deferred docket registry for asbestos-related litigation.

Although our recitation of the procedural facts explains how the court order came about, it does not explain why it came about. To understand why, it is necessary to consider other factors.

****523 ***565** According to statistics provided by plaintiffs-appellees' brief, taken from a report filed with the U.S. Bankruptcy Court [FN2], there are more than 100,000 asbestos related personal injury claims presently pending in courts across the United States today and more than 366,000 claims are projected to be filed in the future. The degree of disability or disease in these claimants ranges from extremely mild (claimants who show some evidence of "pleural plaques" *i.e.,* patches of thickening of the lining of the lungs) to severe (claimants who are inflicted with asbestosis, mesothelioma or cancer). Apparently, the largest percentage of claimants exhibit only minor asbestos- related injury [FN3]

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and often have no measurable impairment or disability at the time they file their cause of action. These claimants have chosen to file actions, however, because they are aware of the latent and progressive nature of asbestos-related disease and because they fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability. They justifiably believe that their knowledge that they possess nondysfunctional asbestos-related changes in their lungs places them on notice sufficient to start the statute of limitations time clock running. Consequently, there has been a massive influx of asbestos-related personal injury claims into the court system.

FN2. See *Re: Johns-Manville Corporation, et al.,* Nos. 82 B 11656 (BRL) through 82 B 11676 (BRL) pp. 50-51, 97-99, (U.S.B.C. Southern District of New York) filed May 16, 1991.

FN3. According to defendant-appellee's brief, 462 of the 1,000 or more cases presently in the Cook County Circuit Court system have been placed on the registry. This means that nearly half of the plaintiffs having asbestos-related cases pending in Cook County currently exhibit no disability and suffer no measurable impairment.

Due to the sheer volume, as well as the complexity of these asbestos cases, the court system is becoming clogged. Furthermore, considering the number of actions expected to be filed in the future, the unfortunate reality is that many of the most severely affected claimants might be unable to gain access to the courts in a timely fashion if the courts are required to consider each case as it is filed and without regard to the severity of the injury. For this reason courts have perceived the need to create new procedures whereby they might manage and control this great volume of cases in a more orderly fashion, allowing the more severely impaired claimants to have their claims determined more expeditiously, while ***296** allowing the more mildly affected claimants to preserve their rights but defer their claims to a point in time when, if ever, their injury becomes more pronounced.

To accomplish this goal several courts in other jurisdictions have created deferred docket registries, similar to the one being challenged here. [FN4] We are now asked to rule upon whether the circuit court of Cook County has the authority to enter an order establishing a deferred docket registry and whether it was proper for the court to have done so.

FN4. Registries have already been established in the circuit courts of Baltimore, Maryland and Milwaukee, Wisconsin; the superior courts of Atlanta, Georgia and Los Angeles, California; the supreme court of New York; and the U.S. District Courts of Hawaii, Connecticut, Northern Oklahoma, and Western New York.

The first issue to be addressed, however, is whether this reviewing court has jurisdiction to consider the appeal. If this court's jurisdiction has been invoked at all depends on whether the order is deemed an injunction. If it is not, the order is nonappealable since it does not dispose of the some 1,000 or so underlying cases, nor does it contain the necessary language that no just reason exists to delay the appeal or enforcement of the order. Ill.Rev.Stat.1989, ch. 110A, par. 304(a).

Signal contends that the order is "injunctive in nature" and, as such, appealable pursuant to Supreme Court Rule 307(a). The appellees who have filed briefs with this court (which includes both plaintiffs and defendants involved in asbestos litigation) disagree. They argue that the order is not an injunction and that the questions raised by Signal are not ripe for appeal.

*****566** [1] ****524** Certainly the order does not purport to be an injunction. Instead, it appears to be an attempt by an able judge and a goodly portion of the bar to bring some order to a chaotic situation. Nevertheless, we must delve deeper to determine whether the order constitutes an injunctive order since, as stated in *In re A Minor* (1989), 127 Ill.2d 247, 260, 130 Ill.Dec. 225, 537 N.E.2d 292, it is the substance, not the form that is controlling and actions having the force and effect of injunctions are appealable under 307(a)(1).

However, we find another passage from the *In re A Minor* opinion very instructive. It states:

> "Not every nonfinal order of a court is appealable, even if it compels a party to do or not to do a particular thing. Orders of the circuit which can be properly characterized as 'ministerial,' or 'administrative'--because they regulate only the

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procedural ***297** details of litigation before the court-- cannot be the subject of an interlocutory appeal. (See *People ex rel. Scott v. Silverstein* (1981), 87 Ill.2d 167, 171 [57 Ill.Dec. 585, 429 N.E.2d 483] (stating that discovery orders and subpoenas are not appealable interlocutory orders).) Such orders may be considered noninjunctive because they did not form part of the power traditionally reserved to the courts of equity, but instead, were part of the inherent power possessed by any court to compel witnesses to appear before it and give testimony. (See *JFS v. ABMJ* (1983), 120 Ill.App.3d 261, 262 [75 Ill.Dec. 908, 458 N.E.2d 76].) *They do not affect the relationship of the parties in their everyday activity apart from the litigation,* and are therefore distinguishable from traditional forms of injunctive relief." 127 Ill.2d at 261-62, 130 Ill.Dec. 225, 537 N.E.2d 292. (Emphasis added.)

[2] Based upon the above-cited reference, we must conclude that the order establishing the deferred docket registry is a nonappealable, noninjunctive order since it does not affect the relationship of the parties outside the parameters of the litigation. We believe that the order is best characterized as a ministerial or administrative one because it regulates the procedural details of litigation made complex because of numbers. Given the number of cases presently in the system, delay in litigating the claims is inevitable. Thus, the registry is a tool whereby the court may prioritize the litigation of cases already filed and an example of the court exercising its inherent authority to control its docket. For these reasons we believe that this court has no jurisdiction to consider the merits of Signal's appeal.

Even if we were to have found that this court had jurisdiction, we would question whether Signal's challenge of the order could defeat it entirely or whether the order could only be found ineffective as it applied to Signal. This is because the order was essentially agreed to by the other parties, and even those parties who opposed it did not appeal and so apparently acquiesced to it.

[3] Finally, our finding here does not, we believe, leave Signal without an opportunity for relief. Signal could still move to sever its cases from the registry under the provisions of section 2-1006 of the Code of Civil Procedure. (Ill.Rev.Stat.1989, ch. 110, par. 2-1006.) If the trial court refuses to sever Signal's cases, Signal may request the circuit court to insert in its order denying severance, the language set forth in Supreme Court Rule 304(a) (Ill.Rev.Stat.1989 ch. 110A, par. 304(a)), and then appeal that ruling. Alternatively, Signal could seek to appeal the court's order under Supreme Court Rule 308. Ill.Rev.Stat.1989, ch. 110A, par. 308.

***298** We do not, in any way, mean to suggest that Signal should take such alternative action, as discussed above. Nor do we mean to infer, by any of our comments in this opinion, the degree of success that any such appeal would have. We merely indicate that, at this time, the court is without jurisdiction to consider the present appeal. Consequently, the appeal is dismissed.

DISMISSED.

LORENZ, P.J., and GORDON, J., concur.

586 N.E.2d 521, 224 Ill.App.3d 292, 166 Ill.Dec. 563

END OF DOCUMENT

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16

H

United States District Court, N.D. Illinois, Eastern Division.

In re ASBESTOS II Consolidated Pretrial.

No. 86 C 1739.

May 10, 1991.

In asbestos cases, the District Court, Kocoras, J., held that it was appropriate and desirable to transfer certain types of asbestos cases from active calender to deferred status, so that more serious asbestos cases could be considered by the court ahead of the less serious cases.

So ordered.

West Headnotes

Federal Civil Procedure 1995
170Ak1995

It was appropriate and desirable to transfer certain types of asbestos cases from active calender to deferred status, so that more serious asbestos cases could be considered by the court ahead of the less serious cases.

***153** ORDER TO ESTABLISH ASBESTOS DEFERRED REGISTRY

KOCORAS, District Judge.

A. BACKGROUND

As a result of a motion filed on behalf of a number of plaintiffs and joined in by a number of defendants to transfer certain types of asbestos cases from the active calendar to inactive or deferred status, the Court has received the submissions of various parties, held conferences and hearings, and has considered the arguments on the subject. Additionally, the court has reviewed an order entered by Judge Dean M. Trafelet of the Circuit Court of Cook County establishing a registry for these types of cases. The Court is also informed of the substantial effort engaged in by Judge Trafelet and by lawyers for both plaintiffs and defendants in an effort to reach agreement to the extent possible, an effort which was highly productive and which narrowed differences greatly. Counsel appearing before this Court have been much influenced by the result of Judge Trafelet's actions and order, as has been this Court.

As stated above, counsel for certain plaintiffs, with the concurrence of counsel for certain defendants, have moved for the creation of a "deferred" or "inactive" docket for certain cases involving exposure to asbestos. The cases sought to be placed in this deferred status are the least serious in the pantheon of asbestos related injuries and are sometimes referred to generically as "pleural thickening" cases.

In order to avoid claims being barred by statutes of limitation or similar statutes of repose, plaintiffs have filed a number of actions in which, by virtue of claimed exposure to asbestos, they have been diagnosed with pleural thickening or pleural plaques, or some similar non-serious condition. Although there are physiologic changes in these plaintiffs, there is apparently no present clinical impairment and, hence, no real injury. In order to protect their claims, however, these plaintiffs and their counsel have filed lawsuits as a result of these relatively non-serious medical diagnoses.

The moving plaintiffs and concurring defendants believe that these cases do not presently justify the expense of the full panoply of litigation, including motions, discovery and trial. The plaintiffs are not interested in presently pressing their claims (recovery in these types of cases is either small or non-existent), and the concurring defendants are not interested in forcing these plaintiffs to adjudicate their claims in the normal course of events. Because diseases resulting from exposure to asbestos have varying latency periods, the plaintiffs wish to restore their cases to the active docket as their conditions worsen, based on criteria to be set by the Court.

B. FINDINGS AND CONCLUSIONS

After carefully considering all of the information presented to the Court, it is clear that it is appropriate and desirable to create an Asbestos Deferred Registry, which is done by virtue of this order. The creation of the Asbestos Deferred Registry is an endeavor which will result in more serious asbestos cases being considered by the Court ahead of less serious cases. The Court also believes that substantial economic benefits will inure in the long run to classes of plaintiffs and to groups of defendants. In addition, the benefits to the judiciary are manifest. Scarce resources will be devoted to the most serious cases and case calendar control and supervision will be enhanced.

***154** The Asbestos Deferred Registry is hereby

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established as a repository for certain claims for asbestos-related personal injuries that are deferred until such time, if ever, that such persons develop evidence of impairment consistent with the terms and conditions set out below. The registration of a claim in the Asbestos Deferred Registry shall not be deemed a case or controversy, because the registrant does not seek monetary damages or other judicial relief. Accordingly, no filing fee or other costs attendant to the filing of a lawsuit shall be assessed at the time claims are registered in the Asbestos Deferred Registry.

The registration of a claim in the Asbestos Deferred Registry and notice as required herein to such persons or entities who may be subject to suit at a later date shall constitute public notice sufficient to satisfy commencement requirements for purposes of statutes of limitations, statutes of repose and similar statutes. The Asbestos Deferred Registry shall be administered by the Clerk of Court and the Judges of this Court as herein provided or as later ordered.

C. TERMS AND PROVISIONS

1. The following provisions establish a registry, to be formally known as the Asbestos Deferred Registry ("Registry") for all asbestos personal injury claims registered or to be registered in the United States District Court for the Northern District of Illinois, Eastern Division. These provisions establish the procedures and criteria by which claims are placed on and removed from the Registry.

a. The terms "impaired," "impairment," and "asbestos-related" are used solely as a means of separating claims and ordering them for disposition. The use of these terms in the context of this order, whether by plaintiffs, defendants or the courts, shall not be deemed to be a finding or admission that any physical conditions or changes are or are not asbestos related in a legal or factual sense, and shall not constitute a basis for a finding of liability against any person.

b. Similarly, the use and adoption by the Court of any standard measurement for testing or the reporting of test results shall not be deemed a final and conclusive adoption or endorsement of that particular standard by the courts or any counsel or the rejection of any competing or alternative standard but reflects only the selection of a reasonable and consistent system to help ensure that uniform standards are maintained.

c. Whenever the provisions of this order require that the plaintiff or claimant's counsel make service of specified material, service shall be accomplished in the following manner: plaintiffs' counsel shall file the original of the material with the Clerk of Court and shall include with such filing a certificate of service which shows the names, addresses and dates of service upon all other persons. Simultaneously with the filing, plaintiffs' counsel shall serve a complete and legible copy of the material being filed upon defendants by first class mail.

2. All claims registered by persons who claim a history of asbestos exposure, and who can demonstrate an objective asbestos-related physical finding (such as pleural plaques), but who do not meet the minimum criteria for impairment herein defined, or who have not manifested a cancer certified as asbestos- related as described below, shall be placed upon the Registry, and shall remain on the Registry until and unless removed in accordance with these procedures.

a. Upon motion of a claimant and notice to all defendants, the Court may, in special circumstances and for good cause shown, permit a claimant who meets the criteria for exiting the Registry to remain on the Registry.

PRESENT CLAIMS

3. For purposes of this order, "present claims" shall be defined as those pending in a complaint filed as of the date of this ***155** order. Future claims shall be all those claims filed after the date of this order.

4. Within 20 days of the entry of this order, each defendant who is presently a party in any present claim shall, using the caption Asbestos Deferred Registry, file with the Clerk of Court and serve upon all defense counsel and plaintiffs counsel with whom they have present claims the name, address and title of the person who is to be served with documents and filings made in accordance with this order.

5. Within 90 days from the date of this order, plaintiffs counsel for present claims shall file with the Clerk of Court and serve upon defense counsel a list of all present claims which do not meet the criteria for removal from the Registry set out in this order. These claims, in other words, are the claims which shall now be part of the Asbestos Deferred Registry. The list of present claims to be included in the Registry shall be in the following form:

a. A schedule of all such claims, alphabetically by last name, first name, date of filing, docket number, a list of defendants named and served, exposure period, and asbestos-related condition alleged to exist; and

b. A claimant Registry Information form, in the

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format attached hereto as Exhibit A.

All pending cases in which an asbestos-related cancer or mesothelioma is alleged, or which would otherwise qualify for removal from the Registry under this order, shall remain on the active docket of this Court. All other cases in which the present claims would be insufficient for removal from the Registry and which will now be placed in the Registry shall be dismissed without prejudice with leave to reinstate when the criteria for removal from the Registry are satisfied.

6. Within 30 days of plaintiffs' counsel's submissions of the list of present claims to be placed on the Registry, any defense counsel objecting to the inclusion or non-inclusion of any claims on the list for the Asbestos Deferred Registry shall set forth those objections in writing to be filed with the Court and with service on plaintiff's counsel. The Court shall decide the disputed issues with or without a hearing, as appropriate.

7. All present claims included in the Registry shall be considered inactive claims. Applicable statutes of limitation, statutes of repose and similar statutes shall be tolled as to existing claims and existing defendants upon inclusion in the Registry.

FUTURE CLAIMS

8. Each claimant or plaintiffs' attorney filing a future claim shall, in the first instance, file an Asbestos Personal Injury Information Sheet as in Exhibit B. Those cases which allege an asbestos-related cancer or mesothelioma certified by a qualified expert may proceed with filing a complaint on the active docket and obtaining service of process on all defendants named. For all other non-malignant claims, service will be made in accordance with paragraph 1.c upon the designated service persons listed in paragraph 4 above for each entity who would be named as a defendant in the event a lawsuit were filed ("notice of claim defendants"). No filing fee shall be assessed or paid with respect to the filing of a Claimant Registry form, but the standard filing fee shall be paid in the event the claim is removed from the Registry and placed on the active docket in accordance with the provisions of paragraph 10. All future claims in which an asbestos-related cancer or mesothelioma are alleged may be filed directly on the active asbestos docket, and the standard filing fee will be paid at that time.

9. The filing of an Asbestos Personal Injury Information Sheet and Claimant Registry Form and proper service upon the Clerk of the Court and Defendants' Counsel shall constitute placement on the Registry, and shall toll all applicable statutes of limitations, statutes of repose and similar statutes, as of the date of filing and service, regarding any claim of the claimant, claimant's spouse, children, dependents and their estates arising from the alleged asbestos-related condition(s) alleged in the ***156** Registry form, but only with respect to the notice of claim defendants.

10. If any claimant contends that their case is one which is immediately subject to removal from the Registry, then claimant's counsel shall file, along with the Claimant Registry Form, a Request for Removal and Leave to File a Complaint, in the form attached hereto as Exhibit D, with supporting documentation, and shall file the original of Exhibit D with the Clerk of Court. Service upon all notice of claim defendants shall be made in accordance with paragraph 1.c. Any objecting defendants shall, within 30 days of receipt of Exhibit D, file a document not exceeding two pages for each plaintiff stating defendants' position concerning only the issues of whether the claimant meets the criteria established by this order for removal from the Registry. The Court shall promptly decide any conflict on the papers thus submitted, without a hearing, and shall enter an order determining the issue. The Court may, however, at its discretion and with or without a request from the parties, require a hearing. If the Court decides the issue in favor of the claimant, the case will be removed from the Registry and plaintiffs' counsel may file a complaint and pursue service of process as in any other case. The previous date of tolling established in paragraph 9 above will control issues concerning the statute of limitations and related statutes as to notice of claim defendants and disease processes alleged in the Claimant Registry form and accompanying documents. Nothing in this section or in this Registry order is intended to or shall be construed against any defendant as a waiver of the requirements for valid service of process, including personal service.

Criteria for Removal From the Registry

11. Claims may be removed from the Registry in only the following ways:

a. A claimant may be voluntarily removed from the Registry upon the filing of a certificate by the claimant's attorney which states that the claimant is withdrawing his/her claims, and understands that all tolling of limitations will cease upon the filing of the certificate. The claimant's counsel shall file

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the original of such document with the Clerk of Court and shall make service upon other parties in accordance with paragraph 1.c.
b. A claimant may file a Request for Removal in the form attached as Exhibit D along with the accompanying documents and the required certifications required by Exhibit D. The original of such Request and documentation will be filed with the Clerk of Court and be served upon other parties in accordance with paragraph 1.c.
(1) The minimum criteria for exiting the Asbestos Registry pursuant to Paragraph 11(b) are as follows: (a)(1) A chest x-ray with an ILO rating of 1/0 or greater, as read by a certified B-Reader; *and*
(2) A pulmonary function test performed under the supervision of and interpreted by a board-certified pulmonologist which demonstrates either:
(i) Total Lung Capacity below 80%

or

(ii) A diffusing capacity for oxygen of less than 70% of normal *and* an FEV- 1/FVC ratio of 75% of predicted or greater.

or

(b) A chest x-ray with an ILO rating of 1/1 or greater as read by a certified B-reader *and* a pulmonary function test performed under the supervision of and interpreted by a board-certified pulmonologist which demonstrates a Diffusing Capacity below 80%.

or

(c) Upon exceptional circumstances and for good cause shown and upon notice to all parties, a party may by petition to the Court demonstrate actual impairment equal to or greater than that set forth in (1) and (2) above. Examples of the type of such evidence contemplated hereunder would include:
***157** (1) Evidence of asbestosis determined pathologically, or
(2) Evidence that impairment due to interstitial fibrosis or pleural encasement is so severe that pulmonary function testing cannot be completed.
(2) The original request for removal with the accompanying mandatory documentation described above will be filed with the Clerk of Court, and service upon other parties shall be made in accordance with paragraph 1.c. Within 30 days of the Claimant's filing, any objecting defendant shall submit in a document not exceeding two pages, a statement of its position concerning whether the claim meets the minimum requirements for removal. The original of such response shall be filed with the Clerk of Court, and copies served upon all counsel by first class mail.
(a) If the parties agree to removal, the Clerk will note the claim removed from the Registry, and the claimant's counsel may proceed with filing a complaint and service of process.
(b) If the parties do not agree, The Court will determine the issue promptly upon the papers without a hearing, and will issue an appropriate order. The Court may, however, at its discretion and with or without a request from the parties, require a hearing.
(c) When an order is entered permitting the removal of a future claim from the Registry, the claimant shall file a complaint, the Clerk shall assign to the complaint a civil docket number, and the complaint shall be placed on the active asbestos docket. As to present claims, plaintiff may serve those defendants who had appeared in the original action by service in accordance with paragraph 1(c) of this Order. In all other circumstances, service of process shall be effected in accordance with the provisions of law.
(d) In any present claim case, any fees previously paid shall be deemed to apply to the new complaint filed by plaintiff upon exit from the Registry.

Miscellaneous Provisions

12. The fact that a claimant satisfies the exit criteria for non-malignant lung disease shall not be construed as an admission that he has asbestosis, nor shall the exit criteria be cited, referred to or otherwise used at trial of any case as diagnostic criteria for the determination of whether a plaintiff in fact has asbestosis. Rather, such criteria are established only for the purpose of determining when a claimant may activate a Registry claim into an action.

13. Acting pursuant to this order of Court, placing a claim on the Registry is not to be considered as an admission of liability by any of the potential defendants, nor an admission by any claimant that he or she is not suffering any injury or disability from their asbestos related condition. The existence of the Registry, and the fact that the claim was placed on the Registry, shall not be admissible in any subsequent case, except for the limited purpose of a judge determining whether the provisions of the Registry order were complied with in that particular case.

14. All claims filed in or transferred to the Asbestos Deferred Registry shall bear the caption "In re: Asbestos Deferred Registry," as well as the name of the claimant and all entities which would be named as a defendant in the event a lawsuit is filed ("notice defendants"). All claims on the Registry shall bear a

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Registry number assigned by the Clerk of Court. The Clerk of Court will enter on the Court's computer the claimant's name, current address and date of placement on the Registry.

15. Any defendant not named on a claimant's Registry Form (Exhibit C) shall not be named or served as a defendant in the event the claim is placed on the active docket. However, nothing in this order shall limit the rights of defendants to name additional parties as third-party defendants, in the event a claim is placed on the active docket.

16. Claims in the Registry are exempt from discovery provisions. When a claim is placed on the active docket, it shall receive a new civil docket number.

***158** 17. All filings shall be on an individual basis. No claims on behalf of a group or class of claimants shall be permitted.

18. For all future claims, a filing fee shall be assessed by the Clerk and paid at the time a claim is placed on the active docket. For all present claims, no additional fees will be assessed for a claim already on the active docket which is transferred to the Registry, of for a claim when it is transferred from the Registry to the active docket.

19. With regard to future claims or any present case in which a defendant has not been properly served, this Order shall not effect or modify the rules regarding service for process necessary in the event such a claim is removed from the Registry and a complaint is filed on the active docket. Proper personal service of all defendants named in such a complaint is required.

20. Failure to give notice to any claim defendant of placement of a claim on the Registry shall not toll the statute of limitations as to that defendant. A notice of claim defendant who has received notice of placement of a claim on the Registry but does not receive notice of a Request for removal from the Registry may assert any objections it may have had to removal from the Registry after the complaint has been filed and served.

21. The filing by any defendant of any papers in connection with objections to a request by a claimant to come off the Registry, or the appearance by any defendant at a hearing ordered by the court in connection with such a request shall not be deemed an "appearance" submitting to jurisdiction in the event the claim is placed on the active docket and a lawsuit is commenced.

22. Any amendments to this Order shall be prospective only unless otherwise stated.

EXHIBIT A
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
ASBESTOS DEFERRED REGISTRY

IN RE:) Case No. _____
)
ASBESTOS DEFERRED REGISTRY) Registry No. _____

Claimant Registry Information Form--Pending Claim

1. Registrant's Name: _____
2. Former case number _____; Filed: _____

3. Registrant's Current Address: _____
4. Defendants named and served in original lawsuit: _____
_____
_____
_____

5. Registrant's Date of Birth: _____
6. Registrant's Date of Birth: _____
7. Registrant's Statement of Exposure: Plaintiff was occupationally exposed to asbes- tos-containing materials during the years _____ to _____ in the course of his em- ployment as a _____ during which years he

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(trade or occupation)
worked as a _____ member of Local # _____ of the _____
(Union)

8. Plaintiff's most recent chest x-ray dated _____ reveals:
   a. Pleural plaques YES ( ) NO ( )
      Pleural thickening YES ( ) NO ( )
   b. Parenchymal abnormalities YES ( ) NO ( )
   c. If profusion 1/0 or greater, list pulmonary function test results:

Test Date: _____
TLC _____ DLCO _____ FEV-1 _____ FVC _____ FEV-1/FVC _____

_____ _____
DATE CLAIMANT OR CLAIMANT'S COUNSEL

Attorney's Name
Address
Attorney ID No.

EXHIBIT B
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
ASBESTOS PERSONAL INJURY INFORMATION SHEET

Claimant's Name _____.
Date of Birth _____/_____/_____.
Social Security No. _____-_____-_____.
Current Address _____

1. I, _____, claimant or counsel for claimant herein, have read and am familiar with the provisions of this court's Order regarding the

   classification of different types of claims for asbestos-related personal injury for the purposes of placement of any individual claim on the active trial docket or on the Asbestos Deferred Registry.

2. _____ (Claimant's name) has been diagnosed on _____ (date) by Dr. _____ as having:
   (check appropriate box(es):
   ( ) a) Malignant pleural mesothelioma.
   ( ) b) Malignant peritoneal mesothelioma.
   ( ) c) Malignant lung cancer.
   ( ) d) Malignant gastrointestinal cancer.
   ( ) e) Other malignancy (specify) _____.
   ( ) f) Parenchymal changes consistent with asbestosis.
   ( ) g) Non-malignant pleural changes.
   ( ) h) None of the above.

3. If boxes 2(a), (b), (c), (d) or (e) are checked, have you received from a qualified expert an opinion that the cancer is causally connected to asbestos exposure? YES ( ) NO ( ).

If "Yes," identify the qualified expert _____, and the Clerk will accept the filing of a complaint.
If "No," you must obtain such a report before proceeding with the prosecution

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of a claim.
Once the complaint is filed, you must place summons for service on all defendants named.

4. If you have checked box 2(f) [and not boxes 2(a), (b), (c), (d), or (e), please state:
   a) Your or your client's most recent chest x-ray was taken on ___/___/___/ and revealed:
      i) Pleural plaques? YES ( ) NO ( )
      ii) Pleural thickening? YES ( ) NO ( )
      iii) Parenchymal changes consistent with pneumoconiosis? YES ( ) NO ( ).
      With a profusion level on the ILO scale ___/___.
   b) If you answered yes to (iii) and the ILO rating is 1/0 or greater, list your or your client's most recent pulmonary function test results in the following cate- gories: TLC _____; DLO _____; FEV-1 _____; FEV-/1/FVC Ratio _____. Date of Testing: ___/___/___.
   Please complete No. 5.
5. If you have checked boxes 2(f), (g) or (h), respond to the following: Based on my review of this Court's Order and the current evidence of impairment of myself or my client, I certify that this claim meets the criteria for:

( ) a) Filing as an active case, and I am filing such case.
( ) b) Filing on the Asbestos Deferred Registry.
( ) c) None of the above.

Dated _____ _____
CLAIMANT OR CLAIMANT'S COUNSEL

Attorney's Name
Address
Attorney ID No.

EXHIBIT C
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ASBESTOS DEFERRED REGISTRY

IN RE:) Case No. _____
)
ASBESTOS DEFERRED REGISTRY) Registry No. _____

Claimant Registry Form--New Claim

1. Registrant's Name: _____
2. Registrant's Date of Birth: _____
3. Registrant's Social Security Number: _____

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4. Registrant's Current Address: _____
5. Registrant's Statement of Exposure: I believe that I was occupationally exposed to asbestos-containing materials during the years _____ to _____ in the course of my employment as a _____ during which years I worked as a

_____
(trade or occupation)

member of Local # _____ of the _____.
(Union)

Names of each company that would be sued as a defendant if the case was placed on the active docket: _____

_____

_____

_____.

6. Registrant's Statement of Injury: On _____, 198___, I was informed by Dr. _____ that I have the following medical evidence of non-malig- nant, physical changes due to asbestos exposure. Chest x-ray dated ___/___/___ revealed:

a. Pleural plaques YES ( ) NO ( )
Pleural thickening YES ( ) NO ( )

b. Parenchymal abnormalities YES ( ) NO ( )
Profusion rating _____/_____

c. If profusion 1/0 or greater, list pulmonary function test results: Test
Date: ____/____
TLC _____ DLCO _____ FEV-1 _____ FVC _____
FEV-1/FVC _____

_____ _____
DATE CLAIMANT OR CLAIMANT'S COUNSEL

Attorney's Name
Address
Attorney ID No.

EXHIBIT D
UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:) Case No. _____
)
ASBESTOS DEFERRED REGISTRY) Registry No. ____

Request for Removal from Asbestos Registry and for Leave to File Complaint

1. Claimant's Name: _____
Last First Middle
2. Date original Claimant Registry Form was filed:
_____
3. I hereby request removal of the above-captioned claim from the Registry.
4. The specific asbestos related condition(s) claimed is/are:

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5. The reasons for this request are as follows (here state the specific reasons for removal, specifying which criteria have been satisfied):

_____
_____
_____
_____

6. The following documentation required by the Registry order is attached "hereto in support of this request:

_____ dated _____
_____ dated _____
_____ dated _____
_____ dated _____
_____ dated _____

7. I certify that the foregoing information is true and correct, and hereby request that the above-named claimant's case be removed from the Registry and that leave be granted to file a complaint.

Dated _____

_____
CLAIMANT OR CLAIMANT'S COUNSEL
Certificate of Service

142 F.R.D. 152

END OF DOCUMENT

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Chicago Daily Law Bulletin
Volume 138, No. 134
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July 9, 1992

DEFERRED ASBESTOS DOCKET CLOSED TO OUT-OF-COUNTY PLAINTIFFS

Laura Duncan
Law Bulletin staff writer

A Cook County Circuit Court judge on Thursday refused to allow some 255 plaintiffs who live outside of the county from entering a deferred docket for asbestos cases that involve no present physical illness.

Cook County Circuit Judge Dean M. Trafelet granted the defendants' motion to dismiss the complaint and to quash the plaintiffs' petitions to enter the registry, saying the docket would be "cluttered" with a large volume of cases that will never be heard in Cook County.

"The deferred asbestos docket was created to control the docket and calendar of the Cook County Circuit Court and, as recognized by the Appellate Court, the docket is a tool to prioritize litigation of cases," Judge Trafelet said in his written order and opinion.

"By definition, entry onto the registry should be limited to those cases which are likely to be tried in the Circuit Court of Cook County," Judge Trafelet added.

None of the claimants are residents of Cook County and many live outside of Illinois. Also, none of the plaintiffs alleged that they were exposed to asbestos in Cook County, according to court documents.

The judge said that out-of-state plaintiffs appeared to be trying to register on the deferred docket to defeat the statute of limitations of their resident states.

"We can't be the holding ground nor the repository for people from all around the country who want to toll the statute of limitations to protect their cause of action, based on the fact that they're not seriously ill," he said.

The docket was established in March 1991 by an order of Judge Trafelet for people who have been exposed to asbestos but are not now physically ill, according to court documents.

Because symptoms can take 20 to 30 years to appear after exposure to asbestos, the docket was created to save the courts and all parties involved time and money, the judge said. Once a claimant experiences symptoms of disease and a judge affirms that the person has met certain medical criteria, a lawsuit can be filed.

"This is a situation whereby a creative solution was set up to docket and give consideration to plaintiffs who are more recognizably sick, in the common sense of the word, so that they could have their cases addressed," said Daniel J. Cheely, one of the defendants' attorneys, of Baker & McKenzie.

Plaintiffs attorney Michael P. Cascino said that they were considering filing a motion to reconsider or an appeal, "because the reasons given as the basis of the court's order were never argued before the court by the claimants or by the

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defendants who had filed the motion to dismiss.

"An unfortunate result of the judge's order is that an additional 255 cases may have to be filed in the courts causing delay and confusion, which Judge Trafelet could easily have prevented for the federal courts and some of the smaller county courts in the Midwest," Cascino said.

Cheely said that the judge has done an "amazing" job decreasing the backlog of asbestos cases.

Judge Trafelet said that asbestos cases in the Law Division have been decreased "significantly by massive settlements. We've done blocks of cases 10 to 40 at a time," the judge said.

Judge Trafelet also amended the order that established the deferred docket to require that claimants petitioning to enter the registry have an affidavit stating that the cause of action arose in Illinois.

Between 300 and 400 people are properly on the registry, Judge Trafelet said.

The registry is one of only a handful in the country. Maryland, California, New York and Connecticut also have created registries for claimants who allege that they have been exposed to asbestos but have no physical symptoms, the judge said.

At least 28 companies that either make asbestos products or use asbestos products were named as defendants in the suit.

Asbestos was once widely used for insulation and fireproofing until it was linked to cancer and other diseases. Cities started banning its use during the 1970s.

Daniel A. Anderson, et al. v. All Temp Insulation Inc., et al., No. 91 L 20786.

7/9/92 CHIDLB 1

END OF DOCUMENT

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IN RE:	ASBESTOS	*	IN THE
	PERSONAL INJURY AND	*	CIRCUIT COURT
	WRONGFUL DEATH	*	FOR
	ASBESTOS CASES	*	BALTIMORE CITY
		*	File No. 92344501
		*	

* * * * * * * * * * * * *

ORDER ESTABLISHING AN INACTIVE DOCKET FOR ASBESTOS PERSONAL INJURY CASES

Introduction

The following Order is entered by this Court this 9th day of December, 1992, pursuant to Maryland Rule 1211A and the Court's inherent power to control its docket.

General Provisions

1. The terms "non-impaired" and "asbestos-related" are used in this Order solely as a means of separating cases and ordering them for disposition, and the fact that such terms are employed in this Order shall not be deemed an admission by any person or entity, or serve as a basis for a finding of liability against any person or entity. The existence of an Inactive Docket, or the fact that a claim is or is not on the Inactive Docket, shall not be admissible in any proceeding for any purpose, except for a proceeding concerned with the placement or removal of claims on the Inactive Docket. In addition, the use by the Court of any standard measurement for testing or the reporting of test

results shall not be deemed an adoption or endorsement of that particular standard by the Court or the rejection of any alternative standard, but reflects only the selection of a reasonable system to help ensure that uniform standards are applied.

2. Whenever the provisions of this Order require that the plaintiff or plaintiff's counsel file with the Court and serve certain material, such filing and service shall be accomplished in the following manner: plaintiff's counsel shall file the original of the material with the Clerk of the Court and shall include with such filing a certificate of service which shows the names, addresses and dates of service upon all other persons so served. Simultaneously with the filing, plaintiff's counsel shall serve a complete and legible copy of the material being filed upon all relevant defendants by first class mail; provided, however, that all Inactive Docket Information Forms (attached to this Order as Form A) filed for future cases pursuant to Paragraph 11 below shall be served upon all defendants named on that form by registered or certified mail, return receipt requested.

3. "Future claims" shall be defined as all claims for asbestos personal injury or wrongful death filed and served in this Court after the date of this Order.

4. Liaison Counsel for Plaintiffs and Defendants will be appointed pursuant to this Order. Within fifteen (15) days of the entry of this Order, each defendant who is presently a party in any present case shall file with the Court and serve upon defendants' liaison counsel and all plaintiffs' counsel with whom they have present cases pending, a designation, by name, address and title, of the person who is to be served with documents and filings made in accordance with this Order.

5. A "board-certified pulmonary specialist" or "board certified internist" means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspecialty of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).

6. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored x-ray interpretation course and whose NIOSH-certification is up-to-date.

7. "ILO grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980).

8. "Chest x-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.

9. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d Edition, Intermountain Thoracic Society (1984). Predicted values shall be corrected for race or ethnic origin as appropriate.

10. The "minimum criteria for activation" shall be defined as follows:

Clinical Non-Malignant Changes

a. Chest x-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; and

pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) FVC $\leq$ 80% of predicted with FEV-1/FVC $\geq$ 68% (actual value), <u>or</u>

(ii) TLC $\leq$ 80% of predicted

<u>or</u>

b. Chest x-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; <u>and</u>

Pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, shows either:

(i) FVC $\leq$ 80% of predicted with FEV-1/FVC >65% (actual value), <u>or</u>

(ii) TLC $\leq$ 80% of predicted.

<u>or</u>

c. Chest x-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater <u>and</u> with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows:

either

(i) FVC ≤ 80% of predicted with FEV-1/FVC ≥68% (actual value), <u>or</u>

(ii) TLC ≤ 80% of predicted

<u>and</u> with a statement by a board certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes. The total number of claimants who may be moved to the active docket in any calendar year through this section shall not exceed fifty (50).

<u>Non-Malignant Changes by Pathology</u>

d. If a claim does not otherwise meet clinical criteria for activation, and if representative lung tissue is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is otherwise uninvolved with any other process (<u>e.g.</u>, cancer or emphysema) demonstrate a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies,

and that there is no other more likely explanation for the presence of the fibrosis.

Diagnosis of Cancer

e. A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

Placement On, and Removal From, The Inactive Docket

11. Each plaintiff's counsel bringing a future claim shall, regardless of the disease process alleged, file a complaint and an Inactive Docket Claimant Information Form (Form A) with the Court and effect service on each person or entity named as a defendant in accordance with Maryland Rules and law relating to service of complaints. Filing fees will paid only with respect to the filing of the lawsuit, and not with respect to filing the Inactive Docket Claimant Information Form (Form A).

12. The filing of the Inactive Docket Claimant Information Form (Form A) with the Court shall constitute placement of the claim on the Inactive Docket. Claims on the

Inactive Docket will not be subject to the provisions of Md. Rule 2-507 for so long as they remain on the Inactive Docket. Upon the death of an Inactive Docket claimant, proper notification of death and substitution of parties will suffice for new notification as to any potential wrongful death claim.

13. For each such future claim alleged by the claimant to be immediately eligible for removal from the Inactive Docket, or which the claimant later alleges is eligible for removal because circumstances have changed, claimant's counsel shall also file with the Court a Request for Removal (Form B), and the documentation necessary to show that the claim meets the "minimum criteria for removal" set forth in Paragraph 10 above. The Request for Removal (Form B) and the supporting documentation for each claim shall also be served on the defendants for that claim.

14. Within fourteen (14) days of the submission required by Paragraph 13 above, any defendant objecting to the removal of any claim or claims from the Inactive Docket shall set forth those objections in a writing not to exceed two pages per claim. These written objections shall be filed with the Court and served on claimant's counsel and all defendants. The Court shall decide any disagreements on the papers submitted, and shall enter

an order determining whether the claim or claims shall be removed from the Inactive Docket. Hearings will be conducted only if the Court so orders on its own motion, or if, in the exercise of its discretion, grants a party's request for a hearing.

15. If the Court orders that a claim shall be removed from the Inactive Docket, the Clerk of the Court shall take the appropriate steps to place the case on the active civil docket (Baltimore City) or an administrative transfer order will be prepared (cases filed in jurisdictions other than Baltimore City).

16. A defendant who does not receive notice of a request for removal may assert any objections it may have to removal of the claim from the Inactive Docket once it receives notice of the removal of the claim from the Inactive Docket.

17. All future claims not removed shall remain on the Inactive Docket, but shall be subject to removal in the future if the "minimum criteria for removal" established by Paragraph 10 above are satisfied at that time. All such claims that remain on the Inactive Docket shall be considered inactive claims.

Removal from Registry By Petition

18. Any claimant whose case has been assigned to the Inactive Docket for not less than twenty four (24) months, and who does not meet the minimum criteria for removal established in paragraph 10, above, but who contends that he or she nonetheless has a compensable asbestos-related injury and should thus be removed from the Inactive Docket, may file a Petition for Removal ("Petition") with the Administrative Judge of the Circuit Court for Baltimore City upon the expiration of that twenty-four month period.

a. The Petition shall state the factual and medical bases for claimant's allegation that claimant has a compensable asbestos-related injury.

b. Each Petition so filed must attach a Request for Removal (Form B) with current documentation to show the claimant's current medical condition and the claimant's status with respect to the "minimum criteria for removal" set forth in Paragraph 10 above. The Petition for Removal and Request for Removal (Form B) and the supporting documentation shall be served on all relevant defendants.

19. Within fourteen (14) days after service of a Petition filed in accordance with Paragraph 18, any defendant objecting to the removal of such claim may file a

response. With the response, a defendant may file a request for discovery, including an independent medical examination, upon such terms as the Court may approve. The response and any request for discovery shall be served on claimant's counsel and all relevant defendants.

20. Within 30 days after the time for filing responses has expired, the Administrative Judge of the Circuit Court for Baltimore City shall enter an order which may:

    a. Establish the scope and time for completion of any requested discovery relevant to the claims made in the petition and the attachments to it; and

    b. Set a hearing date.

21. After a hearing, the Administrative Judge, depending on the number of petitioners, shall select up to ten cases that were either filed initially in the Circuit Court for Baltimore City or which the parties agree should be tried or otherwise resolved in that court and shall place those cases on the active civil docket. In selecting those cases, the Administrative Judge shall attempt to find a range of conditions not meeting the "minimum criteria for removal" set forth in Paragraph 10 of this Order to determine whether the conditions alleged in the petitions constitute compensable

injuries. By a scheduling order, the Administrative Judge shall determine:

a. The scope and time for completion of any further discovery;

b. The time for filing any motions and a date for the hearing of any motions that are filed;

c. If the cases, or any of them, survive any motions that are filed and are to proceed to trial, a trial date; and

d. Any other relevant procedural matter.

22. The intent of paragraphs 18-21 is to provide for a test case, upon petition by one or more plaintiffs, to determine whether conditions not meeting the "minimum criteria for removal" constitute compensable injuries. It is anticipated that whatever judgments are rendered by this Court, appeals by one or more of the parties will be filed and that the parties will seek to expedite the appellate cases and obtain a resolution of the disputed issues by the Court of Appeals. Pending a final resolution by the Court of Special Appeals or, if certiorari is granted by the Court of Appeals, by that Court, no other case on the Inactive Docket not meeting the "minimum criteria for removal" will be removed from that Docket absent agreement of the parties.

Miscellaneous Provisions

23. So long as a claim remains on the Inactive Docket, it is exempt from requirements for answer or motion by the Defendants and from requirements for discovery by either plaintiffs or defendants.

24. The Clerk shall assign a docket number with an inactive status code to each claim placed on the Inactive Docket, which shall be the docket number and inactive status code assigned when the case was filed. When and as a case is removed from the Inactive Docket, it shall be given an active status code.

25. All filings shall be on an individual basis. No claims on behalf of a group or class of claimants shall be permitted.

26. The filing by any defendant of any papers in connection with objecting to a request by a claimant to exit the Inactive Docket, or the appearance by any defendant at a hearing ordered by the Court in connection with such a request, shall not be deemed an "appearance" submitting to personal jurisdiction in the event the claim is placed on the active docket and proceedings commence.

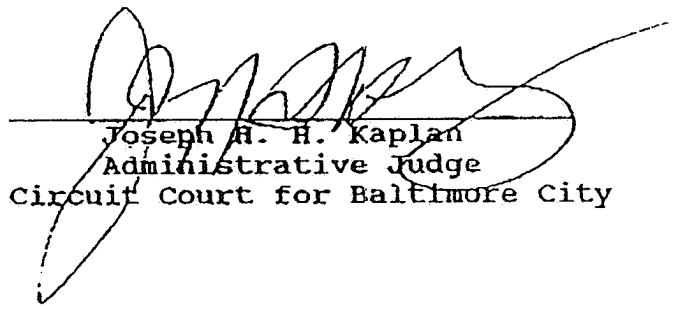
27. The fact that a Claimant satisfies the exit criteria for non-malignant lung changes shall not be construed as an admission or determination that the claimant in

fact has an asbestos-related condition, nor shall the exit criteria be cited, referred to or otherwise used at trial of any case for the determination of whether a plaintiff in fact has an asbestos-related condition. Rather, such criteria are established only for the purpose of determining when a claimant may remove a claim to the active docket.

28. Acting pursuant to this Order of Court, or placing a claim on the Inactive Docket is not to be considered as an admission of liability by any of the potential defendants, nor an admission by any claimant that he/she has not developed an asbestos-related condition. The existence of the Inactive Docket and/or the fact that a claim was placed on the Inactive Docket shall not be admissible in any subsequent proceeding except for the limited purposes of permitting the Court to determine whether there was compliance with the provisions of this Order in a particular case.

29. The same pulmonary function and testing and/or chest x-ray information that was referenced in a Claimant's Form A as a basis to file the original claim and be placed on the Inactive Docket may not be used in whole or in part as the foundation for a later request for removal from the Inactive Docket.

30. The terms of this Order will not be modified except by Order of the Court following notice to all parties of record and a hearing.



Joseph H. H. Kaplan
Administrative Judge
Circuit Court for Baltimore City

Form A

IN RE:	ASBESTOS	*	IN THE
	PERSONAL INJURY AND	*	CIRCUIT COURT
	WRONGFUL DEATH	*	FOR
	ASBESTOS CASES	*	BALTIMORE CITY
		*	File No. 92344501
		*	

* * * * * * * * * * * * *
CASE NAME, CAPTION AND DOCKET NUMBER
* * * * * * * * * * * * *

Inactive Civil Docket Plaintiff Information Form

Date_____

1. Claimant's Name _____
   Last First Middle

2. Claimant's Address_____

_____

_____

3. Claimant's Social Security Number _____

4. Claimant's Date of Birth _____

5. Claimant's Marital Status: Married___ Single___ Widow(er)___
   Divorced___

6. If the Claimant is a different person than the person whose alleged injurious exposure to asbestos gives rise to this

claim, give the following information concerning the alleged exposed person:

Name _____

Last First Middle

Date of Birth _____

Date of Death (if applicable) _____

Cause of Death (if applicable) _____

Social Security Number _____

Claimant's relationship to alleged exposed person:

_____

7. Claimant/Alleged Exposed Person's occupation when exposed to asbestos:

_____

8. Claimant/Alleged Exposed Person's beginning and ending dates (month/year to month/year) of exposure to asbestos:

From: _____ To: _____

9. Specific asbestos related condition claimed to exist (check all that apply):

Non-malignant pleural changes _____ Dx date_____

Asbestosis _____ Dx date_____

Mesothelioma _____ Dx date_____

Bronchogenic (Lung) Carcinoma _____ Dx date_____

Other Cancer (specify site) _____ Dx date_____

Other Condition (specify) _____ Dx date_____

10. The following material is attached in support of the claim that the conditions indicated in paragraph 9 above are asbestos related (include all required by the Rule):

Chest X-ray report _____ dated_____

Pulmonary Function Test _____ dated_____

Pathology Report _____ dated_____

Report of Pulmonary Specialist _____ dated_____

Report of B-Reader _____ dated_____

Report of Cancer Specialist _____ dated_____

Other (specify) _____ dated_____

11. Names of each company that would be sued as a defendant if the case were placed on the active docket:

_____

_____

_____

_____

_____

_____

12. Name, address and telephone number of claimant's counsel:

_____

_____

_____

_____

13. Certification: I hereby certify in accordance with the provisions of ---------- that I am counsel for the above named claimant, that the information set forth to support the claim being filed herein is true and correct, that payment for this claim or one substantially similar to it as to this claimant has not been received from any entity which could be listed in paragraph 11 above, and that there is no other claim or proceeding pending in this or any other jurisdiction on behalf of the claimant or exposed person listed herein which is substantially similar to the present claim in its factual allegations.

_____

Signature of Claimant's Counsel

Certificate of Service

Form B

IN RE:	ASBESTOS	*	IN THE
	PERSONAL INJURY AND	*	CIRCUIT COURT
	WRONGFUL DEATH	*	FOR
	ASBESTOS CASES	*	BALTIMORE CITY
		*	File No. 92344501
		*	

* * * * * * * * * * * * *
CASE NAME, CAPTION AND DOCKET NUMBER
* * * * * * * * * * * * *

Request for Removal From Inactive Civil Docket

Date_____

1. Claimant's Name: _____
Last First Middle

2. Date original Plaintiff Inactive Civil Docket Information Form was filed:

_____

3. I hereby request removal of the above-captioned case from the inactive civil docket.

4. The specific asbestos related condition(s) claimed is/are:

_____

5. The reasons for this request are as follows (here state the specific reasons for removal, specifying which criteria have been satisfied):

_____

_____

_____

_____

_____

6. The following documentation required by Md. Rule _____ is attached hereto in support of this request:

_____ dated_____

_____ dated_____

_____ dated_____

_____ dated_____

7. I certify in accordance with ---------- that the foregoing information is true and correct.

_____

Signature of Claimant's Counsel

Certificate of Service

IN RE:	BALTIMORE CITY	*	IN THE
	PERSONAL INJURY	*	CIRCUIT COURT
	WRONGFUL DEATH	*	FOR
	ASBESTOS CASES	*	BALTIMORE CITY
		*	File No: 92344501

* * * * * * * * * * * * *

AMENDMENT #1 TO ORDER ESTABLISHING AN INACTIVE DOCKET IN ASBESTOS PERSONAL INJURY AND WRONGFUL DEATH CASES, AND SHOW CAUSE ORDER

The Court has preliminarily determined, based upon discussions with some of the counsel for some plaintiffs and some defendants affected by the order, that a non-substantive amendment is appropriate to the order previously entered on December 9, 1992, establishing an inactive docket for asbestos personal injury cases (the "Inactive Docket Order"). The change indicated below will take effect for all cases filed on or after March 30, 1993, the effective date of this amendment, subject to revision based on any responses received to the show cause portion of this order and following a hearing if one is requested by any party.

The Amendment

This amendment changes the provision of paragraphs 13 and 14 of the Inactive Docket Order relating to the service of Forms A (Inactive Civil Docket Plaintiff Information) and B (Request for Removal From Inactive Docket) on counsel for the defendants. Inasmuch as all plaintiffs are required to file and serve their complaints upon each defendant in accordance with Maryland law,

and must therefore pay all filing fees and costs associated with service, it is the Court's view that plaintiffs should not also be required to bear the costs of providing more than one copy of Forms A and/or B and the supporting documentation to counsel for the various defendants. Therefore, this Court has determined that modification of paragraphs 13 and 14 is appropriate.

It is therefore, this 15th day of March, 1993, **ORDERED**, that paragraphs 13 and 14 of the Inactive Docket Order shall be, and the same hereby are, amended and modified as follows:

13. For each case filed by a claimant subject to this order which is (a) not alleged by the claimant to be immediately (i.e., upon filing) subject to removal, and/or (b) alleged by the claimant to be immediately eligible for removal, and/or (c) subsequently alleged to be subject to removal at some time after filing because of changed circumstances, in addition to the documentation required to be attached to the copy of the complaint served upon the defendant in accordance with paragraph 11 (or upon all defendants if the request for removal is filed after initial service of the complaint), claimant's counsel shall also serve one complete copy of the each form and supporting documentation on Liaison Counsel for the Defendants, who will in turn be responsible under this Order for the redistribution of the forms and documentation to the counsel for the parties against whom the claim is asserted, under the terms and conditions set forth below.

    a. Liaison Counsel for the Defendants for the purposes of the distribution required by this Order are hereby appointed as follows: Edward F. Houff, Esquire, Church & Houff, P.A., Suite 700, 117 Water Street, Baltimore, Maryland 21202 (Telephone 410-539-3900), or such other persons as may be designated by the Court from time to time.

    b. Plaintiffs' counsel shall deliver one complete copy of the appropriate form(s) and

supporting documentation, and a list of the names and addresses of the defendants and their counsel to whom the forms and documentation are to be delivered (the "service list"), to Liaison Counsel for the Defendants by registered mail, return receipt requested.

c. Defendants' Liaison counsel is required to (1) acknowledge receipt of the information to plaintiffs' counsel; (2) mail or hand-deliver a complete copy of each form and documentation and a copy of the service list received from the plaintiffs' counsel, to each defendants' counsel named on the plaintiffs' service list; and (3) file a notice of accomplishment of service with the Court which certifies the distribution, within three (3) working days of the receipt of the forms and documentation from the plaintiffs' counsel. Defendants' Liaison Counsel will, in making transmission to the defendants' counsel named in plaintiffs' service list, notify each such counsel of the actual date on which the forms and documentation were received.

d. Defendants' Liaison Counsel is authorized to request, and recipients are ordered to pay promptly to Defendants' Liaison Counsel, reimbursement for the reasonable costs of copying (not to exceed 20 cents per page) and mailing (actual postage costs) or delivery (actual costs) of the materials required to be distributed by this Order.

e. Defendants' Liaison Counsel incur no liability to any defendant or their counsel in the event that they fail to carry out their responsibilities as assigned herein, but are subject to replacement and/or other appropriate sanctions by this Court if the Court finds a willful failure to comply with the Court's orders, or on such terms as the court deems appropriate.

f. No defendant will be prejudiced in any substantive aspect of this Order by any Defendants' Liaison Counsel's failure to comply with the Court's order with respect to

the distribution of forms and documentation. In addition, the service upon a defendant's counsel of the forms and documentation described herein, and the receipt of same by such counsel, shall not be considered as in any way substituting for or diminishing the requirements for service of process on the defendant, and the fact of receipt of such forms and documentation shall not be admissible in any proceeding for any purpose other than a dispute relating to whether and/or when the materials described in this paragraph were received by a particular defendant's counsel.

14. Within thirty (30) days of the date a Form B and documentation requesting removal of a case from the Inactive Docket are delivered to Defendants' Liaison Counsel, any defendant objecting to the requested removal shall set forth those objections in a writing not to exceed two pages per claim. These written objections shall be filed with the Court and other defendants' counsel listed on the Plaintiffs' service list. The Court shall decide any disagreements on the papers submitted, and shall enter an order determining whether the claim or claims shall be removed from the Inactive Docket. Hearings will be conducted only if the Court so orders on its own motion, or if, in the exercise of its discretion, the Court grants a party's request for hearing.

End of Amendment. No other changes are effected by this Amendment.

Show Cause

Plaintiffs' and Defendants' Liaison Counsel shall cause a copy of this Amendment and Show Cause Order to be mailed to all counsel of record within three (3) working days of the date of this order. Any party wishing to object to this amendment shall show cause, in a writing not to exceed three (3) pages, filed with the Court, courtesy copy to chambers, and served upon all

other counsel, not later than the close of business on Tuesday, March 30, 1993. The Court will review all responses and either affirm the existing amendment or modify it as indicated in writing at that time. A hearing will be held if requested by any party, in accordance with paragraph 30 of the Inactive Docket Order.

March 15, 1993

Joseph H. H. Kaplan
Administrative Judge

IN RE:	ASBESTOS	*	IN THE
	PERSONAL INJURY AND	*	CIRCUIT COURT
	WRONGFUL DEATH CASES	*	FOR
		*	BALTIMORE CITY
		*	Consolidated No. ~~89236704~~ 92344501

* * * * * * * * * * * * *

AMENDMENT # 2 TO ORDER ESTABLISHING AN INACTIVE DOCKET IN ASBESTOS PERSONAL INJURY AND WRONGFUL DEATH CASES, AND SHOW CAUSE ORDER

The Court has preliminarily determined, based upon discussions with counsel for some of the parties affected by the order, that a non-substantive amendment is appropriate to the order previously entered on December 9, 1992 (the "Inactive Docket Order"). The changes set forth herein will take effect for all cases filed on, or removed from, the inactive docket on or after August ___, 1993, the effective date of this amendment. The effective date of this Order, and the amendment set forth herein, are subject to revision based upon responses received to the show cause portion of this order, if any, and following a hearing if one is requested by any party.

THE AMENDMENT

The Court has concluded that an addition to the provisions of paragraph 14 is necessary to ensure prompt delivery of court orders to all affected parties. Accordingly, in addition to defense liaison counsel's duties of service of forms and pleadings as required by paragraph 14 already, the Court orders that defense liaison counsel shall also serve copies of orders of the Court on all appropriate parties--both plaintiffs and defendants.

The Court also has concluded that paragraph 15 shall be amended to include a specific time for defendants to respond or answer those cases removed from the inactive docket.

It is therefore, this ___ day of August, 1993, ORDERED, that paragraphs 14 and 15 of the Inactive Docket Order shall be, and the same hereby are, amended and modified as follows:

14. Within thirty (30) days of the date a Form B and documentation requesting removal of a case from the Inactive Docket are delivered to Defendants' Liaison Counsel, any defendant objecting to the requested removal shall set forth those objections in a writing not to exceed two pages per claim. These written objections shall be filed with the Court and other defendants' counsel listed on the Plaintiffs' service list. The Court shall decide any disagreements on the papers submitted, and shall enter an order determining whether the claim or claims shall be removed from the Inactive Docket. Hearings will be conducted only if the Court so orders on its own motion, or if, in the exercise of its discretion, the Court grants a party's request for hearing.

    No case shall be deemed to have been removed from the inactive docket until so ordered by the court. Upon removal from the docket, the court shall promptly provide a copy of the removal order to defense liaison counsel. Within three business days of receipt of the removal order, or any other court order that relates to the inactive docket, defense liaison counsel shall hand deliver, mail, or otherwise serve copies of the order on the affected plaintiff's counsel and all defense counsel listed on plaintiff's service list in the removed case(s). Defense liaison counsel shall file with the clerk of court (no copy to court chambers) a "Notice of Accomplishment of Service of Court Order" upon completion of distribution of an order.

    If defense liaison counsel incurs mailing, postage, or delivery costs for service of a court order, defense liaison counsel may request, and receiving parties are hereby ORDERED to pay, those costs, in accordance with paragraph 13d of Amendment #1 to the Inactive Docket Order.

15. If the Court orders that a claim shall be removed from the Inactive Docket, the Clerk of the Court shall take the appropriate steps to place the case on the active civil docket (Baltimore City) or an administrative

transfer order will be prepared (cases filed in jurisdictions other that Baltimore City).

Once a case is removed from the inactive docket, defendants who have been properly sued and served shall have 30 days from the date of "Notice of Accomplishment of Service of Court Order" within which to answer or respond to the complaint. The answer or response shall be filed with the appropriate Clerk of Court (no copy to court chambers).

No defendant shall be prejudiced by a plaintiff's failure to include the defendant's name on plaintiff's service list for a case in which that defendant has been sued. Plaintiffs are required to accurately list the names of each defendant sued on the service list and provide this list to defense liaison counsel at the time the case is filed.

End of Amendment. No other changes are effected by this Amendment.

SHOW CAUSE

Defense liaison counsel shall cause a copy of this amendment and show cause order to be mailed to all counsel of record (list attached) within three (3) business days of the date of this order. Any party that objects to this amendment shall show cause why the amendment should not be ordered, in writing not to exceed three (3) pages, filed with the Court, courtesy copy to chambers, and served upon all other counsel, not later than the close of business on September 10, 1993. The Court will review all responses and either affirm the existing amendment or modify it as indicated in writing at that time. A hearing will be held if requested by any party, in accordance with paragraph 30 of the Inactive Docket Order.

August 26, 1993

Joseph H. H. Kaplan
Administrative Judge

Kenneth Neal, Esquire
Joyce A. Lagnese, Esquire
Donna L. Harvey, Esquire
Wendy Wanchak, Esquire
Danaher, Tedford, Lagnese & Neal
21 Oak Street, Capitol Place
Hartford, CN 06106

Attorney for Pittsburgh Corning Corp.

Gerald G. Magrogan, Esquire
McGuire, Woods, Battle & Boothe
One North Charles Street
Baltimore, Maryland 21201

Attorneys for Westinghouse Electric Corp.
Westinghouse Electric Corp. and
Westinghouse Electric Supply Corporation

James R. Eyler, Esquire
John P. Sweeney, Esquire
William J. Evans, Esquire
Miles & Stockbridge
10 Light Street
Baltimore, Maryland 21202

Attorneys for Owens-Corning Fiberglas, Corhart
Refractories, Proko Industries, and Bondex

William J. Murphy, Esquire
Law Offices of William Murphy
100 Light Street - Suite 750
Baltimore, Maryland 21202

Attorney for General Electric
Company

Patricia L. Taylor, Esquire
Thompson, Hine and Flory
1920 N Street, N.W.
Washington, Dc. 20036

Attorneys for The Flintkote Company

George Littlehales, Esquire
Rockbestos Products Corporation
20 Brady Park Road
East Brandy, CT 06026

Peter G. Angelos, Esquire
Gary J. Ignatowski, Esquire
Armand J. Volta, Jr., Esquire
R. Bruce McElhone, Esquire
✓Andrew M. Cantor, Esquire
Law Offices of Peter G. Angelos
~~5905 Harford Road~~ 300 E. Lombard St. 18th floor
Baltimore, Maryland ~~21214~~ 21202

Attorneys for Plaintiffs

John T. Enoch, Esquire
John Amato, Esquire
Goodman, Meagher & Enoch
111 North Charles Street
Baltimore, Maryland 21201

Attorneys for Plaintiffs

Peter T. Nicholl, Esquire
Ashcraft & Gerel
10 East Baltimore Street - Suite ~~805~~ 1212
Baltimore, Maryland 21202

Attorneys for Plaintiffs

Clifford W. Cuniff, Esquire
207 East Redwood Street - Suite 512
Baltimore, Maryland 21202

Attorneys for Plaintiffs

William Kurtz, Esquire
Verderaime & DuBois, P.A.
1231 N. Calvert Street
Baltimore, Maryland 21202

Attorneys for Plaintiffs

Shepard Hoffman, Esquire
~~Connerton, Ray~~ & Simon
1920 ~~L Street~~, N.W. - 4th Floor
~~Washington~~, D.C. 20036

301 N. Charles Street
Suite 901
Balto. Md 21201

Attorneys for Plaintiffs

Added to Certificate of Service on August 27, 1993:

Harry Goldman, Jr, Esquire
David Layton, Esquire
Goldman, & Skeen, P.A. & Wadler
1123 Munsey Building 301 N. Charles Street
7 North Calvert Street Suite 900
Baltimore, Maryland 21202 Balto., Md 21201

Attorney for Plaintiffs

IN RE:	ASBESTOS	*	IN THE
	PERSONAL INJURY AND	*	CIRCUIT COURT
	WRONGFUL DEATH CASES	*	FOR
		*	BALTIMORE CITY
		*	Consolidated File No. 89236704

AMENDMENT #3 TO ORDER ESTABLISHING AN INACTIVE DOCKET IN ASBESTOS PERSONAL INJURY AND WRONGFUL DEATH CASES, AND SHOW CAUSE ORDER

The Court has preliminarily determined, based upon representation of defense counsel affected by the Order, that a non-substantive amendment is appropriate to the order previously entered on December 9, 1992, establishing an inactive docket for asbestos personal injury cases (the "Inactive Docket Order"). The change indicated below will take effect for all cases filed on or after April 24, 1995, the effective date of this amendment, subject to revision based on any responses received to the show cause portion of this Order and following a hearing if one is requested by any party.

The Amendment

This amendment changes the provisions of paragraphs 11 and 13 of the Inactive Docket Order relating to the service of Forms A (Inactive Civil Docket Plaintiff Information) and B (Request for Removal From Inactive Docket) on counsel for the defendants. All plaintiffs are required to file and serve a complaint and Form A upon each defendant in accordance with Maryland law. Plaintiffs shall file and serve Form B and supporting documentation on Defendants' Liaison Counsel, along with a service list identifying

the defendants and their counsel. Liaison Counsel shall distribute Form B and the supporting documentation to all defense counsel on the service list. Liaison counsel are not responsible for the distribution of the Complaint and Form A.

It is therefore, this 12th day of April,1995,

ORDERED, that paragraphs 11 and 13 of the Inactive Docket Order shall be and the same hereby are, amended and modified as follows:

11. Each plaintiff's counsel bringing a future claim shall, regardless of the disease process alleged, file a complaint and an Inactive Docket Claimant Information Form (Form A) with the Court and effect service of a copy of the Complaint and the Inactive Docket Claimant Information Form (Form A) on each person or entity named as a defendant in accordance with Maryland Rules and law relating to service of complaints. Filing fees will be paid only with respect to the filing of the lawsuit, and not with respect to filing the Inactive Docket Information Form (Form A).

13. For each case filed by a claimant subject to this order which is (a) not alleged by the claimant to be immediately (i.e., upon filing) subject to removal, and/or (b) alleged by the claimant to be immediately eligible for removal, and/or (c) subsequently alleged to be subject to removal at some time after filing because of changed circumstances, in addition to the documentation required to be attached to the copy of the complaint served upon the defendant in accordance with paragraph 11 (or upon all defendants if the request for removal is filed after initial service of the complaint), claimant's counsel shall also serve one complete copy of Form B and supporting documentation on Liaison Counsel for the Defendants, who will in turn be responsible under this Order for the redistribution of the Form B and documentation to the counsel for the parties against whom the claim is asserted, under the terms and conditions set forth below.

    a. Liaison Counsel for the Defendants for the purposes of the distribution required by this Order are hereby appointed as follows: Edward F. Houff, Esquire, Church & Houff, P.A., Suite 700, 117 Water Street, Baltimore, Maryland 21202

(Telephone 410-539-3900), or such other persons as may be designated by the Court from time to time.

b. Plaintiffs' counsel shall deliver one complete copy of Form B and supporting documentation, and a list of the names and addresses of the defendants and their counsel to whom the Form B and documentation are to be delivered (the "service list"), to Liaison Counsel for the Defendants by registered mail, return receipt requested.

c. Defendants' Liaison Counsel is required to (1) acknowledge receipt of the information to plaintiffs' counsel; (2) mail or hand deliver a complete copy of each Form B and documentation and a copy of the service list received form the plaintiffs' counsel, to each defendants' counsel named on the plaintiffs' service list; and (3) file a notice of accomplishment of service with the Court which certifies the distribution, within three (3) working days of the receipt of the Form B and documentation from plaintiffs' counsel. Defendants' Liaison counsel will, in making transmission to the defendants' counsel named in plaintiffs' service list, notify each such counsel of the actual date on which the Form B and documentation were received.

d. Defendants' Liaison Counsel is authorized to request, and recipients are ordered to pay promptly to Defendants' Liaison Counsel, reimbursement for the reasonable costs of copying (not to exceed .20 cents per page) and mailing (actual postage costs) or delivery (actual costs) of the materials required to be distributed by this Order.

e. Defendants' Liaison Counsel incur no liability to any defendant or their counsel in the event that they fail to carry out their responsibilities as assigned herein, but are subject to replacement and/or other appropriate sanctions by this Court if the Court finds a willful failure to comply with the Court's orders, or on such terms as the Court deems appropriate.

f. No defendant will be prejudiced in any substantive aspect of this Order by and Defendants' Liaison Counsel's failure to comply with the Court's order with respect to the distribution of Form B and documentation. In addition, the service upon an

defendants' counsel of the Form B and documentation described herein, and the receipt of same by such counsel, shall not be considered as in any way substituting for or diminishing the requirements for service of process on the defendant, and the fact of receipt of such Form B and documentation shall not be admissible in any proceeding for any purpose other than a dispute relating to whether and/or when the materials described in this paragraph were received by a particular defendant's counsel.

End of Amendment. No other changes are effected by this Amendment.

Show Cause

Plaintiffs' and Defendants' Liaison Counsel shall cause a copy of this Amendment and Show Cause Order to be mailed to all counsel of records within three (3) working days of the date of this order. Any party wishing to object to this amendment shall show cause, in a writing not to exceed three (3) pages, filed with the Court, courtesy copy to chambers, and served upon all other counsel, not later than the close of business on Friday, April 21, 1995. The Court will review all responses and either affirm the existing amendment or modify it as indicated in writing at that time. A hearing will be held if requested by any party, in accordance with paragraph 30 of the Inactive Docket Order.

April 12, 1995
DATE

Joseph H. H. Kaplan
Administrative Judge

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IN RE:	*	
	*	
	*	IN THE
PERSONAL INJURY	*	
	*	CIRCUIT COURT
AND WRONGFUL DEATH	*	
	*	FOR
ASBESTOS CASES	*	
	*	BALTIMORE CITY
	*	
	*	Case No. 24-X-92-344501
	*	

****

MEMORANDUM OPINION AND ORDER DENYING MODIFICATION TO INACTIVE DOCKET MEDICAL REMOVAL CRITERIA

Rombro, J.

I. Introduction

Once again this court is required to deal with objections to the inactive docket. In a prior hearing, the court considered the same Plaintiff's counsel's objections to its operation. After that hearing, this court filed a memorandum and opinion which was dated May 9, 2001. Hardly was the ink dry when the instant motion was filed by another group of Plaintiffs whose cases remain on the inactive docket.

Plaintiffs are now requesting an addition to the criteria established by the original inactive docket order and its several amendments by adding a test of an individual Plaintiff's diffusing capacity, also called DLCO.

In the earlier opinion, this court set forth some of the history and procedure involved in the promulgation of the Inactive Docket Order. The court did not discuss the medical

aspects involved in that order, nor will it review all of the medical requirements contained in that order. Several, however, are appropriate to the present request for relief.

Paragraph 9 of the order defines "pulmonary function testing". The order states that that term shall refer to "spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS)". Paragraph 10 then sets forth the specific qualifications which a Plaintiff must meet in order to have his case removed from the inactive docket. For example, § a. provides that the plaintiff's x-rays must show small irregular opacities of ILO grade 1/0 and a pulmonary function test that shows either decreased FVC <u>or</u> decreased TLC. The inactive docket order provides for several other tests to determine of whether the plaintiff is impaired sufficiently to require removal from the inactive docket. Generally speaking, all of the tests are combinations of abnormal chest x-rays together with some combination of decreased FVC or TLC[1].

<u>None of the tests involve decreased diffusing capacity</u>. This court believes that this omission is important because diffusing capacity was known and referred to in the order. It was written about by the American Thoracic Society prior to the promulgation of the order.

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[1]Plaintiff's medical expert, Dr. Steven Zimmet, specializes in the field of pulmonary medicine. He explained to the court that pulmonary function tests for persons with suspected asbestosis are divided into three sections:

> 1.) Spirometry measures an individual's airflow. The subject takes a deep breath in, blows it out, and the airflow is measured.
> 2.) Total lung volume (TLV) which measures the capacity of the lung.
> 3.) The diffusing capacity (DLCL) measures the gas exchange. At the perimeter of the lung in the smallest alveolus oxygen molecules pass through the airspace of the lung into the bloodstream, thus replenishing the body with oxygen. How efficiently the oxygen molecules pass into the bloodstream is called the diffusing capacity.

See Defendant exhibit number 2. No one raised the question of testing for decreased diffusion capacity.

For whatever reasons, the DLCO is not included as one of the tests in the inactive docket criteria. The motion requests the court to amend the criteria so that a plaintiff who has a case on the inactive docket and who has essentially normal tests except for a diffusing capacity, which is 80 percent or greater below expected, would be entitled to be removed from the inactive to the active docket. The Defendants have objected and as a result the court held two hearings.

III. The Procedure

The court gave several hours to the Plaintiff to present the testimony of Dr. Zimmet. The Defendants had not produced a witness. The court wished to learn as much as possible about the test and whether the inactive docket Plaintiffs were being denied their day in court. Accordingly, the court asked defense counsel whether they wished to present testimony. The court granted the Defendants the right to present such testimony and a hearing was scheduled within one month of the first hearing. At that hearing the Defendants produced Dr. Gary Friedman, who was also certified in pulmonary medicine. Both expert witnesses are well-qualified. The court notes that Dr. Friedman's experience for most of his career has been testifying on behalf of plaintiffs in asbestos cases. This is apparently one of the rare cases in which he has testified on behalf of a defendant. Dr. Friedman stated repeatedly throughout his testimony in both direct and cross examination, that while the test for diffusing capacity

may be helpful in diagnosing whether an individual has asbestosis or not, it is not helpful in determining whether that individual is impaired.

IV. Discussion

The Plaintiff submitted a medical report from Dr. Zimmet on one of the cases on the inactive docket. The report was submitted and the doctor was asked questions purely for illustrative purposes it being understood that the case itself was not to be gone into in depth. After listening to most of Dr. Zimmet's testimony and after reviewing the report of the individual (William Cole) the court inquired whether Mr. Cole was indeed "sick". While he had rales and an abnormal x-ray and a DLCO of 73, all of the other tests were negative. Indeed the only complaint of this 76 year old man was that he was short of breath upon exertion. In the May 9th opinion, this court referred to the groups of cases that were tried by five of the judges of this court in which the minimally injured plaintiffs received little or nothing by way of award. The testimony of the illness was very similar to that presented by Mr. Cole. The juries were simply not impressed that a man in his seventies or eighties would experience shortness of breath upon exertion. This is not an uncommon finding among people of that age who have never been exposed to asbestos.

This court does not have the ability to process the thousands of cases in the short period of time the Plaintiff's counsel desires. As was pointed out in the prior opinion of the court, if the inactive docket was repealed today, it would be years before those Plaintiff's cases would be heard. Plaintiff's counsel candidly told the court in argument

that one of the primary reasons for removal from the inactive docket is to permit settlement discussions to begin. While the court appreciated counsel's forthrightness, this was not the intention nor the purpose of the inactive docket when it was established.

Under the leadership of Administrative Judge Ellen Heller, there has been established an Asbestos Working Group composed of plaintiff's and defendant's attorneys who meet periodically with judges of this court to discuss problems inherent in the management of the asbestos docket. At one such meeting we were advised that since its establishment in December of 1992, there have been 14,713 cases filed and placed on the inactive docket; in that same period 6,098 cases have been moved to the active docket, and 71 cases which were removed to the Federal Court. The number activated from the inactive docket is over 40 percent which would indicate to this court that the docket is working and that a substantial number of cases have been moved to the active docket while those without any impairment remain on the inactive docket.

This court has looked at the asbestos docket figures for the year 2002. From January 1 through July 30, there have been 1654 asbestos cases filed in this court. It is almost inconceivable that as we move farther away from the time when asbestos was in common use that the number of cases should multiply, not decrease. The question at this point is not whether these plaintiffs have been exposed to asbestos, but whether or not there is any impairment. With the number of defendant companies that have declared bankruptcy, it would seem that the resources should be conserved for those

who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos.

The Court also heard testimony that there are a number of conditions which could affect diffusing capacity's test results, such as emphysema, anemia and smoking, among others. Not only is the test result affected by other diseases or medical conditions, the test itself is very effort dependent; that is, the patient must be totally cooperative and expend some effort. The amount of effort required is a matter of disagreement between the medical experts who testified. What is not in dispute is that there was a statement in 1995 by the American Thoracic Society that there is four times more variability of diffusion capacity tests laboratory to laboratory than there is of FVC.

The relevance of these factors is that this Court does not accept that the test here being advocated is as reliable as the other tests for purposes of determining impairment.

Finally, it should be noted that while Plaintiff's counsel, in this case, are asking for an amendment to the inactive docket, they have not attempted to conceal their desire to have it repealed entirely. In correspondence to other counsel (copy to the court), an attorney for the Plaintiff referred to the docket as a "grotesque caricature of justice"; and at a hearing in this court on August 10, 2000, Mr. Hogan, an attorney in Plaintiff's law firm, told the court

> "...it's our position, your honor, that the inactive docket in and of itself simply can not stand."

Counsel has not been successful in moving the court to abolish the inactive docket. It appears now to the court that the plaintiffs are attempting a piece by piece of dismantling of the docket. Again, the court will not accede in this attempt.

For the foregoing reasons, the motion is denied.

Richard T. Rombro, Judge
August 15, 2002

RTR/flh
cc: Clerk of the Court

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SUPREME COURT OF THE STATE OF NEW YORK
ALL COUNTIES WITHIN THE CITY OF NEW YORK

IN RE: NEW YORK CITY ASBESTOS LITIGATION	New York City Asbestos Litigation (NYCAL)
This Document Relates To:	ORDER
All Cases	Index No. 40000/88

More than 21,000 asbestos-related personal injury actions for personal injury or wrongful death are now pending in New York County. Of that number, fewer than 2000, or 10%, of the claimants or decedents suffer or suffered from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis. For the great majority of plaintiffs and decedents, however, the only clinical markers of asbestos exposure are pleural thickening or plaques that caused no discernible physical impairment.[1]

The large number of claims made by or on behalf of the unimpaired or minimally impaired impedes the ability of the much smaller group of seriously ill plaintiffs and decedents to recover for their injuries. Recoveries by unimpaired or minimally impaired plaintiffs deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are

[1]The United States Supreme Court has stated that "up to one-half of asbestos claims [nationwide] are now being filed by people who have little or no physical impairment." *Amchen 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, 393 (1993). A recent study estimates that more than ninety percent of current claimants nationwide allege non-malignant injuries. Jennifer L. Biggs et al., Overview of Asbestos Issues & Trends 3 (December 2001), available at http://www.actuary.org/mono.htm.

dwindling as the "elephantine mass of asbestos cases"[2] nationwide drives large numbers of potentially culpable parties into bankruptcy.[3]

To protect the interests of the significantly impaired, the "first in, first out" system of docket management ("FIFO") heretofore used in the New York City Asbestos Litigation ("NYCAL"), as set forth in the Amended Case Management Order (the "CMO") dated September 20, 1996, amended as of July 23, 2001, and as further amended to date, shall be modified to establish (1) a "Deferred Docket" of claimants with minimal or no impairment, (2)

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[2]*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). By the end of 2000, more than 600,000 people in the United States had filed claims for asbestos-related personal injuries. Stephen J. Carroll et al., *Asbestos Litig. Costs & Compen.* 40-41 (RAND Inst. for J. 2002).

[3]Since 1982, at least sixty-two companies that mined asbestos, or manufactured or used asbestos-containing products, have filed for bankruptcy. UNR Industries, Inc. (filed in 1982), Johns-Manville Co. (1982), Amatex Corp. (1982), Waterman Steamship Corp. (1983), Wallace & Gale Co. (1984), Forty-Eight Insulations, Inc. (1985), PACOR (1986), Prudential Lines, Inc. (1986), Standard Insulations, Inc. (1986), U.S. Lines (1986), Nicolet, Inc. (1987), Gatke Corp. (1987), Todd Shipyards (1987), Chemetron Corp. (1988) Raytech (1989), Delaware Insulations (1989), Celotex Corp. (1990), Hillsborough Holdings (1990), National Gypsum Co. (1990), Standard Asbestos Mfg. & Insul. (1990), Eagle-Picher (1991), H.K. Porter Co. (1991), Cassiar Mines (1992), Kentile Floors (1992), Keene Corp. (1993), American Shipbuilding, Inc. (1993), Lykes Brothers Steamship (1995), Rock Wool Mfg. (1996), SGL Carbon (1998), M.H. Detrick (1998), Brunswick Fabricators (1998), Fuller-Austin Insul. (1998), Harnischfeger Corp. (1999), Joy Technologies (1999), Rutland Fire & Clay (1999), Babcock & Wilcox (2000), Pittsburgh Corning (2000), Burns & Roe Enterprises (2000), E.J. Bartells (2000), Owens Corning (2000), Armstrong World Industries (2000), G-1 Holdings (GAF Corp.) (2001), W.R. Grace (2001), Skinner Engine Co. (2001), USG (US Gypsum) Corp. (2001), Federal Mogul (2001), Eastco Industrial Safety Corp. (2001), Washington Group Int'l, Inc. (2001), Bethlehem Steel (2001), North American Refractories (NARCO) (2002), Kaiser Aluminum (2002), Plibrico Refractories (2002), Porter-Hayden (2002), American Club (2002), Huxley Development Corp. (2002), Harbison-Walker Refractories Co. (2002), Continental Producers Corp. (2002), A.P. Green Indus. (2002), Shook & Fletcher (2002), Atra Group, Inc. (Synkoloid) (2002), and ACandS, Inc. (2002).

All these corporations filed bankruptcy petitions indicating that asbestos litigation was the primary cause of their insolvency. Carroll et al., *Asbestos Litig. Costs & Compen.* at 71.

an "Active Docket" for clustering and trying cases of significantly impaired claimants who are ineligible for the Accelerated Trial Clusters under the CMO, and (3) a procedure for transferring cases from the Deferred Docket to the Active Docket.

I. *Amendment of CMO*

To the extent that this order conflicts with any provisions of the CMO, this order supersedes those provisions, *except* that this order shall not apply to or affect any case which has already been assigned to a monthly trial group pursuant to CMO § XIV, or to an Accelerated Trial Cluster pursuant to CMO § XV.

The Special Master is directed to submit an amended and re-stated CMO that incorporates the provisions of this order.

II. *Definitions*

For purposes of this order,

1. A "board-certified pulmonary specialist" or "board-certified internist" means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspeciality of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).
2. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.

3. "ILO grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980).

4. "Chest X-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.

5. "Pulmonary Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 *American Review of Respiratory Disease* 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, *Clinical Pulmonary Function Testing*, 2d ed., Intermountain Thoracic Society (1984).

6. The "minimum criteria for activation" shall be defined as follows:

<u>Non-Malignant Changes Shown By Testing</u>

A. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; *and*

pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) FVC $\leq$ 80% of predicted value with FEV-1/FVC $\geq$ 68% (actual value), *or*

(ii) TLC $\leq$ 80% of predicted value;

or

B. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/1 or greater; *and*

Pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) FVC $\leq$ 80% of predicted value with FEV-1/FVC $\geq$ 65% (actual value), *or*

(ii) TLC $\leq$ 80% of predicted value;

or

(C) Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater *and* with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either

(i) FVC $\leq$ 80% of predicted value with FEV-1/FVC $\geq$ 68% (actual value), *or*

(ii) TLC $\leq$ 80% of predicted value,

and with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

or

Non-Malignant Changes Shown by Pathology

(D) In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (*e.g.*, cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

or

Diagnosis of Cancer

(E) A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

III. *Deferred Docket*

(1) The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.

(2) Any case that, as of the date of this order, has been commenced but not assigned to either a monthly trial group (pursuant to CMO § XIV) or an Accelerated Trial Cluster (pursuant to CMO § XV) is deemed to be on the Deferred Docket, *unless*

(A) on or before April 1, 2003, (i) plaintiffs and (ii) Special Liaison Counsel for the defendants (as described below) stipulate that the party allegedly injured from asbestos exposure satisfies the minimum criteria for activation;

or

(B) on or before April 15, 2003,

(i) the plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure satisfies the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, *and*

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied if the minimum criteria for activation have not been satisfied.

(3) Any case that is commenced after the date of this order is deemed to be on the Deferred Docket, *unless* the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite documentation as evidence thereof. No plaintiff may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order.

(4) Any case that

(A) is commenced after the date of this order and initially deemed to be on the Deferred Docket

or

(B) was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in section III(2),

shall be removed from it and placed on the "Active Docket," as described below,

if

(C) plaintiffs and Special Liaison Counsel for the defendants (as hereinafter defined) stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

or

(D) (i) The plaintiff or plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, *and*

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

IV. *Active Docket*

(1) All cases which (A) as of the date hereof, have been assigned to a monthly trial group pursuant to CMO § XIV *or* (B) have been or will be assigned to an Accelerated Trial Cluster pursuant to CMO § XV, shall be prosecuted and tried in the manner now set forth in the CMO.

(2) All other cases which are not on the Deferred Docket are deemed to be on the Active Docket. A case on the Active Docket shall be clustered and scheduled for trial strictly in FIFO order, except for the first Active Docket cluster described below. For a case on the Active Docket, FIFO order is determined by the date that the action was commenced, *except that*, for any case that

(A) is commenced after the date of this order which initially is on the Deferred Docket, and which is later placed on the Active Docket by stipulation or order of the Court granting leave to amend the complaint

or

(B) was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Section III(2), the FIFO order shall be determined by the date of said stipulation or order. The fifteen-month discovery schedule set forth in CMO § XIV shall apply to all Active Docket clusters.

(3) The first Active Docket cluster shall comprise the first 75 cancer cases (not asbestosis) on the Active Docket, selected in strict FIFO order, and shall begin trial on February 2, 2004.

(4) Thereafter, two annual clusters of 150 Active Docket cases shall be clustered to begin trial on the first Monday of each February and August, beginning with August 2, 2004.

V. *Docket Lists*

On or before May 1, 2003, counsel for plaintiffs shall submit to the Special Master and to Special Liaison Counsel, as described below, complete lists of (1) the inventory of cases on the Deferred Docket and (2) the inventory of cases on the Active Docket, specifying for each the disease alleged and FIFO date. The lists shall be updated periodically at the direction of the Special Master.

VI. *Special Liaison Counsel*

After consultation with the parties, the Special Master shall designate Special Liaison Counsel with the authority to (1) stipulate that the minimum criteria for activation has been met in a case and (2) review the docket lists submitted by plaintiffs for accuracy.

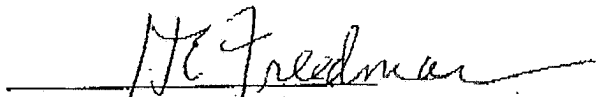
VII. *Special Master*

(1) All disputes concerning the composition of the docket lists, as well as the FIFO ordering of the Active Docket, are referred to the Special Master for rulings.

(2) Any party objecting to a ruling by the Special Master with respect to the composition and ordering of the Active Docket and Deferred Docket may raise its objection with the Court utilizing the procedures set forth in CMO § III(B).

SO ORDERED.

Dated: December 19, 2002



Helen E. Freedman, J.S.C.

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SUPREME COURT OF THE STATE OF NEW YORK
FIFTH JUDICIAL DISTRICT

In RE: FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION

This Document Relates To:

All Cases

FIFTH JUDICIAL DISTRICT ASBESTOS LITIGATION (5JDAL)

AMENDMENT TO AMENDED CASE MANAGEMENT ORDER NO. 1

Date: January 31, 2003

Introduction:

More than 200 asbestos-related actions for personal injury or wrongful death are now pending in the Fifth Judicial District. Of that number less than 5% of the claimants or decedents suffer or suffered from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis. For the great majority of plaintiffs and decedents, however, the only clinical markers of asbestos exposure are pleural thickening or plaques that caused no discernible physical impairment.'

To protect the interests of the significantly impaired, the "first in, first out" system of docket management ("FIFO") heretofore used in the Fifth Judicial District as set forth in the Amended Case Management Order (the "CMO") shall be modified to establish a (1) a "Deferred Docket" of claimants with minimal or no impairment, (2) "Active Docket" for clustering and trying cases of significantly impaired claimants who are ineligible for the Accelerated Trials under the CMO [see also, New York Civil Practice Law and Rules § 3407], and (3) a procedure for transferring cases from the Deferred Docket to the Active Docket.

I. Amendment of CMO

To the extent that this order conflicts with any provisions of the CMO, this order supersedes those provisions. *except* that this order shall not apply to or affect any case which has already been assigned a trial date.

II. Definitions

For purposes of this order:

1. A "board-certified pulmonluy specialist" or "board-certified internist" means a physician currently actively licensed to practice medicine in one or more of the States of the United States who is currently actively certified by the American Board of Internal Medicine in the Subspeciality of Pulmonary Medicine (pulmonary specialist) or the American Board of Internal Medicine (internist).
2. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored X-ray interpretation course and whose NIOSH-certification is up-to-date.
3. IL0 grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of

Pneumoconioses" (1980).

4. "Chest X-rays" means chest films taken in four views (PA, Lateral, Left and Right Oblique) that are graded quality 1 for reading according to the ILO criteria.

5. "Pulmonsry Function Testing" shall refer to spirometry, lung volume testing and diffusing capacity testing which conform to quality criteria established by the American 'Thoracic Society (ATS) and is performed on equipment which meets ATS standards for technical quality and calibration, all as set forth in 20 C.F.R. 718.103 and Appendix B thereto or in the ATS guidelines in 144 American Review of Respiratory Disease 1202-18 (1991). Each subject must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, Clinical Pulmonary Function Testing, 2d ed., Intermountain Thoracic Society (1984).

6. The minimum criteria for activation" shall be defined as follows:

Non-Malianant Changes Shown Bv Testing:

A. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade 1/0; and pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(i) FVC ≤80% of predicted value with FEV-l/FVC ≥65% (actual value), or

(ii) TLC≤ 80% of predicted value.

OR

B. Chest X-rays which, in the opinion of a currently certified B-reader, show small irregular opacities of ILO grade l/l or greater; *and*

pulmonary function testing that, in the opinion of a board-certified pulmonary specialist or internist, shows either:

(iii) **FVC** ≤80% of predicted value with FEV-1/FVC ≥65% (actual value), or

(iv) TLC≤ 80% of predicted value

OR

C. Chest X-rays which, in the opinion of a currently certified B-reader, to a reasonable degree of medical certainty, demonstrate bilateral asbestos-related pleural thickening which has an ILO grade B2 or greater and with pulmonary function testing that, in the opinion of a board certified pulmonary specialist or internist, to a reasonable degree of medical certainty shows either:

(i) **FVC** ≤80% of predicted value with FEV-1/FVC ≥68% (actual value), or

(ii) TLC≤ 80% of predicted value

and with a statement by a board-certified pulmonary specialist or internist that, based upon a complete review of the claimant's entire medical record, to a reasonable degree of medical certainty, the asbestos-related changes are a substantial contributing factor to the pulmonary function changes;

OR

Non-Malignant Changes Shown by Pathology:

D. In the case of a claim brought on behalf of a decedent, if representative lung tissue of the decedent is available, a report by a board-certified pathologist, stating that, to a reasonable degree of medical probability, more than one representative section of lung tissue that is unaffected by any other process (e.g., cancer or emphysema) demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies, and that there is no other more likely explanation for the presence of the fibrosis;

OR

Diagnosis of Cancer:

E. A diagnosis of cancer, which is demonstrated by a medical report of aboard-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

III. Deferred Docket

1. The Deferred Docket consists of all actions brought by or on behalf of claimants who do not meet the minimum criteria for activation. All proceedings with respect to cases on the Deferred Docket are stayed, except for stipulations (as described below) to transfer cases to the Active Docket, as hereinafter defined, and motions for leave to amend the complaint (as described below), until further order of the Court.

2. Any case that, as of the date of this order, has been assigned a trial date is deemed to be on the Deferred Docket, unless:

A. On or before May 15, 2003:

(i) plaintiffs and (ii) Liaison Counsel for the defendants stipulate that the party allegedly injured from asbestos exposure satisfies the minimum criteria for activation;

B. On or before April 15,2003:

(i) the plaintiff(s) (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure satisfies the minimum criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, and

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied if the minimum criteria for activation have not been satisfied.

C. Any case that is commenced after the date of this or&r is deemed to be on the Deferred Docket, unless the complaint, as initially filed and served, alleges with specificity that the party claiming injury from asbestos exposure meets the minimum criteria for activation and annexes the requisite documentation as evidence thereof, No plaintiff may file a Request for Judicial Intervention for any Deferred Docket case commenced after the date of this order.

3. Any case that:

A. is commenced after the date of this order and initially deemed to be on the Deferred Docket.

OR

B. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, under the procedures set forth above in section III(2),

shall be removed from it and placed on the "Active Docket," as described below, if

C. plaintiffs and Special Liaison Counsel for the defendants (as hereinafter defined) stipulate that the party allegedly injured from asbestos exposure now satisfies the minimum criteria for activation,

OR

D. (i) The plaintiff or plaintiffs (a) move for leave to amend the complaint so as to allege with specificity that the party injured from asbestos exposure meets

the **minimum** criteria for activation and (b) annex the requisite documentation to the proposed amended complaint, *and*

(ii) the Court grants leave to amend the complaint. Leave to amend shall be denied and the case shall remain on the Deferred Docket if the minimum criteria for activation have not been satisfied.

IV. Active Docket

1. All cases which (A) as of the date hereof. have been assigned a trial date shall be prosecuted and tried in the manner now set forth in the CMO.

3. All other cases which are not on the Deferred Docket are deemed to be on the Active Docket. A case on the Active Docket shall be scheduled for trial strictly in FIFO order except as described below. For cases on the Active Docket, FIFO order is determined by the date that the action was commenced, except for:

A. Cases which receive a preference pursuant to New York Civil Practice Law and Rules § 3407, or

B. Is commenced after the date of this order which is initially on the Deferred Docket, and which is later placed on the Active Docket by stipulation or Order of the Court granting leave to amend the complaint, or

C. was commenced before the date of this order but not transferred to the Active Docket by timely stipulation or motion, pursuant to Section III(2), shall be determined by the date of said stipulation or Order.

V. Docket Lists

On or before June 1,2003, counsel for plaintiffs shall submit to the Court and plaintiffs' and defendants' liaison counsel, complete lists of (1) the inventory of cases on the Deferred Docket and (2) the inventory of cakes on the Active Docket, specifying for each the disease alleged and FIFO date. The lists shall be updated periodically at the direction of the Court.

So Ordered:

Hon. James W. McCarthy
Acting Justice, Supreme Court

22

SHARON S. ARMSTRONG
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURTHOUSE
King County, Washington

(206) 296-9363
Courtroom: E835

516 Third Avenue
Seattle, WA 98104

December 3, 2002

To: Counsel of Record, Moving and Responding Parties

Re: ACR XXIV Motions

Dear Counsel,

This matter came before the court on motions by several defendants to transfer certain cases to ACR XXV, place them on an inactive status calendar due to lack of competent evidence establishing physical impairment, or grant summary judgment, as well as motions to excuse certain defendants from participating in the December 2002 mediation session due to late discovery. In addition, various defendants have joined in other defendants' motions.

The court has reviewed the materials submitted by all parties and has heard oral argument of counsel.

In recognition of the increasing volume of asbestos cases filed in the past 18 months in King County, which the court cannot accommodate with its established procedures, it is necessary for the court to give priority to the cases of plaintiffs who are the most ill. These motions identify a number of plaintiffs who are asymptomatic, who suffer only mild reduction in lung function, or whose reduced lung function is not attributed by competent medical opinion to asbestos-related disease. These cases will be placed on an Inactive Status calendar, and may be transferred into a future ACR group at such time as the plaintiff's symptoms or lung function reaches the level of a significant functional impairment, provided that the diagnosis of asbestos –related disease and the causal connection between that disease and functional impairment is established by competent medical opinion. The court expects to confer with counsel as to the standards that would define such a threshold for inclusion in future ACR groups.

The following plaintiffs shall be placed on an Inactive Status Calendar:

Beavin[1]
Brown[2]
Hannah[3]
Hautala[4]
Hogg[5]
Hooper[6]
Larson[7]
Lawhon[8]
Littlejohn[9]
Mattison[10]
Pearson[11]
Schippers[12]
Schooler[13]
Simmons[14]
Thompson[15]

Two plaintiffs would appear to be functionally impaired, but lack competent and reliable evidence of diagnosis and causation. The court's ruling on these two cases will be deferred until February 14, 2003 to permit counsel to obtain additional medical evidence by a physician licensed in Washington as to diagnosis and causation. If such evidence is not filed by then, these two cases will also be transferred to the Inactive Status Calendar:

Eliason[16]
Risner[17]

---

1 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
2 Dan Charles Agency's Motion to Transfer to Inactive Status or to ACR XXV; Daimler Chrysler's Motion to Transfer to Inactive Status or to ACR XXV; Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
3 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
4 Western Auto's Motion to Dismiss or Transfer to Inactive Status; Honeywell's Motion to Transfer to Inactivate Status or to ACR XXV
5 Dan Charles Agency's Motion to Transfer to Inactive Status or to ACR XXV; Kaiser Gypsum's Motion to Transfer to Inactive Status
6 Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
7 Kaiser Gypsum's Motion to Transfer to Inactive Status; Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
8 Dan Charles Agency's Motion to Transfer to Inactive Status or to ACR XXV
9 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
10 Dan Charles Agency's Motion to Transfer to Inactive or ACR 25; Gunnar Auto Supply's Motion to Transfer to ACR 25; Kaiser Gypsum's Motion to Transfer to Inactive Status; Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
11 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
12 Dresser Industries' Motion to Transfer to Inactive Status; CSK Auto's Motion to Transfer to Inactive Status; Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
13 Kaiser Gypsum's Motion to Transfer to Inactive Status
14 Kaiser Gypsum's Motion to Transfer to Inactive Status; Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
15 CSK Auto's Motion to Transfer to Inactive Status
16 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status

Plaintiff's motion to dismiss Reinholdt[18] was granted November 18, 2002.

Metalclad's motion with respect to the following cases is withdrawn:

Erickson[19]
Frankenburg[20]
Kushmaul[21]
Timson[22]

Honeywell is excused from participating in the December 2002 mediation with respect to the following cases due to late or inadequate discovery:

Bryant[23]
McBride[24]
Rakestraw[25]
Winters[26]

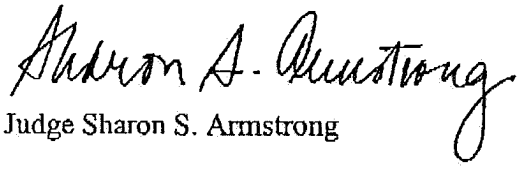
Ford is excused from participating in the December 2002 mediation with respect to the following case due to late discovery:

Winters[27]

Orders granting this relief will follow.

If counsel observe that other motions were omitted, please promptly advise the bailiff. Thank you.

Very truly yours,



Judge Sharon S. Armstrong

Cc: Court File

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17 Dan Charles Agency's Motion to Transfer to Inactive Status or to ACR XXV; Daimler Chrysler's Motion to Transfer to Inactive Status or to ACR XXV
18 Plaintiff's Motion for Dismissal
19 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
20 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
21 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
22 Metalclad's Motion for Summary Judgment or to Transfer to Inactive Status
23 Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
24 Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
25 Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
26 Honeywell's Motion to Transfer to Inactive Status or to ACR XXV
27 Ford's Motion to Transfer to ACR XXV

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TEXAS BILL TEXT

By: Janek S.B. No. 8

A BILL TO BE ENTITLED
AN ACT

VERSION: Introduced

June 30, 2003
Janek

relating to civil claims involving exposure to **asbestos.**

TEXT:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Title 4, Civil Practice and Remedies Code, is amended by adding Chapter 90 to read as follows:

CHAPTER 90. CLAIMS INVOLVING EXPOSURE TO **ASBESTOS**

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 90.001. DEFINITIONS. In this chapter:

(1) "Active docket" means a trial court's regular trial docket, established in accordance with Chapter 23, Government Code, and other applicable law.

(2) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of **asbestos** fibers.

(3) "Certified B-reader" means a person who has successfully completed the x-ray interpretation course sponsored by the National Institute for Occupational Safety and Health (NIOSH) and whose NIOSH certification is current.

(4) "Chest x-ray" means chest films that are taken in accordance with all applicable state and federal regulatory standards and in the following two views: posterior-anterior, and lateral.

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(5) "Claim" means a civil action seeking recovery of damages for an alleged personal injury or death caused by exposure to **asbestos** fibers.

(6) "Claimant" means a party seeking recovery of damages for a claim, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In a suit in which a party seeks recovery of damages for personal injury or death of another person, "claimant" includes both that other person and the party seeking recovery of damages.

(7) "Defendant" means a party from whom the claimant seeks recovery of damages.

(8) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(9) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration.

(10) "Inactive docket" means the docket established under Subchapter B for a claim.

(11) "Independent expert" is an expert appointed to examine a contested motion to remove under Section 90.057.

(12) "ILO grade" means the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980), as amended.

(13) "ILO scale" means the system for the classification of chest x-rays set forth in the International Labor Office's "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980), as amended.

(14) "Mesothelioma" means a rare and fatal form of cancer caused by exposure to **asbestos** in which the cancer invades cells in the membranes lining:

(A) the lungs and chest cavity, the **pleural** region; or

(B) the abdominal cavity, the peritoneal region.

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(15) "Office of court administration" means the Office of Court Administration of the Texas Judicial System.

(16) "Physician board-certified in internal medicine" means a physician who is certified by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(17) "Physician board-certified in occupational medicine" means a physician who is certified in the subspecialty of occupational medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(18) "Physician board-certified in oncology" means a physician who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(19) "Physician board-certified in pathology" means a physician who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology or the American Osteopathic Board of Internal Medicine and whose professional practice:

(A) is principally in the field of pathology; and

(B) involves regular evaluation of pathology materials obtained from surgical or postmortem specimens.

(20) "Physician board-certified in pulmonary medicine" means a physician who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine or the American Osteopathic Board of Internal Medicine.

(21) "Pulmonary function testing" means spirometry, lung volume testing, and diffusing capacity testing, performed using equipment, methods of calibration, and technique that meet:

(A) the criteria incorporated in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Ed.) and reported as set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1, Part (A), Sections 3.00(E) and (F); and

(B) the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values and Interpretative Strategies," as published in 144 American Review of Respiratory Disease 1202-1218 (1991) and 152 American Journal of Respiratory and Critical Care Medicine 1107-1136; 2185-2198

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(1995). Pulmonary function testing must be performed under the supervision of and interpreted by a physician who is licensed in this state and board-certified in pulmonary medicine. Each subject must be tested with and without inhaled bronchodilators, with the best values taken. Predicted values for spirometry and lung volume shall be those published by Morris, Clinical Pulmonary Function Testing, 2nd Edition, Intermountain Thoracic Society (1984). Predicted values for diffusing capacity shall be those published by Miller et al., 127 American Review of Respiratory Disease 270-277 (1983), and shall take appropriate account of smoking history or exposure to silica.

Sec. 90.002. APPLICABILITY. This chapter applies to any claim alleging personal injury or death caused by exposure to **asbestos** fibers.

Sec. 90.003. NO CAUSE OF ACTION CREATED. This chapter does not create a cause of action.

[Sections 90.004-90.050 reserved for expansion]

SUBCHAPTER B. INACTIVE DOCKET

Sec. 90.051. INACTIVE DOCKET ESTABLISHED. (a) The supreme court shall establish an inactive docket for claims under this chapter. The inactive docket shall be administered by the office of court administration.

(b) The supreme court by rule shall establish procedures to implement the inactive docket according to this chapter.

Sec. 90.052. LIMITATIONS TOLLED. The limitations period for a claim assigned to the inactive docket under this subchapter is tolled as of the original date on which the petition and information form against each defendant named in the petition are filed under Section 90.054.

Sec. 90.053. INACTIVE CLAIMS NOT SUBJECT TO DISCOVERY AND OTHER COURT ORDERS. A claim on the inactive docket is not subject to any order of the trial court in which the claim was originally filed affecting active claims involving exposure to **asbestos** fibers, including discovery orders. Discovery may not proceed on an inactive claim until the claim is removed to the active docket as provided by this subchapter.

Sec. 90.054. FILING A CLAIM; FILING FEE. (a) A claimant seeking recovery of damages for personal injury or death caused by exposure to **asbestos** fibers shall file, in addition to the petition, an information form containing the following information:

(1) the claimant's name, address, date of birth, social security

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number, and marital status;

(2) if the claimant is not the person whose alleged exposure to **asbestos** fibers gave rise to the claim, the person's name, address, date of birth, social security number, and marital status, the claimant's relationship to the person, and, if the person is deceased, the names of any survivors of the person;

(3) the beginning and ending dates of the alleged exposure to **asbestos** products; and

(4) the specific **asbestos**-related condition claimed to exist.

(b) Each claimant shall:

(1) file a petition and information form required by this section; and

(2) pay the filing fee required by Section 51.317(b)(1), Government Code.

(c) A claim may not be brought on behalf of a group or class of persons, and multiple claims may not be joined unless each claimant files a petition and information form and pays the applicable filing fee.

(d) Except as provided by Subsection (e), as soon as possible after the claim is filed, the trial court shall send the appropriate cause number and a copy of the claimant's information form to the office of court administration for listing on the inactive docket.

(e) The trial court shall place a claim on the active docket if the claimant's petition and information form are accompanied by:

(1) a statement by a physician board-certified in internal medicine, oncology, pulmonary medicine, or pathology indicating a diagnosis of **pleural** or peritoneal mesothelioma; or

(2) a written diagnosis of cancer demonstrated by:

(A) a medical report showing the diagnosis as a primary cancer; and

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(B) a signed report:

(i) certified by a physician board-certified in internal medicine, oncology, pulmonary medicine, or pathology; and

(ii) stating to a reasonable degree of medical probability that exposure to **asbestos** fibers was a producing cause of the diagnosed cancer.

(f) The clerk of the court in which the claim is filed shall forward one-half of the filing fee paid under this section to the comptroller for deposit to the **asbestos** claims inactive docket account established under Subchapter C.

Sec. 90.055. MOTION FOR REMOVAL TO ACTIVE DOCKET. (a) A claimant seeking to remove a claim from the inactive docket for placement on the active docket shall file with the trial court in which the claim was originally filed a motion for removal.

(b) The motion for removal must be accompanied by the documentation necessary to satisfy the criteria specified by Section 90.056.

(c) At the time of filing with the trial court, the claimant shall serve the motion for removal and supporting documentation on each defendant named in the claimant's original petition.

(d) Not later than the 14th day after the date of service of the motion for removal and supporting documentation, a defendant who objects to the removal of the claim must file an objection to removal with the trial court stating the reasons for the objection. The objection shall be served on the claimant and each other defendant.

(e) The filing by a defendant of an objection to removal and any documentation supporting the objection, or the defendant's appearance at a hearing ordered by the court in connection with an objection for removal, is not considered an appearance for purposes of establishing the court's jurisdiction over the defendant in the event the claim is removed to the active docket.

(f) Not later than the 10th day after the date of service of the objection to removal, the claimant may file a response with the trial court. The response must be served on each defendant.

(g) A motion for removal may be filed simultaneously with the original petition and information form under Section 90.054.

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Sec. 90.056. CRITERIA FOR REMOVAL FOR NONMALIGNANCY. (a) A judge reviewing a motion for removal may remove a claim from the inactive docket and place it on the active docket of the trial court in which it was originally filed if the claimant shows by a preponderance of the evidence a diagnosis of impaired asbestosis or other specific, nonmalignant **asbestos**-related condition accompanied by a verifiable physical impairment substantially caused by the **asbestos**-related condition.

(b) An impairment diagnosis under Subsection (a) must:

(1) be demonstrated by a medical report certified by a physician licensed in this state and board-certified in internal, occupational, or pulmonary medicine;

(2) be based on objective criteria of generally accepted medical standards related to impairment due to a reliable history of exposure to **asbestos** fibers; and

(3) include a physical examination of the claimant by the physician rendering the diagnosis that sets forth:

(A) a detailed medical history that includes a thorough review of the claimant's past and present medical status and nonoccupational causes of lung and **pleural** changes and that documents the claimant's smoking history; and

(B) a reliable history of exposure:

(i) that includes a detailed occupational and exposure history taken from the claimant by the physician rendering the diagnosis, or, if the claimant is deceased, by the person most knowledgeable about those histories, including all known trades and all principal places of employment for the claimant involving airborne contaminants; and

(ii) that indicates whether each employment involved exposures to airborne contaminants, including **asbestos** fibers and other disease-causing dusts, that can cause pulmonary impairment, and indicates the nature, duration, and level of any such exposure.

(c) For purposes of this section, meeting the objective criteria for generally accepted medical standards of impairment related to a reliable history of exposure to **asbestos** fibers requires at a minimum:

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(1)(A) a quality 1 chest x-ray that, in the opinion of a certified B-reader, shows bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse **pleural** thickening graded b2 or higher including blunting of the costophrenic angle; or

(B) pathological asbestosis graded 1(B) or higher under the criteria published in **"Asbestos-**Associated Diseases," 106 Archive of Pathology and Laboratory Medicine 11, Appendix 3 (October 8, 1982); and

(2) pulmonary function testing that demonstrates either:

(A) forced vital capacity (FVC) below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or

(B) total lung capacity, by plethysmography or timed gas dilution, below the lower limit of normal.

(d) If the pulmonary function testing results do not meet the requirements of Subsection (c)(2), a claimant may submit an additional report, by a physician licensed in this state and board-certified in pulmonary, internal, or occupational medicine, that states that:

(1) the physician has a physician-patient relationship with the claimant;

(2) the claimant has a quality 1 chest x-ray that has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher;

(3) the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the physician is relying upon to establish that the claimant has restrictive impairment;

(4) the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions, provided that such tests comply with equipment, quality, and reporting standards established by this chapter; and

(5) the physician's conclusion that the claimant's medical findings and impairment were not more probably the result of other causes revealed by the claimant's employment and medical history.

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(e) If a claimant is deceased and no pathology is available, the radiologic findings required by this section may be made with a quality 2 chest x-ray if a quality 1 chest x-ray is not available.

Sec. 90.057. REVIEW BY INDEPENDENT EXPERT. (a) If a defendant objects to the motion for removal, the trial court, not later than the 45th day after the date the motion for removal is filed, shall refer the medical report, test results, and other documentation submitted by the claimant, the defendant's objection to removal, and any other information directed by the court to an independent expert randomly selected from a list of experts published by the supreme court according to Section 90.058.

(b) The costs of the expert shall be paid:

(1) by the objecting defendant if the expert determines the medical criteria for removal have been met; or

(2) by the claimant if the expert determines the medical criteria for removal have not been met.

(c) The independent experts shall submit a report and recommendation to the court not later than the 10th day after the date the expert receives the information from the court. The independent expert may perform pulmonary function testing to verify the information submitted by the claimant.

Sec. 90.058. LIST OF INDEPENDENT EXPERTS. (a) The supreme court shall publish a list of independent experts for the purpose of reviewing motions for removal filed under this subchapter.

(b) To be eligible for placement on the list of independent experts, a person must:

(1) be a physician licensed in this state;

(2) be board-certified in internal medicine, occupational medicine, or pulmonary medicine; and

(3) be actively and primarily practicing medicine in a field directly related to the physician's board certification.

(c) The supreme court shall distribute the list of independent experts to each district court in the state. The supreme court shall update the list at least annually.

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(d) The supreme court by rule shall adopt a system for the random selection of independent experts from the list.

Sec. 90.059. ORDER GRANTING OR DENYING MOTION FOR REMOVAL. (a) Not later than the seventh day after the date the expert's report and recommendation are received, the trial court shall issue an order granting or denying the motion for removal based on the opinion of the independent expert and the submissions of the parties.

(b) Before issuing the order, the court may hold a hearing on its own motion or, in its discretion, on the motion of a party. The decision of the court not to grant a request for a hearing may not be appealed and does not constitute reversible error.

(c) If the court orders a claim removed from the inactive docket and placed on the active docket, any date, deadline, or other provision in a court order relating to claims on the active docket or in the Texas Rules of Civil Procedure applies as if the claim had been filed on the date of the court's order granting the motion for removal.

(d) If the trial court orders a claim removed from the inactive docket and placed on the court's active docket, the court shall notify the office of court administration. Upon receipt of such notification, the office of court administration shall remove the claim from its list of inactive claims.

Sec. 90.060. ADMISSIBILITY OF CERTAIN INFORMATION. (a) The existence of an inactive docket, or the fact that a claim is or is not on an inactive docket, is not admissible in any proceeding for any purpose, except for a proceeding concerned with the removal of a claim from the inactive docket.

(b) The medical criteria established by this subchapter for removal of a claim from the inactive docket are established solely for the purpose of determining whether a claim may be removed to the active docket. The fact that a claimant satisfies the medical criteria for removal of a claim from the inactive docket may not be construed as an admission or determination that a person has a condition related to exposure to **asbestos** fibers. The criteria used to determine whether a claim should be removed may not be cited, referred to, or otherwise used in the trial of a claim for the purpose of determining whether a person has a condition related to exposure to **asbestos** fibers.

(c) An expert report submitted under Section 90.057 is solely for the purpose of determining whether a claim may be removed to the active docket and is inadmissible for any other purpose. An independent expert may not be compelled to testify at any hearing or trial for which the expert submitted a

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report under Section 90.057.

(d) Listing of a claim on an inactive docket may not be construed as an admission by a claimant or person allegedly exposed to **asbestos** fibers that the claimant or person has not developed a condition related to exposure to **asbestos** fibers.

[Sections 90.061-90.100 reserved for expansion]

SUBCHAPTER C. FINANCIAL PROVISIONS

Sec. 90.101. **ASBESTOS** CLAIMS INACTIVE DOCKET ACCOUNT. (a) The **asbestos** claims inactive docket account is an account in the general revenue fund.

(b) The account consists of money deposited to the account under Section 90.054, grants, gifts, and donations to the account, and interest earned on money in the account.

(c) The account may be appropriated only for purposes of administering this chapter.

(d) Sections 403.095 and 404.071, Government Code, do not apply to the account.

Sec. 90.102. DONATIONS. The office of court administration may accept for the account established under Section 90.101 a donation, grant, or gift of any kind from any person for a purpose related to the administration of this chapter.

SECTION 2. Section 23.101(a), Government Code, as amended by House Bill No. 3507, Acts of the 78th Legislature, Regular Session, 2003, is amended to read as follows:

(a) The trial courts of this state shall regularly and frequently set hearings and trials of pending matters, giving preference to hearings and trials of the following:

(1) temporary injunctions;

(2) criminal actions, with the following actions given preference over other criminal actions:

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(A) criminal actions against defendants who are detained in jail pending trial;

(B) criminal actions involving a charge that a person committed an act of family violence, as defined by Section 71.004, Family Code; and

(C) an offense under:

(i) Section 21.11, Penal Code;

(ii) Chapter 22, Penal Code, if the victim of the alleged offense is younger than 17 years of age;

(iii) Section 25.02, Penal Code, if the victim of the alleged offense is younger than 17 years of age; or

(iv) Section 25.06, Penal Code;

(3) election contests and suits under the Election Code;

(4) orders for the protection of the family under Subtitle B, Title 4, Family Code;

(5) appeals of final rulings and decisions of the Texas Workers' Compensation Commission and claims under the Federal Employers' Liability Act and the Jones Act; ~~and~~

(6) appeals of final orders of the commissioner of the General Land Office under Section 51.3021, Natural Resources Code ; and

(7) a claim alleging personal injury caused by exposure to **asbestos** fibers if the basis for the claim is a diagnosis of mesothelioma or other malignancy allegedly caused by exposure to **asbestos** fibers, and the exposed person is still living .

SECTION 3. (a) Except as otherwise provided by this section, Chapter 90, Civil Practice and Remedies Code, as added by this Act, applies to all actions:

(1) commenced on or after the effective date of this Act; or

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(2) pending on that effective date and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date.

(b) Sections 90.057 and 90.058, as added by this Act, apply only to an action commenced on or after April 1, 2003. If a defendant objects to a motion for removal in an action commenced before that date, the trial court shall issue an order granting or denying the motion based on the evidence presented by the parties.

(c) An action commenced before the effective date of this Act in which a trial, new trial, or retrial is in progress on the day before the effective date is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose.

(d) The Supreme Court of Texas shall establish the inactive docket, as required by Subchapter B, Chapter 90, Civil Practice and Remedies Code, as added by this Act, not later than the 60th day after the effective date of this Act.

(e) The Supreme Court of Texas shall publish the list of independent experts and adopt a system for the random selection of independent experts, as required by Subchapter B, Chapter 90, Civil Practice and Remedies Code, as added by this Act, not later than the 60th day after the effective date of this Act.

SECTION 4. (a) In an action to which Section 3(a)(2) of this Act applies, a claimant shall file a notice of claim with the trial court in which the claim was originally filed for purposes of placing the claim on the inactive docket established under Subchapter B, Chapter 90, Civil Practice and Remedies Code, as added by this Act, unless the claim qualifies for the active docket as provided by Section 90.054(e), Civil Practice and Remedies Code, as added by this Act.

(b) The notice of claim required under Subsection (a) of this section shall identify the claimant, each defendant named in the original petition, and the cause number of the original claim. The clerk of the court shall send a copy of the notice of claim to the Office of Court Administration of the Texas Judicial System and the claim shall be treated in all respects as any other claim placed on the inactive docket established under Subchapter B, Chapter 90, Civil Practice and Remedies Code, as added by this Act.

(c) If a claimant to which this section applies did not pay the applicable filing fee when the claim was originally filed, the claimant shall pay the filing fee required by Section 51.317(b)(1), Government Code, with the notice of claim required under Subsection (a) of this section. The clerk of the court shall forward one-half of the fee to the comptroller of public accounts in accordance with Section 90.054(f), Civil Practice and Remedies Code, as added by this Act.

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SECTION 5. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect November 1, 2003.

2003 TX S.B. 8 (SN)

END OF DOCUMENT

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As Introduced

125th General Assembly
Regular Session
2003-2004

H. B. No. 292

Representative Oelslager

A BILL

To amend sections 1701.76 and 1701.82 and to enact sections 2307.91 to 2307.97 of the Revised Code to establish minimum medical requirements for filing certain asbestos claims and to establish limitations on successor asbestos-related liabilities relating to corporations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1701.76 and 1701.82 be amended and sections 2307.91, 2307.92, 2307.93, 2307.94, 2307.95, 2307.96, and 2307.97 of the Revised Code be enacted to read as follows:

Sec. 1701.76. (A)(1) Provided the provisions of Chapter 1704. of the Revised Code do not prevent the transaction from being effected, a lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business, may be made upon ~~such~~ the terms and conditions and for ~~such~~ the consideration, ~~which~~ that may consist, in whole or in part, of money or other property of any description, including shares or other securities or promissory obligations of any other corporation, domestic or foreign, ~~as~~ that may be authorized as follows:

(a) By the directors, either before or after authorization by the shareholders as required in this section; and

(b) At a meeting of the shareholders held for ~~such~~ that purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on ~~such~~ the proposal, or, if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of ~~such~~ the voting power, and by ~~such~~ the affirmative vote of the holders of shares of any particular class ~~as~~ that is required by the articles.

(2) At the shareholder meeting described in division (A)(1)(b) of this section or at any subsequent shareholder meeting, shareholders, by the same vote that is required to authorize the lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets, with or without the good will, of the corporation, may grant authority to the directors to establish or amend any of the terms and conditions of the transaction, except that the shareholders shall not authorize the directors to do any of the following:

(a) Alter or change the amount or kind of shares, securities, money, property, or rights to be received in exchange for the assets;

(b) Alter or change to any material extent the amount or kind of liabilities to be assumed in exchange for the assets;

(c) Alter or change any other terms and conditions of the transaction if any of the alterations or changes, alone or in the aggregate, would materially adversely affect the shareholders or the corporation.

(3) Notice of the meeting of the shareholders described in division (A)(1)(b) of this section shall be given to all shareholders whether or not entitled to vote at the meeting and

shall be accompanied by a copy or summary of the terms of the transaction.

(B) The corporation by its directors may abandon ~~such~~ the transaction under this section, subject to the contract rights of other persons, if the power of abandonment is conferred upon the directors either by the terms of the transaction or by the same vote of shareholders and at the same meeting of shareholders as that referred to in division (A)(1)(b) of this section or at any subsequent meeting.

(C) Dissenting holders of shares of any class, whether or not entitled to vote, shall be entitled to relief under section 1701.85 of the Revised Code.

(D) An action to set aside a conveyance by a corporation, on the ground that any section of the Revised Code applicable to the lease, sale, exchange, transfer, or other disposition of all, or substantially all, of the assets of ~~such~~ that corporation has not been complied with, shall be brought within ninety days after ~~such~~ that transaction, or ~~such~~ the action shall be forever barred.

(E) If a resolution of dissolution is adopted pursuant to section 1701.86 of the Revised Code, the directors may dispose of all, or substantially all, of the corporation's assets without the necessity of a shareholders' authorization under this section.

(F) The terms and conditions of any transaction under this section shall be subject to the limitations specified in section 2307.96 of the Revised Code.

Sec. 1701.82. (A) When a merger or consolidation becomes effective, all of the following apply:

(1) The separate existence of each constituent entity other than the surviving entity in a merger shall cease, except that whenever a conveyance, assignment, transfer, deed, or other

instrument or act is necessary to vest property or rights in the surviving or new entity, the officers, general partners, or other authorized representatives of the respective constituent entities shall execute, acknowledge, and deliver ~~such~~ those instruments and do ~~such~~ those acts. For these purposes, the existence of the constituent entities and the authority of their respective officers, directors, general partners, or other authorized representatives is continued notwithstanding the merger or consolidation.

(2) In the case of a consolidation, the new entity exists when the consolidation becomes effective and, if it is a domestic corporation, the articles contained in or provided for in the agreement of consolidation shall be its original articles. In the case of a merger in which the surviving entity is a domestic corporation, the articles of the domestic surviving corporation in effect immediately prior to the time the merger becomes effective shall continue as its articles after the merger except as otherwise provided in the agreement of merger.

(3) The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity, and, subject to the limitations specified in section 2307.96 of the Revised Code, all obligations belonging to or due to each constituent entity, all of which are vested in the surviving or new entity without further act or deed. Title to any real estate or any interest in the real estate vested in any constituent entity shall not revert or in any way be impaired by reason of such merger or consolidation.

(4) ~~The~~ Subject to the limitations specified in section 2307.96 of the Revised Code, the surviving or new entity is liable

for all the obligations of each constituent entity, including liability to dissenting shareholders. Any claim existing or any action or proceeding pending by or against any constituent entity may be prosecuted to judgment, with right of appeal, as if the merger or consolidation had not taken place, or the surviving or new entity may be substituted in its place.

(5) ~~All~~ Subject to the limitations specified in section 2307.96 of the Revised Code, all the rights of creditors of each constituent entity are preserved unimpaired, and all liens upon the property of any constituent entity are preserved unimpaired, on only the property affected by ~~such~~ those liens immediately prior to the effective date of the merger or consolidation. If a general partner of a constituent partnership is not a general partner of the entity surviving or the new entity resulting from the merger or consolidation, then the former general partner shall have no liability for any obligation incurred after the merger or consolidation except to the extent that a former creditor of the constituent partnership in which the former general partner was a partner extends credit to the surviving or new entity reasonably believing that the former general partner continued as a general partner of the surviving or new entity.

(B) If a general partner of a constituent partnership is not a general partner of the entity surviving or the new entity resulting from the merger or consolidation, the provisions of division (B) of section 1782.434 of the Revised Code shall apply.

(C) In the case of a merger of a domestic constituent corporation into a foreign surviving corporation, limited liability company, or limited partnership that is not licensed or registered to transact business in this state or in the case of a consolidation of a domestic constituent corporation into a new foreign corporation, limited liability company, or limited partnership, if the surviving or new entity intends to transact

business in this state and the certificate of merger or consolidation is accompanied by the information described in division (B)(4) of section 1701.81 of the Revised Code, then, on the effective date of the merger or consolidation, the surviving or new entity shall be considered to have complied with the requirements for procuring a license or for registering to transact business in this state as a foreign corporation, limited liability company, or limited partnership, as the case may be. In such a case, a copy of the certificate of merger or consolidation certified by the secretary of state constitutes the license certificate prescribed by the laws of this state for a foreign corporation transacting business in this state or the application for registration prescribed for a foreign limited partnership or limited liability company.

(D) Any action to set aside any merger or consolidation on the ground that any section of the Revised Code applicable to the merger or consolidation has not been complied with shall be brought within ninety days after the effective date of ~~such~~ that merger or consolidation or be forever barred.

(E) As used in this section, "corporation" or "entity" applies to both domestic and foreign corporations and entities where the context so permits. In the case of a foreign constituent entity or a foreign new entity, this section is subject to the laws of the state under the laws of which the entity exists or in which it has property.

Sec. 2307.91. As used in sections 2307.91 to 2307.95 of the Revised Code:

(A) "AMA guides to the evaluation of permanent impairment" means the American medical association's guides to the evaluation of permanent impairment (fifth edition 2000) as may be modified by the American medical association.

(B) "Asbestos" means chrysotile, amosite, crocidolite, tremolite asbestos, anthophyllite asbestos, actinolite asbestos, and any of these minerals that have been chemically treated or altered.

(C) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes a claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos.

(D) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers.

(E) "Board-certified internist" means a medical doctor who is currently certified by the American board of internal medicine.

(F) "Board-certified oncologist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of medical oncology.

(G) "Board-certified pathologist" means a medical doctor who is currently certified by the American board of pathology.

(H) "Board-certified pulmonary specialist" means a medical doctor who is currently certified by the American board of internal medicine in the subspecialty of pulmonary medicine.

(I) "Certified B-reader" means an individual qualified as a "final" or "B-reader" as defined in 42 C.F.R. section 37.51(b), as amended.

(J) "Civil action" means all suits or claims of a civil

nature in state or federal court, whether cognizable as cases at law or in equity or admiralty. The term "civil action" does not include an action relating to any workers' compensation law.

(K) "Exposed person" means any person whose exposure to asbestos or to asbestos-containing products is the basis for an asbestos claim.

(L) "Exposure years" means the following:

(1) Each single year of exposure prior to 1972 will be counted as one year.

(2) Each single year of exposure from 1972 through 1979 will be counted as one-half year.

(3) Exposure after 1979 will not be counted, except that each year from 1972 forward for which the plaintiff can establish exposure exceeding the occupational safety and health administration (OSHA) limit for eight-hour time-weighted average airborne concentration for a substantial portion of the year will count as one year.

(M) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests.

(N) "FVC" means forced vital capacity that is maximal volume of air expired with maximum effort from a position of full inspiration.

(O) "ILO scale" means the system for the classification of chest x-rays set forth in the international labour office's guidelines for the use of ILO international classification of radiographs of pneumoconioses (1980), as amended.

(P) "Lung cancer" means a malignant tumor in which the primary site of origin of the cancer is inside the lungs, but that term does not include an asbestos claim based upon mesothelioma.

(Q) "Mesothelioma" means a malignant tumor with a primary site of origin in the pleura or the peritoneum, which has been diagnosed by a board-certified pathologist, using standardized and accepted criteria of microscopic morphology and appropriate staining techniques.

(R) "Nonmalignant condition" means a condition that is caused or may be caused by asbestos other than a diagnosed cancer.

(S) "Nonsmoker" means the exposed person has not smoked cigarettes or used any other tobacco products within the last fifteen years.

(T) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis.

(U) "Physical impairment" means a nonmalignant condition that meets the minimum requirements of division (B) of section 2307.92 of the Revised Code, lung cancer that meets the minimum requirements of division (C) of section 2307.92 of the Revised Code, or cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach that meets the minimum requirements of division (D) of section 2307.92 of the Revised Code.

(V) "Predicted lower limit of normal" means the fifth percentile of healthy populations based on age, height, and gender, as referenced in the AMA guides to the evaluation of permanent impairment.

(W) "Qualified physician" means a medical doctor who is providing a diagnosis for purposes of constituting prima-facie evidence of an exposed person's physical impairment that meets the

requirements of section 2307.92 of the Revised Code and who meets the following requirements:

(1) The medical doctor is a board-certified internist, pulmonary specialist, oncologist, or pathologist.

(2) The medical doctor is actually treating or has treated the exposed person and has or had a doctor-patient relationship with the person.

(3) The medical doctor spends not more than ten per cent of the medical doctor's professional practice time in providing consulting or expert services in connection with actual or potential civil actions, and the medical doctor's medical group, professional corporation, clinic, or other affiliated group earns not more than twenty per cent of its revenues from providing those services.

(4) The medical doctor is currently licensed to practice and actively practices in the state where the plaintiff's civil action was filed.

(5) The medical doctor receives or received payment for the treatment of the exposed person from that person's HMO or other medical provider.

(X) "Radiological evidence of asbestosis" means a chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader as at least 1/1 on the ILO scale.

(Y) "Radiological evidence of diffuse pleural thickening" means a chest x-ray showing bilateral pleural thickening graded by a certified B-reader as at least B2 on the ILO scale and blunting of at least one costophrenic angle.

(Z) "Smoker" means a person who has smoked cigarettes or other tobacco products within the last fifteen years.

(AA) "Spirometry" means the measurement of volume of air

inhaled or exhaled by the lung. 298

(BB) "Substantial contributing factor" means all of the following: 299 300

(1) Exposure to asbestos is the predominate cause of the physical impairment alleged in the asbestos claim. 301 302

(2) The exposure to asbestos took place on a regular basis over an extended period of time and in close proximity to the exposed person. 303 304 305

(3) A qualified physician has determined with a reasonable degree of medical certainty that the physical impairment of the exposed person would not have occurred but for the asbestos exposures. 306 307 308 309

(CC) "Veterans' benefit program" means any program for benefits in connection with military service administered by the veterans' administration under title 38 of the United States Code. 310 311 312

(DD) "Workers' compensation law" means Chapters 4121., 4123., 4127., and 4131. of the Revised Code. 313 314

Sec. 2307.92. (A) Physical impairment of the exposed person, to which the person's exposure to asbestos is a substantial contributing factor, shall be an essential element of an asbestos claim. 315 316 317 318

(B) No person shall bring or maintain a civil action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition. That prima-facie showing shall include all of the following minimum requirements: 319 320 321 322 323 324 325 326

(1) Evidence verifying that a qualified physician has taken a detailed occupational and exposure history of the exposed person from the exposed person or, if that person is deceased, from the person who is most knowledgeable about the exposures that form the basis of the asbestos claim for a nonmalignant condition, including all of the following:

(a) All of the exposed person's principal places of employment and exposures to airborne contaminants;

(b) Whether each place of employment involved exposures to airborne contaminants, including, but not limited to, asbestos fibers or other disease causing dusts, that can cause pulmonary impairment and, if that type of exposure is involved, the nature, duration, and level of the exposure.

(2) Evidence verifying that a qualified physician has taken a detailed medical and smoking history of the exposed person, including a thorough review of the exposed person's past and present medical problems and the most probable causes of those medical problems;

(3) A diagnosis by a qualified physician, based on a medical examination and pulmonary function testing of the exposed person, that all of the following apply to the exposed person:

(a) The exposed person has a permanent respiratory impairment rating of at least class 2 as defined by and evaluated pursuant to the AMA guides to the evaluation of permanent impairment.

(b) The exposed person has asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening.

(c) The asbestosis or diffuse pleural thickening described in division (B)(3)(b) of this section, rather than solely chronic

obstructive pulmonary disease, is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has either of the following:

(i) A forced vital capacity below the predicted lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal;

(ii) A chest x-ray showing small, irregular opacities (s, t) graded by a certified B-reader at least 2/1 on the ILO scale.

(C) No person shall bring or maintain a civil action alleging an asbestos claim based upon lung cancer in the absence of a prima-facie showing of all of the following minimum requirements:

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist that the exposed person has primary lung cancer and that exposure to asbestos is a substantial contributing factor to that cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's primary lung cancer;

(3) Either of the following:

(a) In the case of an exposed person who is a nonsmoker, either of the following requirements:

(i) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening;

(ii) Evidence of the exposed person's occupational exposure to asbestos for any of the applicable minimum exposure periods in the occupations as specified in divisions (D)(3)(b)(i), (ii), and (iii) of this section.

(b) In the case of an exposed person who is a smoker, both of the requirements specified in divisions (C)(3)(a)(i) and (ii) of this section.

(D) No person shall bring or maintain a civil action alleging an asbestos claim based upon cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach, in the absence of a prima-facie showing of all of the following minimum requirements:

(1) A diagnosis by a board-certified pathologist, board-certified pulmonary specialist, or board-certified oncologist, whichever is appropriate for the type of cancer claimed, that the exposed person has primary cancer of the colon, rectum, larynx, pharynx, esophagus, or stomach and that exposure to asbestos was a substantial contributing factor to that particular cancer;

(2) Evidence that is sufficient to demonstrate that at least ten years have elapsed between the date of the exposed person's first exposure to asbestos and the date of diagnosis of the exposed person's particular cancer;

(3) Either of the following requirements:

(a) Radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening;

(b) Evidence of the exposed person's occupational exposure to asbestos for any of the following applicable minimum exposure periods in the specified occupations:

(i) Five exposure years for insulators, shipyard workers, workers in manufacturing plants handling raw asbestos, boilermakers, shipfitters, steamfitters, or other trades performing similar functions;

(ii) Ten exposure years for utility and power house workers, secondary manufacturing workers, or other trades performing

similar functions; 417

(iii) Fifteen exposure years for general construction, 418
maintenance workers, chemical and refinery workers, marine engine 419
room personnel and other personnel on vessels, stationary 420
engineers and firefighters, railroad engine repair workers, or 421
other trades performing similar functions. 422

(E) No prima-facie showing is required in a civil action 423
alleging an asbestos claim based upon mesothelioma. 424

(F) Evidence relating to physical impairment under this 425
section, including pulmonary function testing and diffusing 426
studies, shall comply with the technical recommendations for 427
examinations, testing procedures, quality assurance, quality 428
control, and equipment incorporated in the AMA guides to the 429
evaluation of permanent impairment and reported as set forth in 20 430
C.F.R. Pt. 404, Subpt. P, App. 1, Part A, Sec. 3.00 E. and F., and 431
the interpretive standards set forth in the official statement of 432
the American thoracic society entitled "lung function testing: 433
selection of reference values and interpretive strategies" as 434
published in American review of respiratory disease, 435
1991:144:1202-1218. 436

(G) All of the following apply to the presentation of 437
prima-facie evidence that meets the requirements of division (B), 438
(C), or (D) of this section: 439

(1) It does not result in any presumption at trial that the 440
exposed person has a physical impairment that is caused by an 441
asbestos-related condition. 442

(2) It is not conclusive as to the liability of any defendant 443
in the case. 444

(3) It is not admissible at trial. 445

Sec. 2307.93. The plaintiff in any civil action who alleges 446

an asbestos claim shall file together with the complaint or other initial pleading a written report and supporting test results constituting prima-facie evidence of the exposed person's physical impairment that meets the minimum requirements of division (B), (C), or (D) of section 2307.92 of the Revised Code, whichever is applicable. With respect to any asbestos claim that is pending on the effective date of this section, the plaintiff shall file the written report and supporting test results described in this section sixty days following the effective date of this section or thirty days prior to trial, whichever is earlier. The defendant in the case shall be afforded a reasonable opportunity to challenge the adequacy of the proffered prima-facie evidence of the physical impairment. The court shall dismiss the plaintiff's claim without prejudice upon a finding of failure to make the prima-facie showing required by division (B), (C), or (D) of section 2307.92 of the Revised Code.

Sec. 2307.94. (A) Notwithstanding any other provision of the Revised Code, with respect to any asbestos claim based upon a nonmalignant condition that is not barred as of the effective date of this section, the period of limitations shall not begin to run until the exposed person discovers, or through the exercise of reasonable diligence should have discovered, that the person has a physical impairment due to a nonmalignant condition.

(B) An asbestos claim that arises out of a nonmalignant condition shall be a distinct cause of action from an asbestos claim relating to the same exposed person that arises out of asbestos-related cancer. No damages shall be awarded for fear or risk of cancer in any civil action asserting only an asbestos claim for a nonmalignant condition.

(C) No settlement of an asbestos claim for a nonmalignant

condition that is concluded after the effective date of this section shall require, as a condition of settlement, the release of any future claim for asbestos-related cancer.

Sec. 2307.95. Sections 2307.91 to 2307.95 of the Revised Code shall not affect the scope or operation of any workers' compensation law or veterans' benefit program or the exclusive remedy of subrogation under the provisions of that law or program and shall not authorize any lawsuit that is barred by any provision of any workers' compensation law.

Sec. 2307.96. (A) As used in this section and section 2307.97 of the Revised Code:

(1) "Asbestos" has the same meaning as in section 2307.91 of the Revised Code.

(2) "Asbestos claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to asbestos. "Asbestos claim" includes any of the following:

(a) A claim made by or on behalf of any person who has been exposed to asbestos, or any representative, spouse, parent, child, or other relative of that person, for injury, including mental or emotional injury, death, or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or any other effects on the person's health that are caused by the person's exposure to asbestos;

(b) A claim for damage or loss to property that is caused by the installation, presence, or removal of asbestos.

(3) "Successor" means a domestic corporation or a subsidiary of a domestic corporation that acquired any assets of or the stock of a foreign business corporation, if all of the following apply:

(a) The transaction occurred on or before July 29, 1977. 506

(b) The purchasing domestic corporation paid less than five 507
million dollars for the acquisition. 508

(c) The principal place of business of the foreign 509
corporation was located outside the state of Ohio. 510

(4)(a) "Successor asbestos-related liabilities," in relation 511
to an asset purchase or a stock purchase by a successor means any 512
liabilities, whether known or unknown, asserted or unasserted, 513
absolute or contingent, accrued or unaccrued, liquidated or 514
unliquidated, or due or to become due, if the liabilities are 515
related in any way to asbestos claims and are assumed or incurred 516
by a successor as a result of or in connection with the asset 517
purchase or stock purchase, merger, or consolidation, or the 518
agreement of the asset purchase or stock purchase. 519

(b) "Successor asbestos-related liabilities" includes any 520
liabilities described in division (A)(4)(a) of this section that, 521
after the effective date of the asset purchase or stock purchase, 522
are paid, otherwise discharged, committed to be paid, or committed 523
to be otherwise discharged by or on behalf of the successor, or by 524
or on behalf of a transferor, in connection with any judgment, 525
settlement, or other discharge of those liabilities in this state 526
or another jurisdiction. 527

(5) "Transferor" means a foreign corporation or its 528
shareholders from which successor asbestos-related liabilities are 529
assumed or incurred by the successor. 530

(B)(1) Except as otherwise provided in division (B)(2) of 531
this section, the cumulative successor asbestos-related 532
liabilities of a successor shall be limited to the fair market 533
value of the acquired assets or stock as determined on the 534
effective date of the asset purchase or stock purchase, merger, or 535
consolidation. 536

(2) If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the successor asbestos-related liabilities of the successor described in division (B)(1) of this section shall be limited to the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation.

(3) The successor described in division (B)(1) or (2) of this section shall have no responsibility for any successor asbestos-related liabilities in excess of the limitation of those liabilities as described in the applicable division.

(C)(1) Except as otherwise provided in division (C)(2) of this section, the assets of a successor shall be exempt from restraint, attachment, or execution on any judgment entered in this state or another jurisdiction related to any claim for successor asbestos-related liabilities if the cumulative amounts of those liabilities that, after the effective date of the asset purchase or stock purchase that is covered by division (B) of this section, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities exceed the fair market value of the assets or stock as determined on the effective date of the asset purchase or stock purchase, merger, or consolidation.

(2) If a transferor had assumed or incurred successor asbestos-related liabilities in connection with a prior asset purchase, stock purchase, merger, or consolidation involving a prior transferor, the assets of the successor described in division (C)(1) of this section shall be exempt from restraint, attachment, or execution on any judgment entered in this state or another jurisdiction related to any claim for successor

asbestos-related liabilities if the cumulative amounts of those liabilities that, after the effective date of the prior asset purchase, stock purchase, merger, or consolidation, are paid or committed to be paid by or on behalf of the successor, or by or on behalf of the prior transferor, in connection with any judgment, settlement, or other discharge of claims of asbestos-related liabilities, exceed the fair market value of the previously acquired assets or stock as determined on the effective date of the prior asset purchase, stock purchase, merger, or consolidation.

(D)(1) A successor may establish the fair market value of total assets under division (B) or (C) of this section by means of any method that is reasonable under the circumstances, including by reference to the going-concern value of those assets, to the purchase price attributable to or paid for the assets in an arm's length transaction, or, in the absence of other readily available information from which fair market value can be determined, to the value of those assets recorded on a balance sheet. Total assets shall include intangible assets. A showing by the successor of a reasonable determination of the fair market value of total assets is prima-facie evidence of the fair market value of those assets.

(2) After a successor has established a reasonable determination of the fair market value of total assets under division (D)(1) of this section, a claimant that disputes that determination of the fair market value has the burden of establishing a different fair market value of those assets.

(3) For the purpose of adjusting the limitations set forth in division (B) or (C) of this section to account for the passage of time, the fair market value of total assets on the effective date of the applicable asset purchase or stock purchase under the applicable division shall be increased annually, at the rate equal to the prime rate as listed in the first edition of the Wall

Street Journal published for each calendar year since the asset purchase or stock purchase plus one per cent, not compounded, until the earlier of either of the following:

(a) The date of the judgment, settlement, or other discharge of claims of successor asbestos-related liabilities to which the limitations in division (B) or (C) of this section are being applied;

(b) The date on which the adjusted fair market value of total assets under division (D)(3) of this section is first exceeded by the cumulative amounts of successor asbestos-related liabilities that are paid or committed to be paid by or on behalf of the successor, or by or on behalf of a transferor, after the effective date of the asset purchase or stock purchase in connection with any judgment, settlement, or other discharge of the successor asbestos-related liabilities.

(E)(1) The limitations set forth in divisions (B) and (C) of this section shall apply to the following:

(a) All asbestos claims, including asbestos claims that are pending on the effective date of this section, and all litigation involving asbestos claims, including litigation that is pending on the effective date of this section;

(b) Successors of a successor to which this section applies.

(2) The limitations set forth in divisions (B) and (C) of this section do not apply to any of the following:

(a) Workers' compensation benefits that are paid by or on behalf of an employer to an employee pursuant to any provision of Chapter 4121., 4123., 4127., or 4131. of the Revised Code or comparable workers' compensation law of another jurisdiction;

(b) Any claim against a successor that does not constitute a claim for a successor asbestos-related liability;

(c) An insurance corporation; 631

(d) Any obligations arising under the "National Labor 632
Relations Act," 49 Stat. 449, 29 U.S.C. 151 et seq., as amended, 633
or under any collective bargaining agreement. 634

Sec. 2307.97. (A) A holder of shares, an owner of any 635
beneficial interest in shares, or a subscriber for shares whose 636
subscription has been accepted, or any affiliate or holding 637
company of that holder, owner, or subscriber or of the 638
corporation, shall be under no obligation to, and shall have no 639
liability to, the corporation or to any person with respect to any 640
obligation or liability of the corporation relating in any way to 641
asbestos claims on the basis that the holder, owner, subscriber, 642
affiliate, or holding company described in division (A) of this 643
section controlled the corporation or is or was the alter ego of 644
the corporation, or on the basis of actual fraud or constructive 645
fraud, a sham to perpetrate a fraud, a fraudulent conveyance, 646
piercing the corporate veil, or any other similar theory, unless 647
the person demonstrates that the holder, owner, subscriber, 648
affiliate, or holding company caused the corporation to be used 649
for the purpose of perpetrating and did perpetrate an actual fraud 650
on the person primarily for the direct pecuniary benefit of the 651
holder, owner, subscriber, affiliate, or holding company, and then 652
only to the extent of that direct pecuniary benefit. 653

(B) Any liability of the holder, owner, or subscriber of 654
shares of a corporation described in division (A) of this section 655
or any affiliate or holding company of that holder, owner, or 656
subscriber or of the corporation for an obligation or liability 657
that is limited by that division is exclusive and preempts any 658
other obligation or liability imposed upon a holder, owner, or 659
subscriber of shares of a corporation described in that division 660
or any affiliate or holding company of that holder, owner, or 661

subscriber or of the corporation for that obligation or liability under common law or otherwise.

Section 2. That existing sections 1701.76 and 1701.82 of the Revised Code are hereby repealed.

Section 3. (A) The General Assembly makes the following statement of findings and intent:

(1) Asbestos claims have created an increased amount of litigation in state and federal courts that the United States Supreme Court has characterized as "an elephant mass" of cases that "defies customary judicial administration and calls for national legislation." *Ortiz v. Fibreboard Corporation* (1999), 119 S.Ct. 2295, 2303.

(2) The current asbestos personal injury litigation system is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike.

(3) The extraordinary volume of nonmalignant asbestos cases continue to strain federal and state courts, with over two hundred thousand cases pending and over fifty thousand new cases filed each year.

(4) Asbestos personal injury litigation has already contributed to the bankruptcy of more than sixty companies, including nearly all manufacturers of asbestos textile and insulation products, and the ratio of asbestos-driven bankruptcies is accelerating.

(5) The General Assembly recognizes that the vast majority of asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment.

(6) The cost of compensating exposed individuals who are not ill jeopardizes the ability of defendants to compensate people with cancer and other serious asbestos-related diseases, now and in the future; threatens savings, retirement benefits, and jobs of the state's current and retired employees; adversely affects the communities in which these defendants operate; and impairs Ohio's economy.

(7) As stated in testimony by Robert Bunda, a trial lawyer who has been involved with the defense of asbestos claims on behalf of Owens-Illinois, Inc. for twenty-four years, there is something terribly wrong with the current civil justice system, evidenced by the fact that Owens-Illinois has been sued over three hundred thousand times for its brief involvement in manufacturing asbestos. According to Mr. Bunda, at least five Ohio-based companies have gone bankrupt because of the cost of paying people who are not sick. These bankruptcies have imperiled the availability of even modest compensation for the most seriously injured asbestos workers. They have also imperiled jobs, the health benefits, and the retirement funds of tens of thousands of blue-collar workers. New jobs are not being created in Ohio, and existing Ohio jobs are being destroyed.

(8) According to a study conducted by NERA Economic Consulting, in 2000, Owens-Corning laid off two hundred and seventy-five employees from its Granville, Ohio plant. The ripple effect of those job losses predicts total employment in the county of almost five hundred jobs and a fifteen million to twenty million dollar annual reduction in regional income.

(9) The public interest requires the deferring of claims of exposed individuals who are not ill in order to preserve, now and for the future, defendants' ability to compensate people who develop cancer and other serious asbestos-related injuries and to safeguard the jobs, benefits, and savings of the state's employees

and the well being of the Ohio economy. 723

(B) In enacting sections 2307.91 to 2307.97 of the Revised Code, it is the intent of the General Assembly to: (1) give priority to those asbestos claimants who can demonstrate actual physical harm or illness caused by exposure to asbestos; (2) fully preserve the rights of claimants who were exposed to asbestos to pursue compensation should those claimants become impaired in the future as a result of such exposure; (3) enhance the ability of the state's judicial systems and federal judicial systems to supervise and control litigation and asbestos-related bankruptcy proceedings; and (4) conserve the scarce resources of the defendants to allow compensation of cancer victims and others who are physically impaired by exposure to asbestos while securing the right to similar compensation for those who may suffer physical impairment in the future. 724 725 726 727 728 729 730 731 732 733 734 735 736 737

Section 4. (A) As used in this section, "asbestos," "asbestos claim," "exposed person," and "substantial contributing factor" have the same meanings as in section 2307.91 of the Revised Code. 738 739 740

(B) The General Assembly acknowledges the Court's authority in prescribing rules governing practice and procedure in the courts of this state, as provided by Section 5 of Article IV of the Ohio Constitution. 741 742 743 744

(C) The General Assembly hereby requests the Supreme Court to adopt rules to specify procedures for venue and consolidation of asbestos claims brought pursuant to sections 2307.91 to 2307.95 of the Revised Code. 745 746 747 748

(D) With respect procedures for venue in regard to asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that requires that an asbestos claim meet specific nexus requirements, including the requirement that the plaintiff 749 750 751 752

be domiciled in Ohio or that Ohio is the state in which the plaintiff's exposure to asbestos is a substantial contributing factor.

(E) With respect to procedures for consolidation of asbestos claims, the General Assembly hereby requests the Supreme Court to adopt a rule that permits consolidation of asbestos claims only with the consent of all parties, and in absence of that consent, permits a court to consolidate for trial only those asbestos claims that relate to the same exposed person and members of the exposed person's household.

Section 5. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the sections contained in this act are composed, and their applications, are independent and severable.

Section 6. If any item of law that constitutes the whole or part of a section of law contained in this act, or if any application of any item of law contained in this act, is held to be preempted by federal law, the preemption of the item of law or its application does not affect other items of law or applications that can be given affect. The items of law of which the sections of this act are composed, and their applications, are independent and severable.

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LOUISIANA BILL TEXT

HLS 03-1957 (SRS 03-1400) ORIGINAL

Regular Session, 2003

HOUSE BILL NO. 1401

BY REPRESENTATIVE JOHNS

CIVIL/CLAIMS: Provides for civil claims involving exposure to asbestos and to certain successor liability

AN ACT

VERSION: Introduced

March 31, 2003
Johns

To enact Chapter 34 of Title 13 of the Louisiana Revised Statutes of 1950, to be comprised of R.S. 13:5401 through 5415, relative to particular classes of actions and cases; to provide for an inactive docket registry; to provide for medical criteria for certain civil claims; to provide for civil claims involving exposure to asbestos; to provide for definitions; and to provide for related matters.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument.

Johns HB No. 1401

Abstract: Establishes procedures for the hearing and judicial administration of all claims for exposure to asbestos and requires the supreme court to establish rules for the implementation of a special docket for asbestos exposure claims.

Proposed law creates the provisions that shall apply to any claim alleging personal injury or death caused by exposure to asbestos fibers and provides for definitions.

Proposed law provides that a civil action alleging an asbestos claim may

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only be brought by a plaintiff who is domiciled in this state or a plaintiff alleging that exposure to asbestos that is a substantial contributing factor to the physical impairment on which the claim is based occurred in Louisiana.

Proposed law further provides that in a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue.

Proposed law does not create a cause of action.

Proposed law provides that there shall be established within the supreme court an inactive docket registry for claims under proposed law.

Proposed law that the prescriptive period for a claim assigned to the inactive docket is suspended as of the original date on which the complaint and information form against each defendant named in the complaint are filed.

Proposed law provides that a claim on the inactive docket is not subject to any order of the trial court in which the claim was originally filed affecting active claims involving exposure to asbestos fibers. Proposed law further provides that discovery may not proceed on an inactive claim until the claim is removed to the active docket.

Proposed law provides that a claimant seeking recovery of damages for personal injury or death caused by exposure to asbestos fibers shall file, together with the complaint, a sworn information form containing, in part, the claimant's name or the claimant's representative along with certain biographic information, dates and location of each exposure to an asbestos product, the name of the employer, and the specific asbestos-related condition claimed to exist.

Proposed law provides that the trial court shall place a filed claim on the active docket if the claimant's complaint and information form are accompanied by a sworn statement by a physician indicating a diagnosis of pleural or peritoneal mesothelioma, or by a written diagnosis of cancer demonstrated by a medical report showing the diagnosis as a primary cancer together with certain other information from physician licensed in this state and who meets certain qualifications.

Proposed law provides that the clerk of the court in which the claim is filed shall forward one-half of the court costs for deposit to the asbestos claims inactive docket account.

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Proposed law provides that a claimant seeking to remove a claim from the inactive docket for placement on the active docket shall file with the trial court petition for removal which shall be served on each defendant named in the claimant's original complaint.

Proposed law provides that a defendant who objects to the removal of the claim must file a motion with the trial court, no later than 14 days after he has been served with the petition for removal and that the claimant may file a response with the trial court, within 10 days of being served with the objecting motion.

Proposed law provides that physical impairment of the exposed person, to which asbestos exposure was a substantial contributing factor, shall be an essential element of an asbestos claim.

Proposed law provides that no person shall bring a civil action alleging a non-malignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor.

Proposed law provides that evidence relating to physical impairment shall comply with the technical recommendations for examinations, testing procedures, quality assurance/quality control, and equipment of the AMA

Guides to the Evaluation of Permanent Impairment.

Proposed law provides that the presentation of prima facie evidence of asbestos-related impairment shall not result in any presumption at trial that the exposed person is impaired by an asbestos-related condition, and evidence that the exposed person made a prima facie showing of impairment shall not be admissible at trial.

Proposed law provides that if a defendant objects to the petition for removal, the trial court, not later than the 45th day after the date the petition for removal is filed, shall refer the medical report, test results, and other documentation submitted by the claimant, the defendant's objection to removal, and any other information directed by the court to an independent expert.

Proposed law provides that the costs of the expert shall be paid by the objecting defendant if the expert determines the medical criteria for removal have been met, or by the claimant if the expert determines the medical criteria for removal have not been met.

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Proposed law provides that the independent expert shall submit a report and recommendation to the court not later than the 10th day after the date the expert receives the information from the court.

Proposed law provides that the supreme court shall publish and distribute to each district court a current list of independent experts for the purpose of reviewing petitions for removal and shall adopt a system for the random selection of independent experts from the list.

Proposed law provides that to be eligible for placement on the list of independent experts, a person must be a physician licensed in this state, board certified in internal medicine, oncology, pulmonary medicine, or pathology, and actively and primarily practicing medicine in a field directly related to the physician's board certification.

Proposed law provides that the trial court has 11 days to issue an order granting or denying the petition for removal based on the opinion of the independent expert and the submissions of the parties.

Proposed law provides that when a court orders a claim moved to the active docket, any date, deadline, or other provision in a court order relating to claims on the active docket or in the Code of Civil Procedure applies as if the claim had been filed on the date of the court's order granting the petition for removal, and the entity designated by the supreme court to administer the inactive docket shall transfer the claim to the trial court.

Proposed law provides for the inadmissibility of evidence of the existence of an inactive docket, or the fact that a claim is or is not on an inactive docket.

Proposed law provides that the asbestos claims inactive docket account is an account in the general revenue fund and may be appropriated only for purposes of administering proposed law.

Proposed law provides that the entity designated by the supreme court as the administrator of the inactive docket registry may accept donations or gifts of from any person for a purpose related to the administration of proposed law.

Proposed law applies to all actions commenced on or after the effective date, or pending on that effective date in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date.

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Proposed law provides that an action commenced before the effective date, or a trial, new trial, or retrial that is in progress on the effective date is governed by the applicable law in effect immediately before the effective date.

Proposed law provides that the supreme court shall establish rules for the implementation of the inactive docket not later than the 60 days after the effective date, and shall publish the list of independent experts and adopt a system for the random selection of independent experts not later than the 60 days after the effective date.

Effective upon signature of governor or lapse of time for gubernatorial action. (Adds R.S. 34:5401-5415)

TEXT:

Be it enacted by the Legislature of Louisiana:

Section 1. Chapter 34 of Title 13 of the Louisiana Revised Statutes of 1950, comprised of R.S. 13:5401 through 5415, is hereby enacted to read as follows: <<+ CHAPTER 34. SUITS INVOLVING EXPOSURE TO ASBESTOS +>>

<<+ Section 5401. Definitions +>>

<<+ For purposes of this Chapter, the following terms shall have the following meanings unless the context clearly indicates otherwise: +>>

<<+ (1) "Active docket" means a trial court's regular trial docket, as established by law. +>>

<<+ (2) "Asbestosis" means bilateral diffuse interstitial fibrosis of the lungs caused by inhalation of asbestos fibers. +>>

<<+ (3) "Certified B-reader" means a person who has successfully completed the X-ray interpretation course sponsored by the National Institute for Occupational Safety and Health (NOSH) and whose NOSH certification is current. +>>

<<+ (4) "Chest X-rays" means chest films that are all of the following: +>>

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<<+ (a) Taken in the following four views: posterior-anterior, lateral, left oblique, and right oblique. +>>

<<+ (b) Graded quality 1 for reading in accordance with the radiological standards established by the International Labor Office, as interpreted by a certified B-reader. +>>

<<+ (5) "Claim" means a civil action seeking recovery of damages for an alleged personal injury or death caused by exposure to asbestos fibers. +>>

<<+ (6) "Claimant" means a party seeking recovery of damages for a claim, including a plaintiff, counter-claimant, cross-claimant, or third- party plaintiff. In a suit in which a party seeks recovery of damages for personal injury or death of another person, "claimant" includes both that other person and the party seeking recovery of damages. +>>

<<+ (7) "Defendant" means a party from whom the claimant seeks recovery of damages. +>>

<<+ (8) "FEV1" means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests. +>>

<<+ (9) "FVC" means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration. +>>

<<+ (10) "Inactive docket" means a docket as provided for in R.S. 13:5403 for a claim. +>>

<<+ (11) "Independent expert" is an expert appointed to examine a contested petition for removal as provided for in R.S. 13:5407. +>>

<<+ (12) "ILO grade" means the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980), as amended. +>>

<<+ (13) "ILO scale" means the system for the classification of chest X-rays set forth in the International Labor Office's "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses" (1980), as amended. +>>

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<<+ (14) "Mesothelioma" means a rare and fatal form of cancer caused by exposure to asbestos in which the cancer invades cells in the membranes lining any of the following: +>>

<<+ (a) The lungs and chest cavity, the pleural region. +>>

<<+ (b) The abdominal cavity, the peritoneal region. +>>

<<+ (15) "Judicial Administrator's Office" means the Judicial Administrator's Office for the Supreme Court of Louisiana. +>>

<<+ (16) "Physician board certified in internal medicine" means a physician who is certified by the American Board of Internal Medicine. +>>

<<+ (17) "Physician board-certified in oncology" means a physician who is certified in the subspecialty of medical oncology by the American Board of Internal Medicine. +>>

<<+ (18) "Physician board-certified in pathology" means a physician who holds primary certification in anatomic pathology or clinical pathology from the American Board of Pathology and whose professional practice: +>>

<<+ (a) Is principally in the field of pathology; and +>>

<<+ (b) Involves regular evaluation of pathology materials obtained from surgical or postmortem specimens. +>>

<<+ (19) "Physician board-certified in pulmonary medicine" means a physician who is certified in the subspecialty of pulmonary medicine by the American Board of Internal Medicine. +>>

<<+ (20) "Pulmonary function testing" means spirometry, lung volume testing, and diffusing capacity testing that conform to quality criteria established by the American Thoracic Society (ATS) and are performed on equipment that meets ATS standards for technical quality and calibration, as set forth in 20 C.F.R. Section 718.103 and 20 C.F.R. Part 718, Appendix B, and contained in the ATS guidelines in 144 American Review of Respiratory Disease 1202-1218 (1991); 152 American Journal of Respiratory and Critical Care Medicine 1107-1136; 2185-2198 (1995). Pulmonary function testing must be performed under the supervision of and interpreted by a physician who is licensed in this state and board-certified in pulmonary medicine. Each subject must be tested with and without inhaled bronchodilators, with the

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best values taken. Predicted values for spirometry and lung volume shall be those published by Morris, Clinical Pulmonary Function testing, 2nd Edition, Intermountain Thoracic Society (1984). Predicted values for diffusing capacity shall be those published by Miller et al., 127 American Review of Respiratory Disease 270-277 (1983), and shall take appropriate account of smoking history or exposure to silica. +>>

<<+ (21) "Pathological evidence of asbestosis" means a statement by a board-certified pathologist that more than one representative section of lung tissue uninvolved with any other disease process demonstrates a pattern of peribronchiolar or parenchymal scarring in the presence of characteristic asbestos bodies and that there is no other more likely explanation for the presence of the fibrosis. +>>

<<+ (22) "Radiological evidence of asbestosis" means a chest X- +>>

<<+ ray showing small, irregular opacities (s,t) graded by a certified B- +>>

<<+ reader as at least 1/1 on the ILO scale. +>>

<<+ (23) "Radiological Evidence of Diffuse Pleural Thickening" means a chest X-ray showing bilateral pleural thickening of at least B2 on the ILO scale and blunting of at least one costophrenic angle. +>>

<<+ Section 5402. Applicability; venue +>>

<<+ A. This Chapter applies to any claim alleging personal injury or death caused by exposure to asbestos fibers. +>>

<<+ B. A civil action alleging an asbestos claim may only be brought by a plaintiff who is domiciliary of the state of Louisiana or a plaintiff alleging that exposure to asbestos that is a substantial contributing factor to the physical impairment on which the claim is based occurred in Louisiana. In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue. +>>

<<+ Section 5403. No cause of action created +>>

<<+ This Chapter does not create a cause of action. +>>

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<<+ Section 5404. Inactive docket established +>>

<<+ A. There shall be established within the supreme court an inactive docket registry for claims under this Chapter. The inactive docket shall be administered by the Judicial Administrator's Office or by any such entity under the supreme court's administrative supervision that the court determines to best serve judicial efficiency. +>>

<<+ B. The supreme court by rule shall establish procedures to implement the inactive docket registry according to this Chapter. +>>

<<+ Section 5405. Prescription suspended +>>

<<+ The prescriptive period for a claim assigned to the inactive docket under this Chapter is suspended as of the original date on which the complaint and information form against each defendant named in the complaint are filed as provided in R.S. 13:5406. +>>

<<+ Section 5406. Inactive claims not subject to discovery and other court orders +>>

<<+ A claim on the inactive docket is not subject to any order of the trial court in which the claim was originally filed affecting active claims involving exposure to asbestos fibers, including abandonment discovery orders. Discovery may not proceed on an inactive claim until the claim is removed to the active docket as provided by this Chapter. +>>

<<+ Section 5407. Filing a claim; filing fee +>>

<<+ A. A claimant seeking recovery of damages for personal injury or death caused by exposure to asbestos fibers shall file, together with the complaint, a sworn information form containing all of the following information: +>>

<<+ (1) The claimant's name, address, date of birth, social security number, and marital status. +>>

<<+ (2) If the claimant is not the person whose alleged that exposure to asbestos fibers gave rise to the claim, the person's name, address, date of birth, social security number, and marital status and the claimant's relationship to the person. +>>

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<<+ (3) The beginning and ending dates of each alleged exposure for each asbestos product at each location. +>>

<<+ (4) The specific location of each alleged exposure. +>>

<<+ (5) The occupation and name of the employer of the exposed person at the time of each alleged exposure. +>>

<<+ (6) The specific asbestos-related condition claimed to exist. +>>

<<+ (7) Any supporting documentation of the asbestos-related condition claimed to exist. +>>

<<+ B. Each claimant shall: +>>

<<+ (1) File a claim, including the complaint and sworn information form required by this Section; and +>>

<<+ (2) Pay the applicable court costs. +>>

<<+ C. A claim may not be brought on behalf of a group or class of persons, and multiple claims may not be joined unless each claimant files a complaint and information form and pay the applicable court costs. +>>

<<+ D. Except as provided by Subsection E, as soon as possible after the complaint and an information form are filed, the trial court shall transfer the claim to the Judicial Administrator's Office or the entity designated by the supreme court as the inactive docket registry for placement on the inactive docket. +>>

<<+ E. The trial court shall place a claim on the active docket if the claimant's complaint and information form are accompanied by any of the following: +>>

<<+ (1) A sworn statement by a physician licensed in this state and board certified in pathology indicating a diagnosis of pleural or peritoneal mesothelioma. +>>

<<+ (2) A written diagnosis of cancer demonstrated by all of the following: +>>

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<<+ (a) A medical report showing the diagnosis as a primary cancer. +>>

<<+ (b) A signed and sworn report which: +>>

<<+ (i) Is certified by a physician licensed in this state and board certified in internal medicine, oncology, pulmonary medicine, or pathology; and +>>

<<+ (ii) States to a reasonable degree of medical certainty that the diagnosed cancer was substantially caused by exposure to asbestos fibers. +>>

<<+ F. The clerk of the court in which the claim is filed shall forward one-half of the court costs paid under this Section to the comptroller for deposit to the asbestos claims inactive docket account as provided in R.S. 13:5413. +>>

<<+ Section 5408. Petition for removal to active docket +>>

<<+ A. A claimant seeking to remove a claim from the inactive docket for placement on the active docket shall file with the trial court in which the claim was originally filed a petition for removal. +>>

<<+ B. The petition for removal must be accompanied by the documentation necessary to satisfy the criteria as provided in R.S. 13:5408. +>>

<<+ C. At the time of filing with the trial court, the claimant shall serve the petition for removal and supporting documentation on each defendant named in the claimant's original complaint. +>>

<<+ D. Not later than the fourteenth day after the date of service of the petition for removal and supporting documentation, a defendant who objects to the removal of the claim must file a motion with the trial court stating the reasons for the objection. The motion shall be served on the claimant and each defendant. +>>

<<+ E. The filing by a defendant of a motion objecting to removal and any documentation supporting the motion, or the defendant's appearance at a hearing ordered by the court in connection with a petition for removal, is not considered an appearance for purposes of establishing the court's jurisdiction over the defendant in the event the claim is removed to the active docket. +>>

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<<+ F. Not later than the tenth day after the date of service of the motion objecting to removal, the claimant may file a response with the trial court. The response must be served on each defendant. +>>

<<+ G. A petition for removal may be filed simultaneously with the original claim and information form as provided in R.S. 13:5406. +>>

<<+ Section 5409. Physical impairment +>>

<<+ A. Impairment essential element of claim. Physical impairment of the exposed person, to which asbestos exposure was a substantial contributing factor, shall be an essential element of an asbestos claim. For purposes of this Section, cancer shall be presumed to involve physical impairment. +>>

<<+ B. Prima facie evidence of physical impairment. No person shall bring or maintain a civil action alleging a non-malignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor. Such a prima facie showing shall include all of the following minimum requirements: +>>

<<+ (1) A determination by a qualified physician, on the basis of a medical examination and pulmonary function testing, that the exposed person has a permanent respiratory impairment rating of at least Class 2 as defined by and evaluated pursuant to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment; +>>

<<+ (2) A diagnosis by a qualified physician of asbestosis or diffuse pleural thickening, based at a minimum on radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening; and +>>

<<+ (3) A determination by a qualified physician that asbestosis or diffuse pleural thickening (rather than solely chronic obstructive pulmonary disease) is a substantial contributing factor to the exposed person's physical impairment, based at a minimum on a determination that the exposed person has either (a) forced vital capacity below the lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal; or (b) total lung capacity, by plethysmography or timed gas dilution, below the predicted lower limit of normal; or (c) a chest X-ray showing small, irregular opacities (s,t) graded by a certified B-reader at least 2/1 on the ILO scale. +>>

<<+ C. Compliance with technical standards. Evidence relating to physical

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impairment under this Section, including pulmonary function testing and diffusing studies, shall comply with the technical recommendations for examinations, testing procedures, quality assurance/quality control, and equipment of the AMA Guides to the Evaluation of Permanent Impairment or, where the AMA Guides are silent, other authoritative standards. No adjustments with respect to pulmonary function testing shall be made on the basis of race. +>>

<<+ D. No presumption at trial. Presentation of prima facie evidence of asbestos-related impairment meeting the requirements of this Section shall not result in any presumption at trial that the exposed person is impaired by an asbestos-related condition, and evidence that the exposed person made a prima facie showing of impairment shall not be admissible at trial. +>>

<<+ Section 5410. Review by independent expert +>>

<<+ A. If a defendant objects to the petition for removal, the trial court, not later than the forty-fifth day after the date the petition for removal is filed, shall refer the medical report, test results, and other documentation submitted by the claimant, the defendant's objection to removal, and any other information directed by the court to an independent expert randomly selected from a list of experts published by the supreme court pursuant to R.S. 13:5410. +>>

<<+ B. The costs of the expert shall be paid by any of the following: +>>

<<+ (1) The objecting defendant if the expert determines the medical criteria for removal have been met. +>>

<<+ (2) The claimant if the expert determines the medical criteria for removal have not been met. +>>

<<+ C. The independent expert shall submit a report and recommendation to the court not later than the tenth day after the date the expert receives the information from the court. The independent expert may perform pulmonary function testing to verify the information submitted by the claimant. +>>

<<+ Section 5411. List of independent experts +>>

<<+ A. The supreme court shall publish a list of independent experts for the purpose of reviewing petitions for removal filed under this Chapter. +>>

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<<+ B. To be eligible for placement on the list of independent experts, a person must be all of the following: +>>

<<+ (1) A physician licensed in this state. +>>

<<+ (2) Board certified in internal medicine, oncology, pulmonary medicine, or pathology. +>>

<<+ (3) Actively and primarily practicing medicine in a field directly related to the physician's board certification. +>>

<<+ C. The supreme court shall distribute the list of independent experts to each district court in the state. The supreme court shall update the list at least annually. +>>

<<+ D. The supreme court by rule shall adopt a system for the random selection of independent experts from the list. +>>

<<+ Section 5412. Order granting or denying petition for removal +>>

<<+ A. Not later than the seventh day after the date the expert's report and recommendation are received, the trial court shall issue an order granting or denying the petition for removal based on the opinion of the independent expert and the submissions of the parties. +>>

<<+ B. Before issuing the order, the court may hold a hearing on its own motion or, in its discretion, on the motion of a party. The decision of the court not to grant a request for a hearing may not be appealed and does not constitute reversible error. +>>

<<+ C. If the court orders a claim removed from the inactive docket and placed on the active docket, any date, deadline, or other provision in a court order relating to claims on the active docket or in the Louisiana Code of Civil Procedure applies as if the claim had been filed on the date of the court's order granting the petition for removal. +>>

<<+ D. If the trial court orders a claim removed from the inactive docket and placed on the court's active docket, the Judicial Administrator's Office or the entity designated by the supreme court as the administrator of the inactive docket registry, shall transfer the claim, accompanied by the supporting documentation, to the trial court. +>>

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<<+ Section 5413. Admissibility of certain information +>>

<<+ A. The existence of an inactive docket, or the fact that a claim is or is not on an inactive docket, is not admissible in any proceeding for any purpose, except for a proceeding concerned with the removal of a claim from the inactive docket. +>>

<<+ B. The medical criteria established by this Chapter for removal of a claim from the inactive docket are established solely for the purpose of determining whether a claim may be removed to the active docket. The fact that a claimant satisfies the medical criteria for removal of a claim from the inactive docket may not be construed as an admission or determination that a person has a condition related to exposure to asbestos fibers. The criteria used to determine whether a claim should be removed may not be cited, referred to, or otherwise used in the trial of a claim for the purpose of determining whether a person has a condition related to exposure to asbestos fibers. +>>

<<+ C. An expert report submitted pursuant to R.S. 13:5409 is solely for the purpose of determining whether a claim may be removed to the active docket and is inadmissible for any other purpose. An independent expert may not be compelled to testify at any hearing or trial for which the expert submitted a report pursuant to R.S. 13:5409. +>>

<<+ D. Placement of a claim on an inactive docket may not be construed as an admission by a claimant or person allegedly exposed to asbestos fibers that the claimant or person has not developed a condition related to exposure to asbestos fibers. +>>

<<+ Section 5414. Asbestos claims inactive docket account +>>

<<+ A. The asbestos claims inactive docket account is an account in the general revenue fund. +>>

<<+ B. The account consists of money deposited to the account as provided in R.S. 13:5406, grants, gifts, and donations to the account, and interest earned on money in the account. +>>

<<+ C. The account may be appropriated only for purposes of administering this Chapter. +>>

<<+ Section 5415. Donations +>>

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<<+ The Judicial Administrator's Office or the entity designated by the supreme court as the administrator of the inactive docket registry, may accept for the account as provided in R.S. 13:5413, a donation, grant, or gift of any kind from any person for a purpose related to the administration of this Chapter. +>>

Section 2. (A) Chapter 34 of Title 13 as enacted by this Act, shall apply to all actions commenced on or after the effective date of this Act, or pending on that effective date and in which the trial, or any new trial or retrial following motion, appeal, or otherwise, begins on or after that effective date.

(B) In an action commenced before the effective date of this Act, a trial, new trial, or retrial that is in progress on the effective date is governed by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose.

(C) The Supreme Court of Louisiana shall establish rules for the implementation of the inactive docket, as required by this Act, not later than the sixty days after the effective date of this Act.

(D) The Supreme Court of Louisiana shall publish the list of independent experts and adopt a system for the random selection of independent experts, as required by this Act, not later than the sixty days after the effective date of this Act.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

2003 LA H.B. 1401 (SN)

END OF DOCUMENT

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26

State of South Carolina)
) In the Court of Common Pleas
County of Greenville)

In re: Wallace & Graham Asbestos-Related Cases.

Wallace & Graham Asbestos Case Management Order.

I. Statement of Authority. This Court was appointed by the Chief Justice of the South Carolina Supreme Court by Order dated April 2, 2002 to coordinate and control all asbestos-related cases filed and pending in the South Carolina Circuit Courts. Pursuant to the authority granted by that Order and the consent of all parties as evidenced by the signatures of their attorneys of record below, the Court hereby enters this Case Management Order.

II. Application of Case Management Order. The provisions of this Case Management Order apply to all parties in all South Carolina asbestos-related cases in which the plaintiffs are represented by the law firm of Wallace & Graham, or its successors. Defendants who are not signatories to this Case Management Order will be bound by the terms contained herein so long as a copy of this Case Management Order is served on them and they do not opt out within 30 days of service.

III. Establishment of File Entitled In re: Wallace & Graham Asbestos-Related Cases. The Clerk of Court of Greenville County is hereby directed to establish a file entitled "In re: Wallace & Graham Asbestos-Related Cases." This Case Management Order and any and all documents prepared by the Court or any party which has general application to all Wallace & Graham cases or applies to specific cases which have not been assigned Civil Action Numbers shall be captioned as "In re: Wallace & Graham Asbestos-Related Cases."

IV. Definitions.

A. "Licensed physician" refers to a physician licensed to practice medicine in at least one State within the United States.

B. Whenever this Case Management Order requires the diagnosis of a malignancy attributable, at least in part, to asbestos exposure, a licensed physician must make such diagnosis. However, a licensed physician who is a pathologist certified by the American Board of Pathology must make the diagnosis of asbestos-related mesothelioma.

C. Whenever this Case Management Order requires the diagnosis of the disease Asbestosis, such diagnosis must be made by a licensed physician who is certified by the American Board of Internal Medicine in the subspecialty of Pulmonary Medicine ("Board Certified Pulmonary Specialist").

D. Whenever this Case Management Order requires the diagnosis of an asbestos-related disease, the term includes any asbestos-related disease other than those described in paragraphs VI.A.1. and 2., and a licensed physician must make such diagnosis.

E. "ILO grade" shall refer to the radiological ratings of the International Labor Office set forth in "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconioses (1980)."

F. A "currently certified B-reader" shall refer to an individual who has successfully completed the NIOSH-sponsored x-ray interpretation course and whose NIOSH-certification is up-to-date.

G. "Chest x-rays" means chest films that are graded quality 1 for reading according to the ILO criteria.

H. "Impairment rating of class 4 under AMA Guidelines" refers to a class 4 impairment classification for respiratory disorders, using pulmonary function and exercise test results as set forth in the current edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.

I. "Pending Cases" refers to those Wallace & Graham cases pending in a South Carolina Circuit Court as of the date of this Case Management Order, but does not include those cases scheduled for trial and that are controlled by a Scheduling Order as of the date of this Case Management Order.

J. "New Filings" refers to those Wallace & Graham cases in which a Summons and Complaint are filed for the first time in a South Carolina Circuit Court subsequent to the date of this Case Management Order.

V. Evidence in Trial or Other Proceedings. The determination that a plaintiff either fits into one of the medical categories set forth in this Case Management Order or does not fit into one of the medical categories, whether by Order of the Court or by agreement of the parties, does not constitute evidence that the plaintiff does or does not, in fact, fit into that medical category for any purpose other than the administration of this Case Management Order. Therefore, the determination that a plaintiff either fits or does not fit in a certain medical category pursuant to this Case Management Order shall not be used as evidence in trial or other proceedings for any purpose other than the administration of the provisions of this Case Management Order.

VI. Pending Cases.

A. All pending cases not meeting at least one of the following medical criteria shall be dismissed pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure and this Case Management Order[1] and are subject to the provisions of paragraph VI.B., below:

1. The plaintiff has been diagnosed with a malignancy attributed, at least in part, to the plaintiff's alleged exposure to asbestos; or
2. The plaintiff has been diagnosed with the disease asbestosis, his or her chest x-rays have been given an ILO grade of at least 1/1 by a currently certified B-reader, and he or she has been given an impairment rating of Class 4 under AMA Guidelines; or
3. The exposed plaintiff has died and has been diagnosed with an asbestos-related disease.

B. Cases dismissed pursuant to paragraph VI.A., above, are subject to the following:

1. The dismissals are without prejudice.
2. The Statute of Limitations shall remain tolled as of the date it was tolled by the original action and the defendants retain their affirmative defense based on the running of the Statute of Limitations, if any, as it existed when the case was originally brought.
3. To provide relief to the Clerk of Court, the parties shall take possession of all file materials in the possession of the Clerk of Court relating to cases dismissed pursuant to the provisions of this Case Management Order and shall retain the pertinent portions of such material during the time the case

[1] See attachment 1 for an example of an Order of Dismissal.

is dismissed. The material may be retained in electronic or other similar format.

4. The cases may be refiled so long as all parties to the action consent or upon Order of the Court made pursuant to a Motion to Restore, filed and served on all parties, in which the plaintiff demonstrates to the Court's satisfaction that he or she fits into one of the medical categories set forth in paragraph VI.A.1. or 2., above. Defendants shall have two weeks to respond to Motions to Restore.

5. Refiled cases shall be assigned a new civil action number.

6. The refiling, whether by consent of the parties or upon the Court's Order, shall be accomplished by either complying with either subparagraph a. or b., below:

   a. The refiling may be accomplished by the plaintiff filing and serving on all defendants a Notice of Refiling[2] adopting the original Complaint and informing the defendants of the caption of the case, including the civil action number, the allegedly exposed plaintiff's Social Security Number, the date of the refiling, the alleged asbestos-related disease, the plaintiff's asbestos work history and occupation, a statement that the parties consented to the refiling pursuant to this Case Management Order or a copy of the Court's Order allowing the refiling and the following statement: "Time is of the essence and your failure to act within

[2] See attachment 2 for an example of a Notice of Refiling to be used if the refiling is accomplished pursuant to paragraph VI.B.6.a.

30 days of service hereof could result in a default judgment being entered against you and/or loss of certain other rights more fully set forth in the Case management Order.". The plaintiff shall also include in the service to each defendant a copy of the original Summons and Complaint. The service of the Notice of Refiling and attachments shall be accomplished pursuant to Rule 4 of the South Carolina Rules of Civil Procedure.

b. The refiling may be accomplished by the plaintiff filing and serving a new Summons and Complaint in accordance with the South Caroline Rules of Civil Procedure. However, along with the new Summons and Complaint, the plaintiff must serve a Notice of Refiling[3] substantially similar to the one described in paragraph VI.B.6.a. except it should not contain a statement adopting the original Complaint and should not contain the "Time is of the essence" statement.

7. If the plaintiff refiles his or her case pursuant to the procedures set forth in paragraph VI.B.6.a., the defendants, upon being properly served with the items enumerated in said paragraph, may either file and serve an Answer, or other appropriate pleadings, or adopt their original answer by filing and serving a Notice of Adoption of Answer[4] with the caption of the case along with a statement that the defendant adopts its original answer and all affirmative defenses contained therein or adding new or different

[3] See attachment 3 for an example of a Notice of Refiling to be used if the refiling is accomplished pursuant to paragraph VI.B.6.b.

affirmative defenses, if any. So long as a defendant filed and served an Answer to the original Complaint, the defendant's failure to meet the 30 day time period set forth in Rule 12(a) of the South Carolina Rules of Civil Procedure in response to a Notice of Refiling served pursuant to paragraph VI.B.6.a. shall not be considered a default under Rule 55 of the South Carolina Rules of Civil Procedure but does constitute a waiver of the defendant's right to file an Answer different from the one filed in response to the original Complaint or to adopt new or different affirmative defenses in its Notice of Adoption of Answer.

8. If the plaintiff refiles his or her case pursuant to the procedures set forth in paragraph VI.B.6.b., then the defendants must file and serve their Answers, or other appropriate pleadings, in accordance with the South Carolina Rules of Civil Procedure.

VII. New Filings. New filings shall be governed by the following procedures.

A. A Summons and Complaint shall be filed pursuant to the South Carolina Rules of Civil Procedure.

B. If, at the time of filing of the Summons and Complaint, the allegedly asbestos-exposed plaintiff's medical condition does not meet one or more of the medical criteria set forth in paragraph VI.A.1. or 2., above, the case shall be immediately dismissed pursuant and subject to paragraph VII.E., below. If the allegedly asbestos-exposed plaintiff's medical condition does meet one or more of the medical criteria set forth in paragraph VI.A.1. or 2., above, then the case shall be

[4] See attachment 4 for an example of a Notice of Adoption of Answer.

prepared and set for trial or other disposition pursuant to normal procedures established in asbestos cases.

C. If the plaintiff determines that his or her medical condition does not meet the medical criteria set forth in paragraph VI.A.1. or 2., above, then he or she shall prepare an Order of Dismissal and submit it to the Court. Once the Order is signed by the Court, the plaintiff shall serve the Summons and Complaint along with the Order of Dismissal by the procedure outlined in Rule 4(d)(8) of the South Carolina Rules of Civil Procedure, *Service by Certified Mail*, which process may not be refused by the defendants. The Statute of Limitations shall be tolled as of the date the Summons and Complaint are filed. The defendants need not answer the Complaint until such time as the case may be refiled and then pursuant to provisions of paragraph VII.E., below.

D. If the plaintiff believes that he or she meets the medical criteria set forth in paragraph VI.A.1. or 2., above, then the Summons and Complaint, along with all medical documentation which the plaintiff believes establishes that his or her medical condition meets the requirements, must be served on all parties pursuant to Rule 4 of the South Carolina Rules of Civil Procedure. For those cases in which the plaintiffs invoke the provision of this paragraph, the Statute of Limitations shall be tolled pursuant to the normal rules of construction and the defendants must file and serve their Answers, or other appropriate pleadings, in accordance with the applicable provisions of the South Carolina Rules of Civil Procedure. At any time after being served with the Summons and Complaint and medical documentation required by this paragraph, any defendant may challenge

whether the plaintiff's medical condition meets the requirements of paragraph VI.A.1. or 2., by filing and serving a Motion to Dismiss pursuant to this Case Management Order and setting forth the reasons why the plaintiff's medical condition does not meet the applicable medical criteria. The plaintiff shall have two weeks to respond to the Motion. Should the Court grant the defendant's Motion, the case shall be dismissed pursuant to and the case shall be governed by the provisions of paragraphs VII.E., below. Should the Court deny the Motion to Dismiss, the case shall be prepared and set for trial or other disposition pursuant to normal procedures established in asbestos cases.

E. Cases dismissed pursuant to the provisions of paragraphs VII.B., C. or D. shall be dismissed pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure and this Case management Order[5] and shall be governed by the same procedures for dismissed pending cases as set forth in paragraph VI.B. except that if the plaintiff accomplishes refiling in accordance with paragraph VI.B.6.a. the defendants must file and serve an Answer, or other appropriate pleading, within the time set forth by the South Carolina Rules of Civil Procedure if they had not previously done so.

VIII. Amendment of Medical Criteria Set Forth in Case Management Order. Anytime after one year from the date of this Case Management Order, any party may file a Motion to amend the medical criteria set forth in paragraph VI.A.

IX. Signatures of Parties or Their Attorneys. This Case Management Order may be executed by the parties or their attorneys in any number of counterparts and bty different signatories hereto in separate counterparts, each of which, when so executed, shall be

deemed to be an original and all of which taken together shall constitute one and the same Order.

IT IS SO ORDERED.

_____
Larry R. Patterson
Judge, Thirteenth Judicial Circuit

_____, 2002
Greenville, South Carolina

[5] See attachment 1 for an example of an Order of Dismissal.

STATE OF SOUTH CAROLIN	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CIVIL ACTION NO. 02-CP-12-345

John Doe and Jane Doe, Wife,

Plaintiffs,

vs.

Asbestos Defendant, Inc., et al.,

Defendants.

Order of Dismissal

Pursuant to Rule 41(a)(2), South Carolina Rules of Civil Procedure, and the Wallace & Graham Asbestos Case Management Order dated _____, this case is dismissed, without prejudice, and subject to the terms and conditions set forth in the Court's aforementioned Case Management Order, which Case Management Order is specifically incorporated herein by reference.

It is so ordered.

_____
Larry R. Patterson
Judge, Thirteenth Judicial Circuit

_____, 2002

Attachment 1

STATE OF SOUTH CAROLIN) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) CIVIL ACTION NO. 02-CP-12-345

John Doe and Jane Doe, Wife,)
)
Plaintiffs,)
)
vs.)
)
Asbestos Defendant, Inc., et al.,)
)
Defendants.)
)

Notice of Refiling

Notice is hereby given that on this date the above-captioned case has been refiled pursuant to the Wallace & Graham Asbestos Case Management Order dated _____. The plaintiff hereby adopts the original Complaint for purposes of this action. A copy of the original Summons and Complaint is attached. You should consult the Case Management Order referenced above concerning your responsibilities upon proper service of this Notice and attachments on you. **Time is of the essence and your failure to act within 30 days of service hereof could result in a default judgment being entered against you and/or loss of certain other rights more fully set forth in the Case Management Order.** The following information is provided:

Plaintiff's Social Security Number: 123-45-6789.

Asbestos-Related Disease Claimed: Lung Cancer.

Asbestos Work History:

Dates	Employer	Location	Occupation
1961-65	Duke Power	Oconee Nuclear Power Station	Welder Apprentice
1965-75	Duke Power	Belews Creek	Welder
1975-85	Duke Power	Oconee Nuclear	Welder Foreman

		Power Station	
1985-90	Duke Power	Marshall Steam Station	Welder Foreman

The refiling was with the consent of all parties and pursuant to the above-referenced Case Management Order.

_____
John P. Lawyer
[Include Address and Telephone Number]
Lawyers for Plaintiffs

_____, 2002

Attachment 2

STATE OF SOUTH CAROLIN) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) CIVIL ACTION NO. 02-CP-12-345

John Doe and Jane Doe, Wife,)
)
Plaintiffs,)
)
vs.)
)
Asbestos Defendant, Inc., et al.,)
)
Defendants.)
)

Notice of Refiling

Notice is hereby given that on this date the above-captioned case has been refiled pursuant to the Wallace & Graham Asbestos Case Management Order dated _____. The new Summons and Complaint is served herewith and you must Answer or otherwise respond as set forth in the Summons and in accordance with the South Carolina Rules of Civil Procedure. The following information is provided:

Plaintiff's Social Security Number: 123-45-6789.

Asbestos-Related Disease Claimed: Lung Cancer.

Asbestos Work History:

Dates	Employer	Location	Occupation
1961-65	Duke Power	Oconee Nuclear Power Station	Welder Apprentice
1965-75	Duke Power	Belews Creek	Welder
1975-85	Duke Power	Oconee Nuclear Power Station	Welder Foreman
1985-90	Duke Power	Marshall Steam Station	Welder Foreman

The refiling was with the consent of all parties and pursuant to the above-referenced Case Management Order.

_____

John P. Lawyer
[Include Address and Telephone Number]
Lawyers for Plaintiffs

Attachment 3

STATE OF SOUTH CAROLIN	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CIVIL ACTION NO. 02-CP-12-345

John Doe and Jane Doe, Wife,

Plaintiffs,

vs.

Asbestos Defendant, Inc., et al.,

Defendants.

Notice of Adoption of Answer

Notice is hereby given that the defendant, Asbestos Defendant, Inc., hereby adopts its Answer dated _____ to the original Complaint as its Answer to the above-captioned refiled case, including all affirmative defenses contained therein, except that the defendant adopts the following as an additional affirmative defense:

[Here set forth the additional affirmative defense not contained in the original Answer].

_____
Samuel D. Attorney
[Include Address and Telephone Number]
Lawyers for Asbestos Defendant, Inc.

_____, 2002

Attachment 4

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

IN RE: ALL ASBESTOS EXPOSURE CASES FILED IN MULTNOMAH COUNTY	))))))	Case number: 0003-0000B **First Amended Draft General Order Re: Asymptomatic, Untreated, or Inchoate Disease Cases**

FINDINGS

Based upon the Court's own experience with asbestos exposure litigation and the history of this litigation in this Court and nationally, the Court makes the Findings set forth below. Before implementing this General Order, beginning on approximately April 1, 2002 the Court began to discuss the ideas set forth in this General Order at the Court's regular monthly status conferences with counsel for the plaintiffs and the defendants who regularly appear in this litigation. In addition, the Court made available drafts of this General Order on the Court's web site, and solicited input from counsel on the drafts.

1. Asbestos exposure cases first began to be filed in this Fourth Judicial District in approximately 1992. Throughout the years since then, the number of cases filed per year has increased, and the number of cases tried has also increased.

2. From approximately 1992 to September, 1999 two cases were tried to verdict in this Judicial District, and approximately two or three additional cases started trial, but were settled before verdict.

3. From September, 1999 to date three cases have been tried to verdict, and an additional nine cases started trial, but were settled before verdict.

4. When these cases are tried, the trials are generally quite lengthy. The three cases tried to verdict since September, 1999 lasted 55 days, 24 days, and 22 days. In addition, one of the cases that settled before verdict settled on the 22nd day of trial.

5. In September, 1999 this Court had pending approximately 50 of these cases. At present this Court has pending approximately 99 of these cases. Since September of 1999 this Court has continued to dispose of the cases at approximately the same rate as before. However, the number of cases filed per year has approximately doubled.

6. The growth in filings of these cases is not unique to this Court. Nationally, filings have grown at least at a rate as great as in this Court.

7. An estimated 200,000 asbestos cases are pending in state and federal courts in the United States. Approximately 150,000 new cases were filed nationally in the past two years.

8. This Court is now setting these cases for trial 24 months or later after they are filed. These cases are designated by the Presiding Judge as "complex cases," as that phrase is used in the Uniform Trial Court Rules. The Supreme Court's guidelines for the timely disposition of complex cases directs that complex cases be disposed of by the trial courts within 24 months of filing. This Court is at present unable to comply with those guidelines because of the number of these cases that are pending. This Court is now setting these cases for trial in groups of approximately 12 cases in each group, seriatim (on a "to follow basis") with a group of cases set every third month. It is this Court's experience that if these cases settle, they usually settle in the last few days before trial, or as trial is about to start. Frequently this Court starts a trial, only to have it settle, and the

Court promptly moves on to the next case set, almost immediately.

9. Multnomah County has approximately 20% of the population of Oregon, and the Legislative Assembly as allocated to this county approximately 20% of the Circuit Court positions that exist state-wide. However, as far as the Court has been able to determine, all of the asbestos exposure cases filed in the state courts of Oregon are filed in this county. In addition, in the experience of this Court, attorneys file complex civil litigation in this Judicial District at a rate greatly in excess of what the population of this county might otherwise suggest is appropriate.

10. The budget of the Oregon Judicial Department has been substantially impaired of late, due to the financial crisis facing the government of the State of Oregon. The ability of the Court to fulfill all of its responsibilities has been adversely affected by this financial crisis. The Fourth Judicial District (this Court) has suffered budget cuts that have required this Court to lay off employees.

11. The Court must allocate its limited resources to those matters that have Constitutional and statutory priority. Examples of cases that have docket priority ahead of these asbestos exposure cases are as follows: aggravated (capital) murder cases; termination of parental rights cases; major person-to-person felony criminal cases, for which the People have required the Court to impose mandatory minimum prison sentences pursuant to Ballot Measure 11; other criminal cases; and cases in which the custody of children is at issue.

12. A number of the cases filed in this Court, and nationwide, involve plaintiffs who neither

exhibit any symptoms of any asbestos-related condition, have never been treated for any asbestos-related condition, have incurred no medical expenses as a result of an asbestos-related condition, and have not been diagnosed by a treating physician as having an asbestos-related disease ("Asymptomatic, Untreated, or Inchoate Disease Cases"). The number of asymptomatic, untreated, or inchoate disease cases pending in this Court is unknown, as the Court generally does not learn of the specific medical conditions of the plaintiffs unless the case is the subject of a summary judgment motion or is tried.

13. Nationwide and in this state, mass screenings have taken place, whereby individuals who believe they have been exposed to asbestos are invited to a location for a chest x-ray or a CT scan. The time and location of these mass screenings are advertised in the newspaper, and the screenings are sponsored by attorneys and/or labor unions.

14. Nationally, Courts are finding a need to manage these cases in a unique manner. General case management orders similar in effect to this General Order have been implemented in at least the following jurisdictions: Middlesex Superior Court, Cambridge, Massachusetts; Cook County Circuit Court, Chicago, Illinois; Circuit Court for Baltimore City, Maryland; and the Judicial Panel on Multi-District Litigation, United States District Court, Eastern District of Pennsylvania (Philadelphia).

NOW THEREFORE, based upon the foregoing Findings, and upon the Court's inherent power to control its own docket and to allocate its resources to those cases having priority, the Court implements this General Order Re: Asymptomatic, Untreated, or Inchoate Disease Cases, and hereby Orders as follows:

ORDER

1. **Scope:** This General Order Re: Asymptomatic, Untreated, or Inchoate Disease Cases is effective on **, 2002, and applies to all civil actions pending on that date, and to be filed in the future in this Court arising from alleged exposure to asbestos containing products.

2. **Purpose:** The purpose of this Order is to permit the Court, and counsel to allocate their limited resources to cases in which plaintiffs allege injuries that are causing impairment, so as to facilitate the Court in better serving those plaintiffs who have cases that need prompt resolution. This is intended to free the Court of the need to be involved in cases that may be better handled at a later time. The Court recognizes that the statute of limitations may legitimately cause plaintiffs to perceive that they should or must file their suits if they have received information that they may have an asbestos-related condition. This General Order will permit the Court to abate those cases, while preserving for the litigants their positions on any statute of limitations issues.

3. **Definitions:** For the purposes of this General Order, the following definitions apply:

   a. A "certified B-reader" is an individual who has successfully completed the NIOSH-sponsored x-ray interpretation course and is at the time the individual reports an opinion as noted herein, continues to be certified.

   b. "ILO grade" refers to the radiological ratings of the International Labor Office set forth in the "Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconisosis," (1980).

   c. "Chest x-rays" means chest films taken in four views (PA, Lateral, Left and Right

Oblique) that are graded quality 1 for reading according to the ILO criteria.

d. "Pulmonary Function Testing" refers to spirometry, lung volume testing, and diffusing capacity testing which conform to quality creteria established by the American Thoracic Society (ATS) and which are performed on equipment which meets ATS standards for technical quality and calibration. An individual tested must be tested with and without inhaled bronchodilators, with best values taken. Predicted values for spirometry and lung volumes shall be those published by Morris, *Clinical Pulmonary Function Testing,* 2nd Edition, Intermountain Thoracic Society (1984). Predicted values for diffusing capacity shall be those published by Miller, et al., 127 *American Review of Respiratory Disease* 270-77 (1983) and shall take appropriate account of smoking history and exposure to silica.

4. **Criteria:** Cases subject to abatement pursuant to this General Order are cases that fail to meet any of the alternative criteria set forth below in this section. Notwithstanding the criteria below, cases in which the plaintiff alleges that person exposed to asbestos has died as a result of that exposure (wrongful death cases) are not subject to abatement pursuant to this General Order, absent special circumstances.

a. "Criteria A:" Chest x-rays which, in the opinion of a certified B-reader, show small irregular opacities of ILO grade 1/0, *and* pulmonary function testing that, in the opinion of a pulmonologist or internist, shows either of the following:

1.) FVC less than or equal to 80% of predicted with FEV-1/FVC greater than or equal to 75% (actual value), *or*

2.) TLC below 80%;

b. "Criteria B:" Chest x-rays which, in the opinion of a certified B-reader, show small irregular opacities of the ILO grade 1/1 or greater, and pulmonary function testing that, in the opinion of a pulmonologist or internist, shows either of the following:

1.) FVC less than or equal to 80% of predicted with FEV-1/FVC greater than or equal to 70% (actual value), *or*

2.) TLC below 80%;

c. "Criteria C:" Chest x-rays which, in the opinion of a certified B-reader, to a reasonable degree of medical probability, show asbestos-related bilateral diffuse pleural thickening graded C2 or greater on the ILO scale *and* which includes the blunting of at least one costophrenic angle *and* pulmonary function testing that, in the opinion of a pulmonologist or internist, shows either of the following:

1.) FVC less than or equal to 75% of predicted with FEV-1/FVC greater than or equal to 70% (actual value), *or*

2.) TLC less than 75% of predicted value with FEV/FVC greater than 70% (actual value);

d. "Criteria D:" Representative lung tissue is available for which a report by a pathologist shows that to a reasonable degree of medical certainty more than one representative section of lung tissue that is otherwise uninvolved with any other process (e.g. cancer or emphysema) demonstrates a pattern of peribronchiolar or

parenchmal scarring in the presence of characteristic asbestos bodies, and for which there is no more likely explanation for the presence of fibrosis.

e. "Criteria E:" A diagnosis of cancer caused by asbestos exposure, made to a reasonable degree of medical certainty by an pulmonologist, internist, oncologist, or pathologist.

f. "Criteria F:" If a case does not meet any one of the above alternative criteria, the case nevertheless may be abated, if the Court determines that in the interest of justice the case should be subject to abatement pursuant to this General Order.

5. **Procedure:**

a. Motion to Abate:

1. On Plaintiff's Motion: For cases in which plaintiff thinks abatement is appropriate pursuant to the above criteria, plaintiff may file a Motion to Abate pursuant to this General Order. Defendants or their counsel (if they have appeared by counsel) shall be served with a copy of the motion as required by law. The failure of any defendant to object to the motion to abate within 15 days of service of the motion will constitute consent to abatement.

2. On Defendant's Motion: For cases in which any defendant thinks abatement is appropriate pursuant to the above criteria, defendant may file a Motion to Abate pursuant to this General Order. A defendant filing a Motion to Abate shall serve plaintiff and all other defendants or their

counsel (if they have appeared by counsel) with a copy of the Motion to Abate as required by law. The failure of plaintiff or any defendant to object to the Motion to Abate within 15 days of service of the motion will constitute consent to abatement.

3. On the Court's Motion: The Court may require a review of any or all pending cases to screen for the criteria in this General Order. The Court may require the parties to submit documentary materials as to whether the case meets the criteria set forth in this General Order

4. Burden: Except for proceedings on the Court's own motion, the party filing a Motion to Abate pursuant to this General Order bears the burden of establishing entitlement to an Order of Abatement.

5. Documents in Support of Motion to Abate: Any party may present documents in support of or in opposition to a Motion to Abate. Such documents shall be filed and served with the motion or objection. Documents in support of or in opposition to a Motion to Abate need not meet the standards and formalities required for Motions for Summary Judgment pursuant to ORCP 47.

b. Hearing:

1. Hearing date: Hearing on the motion shall be set in the ordinary course. The party filing a Motion to Abate pursuant to this General Order shall include a motion pracepie with the copy of the motion delivered to the

assigned Judge and with the copy of the motion served on the other parties.

2. At a contested hearing on a Motion to Abate pursuant to this General Order, the issue for the Court to decide shall be whether or not the case meets the criteria for abatement set forth in this General Order. No testimony shall be taken at the hearing.

c. Order of Abatement: Any Order of Abatement pursuant to this General Order shall include the following: "This case is hereby abated for a period of four (4) years from the date of this Order. At any time before the expiration of the period of abatement, any party may file a motion to remove the case from abatement status and return the case to the regular docket, to be set for trial. Any such motion shall be supported by documents showing that the case no longer meets the criteria for abatement set forth in this General Order. If no party files a motion to remove the case from abatement status and return the case to the regular docket before the expiration of the abatement period, the case shall be dismissed by the Court for lack of prosecution."

d. Effect of Order: No Order abating a case or denying a Motion to Abate a case pursuant to this General Order shall have any effect except to grant or deny the

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motion. Specifically, the doctrine of issue preclusion shall not be claimed by any party as a result of a ruling on a Motion to Abate.

DATED this _____ day of _____, 2002

Unsigned Draft

John A. Wittmayer, Judge

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE: SPECIAL DOCKET 73958) **JUDGE HARRY A.. HANNA**
CUYAHOGA COUNTY ASBESTOS) **JUDGE LEO M. SPELLACY**
CASES

ADDENDUM TO AMENDED CASE MANAGEMENT ORDER

The Court has spent considerable time in reflection upon the concerns and suggestions offered by counsel since the last proposed case management order was posted on CLAD. We have incorporated most of the suggestions offered and we have amended or deleted some previous provisions to meet the concerns expressed by you. Today we are posting the revised order; this is a temporary change to the current order and it will be in place for at least five months.

During that period of time, each plaintiffs firm will have experienced the start-up process for new groups at least one time. The Court will conduct a hearing on Friday, June 7, 2002 at 10:30 A.M., at which time all counsel will be invited to report their experiences and the Court will decide whether to continue this order, to revert to the old method, or to make further changes.

The most severe criticism of the proposed order came from members of the plaintiffs bar who feared that we were creating an involuntary registry for unimpaired plaintiffs. That is not our intent, although the Eighth District s opinion in In Re Cuyahoga County Asbestos Cases, 127 Ohio App 3d 358,366 (1998) quotes with approval the case permitting such a registry in Cook County, Illinois as a ...tool whereby the court may prioritize the litigation of cases already filed... Thus, by implication, our reviewing court has recognized the inherent power of the Court to create a registry if we desired.

That, however, is not our present intention. We wish to focus the next ten or twelve groups on plaintiffs whose claims seek redress for functional impairment due to asbestos exposure. In June, 2002, we will review this order in light of your experience and we will listen to your suggestions, criticisms or approval. This order is a temporary approach to managing the docket.

Filed on CLAD January 4, 2002

_____
Judge Leo M. Spellacy

_____
Judge Harry A. Hanna

STATE OF OHIO) **IN THE COURT OF COMMON PLEAS**

A. PREAMBLE

It is the goal of this Court to secure the just, efficient and economical resolution of each asbestos personal injury case now pending or hereafter filed in the Court of Common Pleas for Cuyahoga County, Ohio, and to facilitate discovery, eliminate duplication of effort, prevent unnecessary paperwork and promote judicial economy in the management of such cases.

B. GENERAL PROVISIONS

1. Cases to Which This Order Applies

This General Personal Injury Case Management Order No. 1 (as amended, January 4, 2002) shall govern pre-trial discovery activities in all asbestos personal injury cases currently pending or to be filed in this Court from the date of this Order until further order of this Court.

2. The Docket

The Court has decided to use the Complex Litigation Automated Docket (CLAD) system provided by LEXIS-NEXIS in order to increase the efficiency of the Court. (Standing Order 10).

3. The Complaint

In order to facilitate a manageable docketing system and to insure the proper payment of filing fees, multiple plaintiff asbestos complaints shall only be accepted by the clerk if the complaint complies with the following guidelines:

a. The caption of the complaint must indicate that it is a Master Consolidated Asbestos Complaint.

b. The complaint must have a space for the clerk to indicate a <u>separate</u> case number and judge next to <u>each</u> primary plaintiff (not including spouse with consortium claim).

c. A separate regular filing fee shall be paid at the time of filing for each primary plaintiff.

d. A copy of the complaint shall be provided to the clerk for each defendant and each primary plaintiff.

e. Only one summons will be issued to each defendant listed on the Master Consolidated Asbestos Complaint and will apply to all case numbers listed on that complaint.

4. Answer

Defendants and Third-Party Defendants are no longer to file answers to Plaintiff s Complaints or Third-Party Complaints in asbestos litigation in Cuyahoga County, Ohio. Rather, the following procedure will apply:

a. Within 28 days after service of the Complaint, the Defendant or Third-Party Defendant shall enter an appearance which shall constitute:

i. a denial of all averments of fact in the Complaint or Third-Party Complaint, and

ii. an allegation of all affirmative defenses.

b. If any Defendant or Third-Party Defendant wishes to assert a claim for indemnification and contribution against any other party, this may also be accomplished by making a statement in the Notice of Appearance which specifically identifies the party or parties against whom the claim is asserted. Failure to assert such a claim in the Notice of Appearance does not in any way prohibit or limit a party s right to do so at a later time pursuant to the laws of the State of Ohio and the Ohio Rules of Civil Procedure.

c. In the event that a claim for indemnification and contribution is

asserted, the party against whom the claim is asserted shall not file a responsive pleading. All averments of fact shall be deemed to be denied and all affirmative defenses to the claims for indemnification and contribution shall be deemed to have been raised.

d. Except for the filing of motions pursuant to Rule 12 and complaints to join a Third-Party Defendant, there shall be no further pleading after the complaint.

e. The entry of appearance shall include Counsel s E-mail address. (Amended Standing Order No. 7)

f. A cover sheet containing the names of each individual plaintiff and the corresponding case number in the Master Complaint must accompany the notice of appearance. Only one Notice of Appearance is required for each Master Complaint, but it must have the cover sheet which lists plaintiffs names and case numbers.

5. Amended Complaints

Any defendant who is named as party in an original complaint need not serve or file a responsive pleading to any amended complaint. If an amended complaint raises additional claims or sets forth new, substantive allegations, a defendant may serve and file a response within the time prescribed by the Ohio Rules of Civil Procedure. If a defendant chooses not to respond to an amended complaint, its previously filed appearance shall be deemed incorporated as the answer to the amended complaint, and any new matters shall be deemed denied. Any answers to new matters contained in an amended complaint may be limited and may incorporate by reference the previous answers of the defendant.

6. Cross-Claims and Third-Party Claims

a. Cross-claims and third-party claims for contribution and/or indemnity must be made by service of the pleading upon the party against whom the claim is asserted. The mere service of a letter advising counsel of the filing such cross-claims or third-party claims shall not be sufficient.

b. When a cross-claim for contribution and/or indemnity is served upon a defendant or third-party defendant, said defendant or third-party defendant may, within twenty-eight (28) days from service upon it, respond thereto, or it may refrain from filing a responsive pleading. A failure to respond shall be deemed a denial by that defendant of any and all liability for contribution and/or indemnity.

c. Third-party defendants shall respond to all third-party complaints in the manner described in Section 4 above.

7. Conditions for Default Judgment

Plaintiffs counsel, prior to seeking a default judgment against a defendant represented by counsel in any asbestos case, must first notify that counsel and the defendant, in writing, of his or her intentions and reasons for seeking default judgment. The defendant shall have twenty-one (21) days from the date of receipt of the plaintiff s counsel s letter to answer or otherwise respond to the complaint.

8. Leaves to Plead

In order to eliminate the cost and administrative burden involved in docketing and tracking leaves to plead, the Court hereby suspends the requirement for any counsel to file a request, stipulation, or motion for leave to plead, provided that the response is not more than thirty (30) days late, and provided further that the opponent has not previously requested a default judgment as outlined in paragraph 4 above.

9. Service of Documents

Except as otherwise herein provided, a party serving a conventional filing need serve that conventional filing document only upon the party to whom that document is directed. All other parties shall be informed through CLAD that the document was filed and served, and shall be entitled to receive a copy of the document upon request to the filing counsel.

10. Dismissals of Cross-Claims and Third-Party Complaints

Upon the dismissal by a plaintiff of a defendant who has either asserted a cross-claim or filed a third-party complaint for contribution and/or indemnity, such defendant shall file a written Notice of Intention to Pursue Its Cross-Claims or Third-Party claims within thirty (30) days from the date of dismissal. Such Notice shall identify those defendant(s) against whom its cross-claims or third-party claims are asserted. Failure to file such Notice shall be deemed an automatic dismissal, without prejudice, of any and all cross-claims and third-party claims asserted by that defendant against all other defendants. The dismissal shall be effective on the thirtieth (30th) day following the dismissal of the defendant by the plaintiff.

11. Joinder in Motions

Each defendant shall be deemed to have joined in any other defendant s motion where the granting of the motion would benefit it or all defendants generally. Duplicative motions or motions solely adopting the reasoning of the filing defendant s motion shall not be filed. A defendant may, but is not required to, file a supplemental motion setting forth arguments directly related to that defendant s position. Should the defendant originally filing such motion be dismissed from the case(s) in which such motion was filed prior to ruling, the

motion shall remain viable as to all remaining defendants in the case.

12. Multiple Counsel

Where a plaintiff or group of plaintiffs and/or a defendant or group of defendants have by notice of appearance or by the filing of a responsive pleading listed multiple counsel, notice to one attorney for a party shall constitute notice to that party. Counsel attending any court appearances shall have full authority to speak for all other counsel a party may have.

13. Notice of Appearance/Pro Hac Vice

Upon the granting of a Motion to Appear Pro Hac Vice, counsel shall file with the Clerk of Courts, a Notice of Appearance setting forth the attorney s name, address, phone number and party represented.

14. Liaison Counsel

Within fourteen (14) days of the filing of this Order, defendants counsel shall designate one Liaison Counsel with respect to each plaintiffs law firm, and each plaintiffs law firm shall designate one Liaison Counsel with whom the Court may communicate orally for the purpose of the prompt dissemination of information to the parties regarding administrative and scheduling matters only. Liaison counsel shall establish a system for the prompt dissemination of information to all other counsel. The Court shall serve all orders and other written communications upon all counsel of record for all parties. Defense liaison counsel are not authorized to, nor shall they, accept service of pleadings on behalf of parties other than their own respective clients, nor shall liaison counsel be required to serve any pleadings or other papers on behalf of plaintiffs or other parties. Defense liaison counsel are not authorized to speak for or on behalf of other parties without receiving express written authorization to do so.

15. Attendance at Hearings

No party shall waive any rights by failing to attend a hearing or a motion unless the attendance of the party has been ordered by the Court. The designation of an attorney to act as spokesperson for a group of plaintiffs or defendants shall not preclude other counsel from participating to the extent necessary to represent the individual interests of their clients, so long as such participation does not involve duplication or unnecessary delay.

16. Cooperation Among counsel Shall Not Constitute a Waiver of Privileges

No party waives the attorney-client privilege or work-product privilege by virtue of actions taken in cooperation among parties or their counsel pursuant to this or any other Order of this Court in these cases, nor by action taken by the party in pursuit of the just and efficient resolution of these cases. Because cooperation among defendants will expedite the handling of this litigation and aid judicial economy, the defendants conduct in working jointly for the purpose of coordinating discovery or trial efforts, in the sharing of counsel, and for other purposes designed to minimize expenses shall not constitute evidence of conspiracy, concert of action, or any other wrongful conduct, and shall not be admissible as evidence for any purpose.

C. CASE MANAGEMENT SCHEDULE

17. Case Management Schedule

Discovery and trial preparation for each plaintiff shall proceed pursuant to the Case Management Schedule established for the group of plaintiffs in which such plaintiff s case is grouped. A sample Case Management Schedule is attached hereto as Exhibit A.

D. WRITTEN DISCOVERY

18. Defendants Master Consolidated Discovery Requests (CDRs) to Plaintiffs

When a case is grouped, plaintiff shall within 7 days file on CLAD and shall conventionally serve each defendant with that plaintiff s answers and responses to Defendants Master Consolidated Discovery Requests (CDRs). Attached hereto and marked Exhibits B and C are sample Defendants Master Consolidated Discovery Requests for living injured parties and for deceased injured parties, respectively. The Court has been advised that certain counsel for plaintiffs have heretofore provided CDR responses in formats similar to, but not identical to, Exhibits B and C. Such counsel may continue to provide CDR responses in formats previously used provided that the information requested in the Master CDRs is substantially provided.

19. Records of diagnosis

When a case is grouped, plaintiff within 7 days shall conventionally serve on each defendant objective medical substantiation that plaintiff suffers from mesothelioma, asbestos related cancer or an asbestos related functional impairment as well as all medical records in plaintiff s possession.

20. Records Authorizations and Tax Returns

When a case is grouped, each plaintiff shall within 7 days conventionally serve on the applicable Liaison Counsel with copies to each defendant:

a. Executed forms authorizing the release of the allegedly exposed plaintiff s Social Security Statement of Earnings showing the names of all employers and the quarters of years worked for each employer;

b. Executed forms authorizing the release of all medical records,

all original x-ray films, CT scans, MRI images, and pathology specimens, and all reports for each of the allegedly exposed plaintiff s medical service providers;

c. Executed forms authorizing the release of military records, veterans affairs records, and employment records for each employer of the allegedly exposed plaintiff;

d. Executed forms authorizing the release of any workers compensation and/or disability claim records filed by or on behalf of the allegedly exposed plaintiff with any federal, state or private organization; and

e. Copies of any or all of plaintiffs tax returns for the preceding five (5) years if in the possession of Plaintiff; otherwise, authorizations for the release of such tax returns.

To the extent these authorizations become outdated or obsolete, defendants may request, and plaintiffs shall promptly provide, updated authorizations only if there has been no delay in Defendants attempts to obtain medical records with the first set of interrogatories..

21. Identification of Product Identification Witnesses and Product Identification

When a case is grouped or set for trial, each plaintiff shall within 7 days file on CLAD the name and address of witnesses upon whose testimony such plaintiff intends to rely to establish product identification. Unless good cause be shown by motion to the Court, such witnesses shall not number more than six (6). No witness identified after this date shall be permitted to testify at trial or otherwise absent a showing of good cause.

Counsel for such plaintiff shall identify each other plaintiff on whose behalf such product identification witness is expected to testify.

Contemporaneously with that filing, each plaintiff shall provide the identity of the products and manufacturers about which the plaintiff and each product identification witness will testify (Product List/Work History).

The Plaintiff s Product List/Work History shall have the same force and effect as the plaintiffs sworn, signed answers to interrogatories, with the provision that it may be used for impeachment purposes against plaintiff. Each Product List/Work History shall include:

a. The specific product name and manufacturers of products present at each job site. Should a defendant not be implicated in any of the Product List/Work Histories filed in a particular case, then plaintiffs shall set forth the specific information upon which plaintiff bases the naming of that particular defendant, including but not limited to the identity of written documents supporting product identification;

b. Name of employers;

c. Specific location of job site where plaintiff or product identification witness worked and where said products were seen or observed, including the name and address of the job site;

d. The dates the plaintiff or product identification witness worked at said job site; and,

e. The identity of any written documents supporting product identification.

22. X-Rays, Tissue Specimens, Examination of Same

When a case is grouped, Plaintiff s counsel shall within 7 days notify each

defense counsel of any original radiology or pathology materials, including, but not limited to, slides, tissue blocks or wet tissue currently in plaintiff s counsel s possession, or which has been requested by the plaintiff s counsel. The notice shall include the name and address of the provider of such x-rays or pathology.

23. Discovery to Defendants

Within thirty (30) days of receipt of the information described in paragraphs 18-22, each defendant shall admit or deny that its product was at the plaintiff s worksite. If defendant denies the presence of its product, then plaintiffs counsel may but are not required to serve upon defendants counsel master discovery requests, including interrogatories and/or requests for production of documents and/or requests for admissions; upon defendants responses thereto shall be governed by the dates established under the applicable Case Management Schedule.

24. Additional Written Discovery

Additional interrogatories and requests for production of documents may be served by any party only upon leave of court. Unless otherwise agreed to in writing among or between the parties, service of and responses to request for admissions shall be governed by the applicable Ohio Rules of Civil Procedure. The parties are strongly cautioned against the filing of repetitive discovery.

F. DEPOSITIONS

25. Defense Lead Counsel

Defendants shall select one Lead Counsel for each group of cases to coordinate with counsel for plaintiffs the scheduling of depositions of the plaintiffs

and the plaintiffs product identification witnesses in that group.

26. Depositions of Plaintiffs and of Plaintiffs Product Identification Witnesses

a. General

Counsel for the plaintiffs in each group of cases shall coordinate the scheduling of such depositions with Lead Counsel for the defendants for such group.

b. Logistics of Depositions

(i) Plaintiffs depositions shall be taken in Cuyahoga County, Ohio, or in any other location upon which the parties may agree.

(ii) Product identification witnesses depositions shall be taken in any location upon which the parties agree.

(iii) No more than two (2) plaintiffs depositions shall be scheduled to take place on any one day.

(iv) All depositions shall be scheduled with at least ten (10) days notice unless such notice period is otherwise waived by all parties. Defendants shall take the lead in the discovery depositions of plaintiffs and co-workers.

(v) For each such deposition the defendants shall identify one attorney to act as a lead counsel for the purpose of asking general questions. All defendants shall have the opportunity to examine each deponent. Every effort shall be made to avoid: (1) questions designed merely to elicit a recitation of information already contained in the relevant discovery responses provided by the

plaintiff; and (2) the repetition of questions already asked of the deponent.

(vi) If a defendant conducts a deposition of a plaintiff or Product Identification Witness and during said deposition additional exposures or job sites are developed by a defendant, plaintiff may amend the Product List/Work History to ad the additional exposures or job sites developed.

If a defendant is not present at the deposition of the plaintiff or Product Identification Witness because the Product List/Work History did not include notice that said plaintiff or Product Identification Witness would identify said defendant s products or liability at defendant s job site, then any information developed during the deposition regarding said defendant cannot be used against said defendant.

A defendant not implicated on the product identification list for that witness need not attend the deposition of that witness, but shall later depose that witness should that defendant be implicated at the initial deposition. If such defendant declines to re-depose the witness, then the evidence adduced at the first deposition will be admissible.

(vii) Whenever a defendant attends the deposition of a plaintiff or Product Identification Witness, because said Product List/Work History indicated that witness would testify that plaintiff was exposed to that defendant s asbestos-containing product(s) or worked at a premises liability defendant s job site, and said witness during the course of the deposition is asked if he/she can identify that

defendant s product(s) or job site, and exposure to plaintiff, as identified in his/her Product List/Work History, and said witness states under oath that he/she cannot identify said defendant s product(s) or job site as specified in his/her Product List/Work History and a time when plaintiff reasonably may have been exposed to that product or job site, said defendant may file a motion requesting costs for the time incurred in the preparation, travel to, and attendance at said deposition. Unless plaintiff is able to demonstrate to the court that a reasonable basis existed at the time of the filing of the Product List/Work History upon which to believe said witness would identify said defendant s product(s) or job site and exposure to plaintiff, the court may assess costs in an amount which the court deems to be reasonable and just under the circumstances.

(viii) With each deposition schedule, counsel for plaintiffs shall list all cases in the group in which each deponent is then expected to testify on the issue of product identification. Defendants may conduct a thorough deposition of each product identification witness. Duplicate depositions of product identification witnesses will not be permitted, except for good cause shown. Defendants subsequently named in a case in which a plaintiff or product identification witness has already been deposed shall have the right to redepose those witnesses with regard to that defendant s products. A product identification witness who has been deposed may be redeposed if that witness is subsequently identified as a witness for another plaintiff not identified prior to the initial deposition.

(ix) It is contemplated that depositions of plaintiffs and of product identification witnesses will be completed in four hours, and every effort shall be made by all parties to conclude each such deposition in that time frame. Under exceptional circumstances, depositions may be scheduled for longer durations. If, upon receipt of the deposition schedule, it becomes apparent to defendants that the time allocated for a deposition is insufficient, Lead Counsel for defendants on such deposition shall, at least five (5) days before the scheduled date of the deposition, arrange for additional time to be allocated for such deposition, and shall so notify all parties.

(x) At the commencement of each deposition of a plaintiff or a plaintiff s product identification witness, the deponent will be furnished with a list of all the defendants represented by counsel at the deposition. Defense counsel will not be required to identify his/her client before cross-examining the deponent. Plaintiff s counsel will be allowed to ask direct questions of the deponent after the defendants have completed their cross-examination. Plaintiff s counsel will not lead the witness nor include the name of a specific product or company in his/her direct examination of the deponent. Plaintiff s counsel will be allowed to refresh the recollection of the witness by presenting a list of products or companies so long as the list was written or dictated by the deponent not counsel. The deponent will also be allowed to view the photo album compiled by Owens-Corning (or any other collection of photographs depicting products or labels), but there will be no conference between the

witness and plaintiff s counsel during or after the photo review. At the conclusion of the direct examination, counsel for any defendant affected by the direct will be permitted to re-cross the deponent. Neither the direct nor the re-cross examinations shall be longer than fifteen (15) minutes except with the agreement of all parties represented at the deposition or with the approval of the court.

27. Plaintiff s De Bene Esse Depositions

If a discovery deposition of a plaintiff has not already been taken, the defendants shall be permitted to conduct such a deposition at lease seven (7) days prior to the scheduled de bene esse deposition. Except as otherwise ordered by the Court, or by stipulation of the parties, a de bene esse deposition shall not be taken unless each of the following conditions has been met at lease fourteen (14) days prior to the date of the discovery deposition:

a. Plaintiff s counsel shall have provided written notice of the taking of the deposition, together with a statement as to the reason for the taking of the deposition;

b. Plaintiff s counsel shall have served and filed verified answers to the Master CDRs, together with all requested documents;

c. Plaintiff s counsel shall have provided to defendants:

(1) authorizations for the release of medical, Social Security, and workers compensation records, and (2) copies of all discoverable medical records, reports (including reports of experts), and any pathology and radiology materials in the possession of plaintiff s counsel;

d. Plaintiff s counsel shall have provided to each defendant all employment records of plaintiff, including, but not limited to, handwritten notes, diaries and pay stubs.

28. Cancellation of Previously Scheduled Depositions

In the event of the cancellation of the deposition of any party, counsel representing the party shall notify each other counsel of the cancellation by CLAD, by telephone, or by telecopy, during normal business hours, no less than twenty-four (24) hours prior to the scheduled deposition. In the event the deposition is canceled with less than twenty-four (24) hours notice without good cause, the party canceling the deposition may, upon motion, be ordered to pay the reasonable fees and expenses incurred by opposing counsel as a result of such late or inadequate notice of cancellation, including, but not limited to, court reporter fees, deposition location fees, reasonable attorney fees, travel costs and expenses.

G. MEDICAL EXAMINATIONS

29. Physical Examinations

The defendants, collectively, may require each plaintiff to undergo one medical examination relating to plaintiff s claim for injuries. The examination may include, but is not limited to: x-rays, CT scans, MRIs, pulmonary function studies, and blood tests, including arterial blood gases, but only if an expert retained by the plaintiff has done blood gas analysis. No surgical or invasive procedures, such as tissue removal, shall be permitted under any circumstances. More than one physical examination of each plaintiff may be permitted, but only for good cause shown, and then only by order of the Court. The provisions of Rule 35(B) of the Ohio Rules of Civil Procedure shall apply to such examinations. All expenses for

the defense medical examination and procedures shall be paid by the requesting defendants. If the examination is conducted outside the Cleveland metropolitan area, defendants shall reimburse the plaintiff for reasonable costs of travel, lodging and food associated with the examination. Reasonable attempts shall be made to accommodate the plaintiff s work schedule. The provisions of Ohio Revised Code Section 2317.02 shall apply with respect to the waiver of the patient-physician privilege.

H. WITNESS AND EXHIBIT LISTS AND EXPERT REPORTS

30. Identification of Expert and Lay Witnesses -- Reports and Prior Testimony

On or before the dates established in the applicable Case Management Schedule, the plaintiff and the defendants must list all exhibits expected to be used at trial; identify all expert and lay witnesses expected to be called at trial; provide reports of each medical expert witness who examined the plaintiff or the plaintiffs x-ray material or pathology, or who reviewed the plaintiff s records and is expected to testify regarding the plaintiff s diagnosis (Consulting Medical Witness); and provide reports or prior testimony of all other expert witnesses. No expert witness will be permitted to testify whose report or prior testimony was not served within the time prescribed by the applicable Case Management Schedule except as provided by Local Rule 21.1. No lay witness will be permitted to testify who was not identified within the time prescribed by the applicable Case Management Schedule.

31. Final Witness and Exhibits

Each party shall file and serve a Final Witness List and a Final Exhibit List on the day prescribed in the applicable Case Management Schedule. The final

Witness List shall contain the names of the expert and lay witnesses whom the parties actually intend to call to testify at trial, whether that testimony be live, by videotape, or by written deposition. The final Exhibit List shall include those exhibits actually intended to be used at trial. The final Witness List and the Final Exhibit List may not include witnesses or exhibits not previously identified pursuant to the terms of the Case Management Schedule. The purpose of the Final Witness and Exhibit Lists is to reduce the number of witnesses and exhibits to those which will actually be needed for trial.

32. Use of Prior Testimony

If any party intends to use the prior testimony of a witness, such testimony must be identified by case name, case number, court, date, and page(s) and line(s) of transcript. A copy of all such testimony, whether by deposition or trial transcript, must be furnished upon request to any party by the date indicated in the applicable Case Management Schedule.

I. PROCEDURE FOR SEEKING DISMISSAL

33. Defendant s Request

On or before the date established in the applicable Case Management Schedule, any defendant may request any counsel for the plaintiff, in writing, by certified mail, to agree to a consent order dismissing that defendant, without prejudice, and otherwise than upon the merits. The letter shall contain the specific reasons for seeking dismissal, and may include one or more cases in a particular group of cases.

34. Plaintiff s Response

Within thirty (30) days of receiving such a dismissal letter, the plaintiff s counsel must respond, in writing, by certified mail. Such response letter shall

either agree to the defendant s dismissal request, or must set forth the specific reasons for the refusal of the defendant s request for dismissal.

35. Action on Refusal to Consent to Dismissal

Upon the failure of a plaintiff s counsel to respond in writing to a defendant s letter as set forth above, defendant may petition the Court for an order of dismissal without prejudice and otherwise than upon the merits. Refusal by a plaintiff to dismiss without prejudice and otherwise than upon the merits does not preclude a defendant from filing a motion for summary judgment.

J. GROUPING OF PLAINTIFFS

36. General

All asbestos personal injury cases currently pending or hereafter filed in Cuyahoga County shall be grouped for discovery and trial preparation purposes only, in the following manner:

a. In groups of not to exceed fifty (50) plaintiffs, preferably with common worksite(s);

b. Grouped according to the identity of plaintiff s counsel (e,g,: Michael Kelley, Robert E. Sweeney, etc.), preferably with commonality of worksite;

c. Except as provided below for exigent cases, grouped in case number order within the group;

d. Groups will rotate among plaintiffs counsel. Unless consolidation is ordered, each plaintiff s case will be tried individually. The status of a particular group of plaintiffs shall not affect the remaining groups and shall not accelerate or delay subsequent schedules.

37. Subsequent Groups

Subsequent groups will rotate monthly among plaintiffs counsel. Liaison counsel for the parties shall propose to the Court the groupings and Case Management Schedules for twelve new groups every six months commencing on June 30, 2002 and December 31, 2002 and continuing each six months thereafter until all cases are grouped and scheduled.

38. Exigent Cases

In the formulation of all subsequent groups, plaintiffs counsel may identify no more than three (3) plaintiffs per group who may be moved up out of case number order.

K. SANCTIONS

39. General

The concept of grouping plaintiffs claims for pre-trial case management will succeed only if all counsel commit themselves to meeting the deadlines set forth in the individual Case Management Schedules. Failures to comply with these deadlines shall result in the sanctions set forth below.

40. Plaintiff s Failure to Comply

If a plaintiff fails to meet a deadline established in the applicable Case Management Schedule; fails to provide answers to defendants authorized supplemental discovery requests; fails to provide the witness lists; fails to provide the required report or representative testimony of an expert; fails to provide statements of the testimony of lay witnesses; absent a showing of good cause fails to appear to for deposition or for a medical examination at the time schedules; or fails to provide exhibit lists, a Notice of Failure to Comply shall be served upon plaintiff s counsel by any defendant affected by such failure. Service of such

notice shall be made upon all counsel of record. A plaintiff shall have ten (10) working days after service of the Notice of Failure to Comply within which to cure the identified failure. Should the plaintiff fail to cure the failure, upon motion that plaintiff s case (including the claim of his or her spouse) may be removed from its presently assigned group. Any case so removed shall be assigned to the next group of cases to be created for counsel for such plaintiff.

42. Defendant s Failure to Comply

Should any defendant fail to meet the deadlines set forth in any Case Management Schedule, the plaintiffs counsel shall serve a Notice of Failure to Comply upon such defendant. Such defendant shall have ten (10) working days from receipt of the notification within which to comply. If the defendant fails to cure the failure, upon motion, the Court may compel compliance. If the Court finds that the defendant has thereafter failed to comply as ordered, the Court may entertain the application of the full range of sanctions permitted under Rule 37(B) of the Ohio Rules of Civil Procedure.

IT IS SO ORDERED.

Filed on CLAD January 4, 2002

JUDGE HARRY A. HANNA

JUDGE LEO M. SPELLACY

EXHIBIT A
SAMPLE

CASE MANAGEMENT SCHEDULE

(Parenthetical references are to paragraphs of the General Personal Injury Asbestos Case Management Order No. 1)

PLAINTIFF CASE NUMBER

PLAINTIFF	DATE BY WHICH ACTIVITY IS TO BE COMPLETED	DEFENDANT
	Starting Date (/ /200_)	
	[Day 15]	Certified mail request for dismissal without prejudice. (I.32)
Response to Certified Mail Request for dismissal without prejudice.	[Day 30	
Depositions of employers may commence.	[Day 35]	Depositions of employers may commence.
Depositions of Defendants	[Day 50-Day 100]	Depositions of Plaintiff and product identification witnesses.
	[Day 115]	Motions for summary judgment to be filed and served.
File and serve opposition to motions for summary judgment or consents for dismissal.	[Day 130]	

	[Day 137]	Defendants' reply to Plaintiff's opposition to motion for summary judgment.
	[Day 145]	
Pretrial: rulings on dispositive motions; establishment of final pretrial procedures; settlement negotiations.		
	[Day 150]	Medical exam of Plaintiff may commence. (G.27)
Identify expert and lay witnesses. Provide reports of consulting medical experts and reports, or representative prior testimony, of all other experts. Provide statement of testimony for each lay witness. Provide expected exhibit list.	[Day 180]	
	[Day 270]	Identify expert and lay witnesses. Provide reports of Consulting Medical Experts and reports, or representative prior testimony, of all other experts. Provide statement of testimony for each lay witness. Provide expected exhibit list.
Exchange final witness and Exhibit lists (H.30)	[Day 300]	Exchange final witness and Exhibit lists (H.30)

Identify prior testimony of witness intended to be used at trial.		Identify prior any testimony of any witness intended to be used at trial.
	[Day 310]	
	Pretrial to rule on all outstanding motions; final settlement conference.	
Serve written designations of page and line numbers of prior testimony to be used at trial. Serve trial brief.	[Day 315]	Serve written designations of page and line numbers of prior testimony to be used at trial. Serve at Trial.
Serve written Counterdesignation of page and line numbers of prior testimony to be used at trial.	[Day 320]	Serve written Counterdesignation of page and line numbers of prior testimony to be used at trial.
	[Day 330]	
	Trial of each Plaintiff's case in order of case number.	

EXHIBIT B

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

	)	CASE NO.
	)	
Plaintiff(s),	)	JUDGE HARRY A. HANNA
	)	JUDGE LEO M. SPELLACY
v.	)	DEFENDANTS' MASTER
	)	CONSOLIDATED DISCOVERY
	)	REQUESTS TO PLAINTIFFS
	)	
Defendants	)	

Pursuant to Rules 33, 34 and 36 of the Ohio Rules of Civil Procedure, defendants propound the following Master Consolidated Discovery Requests including Interrogatories, and Requests for Production of Documents to each plaintiff. The interrogatories are to be answered under oath by each plaintiff listed above; and the documents requested are to be produced or objections thereto served on all defendants' attorneys within ninety (90) days of service hereof.

These Consolidated Discovery Requests are continuing in nature and require each plaintiff to file supplemental answers in accordance with Rule 26(e) of the Ohio Rules if further or

different information is obtained after the initial answers and before trial, including in such supplemental answers the date upon and manner in which such further or different information came to each plaintiff's attention.

EXPLANATION AND DEFINITIONS

This document includes both interrogatories and a request for production of documents. The documents to be produced are in each instance identified by responses to the interrogatories contained herein.

As used in these interrogatories and document requests, the terms listed below are defined as follows:

(A) "You", "your", "yourself", "plaintiff" or "plaintiffs" means each plaintiff, each individual allegedly exposed to asbestos, and all other persons acting or purporting to act on each plaintiff's behalf.

(B) "Defendants", unless otherwise specified, means any defendant named as a party to this action, as well as any predecessors in interest to any named defendants, and all other subsidiaries or divisions of any named defendants.

(C) "Document" or "documents" means any writing of any kind, including originals and all non-identical copies (whether different from the originals by reason of any notation made on such copies or otherwise), including without limitation correspondence, memoranda, notes, desk calendars, diaries, statistics, letters, telegrams, minutes, contracts, reports,

studies, checks, invoices, statements, receipts, returns warranties, guarantees, summaries, pamphlets, books, prospectuses, inter-office and intra-office communications, offers, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, magazines, publications, printer matter, photographs, computer printouts, teletypes, telefax, invoices, worksheets and all drafts, alterations, modifications, changes and amendments of any of the foregoing tapes, tape recordings, transcripts, graphic or aural records or representations of any kind, and electronic, mechanical or electric records or representations of any kind, of which each plaintiff has knowledge or which are now or were formerly in each plaintiff's actual or constructive possession, custody or control.

(D) "Possession, custody or control" includes the joint or several possession, custody or control not only by the person to whom these interrogatories and requests are addressed, but also the joint or several possession, custody or control by each or any other person acting or purporting to act on behalf of the person, whether as employee, attorney, accountant, agent, sponsor, spokesman, or otherwise.

(E) "Relates to" means supports, evidences, describes,

mentions, refers to, contradicts or comprises.

(F) "Person" means any natural person, firm, corporation, partnership, proprietorship, joint venture, organization, group of natural persons, or other association separately identifiable, whether or not such association has a separate juristic existence in its own right.

(G) "Identify", "identity" and "identification", when used to refer to an entity other than a natural person, means to state its full name, the present or last known address of its principal office or place of doing business, and the type of entity (e.g., corporation, partnership, unincorporated association).

(H) "Identify", identity" and identification", when used to refer to a natural person, means to state the following:

(1) the person's full name and present or last known home address, home telephone number, business address and business telephone number;

(2) The person's present title and employer or other business affiliation;

(3) the person's home address, home telephone number, business address and business telephone number at the time of the actions at which each interrogatory is directed: and

(4) his employer and title at the time of the actions at which each interrogatory is directed.

(I) "Identify", "identity" and "identification", when used

to refer to a document, mean to state the following:

(1) the subject of the document;

(2) the title of the document;

(3) the type of document (e.g., letter, memorandum, telegraph, chart);

(4) the date of the document, or if the specific date thereof is unknown, the month and year or other best approximation of such date;

(5) the identity of the person or persons who wrote, contributed to, prepared or originated such document; and

(6) the present or last known location and custodian of the document.

(J) "His" means his and/or her and "he" means he and/or she.

INSTRUCTIONS

(A) With Respect to each interrogatory, in addition to supplying the information asked for and identifying the specific documents referred to, identify all documents which were referred to in preparing your answers thereto.

(B) If any document identified in an answer to an interrogatory was, but is no longer in your possession or subject to your custody or control, or was known to you, but is no longer

in existence, state what disposition was made of it or what became of it.

(C) If any document is withheld from production hereunder on the basis of a claim of privilege or otherwise, identify each such document and the grounds upon which its production is being withheld.

(D) Attached to these interrogatories and request for production of documents is a medical authorization to obtain the plaintiff's medical records. This medical authorization should be signed by the plaintiff and returned with the Answers to Interrogatories.

INTERROGATORIES

1. Please state the following:

a) Your Full name:

ANSWER:

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b) All of the names by whom you have been know, including nicknames, maiden names or aliases:

ANSWER:

c) Your present address and the date you first resided at that address:

ANSWER:

d) The addresses at which you have resided for five (5) years prior to this date:

ANSWER:

e) Your Social Security number:

ANSWER:

f) Your date of birth:

ANSWER:

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1. Are you employed?

ANSWER:

a) If your answer is in the affirmative, please state your current occupation, place of employment, and the date you first became so employed:

ANSWER:

b) If your answer is in the negative, please state your last occupation, your last place of employment, the date you last worked and your reason(s) for not working since that time:

ANSWER:

3. State the following with respect to your parents:

a) The names of your mother and father:

ANSWER:

b) Their dates of birth:

ANSWER:

c) Their current health conditions:
ANSWER:

d) If deceased, their date of death:

ANSWER:

e) If deceased, their cause of death:

ANSWER:

4. Do you have any brothers and/or sisters?

ANSWER:

If your answer is in the affirmative, please state the following for each such brother and/or sister:

a) The names and addresses of each such brother and/or sister:

ANSWER:

b) The age of each such brother and/or sister:

ANSWER:

c) The current health condition of each such brother and/or sister:

ANSWER:

d) If deceased, the age at death for each deceased brother and/or sister:

ANSWER:

e) If deceased, the cause of death for each deceased brother and/or sister:

ANSWER:

5. Has any member of your family ever filed a suit for an asbestos-related disease?

ANSWER:

If your answer is in the affirmative, please state the following:

a) Identify the name of the family member:

ANSWER:

b) Their relationship(s) to you:

ANSWER:

c) The case name(s), court(s) and case number(s) of the lawsuit(s):

ANSWER:

6. If you are currently married, state the following:

a) The date of marriage:

ANSWER:

b) Your spouse's name:

ANSWER:

c) Your spouse's date of birth:

ANSWER:

d) Your spouse's Social Security number:

ANSWER:

e) Your spouse's occupation:

ANSWER:

f) The name and address of your spouse's employer:

ANSWER:

h) The amount of our spouse's average gross monthly salary:

ANSWER:

i) Whether your spouse was financially dependent upon you at the commencement of this action.

ANSWER:

j) Whether your and your spouse were ever voluntarily or legally separated?

ANSWER:

k) If applicable, state the circumstances, inclusive dates and length of time of any such legal or voluntary separation.

ANSWER:

7. Have you ever had any previous marriages?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name(s) of any former spouse(s):

ANSWER:

b) The address(es) of any former spouse(s):

ANSWER:

d) If terminated by court order, the court(s), city or cities, and the circumstances under which the marriage or marriages were dissolved or terminated:

ANSWER:

8. Do you have any children?

ANSWER:

If the answer is in the affirmative, please state the following for each child:

a) The name of each such child:

ANSWER:

b) The address of each such child:

ANSWER:

c) The age of each such child:

ANSWER:

d) The occupation of each such child:

ANSWER:

e) The current health condition, including specific medical problems, of each such child:

ANSWER:

f) Whether any such child is financially dependent upon you. If so, state the name of such dependent child.

ANSWER:

g) If any child is deceased, state his or her date of death, cause of death, and age at death:

ANSWER:

9. Is anyone who is not listed in the preceding interrogatory financially dependent upon you?

ANSWER:

If the answer is in the affirmative, please state the

following:

a) The name of each such dependent:

ANSWER:

b) The date of birth of each such dependent:

ANSWER:

c) The relationship of each such dependent to you:

ANSWER:

d) Whether you have legal custody of each such dependent:

ANSWER:

e) If custody was awarded to you by court decree, state the date such custody was obtained for each such dependent:

ANSWER:

If the answer is in the affirmative, please state the following:

a) The date graduated and the name of the school:

ANSWER:

11. Have you ever enrolled in or attended any colleges, vocational schools,m union sponsored training, or correspondence courses?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name(s) and address(es) of each such institution:

ANSWER:

b) The date(s) attended:

ANSWER:

c) Courses of study:

ANSWER:

d) Degree(s) or certification received, if any, for each such enrollment or attendance:

ANSWER:

12. Have you ever been a member of the Armed Forces?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The branch of service:

ANSWER:

b) Serial number:

ANSWER:

c) Veteran's Administration Number (if applicable):

ANSWER:

d) The dates of service ending with the date of last discharge:

ANSWER:

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e) The highest rank or grade held:

ANSWER:

f) The type of discharge:

ANSWER:

g) The type of technical education or training received and the length of such training:

ANSWER:

i) Whether you were ever exposed to asbestos, or asbestos-containing products during your military service.

ANSWER:

j) If answer is affirmative, please describe in detail the manner in which you were exposed, the type of duties being performed, and the product to which you were exposed.

ANSWER:

13. Have you ever been convicted of a crime other than a traffic offense?

ANSWER:

If the answer is in the affirmative, please state fully in detail the following:

a) The date(s), place(s), court(s) and nature(s) conviction:

ANSWER:

14. Have you filed a suit for damages for any injuries?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Names and addresses of all the plaintiffs, defendants and their attorneys for each such action:

ANSWER:

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b) The case number, court, place and date of filing for each such action:

ANSWER:

c) The nature and extent of injuries claimed for each such action:

ANSWER:

d) The present status of each suit, and if concluded, the final result, including the amount of any settlements or judgments for each such action:

ANSWER:

15. Have you ever filed a Workers' Compensation Claim?

ANSWER:

If your answer is in the affirmative, please state the following:

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a) The claim number for each and every claim:

ANSWER:

b) The employer under which each and every claim was filed:

ANSWER:

c) State the allowed conditions for each and every claim:

ANSWER:

d) State the amount of any compensation received for each and every claim:

ANSWER:

e) The present status of each and every claim:

ANSWER:

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16. Have you ever used cigarettes, cigars, or pipe or other tobacco products of any kind?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The dates and time periods during which each type of tobacco product was smoked or used:

ANSWER:

b) The types of tobacco products you smoked or used and as to each such product whether the smoke was inhaled or was not inhaled:

ANSWER:

c) The daily frequency with which tobacco products were smoked or used (i.e., 2 packs of cigarettes daily, 3 cigars daily, 2 pipefuls daily, etc.):

ANSWER:

d) For any time period during which use of tobacco products stopped, state the dates during which your use ceased and the reasons why the use stopped:

ANSWER:

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e) For any time period when the use of tobacco products began after a period of having stopped, state the reasons for restarting:

ANSWER:

f) If you ever smoked cigarettes, please state the average number of packs per day and brand so consumed in each

of the following periods from 1930 to the present time:

ANSWER

1. 1930 to 1935 _____ Brand(s) _____
2. 1936 to 1939 _____ Brand(s) _____
3. 1940 to 1945 _____ Brand(s) _____
4. 1946 to 1949 _____ Brand(s) _____
5. 1950 to 1955 _____ Brand(s) _____
6. 1956 to 1959 _____ Brand(s) _____
7. 1960 to 1965 _____ Brand(s) _____
8. 1966 to 1969 _____ Brand(s) _____
9. 1970 to 1975 _____ Brand(s) _____
10. 1976 to 1979 _____ Brand(s) _____
11. 1980 to 1985 _____ Brand(s) _____
12. 1986 to pres._____ Brand(s) _____

g) If advice was ever given to you by any physician to stop smoking or using tobacco products, identify each physician who gave such advice, the dates on which the advice was given and also state whether the advice was followed:

ANSWER:

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h) Are you award of the United States Surgeon General's warning placed on all cigarette packages and advertisements:

ANSWER:

i) If the answer to subpart (h) is in affirmative, please indicate the date on which you first became aware of such warning:

ANSWER:

j) Did you stop smoking at the time you became aware of such warning?

ANSWER:

17. Has any diagnosis and/or prognosis of your medical condition been made as a result of any illness or conditions allegedly sustained as a result of any exposure to asbestos or asbestos-containing products?
ANSWER:

If the answer is in the affirmative, please state the following:

a) Each and every diagnosis which has been made:

ANSWER:

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b) The date(s) of any such diagnosis:

ANSWER:

c) Identify each person making any such diagnosis:

ANSWER:

d) The prognosis made for each and every diagnosis:

ANSWER:

e) Identify each person making any such prognosis:

ANSWER:

f) The date of last prognosis regarding any diagnosis:

ANSWER:

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f) The date the condition or conditions diagnosed first manifested symptoms:

ANSWER:

18. For each and every symptom, indication, malaise, or affliction which you contend to be directly or indirectly related to any asbestos-related disease, disability or physical condition, please state the following:

a) The nature and description of such symptom:

ANSWER:

b) The date, time, place and manner in which such symptom first manifested itself or was made known to you, including all pertinent information as to the source of such knowledge:

ANSWER:

c) Whether you contend such symptom is related in any fashion to your exposure to asbestos, and the nature and extent of such relationship:

ANSWER:

d) All facts and opinions on which you rely in alleging that the symptoms identified are related to exposure to asbestos:

ANSWER:

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19. Has any diagnosis and/or prognosis of your medical condition been made as a result of any illness or conditions allegedly sustained as a result of any exposure to silica or silica-containing products?
ANSWER:

If the answer is in the affirmative, please state the following:

a) Each and every diagnosis which has been made:

ANSWER:

b) The date(s) of any such diagnosis:

ANSWER:

c) Identify each person making any such diagnosis:

ANSWER:

27

d) The prognosis made for each and every diagnosis:

ANSWER:

e) Identify each person making any such prognosis:

ANSWER:

f) The date of last prognosis regarding any diagnosis:

ANSWER:

g) The date the condition or conditions diagnosed first manifested symptoms:

ANSWER:

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b) The date, time, place and manner in which such symptom first manifested itself or was made known to you, including all pertinent information as to the source of such knowledge:

ANSWER:

c) Whether you contend such symptom is related in any fashion to your exposure to silica, and the nature and extent of such relationship:

ANSWER:

d) All facts and opinions on which you rely in alleging that the symptoms identified are related to exposure to silica.

ANSWER:

21. Have you ever been hospitalized, operated upon, or confined to an institution, including nursing homes or extended care facilities?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Names and addresses of all hospitals or institutions involved:

ANSWER:

b) The beginning and ending dates of each period of hospitalization or institutionalization;

ANSWER:

c) The nature of the illness, injury or complaint for which you were admitted;

ANSWER:

d) The names and addresses and relationship to you of all persons who treated or examined you:

ANSWER:

22. With respect to each physician, not listed in the preceding interrogatory, who examined or treated you during your lifetime to date, state the following:

a) Identify each physician and his address;

ANSWER:

b) List the complaint you had that caused you to see each particular physician;

ANSWER:

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c) The type of examination, the diagnosis and type of treatment that each doctor gave you;

ANSWER:

d) The date or dates on which you were examined, diagnosed and treated by each particular physician:

ANSWER:

23. Have you ever had x-rays taken of your chest other than at any of the institutions listed previously, including x-rays performed by the Armed Forces, employers or unions?

ANSWER:

If the answer is in the affirmative, please state the following for each set of x-rays taken:

a) Name and address of the office or hospital where each set of x-rays was taken:

ANSWER:

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b) The reason(s) why such x-rays were taken;

ANSWER:

c) Whether anything was reported to you, and the nature of any such report(s), as being the ex-ray diagnosis;

ANSWER:

d) Who paid to have the x-rays taken;

ANSWER:

e) The names and addresses of any physicians, hospitals, clinics, or other persons to whom copies of x-ray reports were sent:

ANSWER:

24. Have you ever had a pulmonary function test ("PFT") or breathing test?

ANSWER:

If the answer is in the affirmative, please state for each such test:

a) Name and address of the office or hospital where each such PFT or breathing test was taken:

ANSWER:

b) The reason(s) why such PFT or breathing test was taken;

ANSWER:

c) Whether anything was reported to you, and the nature of any such report(s), as being the PFT or breathing test diagnosis:

ANSWER:

25. Have you ever had any of the following conditions? Please place an "X" next to the appropriate answer and state the date of diagnosis for each such condition:

		Yes	No	Date of Diagnosis
a)	bronchitis			
b)	emphysema			
c)	asthma			
d)	tuberculosis			
e)	Chronic Obstructive Pulmonary Disease			

f)	pneumonia			
g)	high blood pressure			
h)	heart trouble			
i)	skin cancer			

j) diverticulitis
k) colitis
l) ulcers
m) polyps
n) jaundice
o) arthritis
p) gout

26. Have you used any drugs or medicines during the past ten (10) years in connection with any injury, complaint or illness?

ANSWER:

If your answer is in the affirmative, please state fully in detail:

a) A description of each item, including its name and dosage:

ANSWER:

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b) Identify the physician who prescribed each item, if any:

ANSWER:

c) The injury, complaint or illness for which each item was prescribed or used:

ANSWER:

d) The dates during which each item was used:

ANSWER:

27. Have you ever been discharged, or voluntarily left a job, or changed residence due to health reasons?

ANSWER:

If the answer is in the affirmative, please state in detail the dates, places and circumstances:

ANSWER:

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28. Have you ever received financial benefits (other than wages), either directly or indirectly, from any source at any time in your lifetime (including but not limited to government agencies, illness or disability wages from employers, life or health insurance companies, service providers or others)?

ANSWER:

If the answer is in the affirmative, please indicate the following:

a) The date of each such payment(s):

ANSWER:

b) The source of each such payment(s):
ANSWER:

c) The time period and amount of each such payment(s):

ANSWER:

d) The reason for each such payment(s):

ANSWER:

e) The identity of all persons, including but not limited to physicians, insurance carriers, government employees or others who participated in the determination of each such payment(s):

ANSWER:

29. Please identify each of your employers in whose employ you claim you were exposed to asbestos. Include in your answer the following:

a) the name, address and telephone number for each such employer;

ANSWER:

b) For each such employer, indicate the jobsite, address and inclusive dates of claimed exposure:

ANSWER:

c) Your job title and work description for each such employment of claimed exposure:

ANSWER:

d) The dates of such employment of claimed exposure:

ANSWER:

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e) The length of time you spent on each jobsite:
ANSWER:

f) The manufacturer, or if the manufacturer is unknown, the trade name and/or the generic type of each and every product which you believe contained asbestos, to which you were exposed during each such employment, and the dates from the first exposure to the last exposure:

ANSWER:

g) Whether the jobs were inside work or outside work:

ANSWER:

30. For each exposure to asbestos and to products you believe contained asbestos that are listed in the answer to Interrogatory 29, please state the name and address of each co-worker who has knowledge that these exposures occurred.

ANSWER:

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31. Please identify each of your employers in whose employ you claim you were exposed to silica. Include in your answer the following:

a) The name, address and telephone number for each such employer;

ANSWER:

b) For each such employer, indicate the jobsite, address and inclusive dates of claimed exposure:

ANSWER:

c) Your job title and work description for each such employment of claimed exposure:

ANSWER:

e) The length of time you spent on each jobsite:

ANSWER:

f) The manufacturer, or if the manufacturer is unknown, the trade name and/or the generic type of each and every product which you believe contained silica, to which you were exposed during each such employment, and

the dates from the first exposure to the last exposure:

ANSWER:

g) Whether the jobs were inside work or outside work:

ANSWER:

h) For each job, whether it involved new construction, repair, replacement or tear-out (specify which):

ANSWER:

32. For each exposure to silica and to products you believe contained silica that are listed in the answer to Interrogatory 31, please state the name and address of each co-worker who has knowledge that these exposures occurred.

ANSWER:

33. Please state whether safety equipment such as respirators or masks to reduce exposure to asbestos and/or silica material was provided or required by any of your employers (specify which):

ANSWER:

If the answer is in the affirmative, please state:

a) Whether you used the masks or respirators:

ANSWER:

b) If so, identify the jobsites at which you used such masks or respirators:

ANSWER:

34. State whether showers were provided for each such employment:

ANSWER:

35. State whether separate lockers for work and personal clothing were provided for each such employment:

ANSWER:

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36. Have you ever been a member of any trade or labor union?

ANSWER:

For each and every membership please list the following:

a) The union, including the local designation for each such union membership:

ANSWER:

b) The beginning and ending dates of membership(s) and the reasons why such membership(s) was terminated:

ANSWER:

c) The types of work authorized to perform by virtue of each and every membership:

ANSWER:

d) The places, dates and offices held or the committees on which you served in both the local and international union(s) for each such membership:

ANSWER:

e) Whether union meetings are or were regularly attended in reference to each such membership:

ANSWER:

f) The names of each and every publication(s) received from the unions and the dates and frequency with which they were received:

ANSWER:

g) The frequency with which such publications are or were read (i.e., regularly, occasionally, rarely):

ANSWER:

37. State whether the you were exposed to asbestos or asbestos-containing products which were manufacturer, sold, produced, prepared or distributed by any entity not named as a defendant in this lawsuit. If so, identify the manufacturer, the product and the dates of exposure.

ANSWER:

38. Have you ever been exposed to asbestos or asbestos-containing products outside the workplace?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The date of each such exposure:

ANSWER:

b) The place of each such exposure:

ANSWER:

d) The trade name(s) and/or manufacturer(s) of the asbestos containing product(s) for each such exposure:

ANSWER:

e) The names and addresses of each individual with knowledge to corroborate each such exposure:

ANSWER:

39. State whether you have ever received any instruction, recommendations or warnings of any kind regarding each asbestos-containing product to which you were exposed (i.e., printed on container or package, tag, covering, or instruction sheet accompanying the product, etc.):

ANSWER:

40. State whether you ever received any instructions or recommendations by your employer or superior at any time regarding the safety precautions to be taken when using each asbestos-containing product to which you were exposed, including, but not limited to, the creation, inhalation or ingestion of dust.

ANSWER:

41. Did you at any time receive, have knowledge of, or possess any advice, publication, warning, order, directive, requirement or recommendation, written or oral, which purported to either advise or warn you of the possible harmful effects of exposure to or inhalation of, asbestos, asbestos-containing materials, silica, or silica-containing materials?

ANSWER:

42. Did you at any time receive, have knowledge of, or possess any advice, publication, warning, order, directive, requirement or recommendation, either written or oral, which purported to advise or recommend techniques, methods or equipment which would serve to reduce or guard against such potentially harmful exposure?

ANSWER:

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If the answer is in the affirmative, please state the following:

a) The nature and exact working of such advice, warning, recommendation etc.:

ANSWER:

b) The complete identity of each source of such advice, warning or recommendation, etc.:

ANSWER:

c) The date, time, place and manner and circumstances when each such advice, warning, recommendation, etc. was given:

ANSWER:

e) Identify each and every co-worker or similar member of your trade and occupation who also received the same or similar advice, warning, recommendation, etc.:

ANSWER:

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43. Have you ever provided testimony, or been SPRINT interviewed in a lawsuit?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name of the case and case number for which each such testimony or SPRINT interview was given:

ANSWER:

b) The nature of each such proceeding and/or testimony:

ANSWER:

c) The approximate date when each such testimony and/or SPRINT interview was given:

ANSWER:

44. Have you ever been exposed to radiation medically, incidentally or occupationally?

ANSWER:

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If the answer is int he affirmative, describe the circumstances of exposure and date or dates of exposure:

ANSWER:

45. State the nature, extent and frequency of any physical examinations which any of your employers required or made available to you, and the frequency (with specific dates) with which you submitted to such examinations.

ANSWER:

46. Please state whether you have obtained any judgments, settlements, or compromises, payments from or entered into any agreements with any person or entity arising from exposure to asbestos, asbestos-containing products, silica or silica containing products.

ANSWER:

If the answer is in the affirmative, please state:

a) The amount of such each and every judgment, settlement, compromise or payment:

ANSWER:

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b) The date upon which each such judgment, settlement, compromise or payment was received:

ANSWER:

c) The person or entity from whom such judgment, settlement, compromise or payment was received:

ANSWER:

47. Please state whether you have entered into any agreement with any party or non-party to this litigation regarding future claims or payments resulting from your alleged exposure to asbestos, asbestos-containing products, silica or silica-containing products.

ANSWER:

If the answer is in the affirmative, please state:

a) The amount of consideration for each such agreement:

ANSWER:

b) The date upon which each agreement was entered into:
ANSWER:

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c) The person or entity with whom each such agreement was reached:

ANSWER:

d) The dates upon which each such payment is to be received:

ANSWER:

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Identify and produce all literature or other documents which relate to the product or products, allegedly containing asbestos and/or silica, to which you claim you were exposed which are in your possession or in the possession of your attorney.

2. Identify and produce your complete work history including the location of each and every jobsite at which you worked wherein you claim you were exposed to asbestos and/or silica. for each such jobsite, state the dates you were present, the length of time you spent at each jobsite, the name and manufacturers of each asbestos-containing product to which you were exposed at each jobsite, the name of your employer, the type of work you performed, and the names and addresses of each co-worker with whom you worked.

3. Identify and produce all literature or other documents in your possession or in the possession of your attorney, that constitute or relate to advice, warnings, orders, directives, requirements or recommendations, which purported to advise you of the possible harmful effects of exposure to asbestos or asbestos-containing products, or of techniques, methods, or equipment which would serve to reduce or guard against such exposure.

4. Identify and product all literature or other documents which relate to your claim of conspiracy as to each defendant named in this lawsuit.

5. Identify and produce all medical records and reports in your possession or in the possession of your attorney.

6. Copies of all bills and receipts for medical services, drugs, medication, doctors' fees or other expenses incurred as a result of the injuries you allege you received relevant to this lawsuit.

7. All documents regarding any and all x-ray screening and the results thereof.

8. Identify and produce tax returns for the last ten (10) years, a Social Security Statement of Earnings, and any other documents relating to income earned in the last ten (10) years which are in your possession or in the possession of your attorney.

9. Identify and product all non-medical expert reports which are in your possession or in the possession of your attorney.

10. Identify and produce all documents and prior testimonies of which you have knowledge which relate to your allegation that you are entitled to receive punitive or exemplary damages.

11. Identify and produce the names and full addresses of all persons you expect to call as expert witnesses at trial, including a summary of the testimony that each witness is expected to give.

12. Identify and produce the names and full addresses of all non-experts you expect to call as witnesses at trial including a summary of the testimony that each witness is expected to give.

13. Documents in your possession constituting or relating to your employment history including, but not limited to, documents which would indicate the place(s) or department(s) of your employer(s) in which you worked, the dates worked, and the names of co-workers with whom you worked at each job

    or jobsite.

14. Any lists which have been prepared or which have been prepared by others on your behalf which indicate the types of products to which you claim you were exposed, and the names of the manufacturers, installers, distributors, sellers, suppliers and outside contractors of those products.

15. All documents pertaining to union memberships, meetings or events relating to the discussions or warnings given concerning hazardous exposures in the workplace and precautions to be taken.

16. Any and all documents or photographs you have reviewed or will review in preparation for any testimony you may give in this case or as a co-worker in any other case.

17. Identify and product all documents, other than those previously identified in your responses to these requests, that you expect to offer as evidence at trial.

18. Copies of all documents supporting the itemization of damages you claim in this suit.

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

TO: _____

_____

_____

This is authority for you to permit any attorney of record, or his or her agent, or any records service or its agents, to copy, inspect, and examine any and all records, charts, reports, pathology materials, original x-rays, x-ray reports, in your possession pertaining to all examinations and treatments rendered to:

NAME: _____ *

SS #: _____
DOB: _____

* _____

DATE: _____

This authorization shall remain valid for a period of eight months from the date set forth herein and authorize the provider to honor all requests for records and/or other materials made within that period of time.

STATE OF OHIO)
) SS:
COUNTY OF _____)

SWORN AND TO SUBSCRIBED before me, a notary public in and for said county and state on this _____ day of _____, 19_____.

_____
NOTARY PUBLIC

PHOTCOPIES OF THIS AUTHORIZATION SHALL BE MADE AND SHALL HAVE THE SAME AUTHORITY AS THE ORIGINAL

*Name of party seeking to provide his or her medical release.

AUTHORIZATION FOR RELEASE OF WORKERS' COMPENSATION INFORMATION

TO: _____

_____

_____

This is authority for you to permit any attorney of record, or any agent of any attorney of record, to copy, inspect, and examine any and all records, correspondence, medical reports, in your possession pertaining to any and all Workers' Compensation claims involving:

NAME: _____

SS#: _____

DOB: _____

CLAIM NO: _____

PHOTOCOPIES OF THIS AUTHORIZATION SHALL BE MADE AND SHALL HAVE THE SAME AUTHORITY AS THE ORIGINAL.

DATE: _____

STATE OF OHIO)
) ss:
COUNTY OF _____)

SWORN TO AND SUBSCRIBED before me, a notary public in and for said county and state on this _____ day of _____, 19 _____.

_____
NOTARY PUBLIC

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EXHIBIT C

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IN RE: :

	:	
	:	
ASBESTOS LITIGATION	:	
	:	
	:	DEFENDANT'S MASTER
	:	CONSOLIDATED DISCOVERY
	:	REQUESTS TO PLAINTIFFS
	:	FOR DEATH CASES

Pursuant to Rules 33, 34 and 36 of the Ohio Rules of Civil Procedure, defendants propound the following Master Consolidated discovery Requests including Interrogatories, Requests for Admissions and Requests for Production of Documents to each plaintiff. The Interrogatories are to be answered under oath by each plaintiff listed above; the Requests for Admissions are to be answered or objected to by the each plaintiff or his attorney; and the documents requested are to be produced or objections thereto served on all defendants' attorneys within twenty-eight (28) days of service hereof.

These Consolidated Discovery Requests are continuing in nature and require each plaintiff to file supplemental answers in accordance with Rule 26(e) of the Ohio Rules if further or different information is obtained after the initial answers and before trial, including in such supplemental answers the date upon and manner in which such further or different information came to each plaintiff's attention.

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EXPLANATION AND DEFINITIONS

This document includes both interrogatories and a request

for production of documents. The documents to be produced are in each instance identified by responses to the interrogatories contained herein.

As used in these interrogatories and document requests, the terms listed below are defined as follows:

(A) "You", "your", "yourself", "plaintiff" or "plaintiffs" means each plaintiff, each individual allegedly exposed to asbestos, (the decedent, if applicable), and all other persons acting or purporting to act on each plaintiff's behalf.

(b) "Defendants", unless otherwise specified, means any defendant named as a party to this action, as well as any predecessors in interest to any named defendants, and all other subsidiaries or divisions of any named defendants.

(C) "Document" or "documents" means any writing of any kind, including originals and all nonidentical copies (whether different from the originals by reason of any notation made on such copies or otherwise), including without limitation correspondence, memoranda, notes, desk calendars, diaries, statistics, letters, telegrams, minutes, contracts, reports, studies, checks, invoices, statements, receipts, returns warranties, guarantees, summaries, pamphlets, books, prospectuses, interoffice and intraoffice communications, offers, notations of any sort of conversations, telephone calls, meetings or other communications, bulletins, magazines, publications, printed matter, photographs, computer printouts, teletypes,

telefax, invoices, worksheets and all drafts, alteration, modifications, changes and amendments of any of the foregoing tapes, tape recordings, transcripts, graphic or aural records or representations of any kind, and electronic, mechanical or electric records or representations of any kind, of which each plaintiff has knowledge or which are

now or were formerly in each plaintiff's actual or constructive possession, custody or control.

(D) "Possession, custody or control" includes the joint or several possession, custody or control not only by the person to whom these interrogatories and requests are addressed, but also the joint or several possession, custody or control by each or any other person acting or purporting to act on behalf of the person, whether as employee, attorney, accountant, agent, sponsor, spokesman, or otherwise.

(E) "Relates to" means supports, evidences, describes, mentions, refers to, contradicts or comprises.

(F) "Person" means any natural person, firm, corporation, partnership, proprietorship, joint venture, organization, group of natural persons, or other association separately identifiable, whether or not such association has a separate juristic existence in its own right.

(G) "Identify", "identity" and "identification", when used to refer to an entity other than a natural person, means to state its full name, the present or last known address of its principal

office or place of doing business, and the type of entity (e.g., corporation, partnership, unincorporated association).

(H) "Identify", "identity" and "Identification", when used to refer to a natural person, means to state the following:

(1) the person's full name and present or last known home address, home telephone number, business address and business telephone number;

(2) The person's present title and employer or other business affiliation;

(3) the person's home address, home telephone number, business address and business telephone number at the time of the actions at which each interrogatory is directed: and

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(4) his employer and title at the time of the actions at which each interrogatory is directed.

(I) "Identify", "identity" and "identification", when used to refer to a document, mean to state the following:

(1) the subject of the document;

(2) the title of the document;

(3) the type of document (e.g., letter, memorandum, telegraph, chart);

(4) the date of the document, or if the specific date thereof is unknown, the month and year or other best approximation of such date;

(5) the identity of the person or persons who wrote, contributed to, prepared or originated such document; and

(6) the present or last known location and custodian of the document.

(J) "His" means his and/or her and "he" means he and/or she.

INSTRUCTIONS

(A) With respect to each interrogatory, in addition to supplying the information asked for and identifying the specific documents referred to, identify all documents which were referred to in preparing your answers thereto.

(B) If any document identified in an answer to an interrogatory was, but is no longer in your possession or subject to your custody or control, or was known to you, but is no longer in existence, state what disposition was made of it or what became of it.

(C) If any document is withheld from production hereunder on the basis of a claim of privilege or otherwise, identify each such document and the grounds upon which its production is being withheld.

(D) Attached to these interrogatories and request for production of documents is

a medical authorization to obtain the decedent's medical records. This medical authorization should be signed by the plaintiff and

returned with the Answers to Interrogatories.

INTERROGATORIES

1. Please state the following:

A) Your full name:

ANSWER:

b) All of the names by whom you have been know, including nicknames, maiden names or aliases:

ANSWER:

c) Your present address and the date you first resided at that address:

ANSWER:

d) The addresses at which you have resided for five (5) years prior to this date:

ANSWER:

e) Your Social Security number:

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ANSWER:

f) Your date of birth:

ANSWER:

2. If this is a death claim, please state the following:

a) The decedent's full name:

ANSWER:

b) All of the names by which the decedent has been known, including nicknames, maiden names or aliases:

ANSWER:

c) The decedent's last address:

ANSWER:

d) The decedent's Social Security number:

ANSWER:

e) The decedent's date and place of birth:
ANSWER:

f) The decedent's date and place of death:

ANSWER:

g) Your relationship to the decedent:

ANSWER:

h) The Probate Court and case number for the decedent's estate:

ANSWER:

3. Are you employed?
ANSWER:

a) If your answer is in the affirmative, please state your current occupation, place of employment, and the date you first became so employed:

ANSWER:

b) If your answer is in the negative, please state your last occupation, your last place of employment, the date you last worked, and your reason(s) for not working since that time:

ANSWER:

4. Please state the following:

a) The decedent's last occupation:

ANSWER:

b) Decedent's last place of employment:

ANSWER:

c) The date decedent last worked:

ANSWER:

d) The reason(s) decedent stopped working:

ANSWER:

5. State the following with respect to decedent's parents:

a) The names of decedent's mother and father:

ANSWER:

b) Their dates of birth:

ANSWER:

c) Their current health conditions:

ANSWER:

d) If deceased, their date of death:

ANSWER:

e) If deceased, their cause of death:

ANSWER:

6. Did decedent have any other brothers and/or sisters?

ANSWER:

If your answer is in the affirmative, please state the following for each such brother and/or sister:

a) The names and addresses of each such brother and/or sister:

ANSWER:

b) The age of each such brother and/or sister:

ANSWER:

c) The current health condition of each brother and/or sister:

ANSWER:

d) If deceased, the age at death for each deceased brother and/or sister:

ANSWER:

e) If deceased, the cause of death for each deceased brother and/or sister:

ANSWER:

7. Has any member of decedent's family ever filed a suit for an asbestos-related

disease?

ANSWER:

If your answer is in the affirmative, please state the following:

a) Identify the name of the family member:

ANSWER:

b) Their relation(s) to the decedent:

ANSWER:

c) The case name(s), court(s) and case number(s) of the lawsuit(s):

ANSWER:

8. If you are currently married, state the following:

a) The date of marriage:

ANSWER:

b) Your spouse's name:

ANSWER:

c) Your spouse's date of birth:

ANSWER:

d) Your spouse's Social Security number:

ANSWER:

e) Your spouse's occupation:

ANSWER:

f) The name and address of your spouse's employer:

ANSWER:

g) Whether your spouse is employed full-time or part-time:

ANSWER:

h) the amount of our spouse's average gross monthly salary:

ANSWER:

i) Whether your spouse was financially dependent upon you at the

commencement of this action:

ANSWER:

9. Was decedent married at the time of his death?

ANSWER:

10. If the answer to the immediately preceding interrogatory is affirmative, please state with respect to the spouse to whom

decedent was married at the time of his death:

ANSWER:

a) The date of marriage:

ANSWER:

b) The spouse's name:

ANSWER:

c) The spouse's date of birth:

ANSWER:

d) The spouse's Social Security number:

ANSWER:

e) The spouse's present occupation:
ANSWER:

f) The name and address of spouse's current employer:

ANSWER:

g) Whether spouse is currently employed full-time or part-time:

ANSWER:

h) The amount of the spouse's average gross monthly salary:

ANSWER:

i) Whether the spouse was financially dependent upon the decedent at the time of his death:

ANSWER:

j) Whether decedent and the spouse were ever voluntarily or legally separated?

ANSWER:

k) If applicable, state the circumstances inclusive dates and length of time of any such legal or voluntary separation.

ANSWER:

11. Has the decedent ever had any previous marriages?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name(s) of any former spouse(s):

ANSWER:

b) The address(es) of any former spouse(s):

ANSWER:

c) The date of termination of any previous marriages:

ANSWER:

d) If terminated by court order, the court(s), city or

cities, and the circumstances under which the marriage or marriages were dissolved or terminated:

ANSWER:

12. Did the decedent have children?

ANSWER:

If the answer is in the affirmative, please state the following for each child:

a) The name of each such child:
ANSWER:

b) The address of each such child:

ANSWER:

c) The age of each such child:

ANSWER:

d) The occupation of each such child:
ANSWER:

e) The current health condition, including specific medical problems of each such child:
ANSWER:

f) Whether any such child was financially dependent upon the decedent at the time of death. If so, state the name of such dependent child.

ANSWER:

g) If any child is deceased, state his or her date of death, cause of death, and age at death:

ANSWER:

13. Was any who is not listed in the preceding interrogatory financially dependent upon decedent at time of his death?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name of each such dependent:

ANSWER:

b) The date of birth of each such dependent:

ANSWER:

c) The relationship to the decedent of each such dependent:

ANSWER:

d) Whether the decedent had legal custody of each such dependent:

ANSWER:

e) If custody was awarded to the decedent by court decree,

state the date such custody was obtained for each such dependent:

ANSWER:

14. Did decedent graduate from high school?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The date graduated and the name of the school:

ANSWER:

15. Has decedent ever enrolled or attended any colleges, vocational schools, union sponsored training, or correspondence courses?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name(s) and address(es) of each such institution:

ANSWER:

b) The date(s) attended:

ANSWER:

c) Courses of study:

ANSWER:

d) Degree(s) or certification received, if any, for each such enrollment or attendance:

ANSWER:

16. Has decedent ever been a member of the Armed Forces?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The branch of service:

ANSWER:

b) Serial number:

ANSWER:

c) Veteran's Administration Number (if applicable):

ANSWER:

d) The dates of service ending with the date of last discharge:

ANSWER:

e) The highest rank or grade held:

ANSWER:

f) The type of discharge:

ANSWER:

g) The type of technical education or training received and the length of such training:

ANSWER:

h) Whether any injury occurred while in the service (explain):

ANSWER:

i) Whether decedent was ever exposed to asbestos, or asbestos-containing products during his military service.

ANSWER:

j) If the answer is affirmative, please describe in detail

the manner in which decedent was exposed, the type of duties being performed, and the product to which decedent was exposed.

ANSWER:

17. Has decedent ever been convicted of a crime other than a traffic offense?

ANSWER:

If the answer is in the affirmative, please state fully in detail the following:

a) The date(s), place(s), court(s) and nature(s) of each conviction:

ANSWER:

18. Has decedent ever filed a suit for damages for any personal injuries?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Names and addresses of all the plaintiffs, defendants and their attorneys for each such action:

ANSWER:

b) The case number, court, place and date of filing for each such action:

ANSWER:

c) The nature and extent of injuries claimed for each such action:

ANSWER:

d) The present status of each suit, and if concluded, the final result, including the amount of any settlements or judgments for each such action:

ANSWER:

19. Have you ever filed a Workers' Compensation Claim?

ANSWER:

If your answer is in the affirmative, please state the following:

a) The claim number for each and every claim:

ANSWER:

b) The employer under which each and every claim was filed:

ANSWER:

c) State the allowed conditions for each and every claim:

ANSWER:

d) State the amount of any compensation received for each and every claim:

ANSWER:

e) The present status of each and every claim:

ANSWER:

20. Has the decedent ever filed a Worker's Compensation Claim?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The claim number for each and every claim:

ANSWER:

b) The employer under which each and every claim was filed:

ANSWER:

c) State the allowed conditions for each and every claim:

ANSWER:

d) State the amount of any compensation received for each and every claim:

ANSWER:

e) The present status of each and every claim:

ANSWER:

21. Did the decedent ever use cigarettes, cigars, or pipe or other tobacco products of any kind?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The dates and time periods during which each type of tobacco products was smoked or used:

ANSWER:

b) The types of tobacco products decedent smoked or used and as to each such product whether the smoke was inhaled or was not inhaled:

ANSWER:

c) The daily frequency with which tobacco products were smoked or used (i.e., 2 packs of cigarettes daily, 3 cigars daily, 2 pipefuls daily, etc.):

ANSWER:

d) For any time period during which use of tobacco products stopped, state the dates during which decedent's use ceased and the reasons why the use stopped:

ANSWER:

e) For any time period when the use of tobacco products began after a period of having stopped, state the reasons for restarting:

ANSWER:

f) If decedent ever smoked cigarettes, please state the average number of packs per day and brand so consumed in each of the following periods from 1930

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to the present time:

ANSWER:

1. 1930 to 1935 _____ Brand(s) _____

2. 1936 to 1939 _____ Brand(s) _____

3. 1940 to 1945 _____ Brand(s) _____

4. 1946 to 1949 _____ Brand(s) _____

5. 1950 to 1955 _____ Brand(s) _____

6. 1956 to 1959 _____ Brand(s) _____

7. 1960 to 1965 _____ Brand(s) _____

8. 1966 to 1969 _____ Brand(s) _____

9. 1970 to 1975 _____ Brand(s) _____

10. 1976 to 1979 _____ Brand(s) _____

11. 1980 to 1985 _____ Brand(s) _____

12. 1986 to pres._____ Brand(s) _____

g) If advice was ever given by any physician to decedent to stop smoking or using tobacco products, identify each physician who gave such advice, the dates on which the advice was given, and also state whether the advice was followed:

ANSWER:

h) Was decedent award of the United States Surgeon General's warning placed on all cigarette packages and advertisements:

ANSWER:

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i) If the answer to subpart (h) is in the affirmative, please indicate the date on which the decedent first became award of such warning:

ANSWER:

j) Did the decedent stop smoking at the time he became aware of such warning?

ANSWER:

22. Has any diagnosis and/or prognosis of decedent's medical condition been made as a result of any illness or conditions

allegedly sustained as a result of any exposure to asbestos or asbestos-containing products?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Each and every diagnosis which has been made:
ANSWER:

b) The date(s) of any such diagnosis:

ANSWER:

c) Identify each person making any such diagnosis:

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ANSWER:

d) The prognosis made for each and every diagnosis:

ANSWER:

e) Identify each person making any such prognosis:

ANSWER:

f) The date of last prognosis regarding any diagnosis:

ANSWER:

g) The date the condition or conditions diagnosed first manifested symptoms:

ANSWER:

23. For each and every symptom, indication, malaise, or affliction which you contend to be directly or indirectly related to any asbestos-related disease, disability or physical condition, please state the following:

a) The nature and description of such symptom:

ANSWER:

b) The date, time, place and manner in which such symptom first manifested itself or was made known to you, including all pertinent information as to the source of such knowledge:

ANSWER:

c) Whether you contend such symptom is related in any fashion to decedent's exposure to asbestos, and the nature and extent of such relationship:

ANSWER:

d) All facts and opinions on which you rely in alleging that the symptoms identified are related to exposure to asbestos:

ANSWER:

24. Has any diagnosis and/or prognosis of decedent's medical condition been made as a result of any illness or conditions

allegedly sustained as a result of any exposure to silica or silica-containing products?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Each and every diagnosis which has been made:

ANSWER:

b) The date(s) of any such diagnosis:

ANSWER:

c) Identify each person making any such diagnosis:

ANSWER:

d) The prognosis made for each and every diagnosis:

ANSWER:

e) Identify each person making any such prognosis:

ANSWER:

f) The date of last prognosis regarding any diagnosis:

ANSWER:

g) The date the condition or conditions diagnosed first manifested symptoms:

ANSWER:

25. For each and every symptom, indication, malaise, or affliction which you contend to be directly or indirectly related to any alleged silicosis or silica-related disease, disability or physical condition, please state the following:

a) The nature and description of such symptom:

ANSWER:

b) The date, time, place and manner in which such symptom first manifested itself or was made known to you, including all pertinent information as to the source of such knowledge:

ANSWER:

c) Whether you contend such symptom is related in any fashion to decedent's exposure to silica, and the nature and extent of such relationship:

ANSWER:

d) All facts and opinions on which you rely in alleging that the symptoms identified are related to exposure to silica:

ANSWER:

26. Has the decedent ever been hospitalized, operated upon, or confined to an institution, including nursing homes or extended care facilities?

ANSWER:

If the answer is in the affirmative, please state the following:

a) Names and addresses of all hospitals or institutions involved;

ANSWER:

b) The beginning and ending dates of each period of hospitalization or institutionalization;

ANSWER:

c) The nature of the illness, injury or complaint for

which decedent was admitted;

ANSWER:

d) The names and addresses and relationship to decedent of all persons who treated or examined decedent:

ANSWER:

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27. With respect to each physician, not listed in the preceding interrogatory, who examined or treated the decedent during his lifetime to date, state the following:

a) Identify each physician and his address;

ANSWER:

b) List the complaint decedent had that caused him to see each particular physician;

ANSWER:

c) The type of examination, the diagnosis and type of treatment that each doctor gave decedent;

ANSWER:

d) The date or dates on which decedent was examined, diagnosed and treated by each particular physician:

ANSWER:

28. Has the decedent ever had x-rays taken of his chest other

than at any of the institutions listed previously, including x-rays performed by the Armed forces, employers or unions?

ANSWER:

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If the answer is in the affirmative, please state the following for each set of x-rays taken:

a) name and address of the office or hospital where each set of x-rays was taken;

ANSWER:

b) the reason(s) why such x-rays were taken;

ANSWER:

c) whether anything was reported to decedent, and the nature of any such report(s), as being the x-ray diagnosis;

ANSWER:

d) who paid to have the x-rays taken;

ANSWER:

e) the names and addresses of any physicians, hospitals, clinics, or other persons to whom copies of x-ray reports were sent:

ANSWER:

29. Has decedent ever had a pulmonary function test ("PFT") or breathing test?

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ANSWER:

If the answer is in the affirmative, please state for each such test:

a) name and address of the office or hospital where each such PFT or breathing test was taken;

ANSWER:

b) the reason(s) why such PFT or breathing test was taken;

ANSWER:

c) whether anything was reported to decedent, and the nature of any such report(s), as being the PFT or breathing test diagnon for such agreement:

ANSWER:

30. Please identify each of decedents employers in whose employ you claim decedent was exposed to asbestos. Include in your

answer the following:

a) The name, address and telephone number for each such employee;

ANSWER:

b) For each such employer, indicate the jobsite, address and inclusive dates of claimed exposure:

ANSWER:

c) Decedent's job title and work description for each such employment of claimed exposure:

ANSWER:

d) The dates of such employment of claimed exposure:

ANSWER:

e) The length of time you spent on each jobsite:

ANSWER:

f) The manufacturer, or if the manufacturer is unknown, the trade name and/or the generic type of each and every product which decedent believed contained asbestos, to which decedent was exposed during each such employment, and the dates from the first exposure to the last exposure:

ANSWER:

g) whether the jobs were inside work or outside work:

ANSWER:

h) For each job, whether it involved new construction, repair, replacement or

tear-out (specify which):

ANSWER:

31. For each exposure to asbestos and to products decedent believed contained asbestos that are listed in the answer to Interrogatory 29, please state the name and address of each co-worker who has knowledge that these exposures occurred.

ANSWER:

32. Please identify each of decedent's employers in whose employee decedent claimed exposure to silica. Include in your answer the following:

a) the name, address and telephone number for each such employer;

ANSWER:

b) For each such employer, indicate the jobsite, address and inclusive dates of claimed exposure:

ANSWER:

c) Decedent's job title and work description for each such

employment of claimed exposure:

ANSWER:

d) The dates of such employment of claimed exposure:

ANSWER:

e) The length of time decedent spent on each jobsite:

ANSWER:

f) The manufacturer, or if the manufacturer is unknown, the trade name and/or the generic type of each and every product which decedent believed contained silica,

to which decedent was exposed during each such employment, and the dates from the first exposure to the last exposure:

ANSWER:

g) Whether the jobs were inside work or outside work:

ANSWER:

h) For each job, whether it involved new construction, repair, replacement or tear-out (specify which):

ANSWER:

33. For each exposure to silica and to products decedent believed contained silica that are listed in the answer to Interrogatory 31, please state the name and address of

each co-worker who has knowledge that these exposures occurred.

ANSWER:

34. Please state whether safety equipment such as respirators or masks to reduce exposure to asbestos and/or silica material was provided or required by any of decedent's employers (specify which):

ANSWER:

If the answer is in the affirmative, please state:

a) whether decedent used the masks or respirators:

ANSWER:

b) If so, identify the jobsites at which decedent used such masks or respirators:

ANSWER:

35. State whether showers were provided for each such employment:

ANSWER:

36. State whether separate lockers for work and personal clothing were provided for each such employment:

ANSWER:

37. Has decedent ever been a member of any trade or labor union?

ANSWER:

For each and every membership please list the following:

a) The union, including the local designation for each such union membership:

ANSWER:

b) The beginning and ending dates of membership(s) and the reasons why such membership(s) was terminated:

ANSWER:

c) The types of work authorized to perform by virtue of each and every membership:

ANSWER:

d) The places, dates and offices held or the committees on which decedent served in both the local and international union(s) for each such membership:

ANSWER:

e) Whether union meetings are or were regularly attended in reference to each such membership:

ANSWER:

f) The names of each and every publication(s) received from the unions and the dates and frequency with which they were received:

ANSWER:

g) The frequency with which such publications are or were read (i.g., regularly, occasionally, rarely):

ANSWER:

38. State whether the decedent was exposed to asbestos or asbestos-containing products which were manufactured, sold, produced, prepared or distributed by any entity not named as a defendant in this lawsuit. If so, identify the manufacturer, the product and the dates of exposure.

ANSWER:

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39. Has decedent ever been exposed to asbestos or asbestos-containing products outside the workplace?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The date of each such exposure:

ANSWER:

b) The place of each such exposure:

ANSWER:

c) The frequency of each such exposure:

ANSWER:

d) The trade name(s) and/or manufacturer(s) of the asbestos containing product(s) for each such exposure:

ANSWER:

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e) The names and addresses of each individual with knowledge to corroborate each such exposure:

ANSWER:

40. State whether decedent has ever received any instructions, recommendations or warning of any kind regarding each asbestos-containing product to which decedent was exposed (i.e., printed on container or package, tag, covering, or instruction sheet accompanying the product, etc.):

ANSWER:

41. State whether decedent ever received any instructions or recommendations by decedent's employer or superior at any time regarding the safety precautions to be taken when using

each asbestos-containing product to which decedent was exposed, including, but not limited to, the creation, inhalation or ingestion of dust.

ANSWER:

42. Did decedent at any time receive, have knowledge of, or possess any advice, publication, warning, order, directive, requirement or recommendation, written or oral, which purported to either advise or warn decedent of the possible harmful effects of exposure to, or inhalation or, asbestos, asbestos-containing materials, silica, or silica-containing materials?

ANSWER:

43. Did decedent at any time receive, have knowledge of, or possess any advice, publication, warning, order, directive, requirement or recommendation, either written or oral, which

purported to advise or recommend techniques, methods or equipment

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which would serve to reduce or guard against such potentially harmful exposure?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The nature and exact wording of such advice, warning, recommendation etc.:

ANSWER:

b) The complete identity of each source of such advice, warning or recommendation, etc.:

ANSWER:

c) The date, time, place and manner and circumstances when

each such advice, warning, recommendation, etc. was

given:

ANSWER:

d) Identify each and every witness to the receipt of such advice, warning, recommendation, etc.:

ANSWER:

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e) Identify each and every co-worker or similar member of decedent's trade and occupation who also received the same or similar advice, warning, recommendation, etc.:

ANSWER:

44. Has decedent ever provided testimony, or been SPRINT interviewed in a lawsuit?

ANSWER:

If the answer is in the affirmative, please state the following:

a) The name of the case and case number for which each such testimony or SPRINT interview was given:

ANSWER:

b) The nature of each such proceeding and/or testimony:

ANSWER:

c) The approximate date when each such testimony and/or SPRINT interview was given:

ANSWER:

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45. Has decedent ever been exposed to radiation medically, incidentally or occupationally?

ANSWER:

If the answer is in the affirmative, describe the circumstances of exposure and date or dates of exposure:

ANSWER:

46. State the nature, extent and frequency of any physical examinations which any of decedent's employers required or made available to decedent and the frequency (with specific dates) with which decedent submitted to such examinations.

ANSWER:

47. Please state whether decedent had obtained any judgments, settlements, or compromises, payments from or entered into any agreements with any person or entity arising from exposure to asbestos, asbestos-containing products, silica or silica-containing products.

ANSWER:

If the answer is in the affirmative, please state:

a) The amount of such each and every judgment, settlement, compromise or payment:

ANSWER:

b) the date upon which each such judgment, settlement, compromise or payment was received:

ANSWER:

c) The person or entity from whom such judgment, settlement, compromise or payment was received:

ANSWER:

48. Please state whether decedent had entered into any agreement with any party or non-party to this litigation regarding future claims or payments resulting from decedent's alleged exposure to asbestos, asbestos-containing products, silica or silica-containing products.

ANSWER:

If the answer is in the affirmative, please state:
a) the amount of consideration for each such agreement:

ANSWER:

b) The date upon which each agreement was entered into:

ANSWER:

c) The person or entity with whom each such agreement was reached:

ANSWER:

d) The dates upon which each such payment is to be received:

ANSWER:

e) The date upon which each agreement was entered into:

ANSWER:

f) The person or entity with whom such agreement was reached:

ANSWER:

g) The dates upon which payment is to be received:

ANSWER:

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REQUEST FOR PRODUCTION OF DOCUMENTS

1. Identify and product all literature or other documents which relate to the product or products, allegedly containing

asbestos and/or silica, to which you claim decedent was exposed which are in your possession or in the possession of your attorney.

2. Identify and product a complete work history of the decedent including the location of each and every jobsite at which decedent worked wherein plaintiff claims decedent was exposed to asbestos and/or silica. For each such jobsite, state the dates decedent was present, the name of decedent's employer, the type of work decedent performed and the names and addresses of each co-worker with whom decedent worked.

3. Identify and product all literature or other documents, in your possession or in the possession of your attorney, that constitute or relate to advice, warnings, orders, directives, requirements or recommendations, which purported to advise the decedent of the possible harmful effects of exposure to asbestos or asbestos-containing products, or of techniques, methods, or equipment which would serve to reduce or guard against such exposure.

4. Identify and produce all literature or other documents which relate to your claim of conspiracy as to each defendant named in this lawsuit.

5. Identify and product all medical records and reports, including autopsy report and death certificate, in your possession or in the possession of your attorney.

6. If this a death claim, identify and produce the appropriate probate papers which designate the appointment of the fiduciary of the decedent's estate in your possession or in the possession of your attorney.

7. Identify and product tax returns for the last ten (10) years, a Social Security Statement of Earnings, and any other documents relating to income earned in the last ten (10) years which are in your possession or in the possession of your attorney.

8. Identify and produce all non-medical experts reports which are in your possession or in the possession of your attorney.

9. Identify and product all documents and prior testimonies of which you have knowledge which relate to your allegation that you are entitled to receive punitive or exemplary damages.

10. Identify and product the names and full addresses of all

persons you expect to call as expert witnesses at trial, including a summary of the testimony that each witness is expected to give.

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11. Identify and produce the names and full addresses of all non-experts you expect to call as witnesses at trial including a summary of the testimony that each witness is expected to give.

12. Identify and produce all documents, other than those previously identified in your responses to these requests, that you expect to offer as evidence at trial.

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AUTHORIZATION FOR RELEASE OF WORKERS' COMPENSATION INFORMATION

TO: _____

_____

_____

This is authority for you to permit any attorney of record, or any agent of any attorney of record, to copy, inspect, and examine any and all records, correspondence, medical reports, in your possession pertaining to any and all Workers' compensation claims involving:

NAME: _____

SS#: _____
DOB: _____

CLAIM NO: _____

PHOTOCOPIES OF THIS AUTHORIZATION SHALL BE MADE AND SHALL HAVE THE SAME AUTHORITY AS THE ORIGINAL.

DATE: _____ _____

STATE OF OHIO)
) ss:
COUNTY OF _____)

SWORN TO AND SUBSCRIBED before me, a notary public in and for said county and state on this _____ day of _____, 19 __.

_____
NOTARY PUBLIC

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C

Court of Appeals of Ohio,
Ninth District, Summit County.

FIRST BENEFITS AGENCY, INC., Appellant,
v.
TRI-COUNTY BUILDING TRADES WELFARE FUND et al., Appellees.

No. 19003.

Decided Dec. 30, 1998.

Insurance administrator for employee welfare benefit plan sued the plan for breach of contract. Action was placed on court's "inactive docket" to await outcome of related federal lawsuit. Administrator subsequently moved to remove case from "inactive docket" and to place it on "active docket." The Court of Common Pleas, Summit County, denied motion and then denied administrator's motion for relief from that order. Administrator appealed. The Court of Appeals, Dickinson, J., held that: (1) denial of administrator's motion to remove case from court's "inactive docket" and to place it on "active docket" was not a final, appealable order, and (2) denial of such motion was not a final order from which administrator could obtain relief pursuant to rule governing relief from judgment or order.

Case dismissed.

West Headnotes

[1] Appeal and Error 78(1)
30k78(1)

Trial court's denial of plaintiff's motion to remove breach of contract case from court's "inactive docket" and to reinstate it to the "active docket" was not a final, appealable order. R.C. § § 2505.02(B), 2505.03(A).

[2] Judgment 345
228k345

Trial court's denial of plaintiff's motion to remove breach of contract case from court's "inactive docket" and to reinstate it to the "active docket" was not a final order from which plaintiff could obtain relief pursuant to rule governing relief from judgment or order. Rules Civ.Proc., Rule 60(B).

****479 *30** Mark H. Ludwig, Akron, for appellant.

William B. Gore and Teresa R. Kintz, Akron, for appellees.

DICKINSON, Judge.

Plaintiff First Benefits Agency Incorporated has attempted to appeal from two orders of the Summit County Common Pleas Court, the first of which denied its motion to remove this case from the trial court's inactive docket and to reinstate it on the active docket, and the second of which denied its motion for relief from judgment to vacate that first order. Plaintiff has argued (1) that the trial court incorrectly denied its motion to reinstate the case to the active docket, and (2) that the trial court incorrectly denied its motion for relief from judgment to vacate that denial. This court dismisses this case because the orders from which plaintiff has attempted to appeal were not final, appealable orders.

***31** I

Defendant Tri-County Building Trades Welfare Fund is an employee welfare benefit plan as defined by the Employee Retirement Income Security Act. Beginning during February 1987, plaintiff acted as the insurance administrator for defendant, and defendant paid plaintiff a monthly administrative fee for that service. In addition, plaintiff collected commissions on insurance policies it purchased on defendant's behalf. During 1992, defendant notified various insurance carriers that plaintiff was no longer its agent of record. As a result, plaintiff did not receive commissions of approximately $40,000 to which it claimed it was entitled. Plaintiff, therefore, filed this breach-of- contract action in the Summit County ****480** Common Pleas Court on February 8, 1993.

Defendant filed a counterclaim against plaintiff, by which it sought commissions paid plaintiff prior to 1992, based on the Employee Retirement Insurance Security Act, codified at Section 1132, Title 29, U.S.Code. Based upon that counterclaim, defendant attempted to remove this action to the United States District Court for the Northern District of Ohio. The federal district court, however, during June 1994, remanded this matter to the Summit County Common Pleas Court because plaintiff's complaint did not allege a federal question; the federal court, therefore, lacked subject-matter jurisdiction over the case.

On July 15, 1994, defendant filed an action against

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plaintiff in the United States District Court for the Northern District of Ohio, alleging essentially the same claims that it had alleged in its counterclaim in this case. On March 16, 1995, upon agreement of the parties, this action was placed on the Summit County Common Pleas Court's inactive docket to await the outcome of the federal action. After trial of the federal case, the federal district court ruled, among other things, that the commissions received by plaintiff prior to 1992 were subject to disgorgement. It, therefore, awarded defendant $271,064.70.

On January 27, 1998, plaintiff moved the Summit County Common Pleas Court to remove this case from the trial court's inactive docket and to place it on the active docket. In addition, it requested that the trial court award it attorney fees for defendant's allegedly frivolous attempt to remove this case to federal court. On March 6, 1998, the trial court denied that motion. It ruled that the claims in plaintiff's complaint were mandatory counterclaims that should have been raised in the federal action. Consequently, the trial court decided that it would not remove the case from its inactive docket and entertain those claims. It also ruled that plaintiff's motion for attorney fees was untimely and, therefore, refused to consider that issue.

Plaintiff attempted to appeal that decision to this court and, while that attempted appeal was pending, moved the trial court for relief from judgment ***32** pursuant to Civ.R. 60(B). By its Rule 60(B) motion, plaintiff asked the trial court to vacate the denial of its motion to place the case on the active docket. On May 8, 1998, this court granted plaintiff a stay of appellate proceedings pending the outcome of its motion for relief from judgment. On May 28, 1998, the trial court "reiterate[d]" its March 6, 1998, order, and denied plaintiff's 60(B) motion to vacate its decision not to place plaintiff's case on the court's "active docket." Plaintiff amended its notice of appeal to add an attempted appeal from that denial.

II

A

[1] Plaintiff's first assignment of error is that the trial court incorrectly denied its motion to remove this case from its inactive docket and to reinstate it to the active docket. It has argued that the order from which it has attempted to appeal was a final, appealable order and that, consequently, this court has jurisdiction to review it.

R.C. 2505.03(A) provides that "[e]very final order, judgment, or decree of a court * * * may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction." A final order is defined in R.C. 2505.02(B):

"An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

"(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

"(2) An order that affects a substantial right made in a special proceeding or upon ****481** a summary application in an action after judgment;

"(3) An order that vacates or sets aside a judgment or grants a new trial;

"(4) An order that grants or denies a provisional remedy and to which both of the following apply:

"(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

"(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

"(5) An order that determines that an action may or may not be maintained as a class action."

***33** Plaintiff has failed to demonstrate how the order from which it has attempted to appeal fits any of the definitions listed above.

The denial of its motion to reinstate this case to the trial court's active docket did not affect a substantial right that determined the action and prevented a judgment. The case has not been dismissed. The trial court may decide to reinstate it, in which case plaintiff's claims would be determined.

In *In re Cuyahoga Cty. Asbestos Cases* (1998), 127 Ohio App.3d 358, 713 N.E.2d 20, the Court of Appeals for the Eighth District considered a situation in which the trial court had created a "Voluntary Registry for the Unimpaired Asbestos Claims," which allowed those asbestos plaintiffs who were not severely medically impaired to place their claims on the court's inactive docket, during which time those claims would be exempt from discovery and not age.

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Upon proof that a plaintiff had progressed to a certain level of medical impairment, the case would be transferred to the court's active docket for resolution on its merits. The court of appeals for the Eighth District held that the placing of those claims on the inactive docket was not a final, appealable order. *Id.* It noted that the creation of the voluntary registry did not "determine the underlying personal injury action of any claimant nor * * * adjudicate any issue in the case. The order d[id] not determine the action nor d[id] it prevent a judgment." *Id.*

The trial court's action in this case was similar to the actions of the trial court in *Asbestos Cases.* The denial of plaintiff's motion to reinstate the case to the active docket did not determine any issues, let alone the entire action, and did not prevent a judgment. The trial court did not dismiss the case. It simply refused to remove it from the inactive docket. It may do so at a future date, at which time the case will be adjudicated. The trial court's order was not, therefore, a final, appealable order pursuant to R.C. 2505.02(B)(1).

The order also did not affect a substantial right made in a special proceeding. A special proceeding is an action or proceeding that was specially created by statute and that, prior to 1853, was not denoted as an action at law or a suit in equity. R.C. 2505.02(A)(2). Plaintiff, in its complaint, alleged state law contract claims. Consequently, the denial of its motion to reinstate the case was not made in a special proceeding. See R.C. 2505.02(B)(2).

Further, the trial court's order did not vacate or set aside a judgment, and it did not grant a new trial. See R.C. 2505.02(B)(3). Similarly, the order did not grant or deny a provisional remedy that determined the action and prevented a judgment with respect to that provisional remedy, leaving plaintiff without a meaningful or effective remedy by an appeal following final judgment in its action. See R.C. 2505.02(B)(4). Finally, the order did not determine that an action may or may not be maintained as a class action. See R.C. 2505.02(B)(5).

***34** The order from which plaintiff has attempted to appeal did not meet any definition ****482** of a final order in R.C. 2505.02. It was not, therefore, a final, appealable order from which plaintiff may maintain an appeal.

Plaintiff has also challenged the trial court's failure to award it attorney fees, as it requested in its motion to reinstate the case. The trial court denied that motion for attorney fees because it ruled that it was not timely. Because plaintiff's attempted appeal is not properly before this court, this court cannot consider whether the trial court's decision regarding attorney fees was correct.

Plaintiff's attempted appeal from the trial court's order refusing to place this case on its active docket is not properly before this court. Accordingly, that aspect of plaintiff's attempted appeal is hereby dismissed.

B

[2] Plaintiff's second assignment of error is that the trial court incorrectly denied its motion for relief from judgment, pursuant to Civ.R. 60(B), to vacate the denial of its motion to reinstate the case to the active docket. As discussed above, the trial court's denial of plaintiff's motion to remove this case from its inactive docket was not a final, appealable order. Consequently, Civ.R. 60(B) relief was not available. See *Busa v. Lasorella* (May 4, 1995), Cuyahoga App. No. 67980, unreported, 1995 WL 264449 ("[t]hough a judgment granting or denying a 60[B] motion is, as a rule, a final appealable order * * *, a party may seek 60[B] relief only from a final judgment").

Plaintiff's 60(B) motion was not appropriate because it was an attempt to vacate an order that was not final. Consequently, the trial court's resolution of that motion was not a final, appealable order and this court has no jurisdiction to entertain this aspect of plaintiff's attempted appeal.

III

The orders from which plaintiff has attempted to appeal were not final, appealable orders. Consequently, this court is without jurisdiction to entertain this appeal. This case is dismissed.

Case dismissed.

BAIRD, P.J., and REECE, J., concur.

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20 No. 7 ANASBLR 12
20 No. 7 Andrews Asbestos Litig. Rep. 12
(Publication page references are not available for this document.)

Andrews Asbestos Litigation Reporter
May 1, 1998

Procedure

OHIO APPEALS COURT REJECTS USX'S CHALLENGE TO CLEVELAND UNIMPAIRED CLAIM REGISTRY

In re Cuyahoga County Asbestos Cases

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The Ohio Court of Appeals has rejected the constitutional challenge raised by USX Corp. over the establishment of a voluntary registry for less seriously impaired asbestos plaintiffs with claims pending in the Cuyahoga County Court of Common Pleas. The panel concluded that the trial court order approving the registry was not a "final" order under state law, and that it had no jurisdiction over USX's appeal. In re Cuyahoga County Asbestos Cases, No. 72388 (OH Ct. App., 8th App. Dist., April 16, 1998).

Some 5400 individual asbestos PI claims are pending in state trial court in Cleveland against over 70 defendants. In December 1996, various plaintiffs asked the trial court to establish the challenge registry as a means of giving more seriously impaired plaintiffs faster access to the courts.

The proposed order set forth objective medical criteria for defining an "unimpaired" plaintiff, and provided that such plaintiffs can voluntarily place their claims on an inactive deferred docket.

While on the inactive docket, the claims are exempt from discovery and do not age. The plaintiffs may remove their claims from the deferred docket if their condition progresses to impairment or they provide additional evidence of impairment that meets the medical criteria. The trial court granted the plaintiffs' motion in March 1997, and entered an order establishing the registry.

USX appealed the order, asserting that the creation of the registry violates its constitutional due process, equal protection and jury trial rights. The defendant also asserted that the registry frustrates the effect of any applicable statutes of limitation, and challenged the trial court's jurisdiction over the unimpaired claims.

In its review, the Ohio Court of Appeals was faced with the threshold issue of whether the registry order was "final," and thus appealable, for the purposes of state law. Under R.C. 2505.02, Ohio statutorily defines a final order as one "that affects a substantial right in an action which in effect determines the action and prevents a judgment, ¿oro an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets aside a judgment or grants a new trial."

USX asserted that the order satisfied the first statutory definition, in that it adjudicated at least one issue (choice of law) and that it prevents a judgment because dispositive motion practice cannot be maintained. Any plaintiff who filed before the 1996 advent of Ohio's tort reform law can avail himself of more favorable laws indefinitely, the defendant contended.

"¿Woe do not see that because the 'unimpaired' plaintiffs have chosen to file their claims prior to the enactment of the tort reform law rather than risk bar by the statute of limitations they have prejudiced these defendants by their 'choice of law,'" the appellate court rejoined. The panel was also unmoved by the assertion that the order "prevents a judgment." While judgment will be deferred during the time cases are on the inactive docket, "these defendants are not denied any of the procedures permitted by the Civil Rules" when a case is on the active docket, the panel stated.

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The Court of Appeals next found that the order was not "made in a special proceeding" for the purposes of the second statutory definition under R.C. 2505.02. "¿Tohe underlying actions are ordinary civil actions in tort for personal injury as recognized at common law and, consequently, cannot be considered a 'special proceeding,'" the panel wrote.

Counsel for the plaintiffs include Robert E. Sweeney of Robert E. Sweeney Co. L.P.A., Cleveland, and William J. Kerner of John J. Duffy & Associates, North Olmstead, OH.

USX is represented by Patrick R. Baughman and Christopher R. Calfin of Baughman & Associates, Cleveland.

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Court of Appeals of Arizona,
Division 2, Department A.

Lowell V. BURNS, Gloria A. Lloyd, Georgina A. Burns, Vernon P. Burrington, Ryan Cothrun, Ronald K. Cothrun, William E. Crawford, Deloys M. Crawford, Jeffrey R. Crawford, Robert L. Dobbs, Gloria O. Dobbs, Robert L. Dobbs, II, Daniel L. Dobbs, Margo L. Drake, Rose M. Giorza, Geno Giorza, Maury S. Gooch, Carroll E. Hounshell, Carolyn G. Hounshell, Cathy J. Hounshell, Roy M. Hudson, Ruth E. Hudson, Thomas B. Hunt, Cytha L. Hunt, Crystal N. Hunt, Brandon T. Hunt, Kim I. Hutchinson, Elaine F. Insalaco, Stephanie L. Joy, Lilalee M. McClellan, Tamiko McClellan, Patrick W. McClellan, Toni M. McClellan, Steven D. McDonald, Nicole L. McDonald, Barbara J. Pearson, Vicky J. Preston, Nicole D. Preston, James M. Richards, Shannon Richards, David J. Vasbinder, Debra A. Vasbinder, Molly A. Vasbinder, Christine S. Christian, Gerald W. Fisher, Penelope A. Fisher, Gerald W. Fisher, II, Joseph I. Giorza, II, F. Arlene Hutchinson, Donald E. Vasbinder, Irene Burrington, Robert B. Denk, Audrey I. Denk, Gary R. Drake, Gary H. Drake, Louis A. Giorza, Dorothy O. Gooch, James S. Ianello, Janet N. Ianello, Anthony C. Insalaco, Salvatore M. Insalaco, Anna D. Insalaco, Gary P. McDonald, Karen K. McDonald, Grady M. Towerton, Verda M. Towerton, Charlene A. Vasbinder, Eunice M. West, John T. West, Dawn M. Winter (Drake), Raymond W. Luckie, Sarah Luckie, Kelly Luckie, Holly R. Luckie, Hiddie B. Pyle, Katherine A. Scott, Shawn H. Scott, Stacy A. Scott, Orval B. Williams, Lanora B. Williams, Melanie Williams, Lori Williams, Jason Williams, Ralph Ycedo, Jr., Albina Ycedo, and Michael E. Ycedo, Plaintiffs/Appellants,

v.

JAQUAYS MINING CORPORATION, D.W. Jaquays Mining and Contractors Equipment Co., D.W. Jaquays and Evelyn Jaquays, Gila County, Pinal-Gila Counties Air Quality Control District, City of Globe, State of Arizona, Mr. and Mrs. Rex Town, Neal Beaver and Mr. and Mrs. Larry M. Schwartz, Defendants/Appellees.

No. 2 CA-CV 5970.

Dec. 10, 1987.
As Corrected Dec. 22, 1987.
As Amended Jan. 15, 1988.
Petition for Review Granted in part and Denied in part April 26, 1988.
Cross-Petition for Review Denied April 26, 1988.

Residents of land adjacent to asbestos-producing mill brought suit against mill owner to recover for, inter alia, subclinical asbestos-related injury. The Superior Court, Gila County, Cause Nos. 22,270, 22,748 and 24,457, James E. Don, J., granted mill owner's motion for summary judgment, and residents appealed. The Court of Appeals, Howard, P.J., held that: (1) subclinical asbestos-related injury was not sufficient to constitute actual loss or damage required to support cause of action; (2) there can be no claim for damages for fear of contracting asbestos-related diseases in the future without manifestation of bodily injury; (3) residents could recover damages for inconvenience, discomfort and annoyance and for property damage resulting from asbestos contamination; and (4) residents were entitled to medical surveillance of development of cancer and other asbestos-related diseases to be paid by mill owner out of court-supervised fund rather than lump-sum award.

Affirmed in part, reversed in part.

West Headnotes

[1] Products Liability ⚷62
313Ak62 Most Cited Cases

Subclinical asbestos-related injury sustained by residents of land adjacent to asbestos-producing mill was not the actual loss or damage required for tort cause of action against mill owner.

[2] Products Liability ⚷62
313Ak62 Most Cited Cases

There can be no claim for damages for fear of contracting asbestos-related diseases in the future without manifestation of bodily injury.

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[3] Action ⚷53(2)
13k53(2) Most Cited Cases

[3] Limitation of Actions ⚷95(5)
241k95(5) Most Cited Cases
(Formerly 241k95(1))

Neither single controversy rule, nor statute of limitations will preclude timely filed cause of action for damages prompted by future discovery of disease or injury related to exposure to toxic substance, even though there has been prior litigation between the parties on different claims based on same tortious conduct.

[4] Nuisance ⚷72
279k72 Most Cited Cases

Residents of land adjacent to asbestos-producing mill could recover damages on nuisance theory from mill operator for inconvenience, discomfort and annoyance and for property damage resulting from contamination by asbestos.

[5] Products Liability ⚷62
313Ak62 Most Cited Cases

Residents of land adjacent to asbestos-producing mill were entitled to medical surveillance to monitor development of cancer or other asbestos-related diseases, to be paid by mill owner out of court-supervised fund rather than lump-sum award.
****29 *376** Harrison & Lerch, P.C. by Mark I. Harrison, Douglas L. Christian and Mary E. Berkheiser, Phoenix, Sparks & Siler, P.C. by Joe P. Sparks and Kevin T. Tehan, Scottsdale, Henderson & Goldberg by Thomas W. Henderson and Robert Jennings, Pittsburgh, for plaintiffs/appellants.

Robbins & Green, P.A. by William H. Sandweg III, Jill H. Grossman and William P. Hovell, Phoenix, for defendants/appellees.

John H. Ryley, Sp. Asst. Atty. Gen., Phoenix, co-counsel for defendant/appellee State of Arizona.

Burch & Cracchiolo, P.A. by Brian Kaven, Daniel R. Malinski, Phoenix, for defendants/appellees Gila County and Pinal-Gila Counties Air Quality Control Dist.

Leonard Everett by Leonard Everett, Tucson, for defendant/appellee City of Globe.

Gallagher & Kennedy by W. Charles Thomson, Thomas A. Maraz, Phoenix, co- counsel for defendant/appellee Schwartz.

Crampton, Woods, Broening & Oberg by Mary B. Wilson, James R. Broening, Phoenix, for defendant/appellee Beaver.

Marc Cavness, Phoenix, co-counsel for defendant/appellee City of Globe.

Hill & Savoy by George Hill, Phoenix, for defendants/appellees Town.

OPINION

HOWARD, Presiding Judge.

This is an appeal from the granting of a summary judgment. [FN1] The main issue in this case is whether subclinical asbestos-related injury is sufficient to constitute the actual loss or damage required to support a cause of action. We hold that it is not.

FN1. The defendants who were awarded the summary judgment are Jaquays Mining Corporation, D.W. Jaquays Mining and Contractors Equipment Co., D.W. Jaquays and Ethelyn (sic) Jaquays (hereinafter referred to collectively as "Jaquays"), Mr. and Mrs. Larry M. Schwartz, Gila County, Pinal-Gila Counties Air Quality Control District, City of Globe, State of Arizona, Mr. and Mrs. Rex Town and Neal Beaver.

Jaquays owned land in Gila County upon which it operated an asbestos mill and had a tailings pile. In 1973, the City of Globe approved the creation of a mobile home subdivision, Mountain View Mobile Home Estates, on adjacent land. The plaintiffs were all at one time residents of the trailer park. Asbestos fiber was blown from the mill and tailings pile into the trailer park. In 1979, the plaintiffs learned the asbestos was dangerous and life threatening. In December 1979, the governor declared the trailer park a disaster area. Steps were taken to clean up the contamination and, in 1983,

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the state began to relocate the residents who stayed on the premises. It was not until September 16, 1985, that the asbestos hazard was finally contained.

[1] The first lawsuits were filed in 1980 and 1981. Other suits were filed in 1982 ****30 *377** and 1983. [FN2] Plaintiffs seek damages for personal injuries and property damage based on negligence, gross negligence, strict liability and nuisance. They also claim damages for the increased risk of developing cancer or other asbestos-related diseases, the need for life-long medical surveillance to monitor the development of those diseases and emotional distress caused by the knowledge and fear of these impending developments. The trial court granted summary judgment on all counts except the count for damages to property.

FN2. Fifty-six plaintiffs remain in this case.

We view the facts in the light most favorable to the plaintiffs. *Gulf Insurance Co. v. Grisham,* 126 Ariz. 123, 613 P.2d 283 (1980). According to the plaintiffs' expert witnesses, the residents of the trailer park were exposed to substantial and cumulative quantities of asbestos fiber. Their cumulative exposure was comparable to and greater than the exposure experienced by workers in asbestos mines, milling and manufacturing industries. They all have asbestos fibers in their lungs which are causing changes in the lung tissue. Sooner or later some of the residents, if they live long enough, will suffer from asbestosis and other asbestos-related diseases. Some of the children who have been exposed will die of asbestos-related diseases and some will become seriously handicapped.

It is clear from the record that none of the plaintiffs has been diagnosed as having asbestosis. Some of the plaintiffs claim to be suffering from mental anguish as a result of their exposure to asbestos, but there is no competent evidence of any physical impairment or harm caused by this exposure. "The threat of future harm, not yet realized, is not enough." Prosser and Keeton on the Law of Torts § 30 at 165 (5th ed. 1984). See also, *DeBoer v. Brown,* 138 Ariz. 168, 673 P.2d 912 (1983); *Alhino v. Starr,* 112 Cal.App.3d 158, 169 Cal.Rptr. 136 (1980); *Johnson v. Rouchleau-Ray Iron Land Co.,* 140 Minn. 289, 168 N.W. 1 (1918). We believe the following quote from *Schweitzer v. Consolidated Rail Corp. (Conrail),* 758 F.2d 936, 942 (3rd Cir.1985), cert. denied, 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152, is applicable here:

> "It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. [citations omitted.] Likewise, the existence of such injury may be of vital concern to insurers and their insureds who have bargained for liability coverage triggered by 'bodily injury.' [citation omitted.] We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.
>
> Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury."

The reasoning in *Schweitzer* was approved in *Jackson v. Johns-Manville Sales Corp. (Jackson III),* 781 F.2d 394, 412 n. 22 (5th Cir.1986), cert. denied, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743. See also *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (cause of action for silicosis accrues when the disease manifests itself); *Clutter v. Johns- Manville Sales Corp.,* 646 F.2d 1151 (6th Cir.1981) (a cause of action under Ohio law for asbestosis accrues when the disease manifests itself); ***378**31** *Bendix Corp. v. Stagg,* 486 A.2d 1150 (Del.1984) (statute of limitations for injuries arising from inhalation of asbestos fiber began to run when harmful effect of asbestosis first manifested itself and became physically ascertainable, and not at time of exposure or time

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scar tissue began to form).

Arizona follows the "discovery rule" as far as the statute of limitations for personal injuries is concerned. See *Mack v. A.H. Robins Co., Inc.,* 573 F.Supp. 149 (D.C.1983); *DeBoer v. Brown, supra.* See also A.R.S. § 12- 542(1). The statute of limitations does not begin to run until there is a manifestation of disease or physical injury. The purpose of the discovery rule, in the context of a latent disease, is to protect a plaintiff who, through no fault of his own, discovers only belatedly that he has the disease. Allowing plaintiffs to sue for injuries when the disease is still subclinical would be an abrogation of the discovery rule in asbestos cases and mandate the commencement of a suit as soon as the contact with the asbestos fiber occurs, hardly a desirable result.

We agree with the observations made by the court in *Schweitzer v. Consolidated Rail Corp. (Conrail),* supra. Justice would not be done either to the plaintiffs or the defendants by allowing a suit prior to manifestation of any physical injuries or disease. In addition to the reasons given by the federal court, we also note that until the asbestosis manifests itself one can only speculate as to the debilitating effects the plaintiff will suffer. Not all asbestosis is one hundred percent debilitating. [FN3] We see no reason to depart from traditional tort concepts and allow recovery for injuries before any disease becomes manifest. [FN4] The statute of limitations does not begin to run until there is a manifestation of physical injuries or disease.

FN3. The plaintiff in *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506 (5th Cir.1984) was first diagnosed as having a 15 percent pulmonary disability which had not progressed significantly by the time of trial.

FN4. Division One of this court reached the same conclusion in *DeStories v. City of Phoenix,* 154 Ariz. 604., 744 P.2d 705 (App.Ct.1987.)

[2][3] In order to overcome the lack of manifestation of any asbestos- related diseases and to supply the necessary physical harm required for a claim of damages for enhanced risk of cancer and emotional distress, the plaintiffs point to the affidavit of one of their experts, Dr. Michael Gray, who did not conduct a physical examination of all the residents. He states that many of the residents have suffered severe and clinically significant mental distress as a consequence of the asbestos situation. He did not specifically identify any of the plaintiffs as being in this class. He also stated that the emotional distress manifested itself "in a variety of disorders affecting normal sleep patterns, normal gastrointestinal functions, alterations in the ability to cope with other life stress, manifestations of anger, headaches, personality disorders, sexual dysfunction, and other adverse health effects which in no fashion could be termed trivial, insignificant, or of only minor or temporary inconvenience for these people." In addition to the fact that the affidavit fails to link any of the plaintiffs with these so-called physical manifestations, there is another reason why plaintiffs' claims for enhanced risk of cancer and for emotional distress are insufficient. There can be no claim for damages for the fear of contracting asbestos-related diseases in the future without the manifestation of a bodily injury. See *Keck v. Jackson,* 122 Ariz. 114, 593 P.2d 668 (1979); see also *Adams v. Johns-Manville Sales Corp.,* 783 F.2d 589 (5th Cir.1986); *Nutt v. A.C. & S., Inc.,* 466 A.2d 18 (Del.Super.Ct.1983), aff'd, 480 A.2d 647 (Del.1984). We agree with the New Jersey Supreme Court in *Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287 (1987), that neither the single controversy rule, nor the statute of limitations will preclude a timely filed cause of action for damages prompted by the future discovery of a disease or injury related to the exposure to a toxic substance, even though there has been prior litigation between the parties on different claims based on the same tortious conduct.

****32 *379** The psychosomatic injuries diagnosed by Dr. Gray consist of headaches, acid indigestion, weeping, muscle spasms, depression and insomnia. There is no evidence that these were other than transitory physical phenomena. They were not linked to any specific plaintiff, and they are not the type of bodily harm which would sustain a cause of action for emotional distress. Comment *c* to the Restatement (Second) of Torts § 436(A) (1965) is applicable here:

"The rule [preventing recovery for emotional disturbance alone] applies to all forms of emotional disturbance, including temporary

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fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character...."

[4] The complaints in this case also alleged a private and public nuisance as follows:

"As a direct and proximate result of the continued maintenance of a nuisance on said property Plaintiffs were caused to become sick, ill and disabled and were prevented from attending to their usual duties and occupation and were compelled to secure medical care and attention in an effort to heal and/or alleviate said injuries and illnesses and will, in the future, be continuously exposed to risk of grave illnesses and harm and may be compelled to secure additional medical care and attention in an effort to heal their said injuries, to their damage. As a further direct and proximate result of the exposure to carcinogenic asbestos the plaintiffs have incurred psychological and emotional trauma and distress."

Restatement (Second) of Torts § 929 sets forth the damages one can recover as a result of a nuisance:

"(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant."

The Comment on Subsection (1), Clause (*c*) states:

"(*e*) *Discomfort and other bodily and mental harms.* Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests. He is also allowed to recover for his own serious sickness or other substantial bodily harm but is not allowed to recover for serious harm to other members of the household, except so far as he maintains an action as a spouse or parent, under the rules stated in §§ 693 and 703. The owner of land who is not an occupant is not entitled to recover for these harms except as they may have affected the rental value of his land."

Those damages that are recoverable are those for the disruption and inconvenience resulting from, in this case, the contamination by asbestos. See *Ayers v. Township of Jackson,* supra. While some of the damages prayed for in plaintiffs' nuisance counts are not recoverable, the counts do set forth a claim for damages for inconvenience, discomfort and annoyance and for property damage, all of which is within the permissible ambit of § 929 of the Restatement. We conclude that the trial court erred in dismissing the nuisance counts.

****33 *380** [5] The last issue is the plaintiffs' claim for recovery of damages to institute a medical surveillance. Dr. Gray testified that as of 1981, all of the adults of ages 65 or under are at greatly advanced risk of asbestos-related lung cancers, mesothelioma, gastrointestinal cancers and asbestosis. Some of the children will die from these diseases and some will become severely handicapped. Dr. Gray also testified that because of the risk, all of the residents should be provided with present and future medical surveillance in order to minimize, detect and treat the diseases as they arise. He described the type of surveillance that should be available, which included physical exams, blood and urine laboratory work-up, electro-cardiograms, periodic chest x-rays, CT scanning techniques and/or magnetic resonance imaging and pulmonary function testing. For individuals over 40 years of age and/or individuals who are 20 years from their initial exposures to asbestos, periodic rectal examinations and gastrointestinal consultation was required as well as additional testing when respiratory disease was apparent. He believed that the frequency of the medical surveillance would, in substantial measure, be influenced by the nature and prevalence of various asbestos-related abnormalities detected on the population as a whole and in each

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individual. He recommended that the testing be conducted approximately every other year, with the frequency increased as time progresses because the probability of asbestos-related disease increases directly as a latency period increases. He suggested that radiologic chest assessments, if utilized, should occur approximately every five years.

We believe, under the facts of this case and despite the absence of physical manifestation of any asbestos-related diseases, that the plaintiffs should be entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of these types of injuries. We agree with the court in *Ayers v. Township of Jackson,* supra 525 A.2d at 312, that when the evidence shows "through reliable expert testimony predicated on the significance and extent of exposure ... the toxicity of [the contaminant], the seriousness of the diseases for which the individuals are at risk, the relative increase in the chance of onset of the disease in those exposed and the value of early diagnosis, ... surveillance to monitor the effects of exposure to toxic chemicals is reasonable and necessary," and its cost is a compensable item of damages. As the New Jersey Supreme Court said at 525 A.2d 311:

> "Compensation for reasonable and necessary medical expenses is consistent with well accepted legal principles. [citation omitted.] It is also consistent with the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. The value of early diagnosis and treatment for cancer patients is well documented. [citation omitted.]"

The New Jersey court gave another cogent reason for its ruling:

> "Recognition of pre-symptom claims for medical surveillance serves other important public interests. The difficulty of proving causation, where the disease is manifested years after exposure, has caused many commentators to suggest that tort law has no capacity to deter polluters, because the costs of proper disposal are often viewed by polluters as exceeding the risk of tort liability. [citations omitted.] However, permitting recovery for reasonable pre-symptom, medical-surveillance expenses subjects polluters to significant liability when proof of the causal connection between the tortious conduct and the plaintiffs' exposure to chemicals is likely to be most readily available. The availability of a substantial remedy before the consequences of the plaintiffs' exposure are manifest may also have the beneficial effect of preventing or mitigating serious future illnesses and thus reduce the overall costs of the responsible parties.
>
> Other considerations compel recognition of a pre-symptom medical surveillance ****34 *381** claim. It is inequitable for any individual, wrongfully exposed to dangerous toxic chemicals but unable to prove that disease is likely, to have to pay his own expenses when medical intervention is clearly reasonable and necessary."

The next question is whether the plaintiffs are entitled to a lump sum award for this medical surveillance or whether a court-supervised fund should be utilized. We believe that the latter approach is proper. As the court said in *Ayers,* 525 A.2d at 314:

> "In our view, the use of a court-supervised fund to administer medical- surveillance payments in mass exposure cases, ... is a highly appropriate exercise of the Court's equitable powers. [citation omitted.] ... Such a mechanism offers significant advantages over a lump-sum verdict....
>
> In addition, a fund would serve to limit the liability of defendants to the amount of expenses actually incurred. A lump-sum verdict attempts to estimate future expenses, but cannot predict the amounts that actually will be expended for medical purposes. Although conventional damage awards do not restrict plaintiffs in the use of money paid as compensatory damages, mass-exposure toxic-tort cases involve public interests not present in conventional tort litigation. The public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure.
>
> Where public entities are defendants, a limitation of liability to amounts actually expended for medical surveillance tends to reduce insurance costs and taxes,....
>
> Although there may be administrative and procedural questions in the establishment and operation of such a fund, we encourage its use by trial courts in managing mass-exposure cases. In litigation involving public-entity defendants, we conclude that the use of a fund to administer medical- surveillance payments should be the general rule, in the absence of factors that render

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> it impractical or inappropriate. [footnote omitted.] This will insure that in future mass-exposure litigation against public entities, medical-surveillance damages will be paid only to compensate for medical examinations and tests actually administered, and will encourage plaintiffs to safeguard their health by not allowing them the option of spending the money for other purposes...."

The judgment below is reversed as to plaintiffs' claims for damages based on nuisance and for medical surveillance, and it is affirmed in all other respects.

752 P.2d 28, 156 Ariz. 375

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Superior Court of Pennsylvania.

William and Paula GIFFEAR, Appellants,
v.
JOHNS-MANVILLE CORPORATION, Pacor, Inc., Eagle-Picher Industries, Unarco Industries, Inc., Keene Corporation, Raybestos-Manhattan, Inc., Celotex Corporation, Southern Textile Company, J.P. Stevens Company, Garlock, Inc., Owens-Illinois Glass Company, Fibreboard Corporation, GAF Corporation,
v.
48 INSULATIONS, Nicolet, Inc., Pittsburgh Corning Corporation, Armstrong World Industries, Inc., H.K. Porter Company, Amatex, Inc., Owens-Corning Fiberglas Corporation.

Argued June 7, 1993.
Filed Sept. 16, 1993.

Worker, who was exposed to asbestos in workplace, and his wife brought action against asbestos manufacturers. The Court of Common Pleas, Philadelphia County, Civil Division, No. 0719 July T., 1982, Hill, J., entered judgment notwithstanding jury verdict in favor of worker and wife in amount of $3,000,000. Worker and wife appealed. The Superior Court, No. 1038 Philadelphia 1992, Cirillo, J., held that: (1) worker's asymptomatic asbestos- related pleural thickening was not compensable injury giving rise to cause of action against manufacturers, and (2) worker's fear and increased risk of cancer were not compensable injuries.

Affirmed.

Wieand, J., filed concurring opinion.

Del Sole, J., filed concurring opinion in which Ford Elliott, J., joined.

West Headnotes

[1] Judgment ⚷199(3.5)
228k199(3.5) Most Cited Cases

Judgment n.o.v. may be entered only in clear case where facts are such that no two reasonable persons can fail to agree that verdict was improper.

[2] Appeal and Error ⚷934(1)
30k934(1) Most Cited Cases

Court reviewing grant of judgment n.o.v. must consider evidence, as well as all reasonable inferences which may be drawn therefrom, in light most favorable to verdict winner.

[3] Damages ⚷32
115k32 Most Cited Cases

Asbestos-related pleural thickening, absent disabling consequences or manifest physical symptoms, is noncompensable injury and, therefore, does not give rise to cause of action; overruling *Higginbotham v. Fibreboard Corp.*, 630 A.2d 14, and *Morrison v. Fibreboard Corp.*, 630 A.2d 436.

[4] Damages ⚷3
115k3 Most Cited Cases

[4] Limitation of Actions ⚷95(4.1)
241k95(4.1) Most Cited Cases

"Injury" for purposes of triggering statute of limitations and "injury" for purposes of recovering damages for bodily harm can be distinguished.

[5] Limitation of Actions ⚷95(5)
241k95(5) Most Cited Cases

Plaintiff's discovery of pleural thickening no longer launches running of statute of limitations for all present and future asbestos-related injuries; rather, claim for each asbestos-related injury may be brought separately.

[6] Trial ⚷136(1)
388k136(1) Most Cited Cases

What constitutes cognizable cause of action is legal question reserved for court and not factual question for jury.

[7] Damages ⚷32
115k32 Most Cited Cases

[7] Products Liability ⚷62

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313Ak62 Most Cited Cases

Worker's asbestos-related pleural thickening did not give rise to compensable injury and, therefore, worker did not have legally cognizable claim against asbestos manufacturers; worker had no ascertainable physical symptoms, impairment, or disability.

[8] Action ⚷38(3)
13k38(3) Most Cited Cases

[8] Limitation of Actions ⚷95(5)
241k95(5) Most Cited Cases

Any recovery for symptomatic asbestos-related pleural thickening would not preclude later action if cancer were to develop as result of asbestos exposure.

[9] Damages ⚷49.10
115k49.10 Most Cited Cases

Worker's fear and increased risk of cancer due to his asymptomatic asbestos- related pleural thickening was not compensable injury giving rise to cause of action against asbestos manufacturers.

[10] Damages ⚷49.10
115k49.10 Most Cited Cases

Under "two disease rule," claims for risk and fear of cancer cannot form basis for recovery in asbestos cases where cancer is not present; in action for exposure for asbestos, plaintiff's claim may encompass only harms caused by disease which have become manifest and later separate action may be pursued if and when separate disease occurs.
****881 *329** Steven J. Cooperstein, Philadelphia, for appellants.

Richard T. Wentley, Pittsburgh, for appellee Fibreboard.

James F. Hammill, appellee, pro se.

Before ROWLEY, President Judge, and WIEAND, CIRILLO, DEL SOLE, TAMILIA, KELLY, POPOVICH, HUDOCK and FORD ELLIOTT, JJ.

CIRILLO, Judge.

William and Paula Giffear (the Giffears) appeal from an order entered in the Court of Common Pleas of Philadelphia County granting judgment notwithstanding the verdict (j.n.o.v.) in favor of appellees Keene Corporation and Fibreboard Corporation (Keene and Fibreboard). We affirm.

The Giffears instituted this action seeking damages for physical injuries and for fear and increased risk of cancer arising out of Mr. Giffear's occupational exposure to asbestos. All but three of the non-bankrupt defendants settled with Mr. ***330** Giffear. Trial ****882** against the remaining defendants, Fibreboard, Keene and Owens-Corning Fiberglas Corporation (a third party defendant), [FN1] was held in reverse bifurcated form; that is, the first phase of trial concerned solely the issue of damages.

FN1. Owens-Corning Fiberglas Corporation settled with the Giffears after the verdict.

The evidence at trial established that Mr. Giffear's initial exposure to asbestos occurred in 1964, when Mr. Giffear began service in the United States Navy. Mr. Giffear testified that for the next four years, he was exposed to asbestos products virtually every day for a period of three to four hours. After serving in the military, Mr. Giffear spent approximately ten years working as a plumber and was exposed to asbestos two to three times per week. In 1980, Mr. Giffear began work as a pipefitter in the Philadelphia Naval Shipyard. While there, he received an annual medical checkup and, in 1982, was told that he had pleural disease. Mr. Giffear was thirty-five years old at the time of this diagnosis and was told that his asbestos exposure could lead to cancer.

At trial, Mr. Giffear's medical expert, Dr. William Fineman, testified that Mr. Giffear's chest x-rays revealed extensive pleural thickening and plaque formation. Dr. Fineman was unable, however, to identify any clinical physiologic impairment in Mr. Giffear as a result of this diagnosis. In other words, Dr. Fineman could not attribute any physical symptoms to the pleural thickening. Furthermore,

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Dr. Fineman observed no change in the extent of the pleural thickening in a series of Mr. Giffear's x-rays spanning ten years. Dr. Fineman opined that, based on Mr. Giffear's asbestos exposure, Mr. Giffear is five times as likely to contract lung cancer as he would have been had he never been exposed to asbestos and, further, that his risk of mesothelioma had increased by a factor of three-hundred.

Keene and Fibreboard did not dispute that Mr. Giffear had some asbestos- related pleural thickening, although they did dispute the severity of such thickening. Specifically, Keene's and Fibreboard's expert, Dr. Alan Pope, testified that Mr. ***331** Giffear's pleural thickening was mild and, while pleural changes had progressed in the period of 1980 through 1983, the thickening had since stabilized. Dr. Pope, like Dr. Fineman, opined that the pleural thickening had no physical effect on Mr. Giffear. Finally, Dr. Pope disputed Dr. Fineman's testimony that Mr. Giffear's asbestos exposure left him with a five times increased risk of lung cancer. According to Dr. Pope, Mr. Giffear's exposure made him only twice as likely to get lung cancer. Dr. Pope did not dispute Dr. Fineman's testimony regarding Mr. Giffear's increased risk of mesothelioma.

At the conclusion of the damages phase of trial, the court instructed the jury, at Keene's and Fibreboard's request, that the jury must determine whether Mr. Giffear had suffered a compensable injury. Additionally, the court instructed the jury that if it decided that Mr. Giffear had *not* sustained compensable injury, he would be entitled to bring another lawsuit should he develop an asbestos-related medical problem in the future. Because Mr. Giffear was also seeking recovery for increased risk and fear of cancer, the jury was additionally instructed that if it *did* find that Mr. Giffear had sustained a compensable injury, that is to say, a condition which caused him harm, the amount of damages must adequately compensate him for all harm he has sustained in the past and might sustain in the future; he would, in this case, not be entitled to start another lawsuit for future medical problems. [FN2] In accordance with its instructions, the court submitted to the jury the following interrogatory on the ****883** verdict sheet: "[I]s [Mr. Giffear's] pleural thickening or pleural plaques an asbestos-related condition or disease allowing him to receive compensation?" ***332** The jury answered that question in the affirmative and awarded Mr. Giffear damages in the amount of $300,000.00. [FN3]

FN2. The jury instruction rendered here was essentially identical to the jury instruction approved by the majority in *Manzi v. H.K. Porter Co.,* 402 Pa.Super. 595, 587 A.2d 778 (1991), *appeal denied,* 530 Pa. 644, 607 A.2d 254 (1992). The instruction in *Manzi,* which provided for a second action if an asbestos injury was found to be non-compensable, significantly eroded the prior rigid rule limiting asbestos plaintiffs to a single lawsuit. Following the reasoning initiated in *Manzi,* this court en banc recently made the explicit statement that Pennsylvania has now joined the majority of jurisdictions which allow separate actions for separate asbestos-related injuries. *See Marinari v. Asbestos Corp., Ltd.,* 417 Pa.Super 440, 612 A.2d 1021 (1992), discussed *infra.*

FN3. On the issue of liability, the matter was tried without a jury, and the trial was conducted by stipulation. The trial court found Keene and Fibreboard liable for one-eighth (1/8) of the verdict.

Post-trial motions were filed and the trial court, after oral argument, granted Keene's and Fibreboard's motion for j.n.o.v. Judge Hill's opinion stated that there was "no medical testimony in either case linking any symptoms, illness or impairment of any sort to the pleural thickening allegedly suffered by [Mr. Giffear]." As a result, Judge Hill concluded that pleural thickening did not constitute a compensable injury.

The Giffears appealed and ask us to consider whether the trial court erred in granting the j.n.o.v. Specifically, the Giffears assert that Mr. Giffear suffered compensable physical injury and an increased risk and fear of cancer as a result of his asbestos exposure. [FN4]

FN4. At this point we find it necessary to

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address the concern enunciated in the concurring opinions authored by Judges Del Sole and Wieand regarding the issue surrounding Mr. Giffear's asymptomatic pleural thickening. Both concurring opinions conclude that the issue of whether asymptomatic pleural thickening is a compensable injury is not necessary to resolve the instant case (Del Sole, J., concurring) and/or should be left for another day (Wieand, J., concurring). While the Giffears have stated their issue in the broadest of terms (*i.e.* Did the trial court err in granting j.n.o.v.?), it is clear from both their original appellate brief and their brief on reargument en banc that they raise two separate issues, one being whether asymptomatic pleural thickening, in and of itself, is a compensable injury.

In their original appellate brief, the Giffears' first paragraph of the argument section squarely confronts this issue. Responding to the trial court's decision, the Giffears begin their argument with the following: "According to the court, asymptomatic pleural disease is, as a matter of law, not a compensable injury. This ruling flies in the face of well-established Pennsylvania law." The Giffears' assertions in support of this statement follow. Similarly, in their reargument en banc brief, the Giffears have labeled the first portion of the argument section of the brief as follows: ***A. Pleural Thickening Is An Injury Giving Rise To A Cause Of Action.*** Clearly, this issue had to be addressed.

Additionally, the issue was obviously a basis for the trial court's decision to enter the j.n.o.v., as was unequivocally revealed in Judge Hill's trial court opinion:

The issue of whether asymptomatic pleural thickening constitutes a compensable injury under Pennsylvania law was recently addressed by a Common Pleas Court sitting en banc ... in the case of *John Czekaj and Lorraine Czekaj v. Johns-Manville* [citation omitted]. As the instant case is factually similar to *Czekaj,* this court feels it must be guided by the holding in *Czekaj* in which the undersigned participated as a member of the court en banc.

The question of whether asymptomatic pleural thickening constitutes a compensable injury under Pennsylvania law is an issue that is clearly confronting this court under the facts of this case. In fact, we find it difficult to imagine a more appropriate set of circumstances in which to address the arguments surrounding this complicated question than those we are faced with today.

***333** [1][2] A j.n.o.v. may be entered only in a clear case where the facts are such that no two reasonable persons can fail to agree that the verdict was improper. *Mitzelfelt v. Kamrin,* 526 Pa. 54, 61, 584 A.2d 888, 891 (1990); *Lira v. Albert Einstein Medical Center,* 384 Pa.Super. 503, 508, 559 A.2d 550, 552 (1989), *appeal denied,* 527 Pa. 635, 592 A.2d 1302 (1990). A reviewing court must consider the evidence, as well as all reasonable inferences which may be drawn therefrom, in the light most favorable to the verdict winner, in this case the Giffears. *Mitzelfelt, supra; Lira, supra.*

In their appellate reply brief the Giffears argue that this court's recent en banc decision in *Marinari v. Asbestos Corp., Ltd.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992) serves as an adequate basis for reversal of Keene's and Fibreboard's j.n.o.v. In making this assertion, the Giffears refer to the following language:

The physiologic changes evidenced by pleural thickening are a clear indication that damage which is objective and ascertainable has occurred to tissues in the thoracic cavity. *Hence, we conclude that pleural thickening, even when asymptomatic, is an injury which gives rise to a cause of action.*

****884** *Id.,* 417 Pa.Super. at 454, 612 A.2d at 1028 (emphasis added).

Taken out of context, this passage appears to be the the holding of *Marinari;* it is not, however, and we are therefore not bound to follow such language. Rather, the sole issue presented in *Marinari* was whether Pennsylvania, in the context of asbestos actions, should adopt a "separate disease rule." In deciding this question, this court considered the ***334** following facts. As a result of occupational asbestos exposure, Mr. Marinari discovered that he

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had pleural thickening. Since Marinari was not, however, experiencing any discernible impairment of his lung function, he chose not to pursue an action to recover damages for the pleural thickening. Years later, Marinari was diagnosed with lung cancer. The trial court was constrained to find that the cancer claim had been barred by the statute of limitations, in light of the fact that Marinari had discovered the pleural thickening years before. In deciding that Pennsylvania should observe a "separate disease rule," this court specifically held that a "[p]laintiff's discovery of a nonmalignant, asbestos related lung pathology, whether or not accompanied by clinical symptoms of impaired pulmonary function, does not trigger the statute of limitations with respect to an action for a later, separately diagnosed, disease of lung cancer." [FN5] *Id.* 417 Pa.Super. at 442, 612 A.2d at 1022. The question of whether to label asymptomatic pleural thickening as an "injury" constituting a "cause of action" was not before the court in *Marinari;* in fact, the action for asymptomatic pleural thickening was waived in that case. *See id.,* 417 Pa.Super. at 454, 612 A.2d at 1028 (in failing to file an action for pleural thickening within the two year statute of limitations period, the decedent waived only the cause of action for pleural thickening; the action for cancer was not barred). In light of the foregoing, we conclude that we are not constrained to follow the *Marinari* court's characterization, in dictum, of asymptomatic pleural thickening as an injury giving rise to a cause of action. [FN6]

FN5. The holding in *Marinari* represents a sharp break from the previous law, which required plaintiffs in Pennsylvania, once informed of pleural thickening, to act within the applicable statute of limitations period to make a claim for an asymptomatic condition and also for any and all predictable later diseases and/or injuries related to asbestos exposure. *Marinari,* 417 Pa.Super. at 448-49, 612 A.2d at 1025.

FN6. According to *Black's Law Dictionary,* "dictum," is generally used as an abbreviated form of "obiter dictum," or "a remark by the way." To elaborate, it is described as

> [A]n observation or remark made by a judge in pronouncing an opinion upon a cause, concerning some rule, principle, or application of law, or the solution of a question suggested by the case at bar, but not necessarily involved in the case or essential to its determination.... Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of adjudication.

Black's Law Dictionary 409 (5th ed. 1979). *See also Stellwagon v. Pyle,* 390 Pa. 17, 133 A.2d 819 (1957) (language in judicial opinion going beyond issue decided is considered dictum); *O'Neill v. Metropolitan Life Ins. Co.,* 345 Pa. 232, 26 A.2d 898 (1942) (statement of court on an issue not raised is dictum).

***335** [3] After careful consideration we hold, as a matter of law, that pleural thickening, absent disabling consequences or manifest physical symptoms, is a non-compensable injury and is therefore not a cognizable claim in the Commonwealth. In reaching this conclusion, we begin with a more thorough explanation of the pleural thickening condition itself. Asbestos-related pleural thickening is, basically, the formation of calcified tissue on the membranes surrounding the lungs; such condition may be objectively determined in the sense that it shows up on an x-ray. *Doe v. Johns-Manville Corp.,* 324 Pa.Super. 469, 472, 471 A.2d 1252, 1253 (1984) (en banc). Pleural thickening may occur independent of or in conjunction with asbestosis. *Marinari, supra,* quoting Mansfield, *Asbestos: The Cases and the Insurance Problem,* 15 Forum 860, 861-64 (1980). When the pleural thickening is asymptomatic, as in Mr. Giffear's case, plaintiffs are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring. *See Marinari,* 417 Pa.Super. at 448, 612 A.2d at 1025; *In re Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563, 1567 (D.Haw.1990).

****885** While the Pennsylvania state appellate

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courts have recited much dictum regarding the subject of compensable injury in the context of asbestos litigation, there has not been an occasion, until now, to precisely confront the issue of whether asymptomatic pleural thickening constitutes a cognizable cause of action, i.e., a compensable injury under Pennsylvania law.

One of the most frequently cited cases by Pennsylvania courts attempting to define "injury" is *Ayers v. Morgan,* 397 Pa. 282, 154 A.2d 788 (1959) . The Giffears point to the well recognized holding in *Ayers* in support of their position that ***336** Mr. Giffear's pleural thickening is a compensable injury: "[I]njury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable." *Id.* at 290, 154 A.2d at 792. We initially point out that the *Ayers* holding refers to a determination of what triggers the statute of limitations. When the *Ayers* holding is read in its intended context, that is, defining "injury" for purposes of allowing the statutory period to run, it has been interpreted correctly. It is an entirely different and, we believe, incorrect interpretation to read the above-quoted *Ayers* passage to support the proposition that once an x-ray reveals pleural thickening, a plaintiff has automatically been "injured" in the *legal* sense, thus entitling him or her to bring an action for damages. While it is true that Mr. Giffear's x-rays evidenced a physical and ascertainable change in the condition of his lung lining, to allow this alone to constitute a claim for a compensable injury simply does not conform to the established principles of Pennsylvania tort law. [FN7] The legal and medical realities of a ***337** diagnosis of pleural thickening *unaccompanied by* discernible physical symptoms or functional impairment cannot justifiably give rise to an action for damages.

FN7. Mr. Giffear sought recovery against Fibreboard and Keene under several theories of liability; such theories allow recovery for physical harm to the user or consumer under certain conditions. *See* Restatement (Second) of Torts § 402A. The Restatement makes the following distinctions between "injury," "harm," and "physical harm:"

§ 7. Injury and Harm

(1) The word "injury" is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another.

(2) The word "harm" is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.

(3) The words "physical harm" are used throughout the Restatement of this Subject to denote the physical impairment of the human body, or of land or chattels.

Restatement (Second) of Torts, § 7.

"Injury" denotes an invasion of a legally protected interest which, if it is the legal result of a tortious act, entitles one so injured to maintain an action in tort. *Id.,* comment a. "Harm" is carefully distinguished from "injury."

"Harm" implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object, or thing. Physical changes or alterations may be either beneficial, detrimental, or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm.

Id., comment b.

These distinctions are important in understanding the Giffears' failure to show a compensable harm suffered by Mr. Giffear. Mr. Giffear has suffered no detrimental effects as a result of his asbestos exposure and, therefore, no harm. While Mr. Giffear's lungs may have been "injured" without being "harmed," there is no rule of law that gives a person with an actionable injury the right to recover damages.

[4][5] Before Pennsylvania's adoption of the separate disease rule, cases that did indirectly address what constitutes "injury," like the *Ayers* decision, did so within the confines of a statute of limitations issue under the strict "single disease rule." Thus, in statute of limitations cases, pleural thickening, under the one disease rule, was considered an "injury" because it indicated a condition used for purposes of initiating the limitations period. [FN8] ****886** Consequently, an

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"injury" for purposes of triggering the statute of limitations, and an "injury" for purposes of recovering damages for bodily harm can be distinguished. As *Marinari* has made clear, a plaintiff's discovery of pleural thickening no longer launches the running of the statute of limitations for all present and future asbestos- related injuries; rather, a claim for each asbestos-related injury may be brought separately. This being the case, plaintiffs no longer have a valid reason to bring a lawsuit for asymptomatic pleural thickening. Absent evidence of reduced physiological functions, we can find no basis on which to award damages to a plaintiff who has been diagnosed with pleural thickening, especially given the fact that, if the asymptomatic pleural thickening would lead to a clear asbestos-related injury (***338** asbestosis, lung cancer or mesothelioma), the plaintiff could then bring an action at that time. *Marinari, supra.*

FN8. *See Cathcart v. Keene Industrial Insulation,* 324 Pa.Super. 123, 471 A.2d 493 (1984) (en banc) (while acknowledging differences between pleural thickening and asbestosis, court nonetheless held that a second injury or complication arising from an original tortious act does not give rise to a separate cause of action); *Doe v. Johns-Manville Corp.,* 324 Pa.Super. 469, 471 A.2d 1252 (1984) (en banc) (plaintiff diagnosed with pleural thickening seeking declaratory relief in the form of a declaration that statute of limitations does not begin to run until plaintiff is actually disabled, is something the law does not permit at this time); *Howell v. Celotex Corp.,* 904 F.2d 3 (3d Cir.Pa.1990) (faced with issue of whether pleural thickening amounts to a compensable injury under Pennsylvania law, court recognizes that Pennsylvania has not yet ruled on this issue and states that such a question remains a factual one).

In reaching our determination that asymptomatic pleural thickening does not constitute an injury sufficient to bring about a legal cause of action, we are persuaded by the reasoning in other jurisdictions, along with our own trial courts, that have been faced with similar issues. In *Wright v. Eagle- Picher Industries, Inc.,* 80 Md.App. 606, 565 A.2d 377 (1989), Maryland's court of appeals was confronted with the issue of whether the trial court had invaded the province of the jury by its instruction that the medical condition of pleural plaques alone was a non-compensable injury. The court found no error in the pleural plaques instruction. Like Mr. Giffear, the appellants in *Wright* "failed to present any testimony indicating that pleural plaques caused any injury, symptom or functional impairment to any of the appellants." *Id.,* 80 Md.App. at 615, 565 A.2d at 381. *See also Caterinicchio v. Pittsburgh Corning Corp.,* 127 N.J. 428, 605 A.2d 1092 (1992) (following reasoning in *Wright*).

Even more persuasive is a decision out of an Arizona state appellate court, *Burns v. Jaquays Mining Corp.,* 156 Ariz. 375, 752 P.2d 28 (1987). The *Burns* court was asked to decide the very same issue confronting us today, that is, "whether subclinical asbestos-related injury is sufficient to constitute the actual loss or damage required to support a cause of action." *Id.* at 376, 752 P.2d at 29. In answering this question in the negative, the Arizona state court relied upon federal law. Specifically, the court quoted at length from *Schweitzer v. Consolidated Rail Corp.,* 758 F.2d 936 (3d Cir.1985), *cert. denied,* 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985):

> It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. [citations omitted] Likewise, the existence of such injury may be of vital concern to insurers.... We believe, however, that *subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a* ****339*** *cause of action under generally applicable principals of tort law....* Requiring manifest injury as a necessary element of an asbestos-related tort action ... best serves the underlying purpose of tort law: the compensation of victims who have suffered.

Burns, 156 Ariz. at 376-77, 752 P.2d at 29-30, quoting *Schweitzer, supra,* at 942 (emphasis added).

In another federal case, *Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563 (D.Haw.1990), plaintiffs claimed damages for bodily harm and fear of cancer as a result of asbestos exposure. In framing the issues on appeal, the *Hawaii Federal* court mirrored

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the concerns we are faced with in *Giffear.*

> Frequently, persons claiming damages from exposure to asbestos reflect no objectively observable disablement which is traditionally the basis of tort litigation.... While some of the lung diseases caused by asbestos, such as mesothelioma and asbestosis, typically involve some of these indicia of injury, mere lung scarring or pleural plaques or pleural thickening frequently do not involve these indicia.... All of the above indicates a need for some form of easily verifiable standard for determining whether an "injury" exists and when such injury warrants an award of compensation.

Id. at 1566. The court went on to determine that the mere presence of asbestos fibers, ****887** pleural thickening or pleural plaques in the lung, unaccompanied by an objectively verifiable functional impairment, is not enough to show compensable harm. *Id.* at 1567. As pointed out earlier, in reaching its conclusion, the court pointed to the widely accepted notion that "in 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." *Id.* at 1566.

We are equally impressed with the Pennsylvania trial court decisions that have called for reform in asbestos litigation. For instance, it was suggested in *Blue v. Johns-Manville Corp.,* 10 Phila. 23 (1983) that "there should be no cause of ***340** action [for pleural thickening] unless there is impairment (reduced physiological function).... There must be a demonstrable change in bodily function before there can be recovery." *Id.* at 38. Additionally, the court made the point that while a plaintiff diagnosed with asymptomatic pleural thickening "may have a scar on his lung or lung lining that is visible by x-ray, ... he would never know this without the help of a radiologist." *Id.* at 45.

[6] Finally, in deciding that a claim of asymptomatic pleural thickening does not rise to the level of a legally cognizable cause of action or, in other words, a legally compensable injury, [FN9] we look favorably upon the Honorable Armand Della Porta's reasoning in *Czekaj v. Johns-Manville et al.,* 23 Phila. 278 (1991) (en banc). As recognized in the *Czekaj* case, what constitutes a cognizable cause of action is a legal question reserved for a court and not a factual question for a jury. *Kosjer v. Commonwealth Dept. of Public Welfare,* 76 Pa.Commw. 614, 464 A.2d 687 (1983); *Framlau Corp. v. Delaware County,* 223 Pa.Super. 272, 299 A.2d 335 (1972). In *Kosjer,* a cause of action was described as follows: "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.... The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear." *Kosjer,* 76 Pa.Commw. at 616, 464 A.2d at 688, quoting *Baltimore Steamship Co. v. Phillips,* 274 U.S. 316, 321 (1927). Against this backdrop, the *Czekaj* court expressed the following:

> FN9. We wish to point out that proper analysis of this issue requires us to go beyond the semantics involved and, instead, reach the true heart of the matter: Has Mr. Giffear been harmed in a way which entitles him to recover compensatory damages? Throughout our analysis of this question, unlike the terms "harm" and "injury" in the Restatement, we have used "legal harm" and "legal injury" interchangeably. Thus, when we refer to a "compensable injury," we are equating this with a "legal injury." The same is true when we use "compensable harm," which we consider to have the same meaning as "legal harm."

> A jury does not determine which rights are protected by law or what are the elements of a right, a claim, a tort, or a compensable injury. That is why a jury must be instructed ***341** by the Court as to what constitutes a right or the elements of a tort. After being so instructed, it is then the jury's task to evaluate the evidence to determine whether it fulfills the requirements of the law, or satisfies the elements of the tort, or, in the words of the highest Court of the Land, shows the existence of the cause of action in that case, by making the tort appear. [*Baltimore Steamship, supra.*]
>
> [I]t is for the law, as defined by either the Court or the Legislature, to determine whether pleural thickening without accompanying illness, impairment or disability, constitutes a compensable injury, or whether it must be

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accompanied by such symptoms before the law recognizes the combination of both as a compensable injury.

Czekaj, 23 Phila. at 284.

[7] While we sympathize with Mr. Giffear's disturbing discovery, his diagnosis does not warrant compensation. Where we cannot find that one has suffered a symptomatic injury, how is it possible to assess damages? Had Mr. Giffear suffered from discernible physical symptoms, a functional impairment or disability resulting from the pleural thickening, the law, supported by the Commonwealth's public policy and economic reason, would clearly recognize that his injury would entitle him to an award of damages. ****888** It remains that, but for the fact that x-rays were taken revealing a pleural condition, Mr. Giffear would not have realized that such a condition even existed. It would hardly be fair to compensate him for something that has yet to manifest itself into a functional impairment. If and when such impairment does occur, Mr. Giffear may then bring an action for damages. Until that time, however, he is without a legally cognizable claim; there is, at this point, no legal injury. In light of our findings today, there is no reason for courts to entertain claims based on a discovery of asymptomatic pleural thickening. Without evidence that such a condition is causing ascertainable physical symptoms, impairment, or disability, pleural thickening is a non-compensable injury and, therefore, does not give rise to a cause of action.

***342** In reaching this decision, we must now modify two recent opinions of this court. *Higginbotham v. Fibreboard Corp.,* 428 Pa.Super. 26, 630 A.2d 14 (1993) and *Morrison v. Fibreboard Corp.,* 428 Pa.Super. 114, 630 A.2d 436 (1993) both confronted one of the issues here, namely, whether it was error to allow the jury to award damages based on a fear of cancer/asbestos related disease in the future. Citing *Marinari,* this court correctly concluded in both *Higginbotham* and *Morrison* that an award of damages based upon the fear of developing asbestos-related lung cancer or mesothelioma would not stand, given the introduction of the separate disease rule (discussed *infra*). Both cases, however, also cite *Marinari* for the proposition that pleural thickening, even when asymptomatic, is an injury which gives rise to a cause of action and both decisions remand for a new trial for injuries *presently* suffered by the appellees. Given our recent analysis of the pleural thickening issue, the appellees in *Higginbotham* and *Morrison* do not have a cause of action for, nor can they recover from, pleural thickening without accompanying physical symptoms. Thus, these decisions are overruled *only* to the extent that they cite *Marinari* to stand for the principle treating asymptomatic pleural thickening as a legally cognizable injury.

[8] Regarding our disposition of the asymptomatic pleural thickening issue, questions have been raised about whether or not the separate disease rule is still necessary, given our decision to not allow a cause of action or recovery for asymptomatic pleural thickening. Our holding today in no way abolishes the need for the two disease rule, as it is restricted to apply *only* to pleural thickening *not* accompanied by physical symptoms. If, for example, Mr. Giffear's pleural thickening was proven to be debilitating in a physical sense, he would then have a legally cognizable claim whereby damages could be recovered. Perhaps if it were shown that Mr. Giffear was restricted from physical activities that he had engaged in before the pleural thickening had set in, a claim and possible recovery could be made at that time. Any recovery awarded for such *symptomatic* pleural thickening would not preclude a ***343** later action if cancer were to develop as a result of the asbestos exposure. *Marinari, supra.* The important distinction here lies in the fact that Mr. Giffear was experiencing no discernible physical harm as a result of the pleural thickening.

[9] The Giffears next argue that Mr. Giffear did indeed suffer impairment from the knowledge of his pleural thickening condition, that is, in the form of an increased risk and fear of cancer. In considering this second issue, we find, once again, that Mr. Giffear's fear and increased risk of cancer is not something for which he can be compensated. We upheld the trial court's j.n.o.v. on the basis that Mr. Giffear had not suffered a compensable injury; as such, and in accordance with the court's jury instructions, *supra,* and *Marinari, supra,* Mr. Giffear is entitled to bring another lawsuit should he develop asbestos-related cancer in the future.

[10] Quite clearly, because of our recent adoption of the "two disease rule" for asbestos actions, claims for risk and fear of cancer no longer form a

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basis for recovery in asbestos cases where cancer is not present. Part of the *Marinari* rationale provided:

> The speculative nature of the prediction of future damages--that a person with asbestosis will someday contract cancer--may lead to several inequitable results. First, the plaintiff who does not contract cancer gets a windfall-- cancer damages without ****889** cancer. [citation omitted].... [Also,] inequitable awards are more likely to result from a future damages action simply because the damages cannot be known. If the disease has ... come into existence--the actual financial needs of the plaintiff can obviously be more accurately assessed. [citation omitted].

Marinari, 417 Pa.Super. at 451, 612 A.2d at 1026-27, quoting *Eagle- Picher Industries, Inc. v. Cox,* 481 So.2d 517, 523-24 (Fla.Dist.Ct.App.1985) (footnotes omitted). Thus, pursuant to our newly adopted *Marinari* rule, "in an action for exposure to asbestos, a plaintiff's claim may encompass only the harm caused by the diseases which have become manifest and that a later separate action may be pursued if and when a separate ***344** disease occurs." *Ottavio v. Fibreboard,* 421 Pa.Super. 284, 296, 617 A.2d 1296, 1302 (1992) (en banc); *see also Altiere v. Fibreboard Corp.,* 421 Pa.Super. 297, 306-07, 617 A.2d 1302, 1304 (1992) (en banc). In *Ottavio* it was specifically held that in an action for asymptomatic pleural thickening, the plaintiffs could not recover monetary damages for the risk of a future disease such as cancer. *Id.,* 421 Pa.Super. at 297, 617 A.2d at 1302.

Similar reasoning was recently espoused in *Lubowitz v. Albert Einstein Med. Ctr.,* 424 Pa.Super. 468, 623 A.2d 3 (1993), where this court was called upon to decide whether the appellants stated a legally cognizable cause of action for their "fear of AIDS." In concluding that there was no legally cognizable injury for appellants' claim, we applied the rationale used in the asbestos cases involving "fear of cancer" claims.

> It is undisputed that appellants have never tested positive for the AIDS antibody. Moreover, although Robyn Lubowitz alleges that she suffered physical manifestations of emotional distress, the actual injury at issue is the "fear of AIDS." Whether such fear is a compensable injury is an issue of first impression in this Commonwealth. However, we are guided by the decisions which involve similar "risk of contracting disease" claims. *See, e.g., Ottavio v. Fibreboard Corp.,* 421 Pa.Super. 284, 617 A.2d 1296 (1992); *Altiere v. Fibreboard Corp.,* 421 Pa.Super. 297, 617 A.2d 1302 (1992); *Marinari v. Asbestos Corp.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992).
>
> * * * * * *
>
> As in *Ottavio,* Robyn Lubowitz *cannot recover, in her asymptomatic state, monetary damages for a risk or fear of developing AIDS in the future.*

Lubowitz, 424 Pa.Super. at 471, 623 A.2d at 5 (footnote omitted) (emphasis added).

As is evident from the case law set forth above, the Commonwealth's most recent decisions addressing claims for risk/fear of contracting future diseases clearly have not allowed ***345** recovery. Applying the same rationale to the case at bar, we find that Mr. Giffear's risk/fear of cancer is not a compensable or legally cognizable injury. *Id.* We believe that this result provides the most efficient and fair resolution of future disease claims. There is an obvious need in our judicial system to effect just results based on proof rather than upon pure speculation. "The adjudicative process must ultimately serve the principle that a fair and just resolution of disputes depends upon a search for the truth, based on factual, non-speculative evidence." *Marinari,* 417 Pa.Super. at 451, 612 A.2d at 1027. Mr. Giffear, in his asymptomatic state, may never contract cancer or any other asbestos-related compensable disease. To allow recovery under these circumstances based on his fear alone would fly in the face of our recent adoption of the separate disease rule. Again, we remind Mr. Giffear that, should he develop cancer, he would then have a cause of action for a compensable injury and could bring a lawsuit at that time.

After consideration of the evidence and all reasonable inferences drawn from such evidence, in the light most favorable to the Giffears, we uphold the trial court's grant of j.n.o.v. in favor of Keene and Fibreboard. *Mitzelfelt, supra; Lira; supra.* Because we find that the Giffears have not alleged legally cognizable causes of action, we affirm the trial court's order.

Order affirmed.

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WIEAND, J., files a concurring opinion.

DEL SOLE, J., files a concurring opinion, in which FORD ELLIOTT, J., joins.

****890** WIEAND, Judge, concurring.

I concur in the result. The plaintiff-appellant in this case showed that he had sustained an asymptomatic pleural thickening, but he was unable to show any loss or damages resulting from that condition. Under decisions in *Marinari v. Asbestos Corp. Ltd.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992), ***346***Ottavio v. Fibreboard Corp.,* 421 Pa.Super. 284, 617 A.2d 1296 (1992), and *Altieri v. Fibreboard Corp.,* 421 Pa.Super. 297, 617 A.2d 1302 (1992), he was not entitled to recover damages because of a fear or risk that he *might* at some time in the future contract cancer. Therefore, the trial court could properly set aside the jury's award of damages and enter judgment n.o.v. in favor of the defendant-appellees. [FN1]

> FN1. In view of the decision in *Marinari v. Asbestos Corp., Ltd., supra,* it may have been more correct to enter judgment n.o.v. in favor of the plaintiff-appellant for nominal damages of one ($1.00) dollar.

I would leave for another day whether under different circumstances recovery should be allowed for other damages, if any, flowing from asymptomatic pleural thickening.

DEL SOLE, Judge, concurring.

To the extent the Majority holds that a person cannot recover damages for "fear of cancer" and "risk of future cancer" in asbestos cases where cancer is not present, I agree. However, I cannot agree with the conclusion that asymptomatic pleural thickening is not an injury, and, therefore, does not give rise to a cause of action. I suggest that the Majority is confusing a cause of action with damages that can be recovered given a certain medical condition.

I disagree with the Majority's conclusion for three reasons. First, it is not necessary to discuss this question in order to decide the issue before us, namely what damages are recoverable where pleural thickening exists but there is no cancer.

Second, the holding in *Marinari v. Asbestos Corp., Ltd.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992) creating a "two disease" rule inherently recognizes that asymptomatic pleural thickening is an injury which gives rise to a cause of action. Otherwise there would have been no need to create such a rule. As recently as July 15, 1993 this court, in two separate opinions, repeated the rule that asymptomatic pleural thickening is sufficient to give rise to a cause of action. *Morrison v. Fibreboard,* 329 Phil. 1992; *Higginbotham v. Fibreboard,* 328 Phil. 1992.

***347** Third, the majority wrongly assumes that a person with asymptomatic pleural thickening has no damages. This may not necessarily be the case. For example, once one is diagnosed with pleural thickening, there may be medically necessary reasons for increased medical monitoring of the lungs to provide early detection of cancer. The costs of this monitoring would be recoverable. Also, in a particular case, an individual may be able to establish that this condition resulted in lost employment opportunities or decreased earning capacity. In these events the claim should be permitted to be made, and if damages are established, recovery allowed.

I suggest that it is better to limit our decision to the issue before us and allow the law of recoverable damages in pleural thickening cases to develop on a case by case basis.

FORD ELLIOTT, J., joins.

632 A.2d 880, 429 Pa.Super. 327, Prod.Liab.Rep. (CCH) P 13,704

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Supreme Court of Pennsylvania.

James R. and Eleanor SIMMONS, H/W, Appellants,
v.
PACOR, INC., Eagle-Picher Industries, Inc., Keene Corporation, Southern Textile Company, J.P. Stevens Company, Garlock, Inc., Celotex, Inc., Owens-Illinois Inc., Fibreboard Corporation, GAF Corporation, Forty-Eight Insulation, Inc., and Raymark Industries, Inc., Appellees.
Theodore and Mary MURRAY, H/W, Appellants,
v.
PHILADELPHIA ASBESTOS CORPORATION, GAF Corporation, Raymark Industries, Southern Textile Company, Garlock, Inc., Fibreboard Corporation, Eagle-Picher Industries, Inc., Keene Corporation, Celotex Corporation, J.P. Stevens Co., Inc., and Owens-Illinois, Inc., Appellees.
William and Paula GIFFEAR, H/W, Appellants,
v.
JOHNS-MANVILLE CORPORATION, Pacor, Inc., Eagle-Picher Industries, Inc., Unarco Industries, Inc., Keene Corporation, Raybestos Manhattan, Inc., Celotex Corporation, Southern Textile Company, J.P. Stevens Company, Garlock Inc., Owens-Illinois Inc., Fibreboard Corporation, and GAF Corporation, Appellees.
Argued Oct. 23, 1995.
Decided April 4, 1996.

In first case, workers recovered for alleged injuries they sustained as result of their exposure to asbestos products manufactured by defendants. The Court of Common Pleas, Philadelphia County, Civil Division, Nos. 43 and 51 October Term, 1992, Moss, J., entered judgment in favor of plaintiffs and denied defendants' motions for judgment notwithstanding verdict (JNOV), new trial or remittitur. Defendants appealed. The Superior Court, No. 02859-02864 Philadelphia 1992, 433 Pa.Super. 206, 640 A.2d 446, reversed and vacated in relevant part. Appeal was taken. In second case, worker who was exposed to asbestos in workplace brought action against asbestos manufacturers. The Court of Common Pleas, Philadelphia County, Civil Division, No. 0719 July Term 1982, Hill, J., entered judgment notwithstanding jury verdict in favor of worker in amount of $3,000,000. Worker appealed. The Superior Court, No. 1038 Philadelphia 1992, 429 Pa.Super. 327, 632 A.2d 880, affirmed. Appeal was taken. The Supreme Court, Nos. 93 to 95 E.D. Appeal Docket 1994, Zappala, J., held that: (1) asymptomatic pleural thickening, i.e., unaccompanied by disabling consequences or physical impairment, is not compensable injury; (2) plaintiffs could not recover for emotional distress; and (3) victims of asbestos-related asymptomatic pleural thickening can recover for costs of medical surveillance.

Superior Court affirmed.

West Headnotes

[1] Appeal and Error 934(1)
30k934(1) Most Cited Cases

In reviewing judgment notwithstanding verdict (JNOV), evidence must be considered in light most favorable to verdict winner, he must be given benefit of every reasonable inference of fact arising therefrom, and any conflict in evidence must be resolved in his favor.

[2] Judgment 199(3.5)
228k199(3.5) Most Cited Cases

There are two bases upon which judgment notwithstanding verdict (JNOV) can be entered: (1) movant is entitled to judgment as matter of law, and/or (2) evidence was such that no two reasonable minds could disagree that outcome should have been rendered in favor of movant.

[3] Appeal and Error 842(1)
30k842(1) Most Cited Cases

In reviewing trial court's grant of judgment notwithstanding verdict (JNOV), Supreme Court's scope of review is plenary, as it is with any review of questions of law.

[4] Damages 32
115k32 Most Cited Cases

Asbestos-related asymptomatic pleural thickening, i.e., unaccompanied by disabling consequences or physical impairment, is not compensable injury; no physical injury has been established that necessitates awarding of damages, and victims could subsequently commence action for asbestos-related injury when symptoms develop and physiological impairment begins. Restatement (Second) of Torts §

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402A.

[5] Damages 50
115k50 Most Cited Cases

Because asymptomatic pleural thickening is not sufficient physical injury to warrant damages, its victims may not recover for emotional distress caused by increased fear of cancer; requisite physical injury or physical impact is absent, and, assuming cancer subsequently developed, victims could assert their emotional distress or mental anguish claims.

[6] Damages 50
115k50 Most Cited Cases

General rule is that there can be no recovery of damages for injuries resulting from fright, nervous shock, mental or emotional disturbances, or distress unless they are accompanied by physical injury or physical impact.

[7] Damages 43
115k43 Most Cited Cases

Victims of asymptomatic pleural thickening, i.e., unaccompanied by disabling consequences or physical impairment, can recover damages for medical monitoring of that condition.

****233 *666** Steven J. Cooperstein, Philadelphia, for James & Eleanor Simmons, Theodore & Mary Murray, William & Paul Giffear.

Howell K. Rosenberg, Philadelphia, Theodore Goldberg, Pittsburgh, Albert J. Slap, Philadelphia, for amicus curiae Pa. Trial Lawyers.

Nathan Schachtman, Kimberly Waldron, Philadelphia, for Owens-Illinois.

Robert H. Riley, pro hoc vice for Owens-Illinois.

Andrew J. Trevelise, Michael T. Scott, Richard T. Wentley and Robin Sheldon, Philadelphia, for Fibreboard Corp.

Thomas M. Goutman, Philadelphia, for amicus curiae Pa. Defense Institute.

***667** Robert B. Lawler, Philadelphia, for amicus curiae Georgia Pacific.

Kathy K. Condo, Pittsburgh, for amicus curiae Pittsburgh Corning.

Richard A. Ejak, David G. Klaber, Pittsburgh, for amicus curiae Lincoln Electric Company.

Before NIX, C.J., and FLAHERTY, ZAPPALA, CAPPY, CASTILLE and MONTEMURO, JJ.

OPINION

ZAPPALA, Justice.

This consolidated appeal raises issues involving whether asymptomatic pleural thickening caused by occupational exposure to asbestos may give rise to a cause of action. The facts underlying each case are set forth below.

Simmons

James Simmons was exposed to asbestos while serving in the United States Navy between 1943 and 1963. He was also exposed during 1963 through 1974, while he was employed as an electronics technician in the Philadelphia Naval Shipyard. In 1982, when Simmons was fifty-six years old, an abnormality on a chest x-ray revealed pleural thickening. Simmons saw a specialist, who informed him that his asbestos exposure increased his risk of contracting cancer. This information caused Simmons to feel very upset and afraid. His fear of contracting cancer affected his work and had an adverse impact on family relationships.

At trial, Dr. Stanley Altschuler, a board-certified internist and pulmonary specialist, testified that Simmons suffers from pleural thickening as a result of his asbestos exposure. He found that the disease had progressed since the time it was initially visible on x-ray. Dr. Altschuler also testified that Simmons is five times more likely to contract cancer, and three hundred times more likely to get mesothelioma, than he would be had ****234** he never been occupationally exposed to asbestos. [FN1] ***668** Dr. Altschuler opined that Simmons should receive an examination and x-ray each year to help ensure early detection of cancer. He also stated that Simmons's pleural thickening did not affect his lung function or cause any impairment. Dr. Allan Freedman, testifying for the defense, agreed that Simmons had asbestos-caused pleural thickening, but opined that the scarring had not increased since first observed on x-ray.

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FN1. Defendants asserted that the five-fold increase risk of cancer superimposed on a baseline risk of lung cancer in the general population of about 10 out of 100,000, resulted in a statistical risk of 58 out of 100,000 per year, which is an annual risk of only 1/20 of 1%. As to mesothelioma, defendants asserted that the increased risk of mesothelioma set forth by plaintiffs' expert amounted to an increased risk of only 1/32 of 1%.

Murray

Theodore Murray labored as a carpenter, joiner, pipecoverer and insulator for the New York Shipbuilding Company in Camden, New Jersey, between 1952 and 1967. He had considerable asbestos exposure in all areas of his employment.

In 1982, when he was fifty-seven years old, Murray learned that he had asbestos-related disease and that his asbestos exposure increased his risk of contracting cancer. This knowledge has left him fearful of getting cancer. He exhibits signs of nervousness and often has nightmares. He becomes particularly fearful when going to a hospital and when hearing about others who have cancer.

Dr. Altschuler testified at trial that Murray suffers from pleural thickening and that the disease has progressed since the initial x-ray was taken. He also stated that Murray is subject to the same increased risks of contracting cancer and mesothelioma as Simmons. Likewise, his condition should be monitored yearly.

Dr. Theodore Rodman, a defense medical expert, testified that Murray suffers from pleural thickening but disagreed with the proposition that the pleural thickening has increased over the years. Dr. Rodman also testified that there was no impairment in lung function which could be attributed to the ***669** pleural changes and that the changes were of no clinical significance.

Giffear

William Giffear served in the United States Navy from 1964 through 1968, during which time he was exposed to asbestos while working as a boilerman. He inhaled dust created by asbestos-containing products such as pipe covering, pipe cloth and cement on a daily basis. Upon discharge from the Navy, Giffear worked as a plumber and was again exposed to asbestos-containing products. In 1980, he began work as a pipefitter in the Philadelphia Naval Shipyard. He was still employed by the shipyard at the time of trial.

Following an annual medical checkup, Giffear was informed that he had pleural disease. He was also told that the disease was irreversible and could lead to cancer. Giffear was thirty-four years old at the time of the diagnosis and became extremely upset and concerned about caring for his young children.

At trial, Giffear's medical expert, Dr. William Fineman, testified that Giffear's x-rays revealed pleural thickening with plaque formation, but that Giffear did not sustain any lung impairment as a result of his alleged exposure to asbestos-containing products. Fineman also opined that Giffear did not exhibit any signs of mesothelioma or lung cancer. He did, however, set out the cancer risks which Giffear's asbestos exposure subjected him to. The risks were identical to those faced by Murray and Simmons. Giffear testified that he suffers anxiety due to his increased risk of lung cancer and mesothelioma. He further stated that his fear made him irritable, affected his sleep and affected his relationship with his wife.

The defense medical expert, Dr. Alan Pope, agreed that Giffear had pleural thickening with no physical impairment. Dr. Pope found that although there may have been some minimal progression of plaque formation between the first x- ray ***670** films taken of Giffear in 1980 and 1983, there had been no progression in his pleural plaques since that time.

****235** *Procedural History*

Each Appellant filed suit in the Philadelphia County Common Pleas Court to recover damages for injuries caused by occupational exposure to asbestos. Specifically, Appellants sought recovery for (1) risk and fear of cancer, (2) mental anguish, and (3) loss of life's pleasures. At the time of trial, the remaining defendants were Owens Illinois, Inc., Fibreboard Corporation, and Keene Corporation. [FN2] The reverse bifurcated trial in the Giffear action commenced on March 13, 1991. It was jointly tried with another case which was not the subject of any appeal. The Simmons and Murray cases were consolidated prior to trial and a reverse bifurcated trial commenced on June 9, 1991.

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FN2. Owens-Illinois, Inc. settled with Giffear (not with Simmons and Murray) after the verdict. Keene Corporation subsequently filed a bankruptcy petition under 11 U.S.C. § 301 before the Superior Court resolved its appeal. Accordingly, the Superior Court stayed Keene's appeal pending the conclusion of the bankruptcy proceedings.

Following the Giffear trial, the jury returned a verdict of $300,000.00 for Giffear. The liability portion of the trial was then conducted by stipulation between the parties before the court sitting without a jury. Keene Corporation and Fibreboard Corporation were each held liable for 1/8 of the verdict. The defendants moved for post-trial relief, arguing, *inter alia,* that the court erred in failing to direct a verdict that asymptomatic non- impairing pleural thickening is a non-compensable injury. Giffear petitioned the court for delay damages.

On February 4, 1992, the trial court granted the defendants' motion for judgment notwithstanding the verdict (j.n.o.v.) and denied Giffear's petition for delay damages. The trial court found that there was no medical testimony linking any symptoms, illness or impairment of any sort to the pleural thickening suffered by Giffear. It concluded that asymptomatic pleural thickening is not a cognizable cause of action.

***671** Following the damages phase of the Murray/Simmons trial, the jury awarded each plaintiff $350,000.00. Pursuant to the parties' stipulation to the court as to apportionment of liability, Owens-Illinois, Inc., was found to be liable for 1/9 of the Simmons verdict and 1/7 of the Murray verdict. Fibreboard was found to be liable for 1/6 of the verdict.

On July 23, 1992, the trial court denied defendants' request for j.n.o.v. and, alternatively, a remittitur. It found that pleural thickening is a legal injury, objectively determined by a chest x-ray. It noted that both plaintiffs alleged and proved permanent, untreatable pleural thickening and increased risks of mesothelioma and lung cancer. The court also granted plaintiffs' request for delay damages.

All of the judgments were timely appealed to the Superior Court. In *Giffear,* the entry of j.n.o.v. was reversed by a panel of the Superior Court. Upon defendants' petition, the Superior Court granted reargument *en banc.* On September 16, 1993, the Superior Court affirmed the grant of j.n.o.v., holding that a diagnosis of pleural thickening unaccompanied by discernible physical symptoms or functional impairment does not give rise to an action for damages. [FN3]

FN3. Judge Wieand filed a concurring opinion in which he agreed that Giffear failed to establish any damages resulting from his asymptomatic pleural thickening. He noted, however, that he would leave for another day the issue of whether, under different circumstances, recovery should be allowed for other damages flowing from asymptomatic pleural thickening.
Judge Del Sole also filed a concurring opinion in which Judge Ford Elliot joined. Judge Del Sole agreed that a person cannot recover damages for "fear of cancer" and "risk of future cancer" in asbestos cases where cancer is not present. However, he found that asymptomatic pleural thickening was sufficient to give rise to a cause of action if damages are established. Judge Del Sole stated as examples of such damages, the costs of medically monitoring the disease, lost employment opportunities and decreased earning capacity.

On April 11, 1994, a panel of the Superior Court reversed the judgments in favor of Simmons and Murray. Relying on the holding in *Giffear,* the majority concluded that the plaintiffs' non-impairing, asymptomatic ****236** pleural thickening was not ***672** compensable as a matter of law. [FN4]

FN4. Judge Johnson filed a dissenting opinion, finding that the issue of whether asymptomatic pleural thickening is compensable was not preserved by Fibreboard Corporation. He also noted that the decision in *Giffear* should not be applied to Murray and Simmons retroactively.

Discussion

[1][2][3] The general issue we must resolve is whether j.n.o.v. should have been granted for the defendants, Appellees. In reviewing a j.n.o.v., "the evidence must be considered in the light most favorable to the verdict winner, and he must be given

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the benefit of every reasonable inference of fact arising therefrom, and any conflict in the evidence must be resolved in his favor." *Moure v. Raeuchle,* 529 Pa. 394, 402, 604 A.2d. 1003, 1007 (1992) (citations omitted). There are two bases upon which a j.n.o.v. can be entered: one, the movant is entitled to a judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. *Id.* In the instant case, the Superior Court concluded that Appellees were entitled to judgment as a matter of law. In examining this determination, our scope of review is plenary, as it is with any review of questions of law. *Phillips v. A-Best Products,* 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995).

[4] In determining whether Appellees are entitled to judgment as a matter of law, we must specifically decide whether asymptomatic pleural thickening, i.e., unaccompanied by disabling consequences or physical impairment, is a compensable injury. Asbestos-related pleural thickening has been defined as the formation of calcified tissue on the pleura, the membranes surrounding the lungs. *Doe v. Johns-Manville Corp.,* 324 Pa.Super. 469, 472, 471 A.2d 1252, 1253 (1984) (en banc). The condition may be objectively determined in the sense that it is revealed on an x-ray. *Id.* Pleural thickening may occur independent of or in conjunction with asbestosis. *Marinari v. Asbestos Corporation, Ltd.,* 417 Pa.Super. 440, 447, 612 A.2d 1021, 1025 (1992), quoting Mansfield, *Asbestos: The Cases and* ***673** *the Insurance Problem,* 15 Forum 860, 861-64 (1980). When the pleural thickening is asymptomatic, individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring. *See Marinari,* 417 Pa.Super. at 448, 612 A.2d at 1025; *In Re Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563, 1567 (D.Haw.1990).

Herein, Appellants sought recovery under the Restatement (Second) of Torts § 402A (1965) for damages for physical harm to a user or consumer. They contend that the scarring of their lung tissue caused by occupational asbestos exposure, as evidenced by their chest x-rays, is sufficient to establish an ascertainable and physically objective injury. Appellants argue that even though they have not proven the existence of physical symptoms, they have medically significant diseases that will never improve, and may worsen, and which warrant the awarding of damages.

Appellees contend that a compensable tort injury requires physical impairment or a diminution of a bodily function. As there was no medical testimony establishing that Appellants suffered any disabling consequences or physiological dysfunction as a result of their condition, Appellees submit that recovery should not be permitted.

Appellees further rely on the distinctions between "injury," "harm," and "physical harm" as set forth in § 7 of the *Restatement (Second) of Torts* (1965). The word "injury" indicates the invasion of a legally protected interest which, when accompanied by harm, entitles a person thereby harmed to maintain an action in tort. *Id.* at § 7, comment a. The Restatement further provides that

> "[h]arm" implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes or alterations may be either beneficial, detrimental, or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm.

***674** *Id.* at § 7, comment b. Appellees argue that because the scarring of the lung tissue was a ****237** mere physical change that was unaccompanied by any detrimental effect, no "harm" was established.

After examining the issue at great length, we agree that asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action. [FN5] We reach this conclusion not only because we find that no physical injury has been established that necessitates the awarding of damages, but also because, pursuant to *Marinari v. Asbestos Corporation, Ltd.,* 417 Pa.Super. 440, 612 A.2d 1021 (1992), Appellants are not precluded from subsequently commencing an action for an asbestos related injury when symptoms develop and physiological impairment begins.

> FN5. This conclusion is consistent with our finding in *Volterano v. Workmen's Compensation Appeal Board,* 536 Pa. 335, 639 A.2d 453 (1994), that pleural thickening is not a physical injury for purposes of establishing entitlement to worker's compensation benefits because the functioning of the claimant's lungs was not impaired.

In *Marinari,* the issue was whether the two year statute of limitations, 42 Pa.C.S. § 5524(2), bars an

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action for lung cancer where the action was filed within two years of the cancer diagnosis but four years after asymptomatic pleural thickening had been discovered on x-ray. The court held that a plaintiff's discovery of a nonmalignant, asbestos related lung pathology, whether or not accompanied by clinical symptoms of impaired pulmonary function, does not trigger the statute of limitations with respect to an action for a later, separately diagnosed disease of lung cancer. *Id.* at 442, 612 A.2d at 1022. The Superior Court followed the majority of jurisdictions which had adopted this "two disease rule" or "separate disease rule" in asbestos exposure cases.

Prior to *Marinari,* a single cause of action for all present and future harm as a result of an asbestos related disease accrued at the time when the first signs of the disease were discovered. Thus, to prevent the asbestos claim from being precluded by the statute of limitations, the plaintiff faced the arduous task of having to establish all future harm that may ***675** result from the contraction of the asbestos related disease. Although such a rule was workable in a routine personal injury case, it did not bring about just results in cases involving latent diseases which do not surface until years after the initial exposure.

Marinari remedied this situation by permitting a plaintiff to commence separate causes of action for separate asbestos related diseases, i.e., one for a nonmalignant asbestos related disease which had become manifest and another cause of action for the subsequent development of a separate malignant disease such as lung cancer or mesothelioma.

The court in *Marinari* was not specifically presented with the issue of whether pleural thickening, absent physical impairment, is sufficient to sustain a cause of action. [FN6] We conclude, however, that the natural extension of *Marinari* is to preclude an action for asymptomatic pleural thickening since Appellants are permitted to commence an action when the symptoms and physical impairment actually develop. The diagnosis of asymptomatic pleural thickening has no statute of limitations ramifications regarding a claim alleging a nonmalignant physiological impairment. A plaintiff is also permitted to file a subsequent suit if and when cancer develops.

FN6. We note that since the *Marinari* court was not faced with the issue of whether asymptomatic pleural thickening is a compensable injury, the court's finding that a cause of action arises from such condition is mere *obiter dictum* that we reject.

We note that several other jurisdictions also deny recovery for asbestos related disease unaccompanied by physical impairment. *See Owens-Illinois v. Armstrong,* 87 Md.App. 699, 591 A.2d 544, 561 (1991) (compensatory damages will not be awarded for pleural scarring as it does not cause a functional impairment or harm); *In re Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563, 1567 (the mere presence of asbestos fibers, pleural thickening pleural plaques in the lung, unaccompanied by an objectively verifiable functional impairment is not enough to establish compensable harm; the development of asbestos related cancer in a plaintiff at some later date would give rise to a cause of action separate and distinct from any ***676** current injury); ****238***Caterinicchio v. Pittsburgh Corning Corp.,* 127 N.J. 428, 605 A.2d 1092, 1096 (1992) (the trial court was incorrect in determining as a matter of law that plaintiff had suffered a compensable injury solely because there was evidence of pleural thickening); *Howell v. Celotex Corp.,* 904 F.2d 3, 5 (3d Cir.1990) (the presence of pleural thickening may not, alone, mandate a jury finding of compensable injury for an otherwise healthy plaintiff); *Burns v. Jaquays Mining Corporation,* 156 Ariz. 375, 752 P.2d 28 (1987) (changes in lung tissue absent physical impairment is not sufficient to support a cause of action).

[5] Having determined that asymptomatic pleural thickening is not a sufficient physical injury to warrant damages, we must now decide whether Appellants may recover for emotional distress caused by an increased fear of cancer. Appellants concede that a jury may be precluded from awarding damages for an increased risk of cancer in light of *Marinari,* Consolidated Brief for Appellants at 33 n. 7. They contend, however, that the same is not true for a fear of cancer claim since it does not allege a future injury. Rather than being contingent upon developing cancer in the future, Appellants submit that it is a present claim for damages for emotional distress.

[6] Notwithstanding the fact that Appellants' fear presently exists, we hold that because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable. [FN7] It is the general rule of this Commonwealth that there can be no recovery of damages for injuries resulting from fright or nervous shock or mental or emotional disturbances or distress

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unless they are accompanied by physical injury or physical ***677** impact. *Knaub v. Gotwalt*, 422 Pa. 267, 220 A.2d 646 (1966). We decline to adopt Appellants' view that the pleural thickening establishes a sufficient "impact" to warrant recovery for mental anguish. Those cases which base recovery upon an "impact" rather than an injury involve plaintiffs who have witnessed a traumatic physical injury to a close family member. *See Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). [FN8] The instant circumstances are not analogous since we have held that no physical injury to any party has been established.

FN7. We are not eliminating emotional distress or mental anguish as damages in a nonmalignant asbestos disease case. We merely hold that absent physical injury, these damages are not recoverable. Denying damages for increased risk and fear of cancer is consistent with the Superior Court's decisions in *Marinari*, 417 Pa.Super. at 450-451, 612 A.2d at 1026; *Morrison v. Fibreboard Corp.*, 428 Pa.Super. 114, 630 A.2d 436 (1993); *Higginbotham v. Fibreboard Corp.*, 428 Pa.Super. 26, 630 A.2d 14 (1993); and *Ottavio v. Fibreboard Corp.*, 421 Pa.Super. 284, 617 A.2d 1296 (1992).

FN8. In *Niederman v. Brodsky*, a father sought recovery for his physical injuries as well as for mental shock and pain when he witnessed an automobile fatally strike his son. We there abandoned the requirement of a physical impact as a precondition to recovery for damages in those cases where the plaintiff was in personal danger of physical impact and where the plaintiff actually did fear the physical impact.
An exception was carved into the "zone of danger" rule in *Sinn v. Burd*, where a plaintiff was permitted to recover damages for physical and mental injuries incurred when she saw her minor daughter struck and killed by an automobile. The court rejected the notion that the position of the plaintiff at the time of the event controlled whether recovery could be had. Instead, the court focused on whether the emotional injuries sustained by the plaintiff who witnessed the traumatic event were reasonably foreseeable to the defendant.

Furthermore, as the Superior Court noted in *Giffear*, damages for fear of cancer are speculative. The awarding of such damages would lead to inequitable results since those who never contract cancer would obtain damages even though the disease never came into fruition. The actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested.

Several other jurisdictions follow the view that absent manifest injury, emotional distress damages are not recoverable. *See Burns v. Jaquays*, 156 Ariz. at 378, 752 P.2d at 31 (there can be no claim for damages for the fear of contracting asbestos-related disease in the future without the manifestation of a bodily injury); *In re Hawaii Federal Asbestos Cases*, 734 F.Supp. at 1569 (as a matter of law, fear based on self-serving declarations is not reasonable absent an underlying ****239** compensable harm). *Bubash v. Philadelphia Electric Company*, 717 F.Supp. 297 (M.D.Pa.1989) (emotional distress resulting ***678** from fear of contracting cancer is not recoverable absent physical injury); *Friedman v. General Electric Company*, 706 F.Supp. 376 (E.D.Pa.1989) (physical injury required to support fear of cancer claim). [FN9]

FN9. We recognize that there are also jurisdictions which allow recovery for fear of cancer when there is a physical manifestation as a result of asbestos exposure. *See Devlin v. Johns-Manville Corporation*, 202 N.J.Super. 556, 495 A.2d 495 (1985); *Lavelle v. Owens-Corning Fiberglas Corporation et al.*, 507 N.E.2d 476 (Ohio Com.Pl.1987); *Beeman v. Manville Corporation*, 496 N.W.2d 247 (Iowa 1993). These decisions, however, do not analyze the issue in light of the separate disease rule.

In any case, Appellants are not left without a remedy for their mental anguish. As discussed extensively above, *Marinari* permits an action to be commenced if cancer develops. It is in this action that Appellants can assert their emotional distress or mental anguish claims. To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the

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two disease rule. Both Appellees concede that if Appellants contract cancer, their mental anguish claims relating to their fear of cancer would be compensable at that time. [FN10]

FN10. Appellee Fibreboard asserts that "[i]t follows, then, [from the two disease rule] that all damages--past, present and future--associated with the development of a malignant disease are also separate and distinct from the past, present and future damages associated with the development of a nonmalignant asbestos-related condition." Fibreboard Brief at 29. "The *Giffear* Court simply clarified that the two disease rule means that all damages associated with the development of cancer are recoverable in the cause of action for cancer." *Id.*
Appellee Owens-Illinois, Inc. admits that "[a] necessary corollary to the "two disease" rule is that a person may seek damages for fear of cancer only if and when cancer occurs...." Owens-Corning Brief at 11. Owens- Corning further states that "[r]equiring the actual occurrence of impairing asbestos-related disease in order to bring suit, and then awarding damages for all past, present and future pain and suffering related to that disease, insures that adequate compensatory damages are channelled to those who are most entitled to them." *Id.* at 24-25.
Thus, both Appellees admit that damages are recoverable for the fear of cancer at the time the cancer manifests itself.

[7] In summary, we hold that asymptomatic pleural thickening caused by occupational exposure to asbestos does not give rise to a cause of action for the damages requested by ***679** Appellants. We do recognize, however, a limited exception regarding damages for expenses incurred in the medical surveillance of the condition. We acknowledge that the United States Court of Appeals for the Third Circuit has predicted that, in certain cases, we would allow recovery for medical monitoring. *See In re Paoli Railroad Yard PCB Litigation,* 916 F.2d 829 (3d Cir.1990) (*Paoli I*) (claim for medical monitoring recognized where plaintiffs were exposed to polychlorinated biphenyls (PCB's) found in railcar transformers); *In re Paoli Railroad Yard PCB Litigation,* 35 F.3d 717 (3d Cir.1994) (*Paoli II*) (medical monitoring claim viable under Pennsylvania law).

We find both interesting and appropriate the rationale and findings as articulated by the Court of Appeals of Arizona in *Burns v. Jaquays Mining Corporation,* 156 Ariz. 375, 752 P.2d 28 (1988). Notwithstanding its conclusion that asymptomatic pleural thickening is not a compensable tort, the Arizona court awarded damages for medical monitoring. It stated,

> [w]e believe, under the facts of this case and despite the absence of physical manifestation of any asbestos-related diseases, that the plaintiffs should be entitled to such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles applied by physicians experienced in the diagnosis and treatment of these types of injuries.

Id. at 380, 752 P.2d at 33.

We adopt this rationale as the rule of law for this Commonwealth regarding plaintiffs diagnosed with asymptomatic pleural thickening caused by occupational exposure to asbestos. In reaching this conclusion, we note that the circumstances surrounding asbestos related diseases cannot be viewed in a vacuum. We are cognizant of the fact that ****240** the specter of cancer weighs heavily on the minds of those diagnosed with pleural thickening. Although we hold that awarding damages for the increased risk and fear of cancer is contrary to the established jurisprudence of this Commonwealth, ***680** we find that recovery for medical monitoring is appropriate and just. [FN11]

FN11. In *Paoli I,* the court noted that
[t]he injury in an enhanced risk claim is the anticipated harm itself. The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect that injury. The former is inherently speculative because courts are forced to anticipate the probability of future injury. The latter is much less speculative because the issue for the jury is the less conjectural question of whether the plaintiff needs medical surveillance.
Id., 916 F.2d at 850-851.

Unfortunately, although Appellants' experts recommended medical monitoring of the disease, Appellants have not sought relief upon those grounds and are therefore not entitled to such expenses.

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[FN12]

FN12. Appellants expressly state that they "do not seek a holding by the court that they may recover medical monitoring costs." Appellants' Reply Brief at 7.

For the reasons set forth herein, the judgments of the Superior Court are hereby affirmed. [FN13]

FN13. Additionally, the Application to Present Post-Submission Letter which was filed by counsel for amicus curiae, the Lincoln Electric Company and the BOC Group, Inc., is granted.

MONTEMURO, J., who was sitting by designation, did not participate in the decision of this case.

674 A.2d 232, 543 Pa. 664, 64 USLW 2660, Prod.Liab.Rep. (CCH) P 14,600

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33

United States District Court,
D. Hawai'i.

In re HAWAII FEDERAL ASBESTOS CASES
This Document Applies To: Trial Groups II and IV.

Civ. No. 85-0566.

Jan. 31, 1990.
As Amended April 3, 1990.

In suit brought by workers against manufacturers of products containing asbestos, jury returned verdict in favor of workers, and manufacturers moved for judgment notwithstanding the verdict, for new trial, or for remittitur. The District Court, Spencer Williams, J., held that: (1) to recover for negligent infliction of emotional distress based on fear of cancer resulting from asbestos exposure, workers were required to show some underlying compensable harm, which requires some functional impairment due to asbestos exposure; (2) evidence supported jury finding that manufacturer's products were substantial factors contributing to alleged injuries; (3) evidence established that two workers suffered some impairment due to asbestos exposure; (4) uncontroverted evidence established that three workers were not suffering from functional impairment due to exposure, thus precluding damages for asbestos-related injuries or for fear of cancer; and (5) special damage awards to three workers were excessive, thus warranting denial of motion for new trial conditional on workers filing remittitur.

Motions granted in part and denied in part.

West Headnotes

[1] Damages ⚷185(3)
115k185(3) Most Cited Cases

One seeking damages for physical injury due to asbestos exposure must show compensable harm by adducing objective testimony of functional impairment due to asbestos exposure, under Hawaii law, and subjective testimony as to shortness of breath and fatigue, without more, is not sufficient nor is mere presence of asbestos fibers, pleural thickening, or pleural plaques in lung unaccompanied by objectively verifiable functional impairment, but should plaintiffs later develop asbestos-cause cancer or other injuries accompanied by indications of physical impairment, they may later bring suit for those injuries.

[2] Damages ⚷5
115k5 Most Cited Cases

"Special damages" compensate claimants for specific out of pocket financial expenses and losses, while "general damages" provide compensation for pain, suffering, and emotional distress.

[3] Damages ⚷208(1)
115k208(1) Most Cited Cases

While assessment of general damages is generally left to judgment of trier of fact, there is nevertheless some assurance of reasonableness which is question of law for court.

[4] Damages ⚷6
115k6 Most Cited Cases

Generally, speculative harm or threat of future harm is not compensable.

[5] Damages ⚷49.10
115k49.10 Most Cited Cases

Claims for negligent infliction of emotional distress are limited to serious emotional distress, by permitting recovery only where reasonable man, normally constituted, would be unable to cope with mental stress engendered by circumstances of case, and by limiting recovery on general tort principles to those who were foreseeably endangered by particular conduct involved.

[6] Damages ⚷49.10
115k49.10 Most Cited Cases

Fear based on self-serving declarations is not "reasonable," as required to recover for negligent infliction of emotional distress, absent underlying compensable harm.

[7] Damages ⚷50
115k50 Most Cited Cases

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Any mental anguish suffered as a result of asbestos-induced physical damage is compensable as element of general damages.

[8] Damages ⚷49.10
115k49.10 Most Cited Cases

Fear of cancer allegedly suffered by plaintiffs as a result of exposure to asbestos relates to future events which might or might not have had their genesis in defendants' alleged wrongdoing in past, relating to specific event which may or may not occur in future, and thus is not recoverable as general mental anguish for harm caused in past.

[9] Damages ⚷49.10
115k49.10 Most Cited Cases

Plaintiffs' fear of cancer as a result of exposure to asbestos gives rise to independent cause of action sounding in negligence, rather than element of damages as to products liability claims.

[10] Damages ⚷49.10
115k49.10 Most Cited Cases

Hawaii law requires that plaintiffs seeking damage for fear of cancer as result of exposure to asbestos show compensable harm underlying emotional distress before recovery may be had for such mental anguish; plaintiffs may have generalized fear of cancer, but fear would not be reasonable absent knowledge of functional impairment.

[11] Damages ⚷49.10
115k49.10 Most Cited Cases

Once plaintiff seeking to recover for fear of cancer as a result of exposure to asbestos establishes underlying compensable harm, "cannot adequately cope" standard for recovery for negligent infliction of emotional distress comes into play, and opinion of expert tending to show functional impairment based on pulmonary and roentgenographic tests would establish prima facie case for physical impairment.

[12] Damages ⚷50
115k50 Most Cited Cases

Although Hawaii does not require "impact" or "physical manifestation" of emotional distress to recover for negligent infliction of emotional distress, there must be some type of compensable harm, either to plaintiff, third party, or property, in order to trigger mental anguish.

[13] Limitation of Actions ⚷95(5)
241k95(5) Most Cited Cases

Two-year personal injury statute of limitations begins to run as to action for bodily harm and emotional distress as result of exposure to asbestos as of date plaintiff knew or should have known that he or she suffered functional impairment, that defendants manufactured defective product, and that there existed causal connection between two, under Hawaii law.

[14] Federal Civil Procedure ⚷2602
170Ak2602 Most Cited Cases

Motion for judgment notwithstanding verdict may be granted only if motion for directed verdict should have been granted.

[15] Federal Civil Procedure ⚷2117
170Ak2117 Most Cited Cases

In reviewing propriety of denial of renewed motion for directed verdict at close of all evidence, court will judge case as it stood at time renewed motion was denied; even if denial of first motion for directed verdict at close of plaintiff's evidence was error, error is cured if testimony admitted on defendant's behalf repairs shortcomings of plaintiff's case.

[16] Federal Civil Procedure ⚷2610
170Ak2610 Most Cited Cases

Court may grant motions for judgment notwithstanding the verdict only when there can be but one reasonable conclusion as to proper judgment.

[17] Federal Civil Procedure ⚷2331
170Ak2331 Most Cited Cases

[17] Federal Civil Procedure ⚷2339
170Ak2339 Most Cited Cases

District court in its discretion may weigh evidence in determining whether to grant motion for new

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trial, and may grant motion for variety of reasons, including prevention of what it finds to be miscarriage of justice. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[18] Federal Civil Procedure ⚷2377
170Ak2377 Most Cited Cases

Remittitur is appropriate under Federal Civil Rule for any damage award which district court in its discretion finds excessive, and court may deny motion for new trial conditional upon plaintiffs' filing remittitur in stated amount, granting new trial if plaintiff does not file remittitur. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[19] Products Liability ⚷83
313Ak83 Most Cited Cases

Evidence, including workers' testimony, supported jury's findings that each worker worked in vicinity of asbestos ripout or installation operations and that each manufacturer's product was present at such operations, and thus supported finding that manufacturers' products were substantial factors contributing to alleged injuries suffered by workers, in products liability suit, even if manufacturers had halted production of some asbestos products before workers could have conceivably been exposed to products.

[20] Damages ⚷192
115k192 Most Cited Cases

Testimony by physician identifying "pulmonary function abnormalities" suffered by worker as result of asbestos exposure and indicating that second worker suffered impairment due to asbestosis were sufficient to establish compensable harm as required for award of emotional distress damages to such workers based on their fear of cancer.

[21] Federal Civil Procedure ⚷2377
170Ak2377 Most Cited Cases

Manufacturers, who claimed that jury could not have reasonably found that worker suffered from fear of cancer, were not entitled to new trial or remittitur as to award of $105,000 in general damages and $45,000 in special damages, absent any indication in record as to whether compensatory damages awarded worker included any sum for his alleged cancerphobia. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[22] Damages ⚷32
115k32 Most Cited Cases

[22] Damages ⚷49.10
115k49.10 Most Cited Cases

Uncontroverted evidence established that workers were not suffering from functional impairment due to asbestos injury, thus precluding any award of damages for asbestos-related injuries or for fear of cancer.

[23] Federal Civil Procedure ⚷2377
170Ak2377 Most Cited Cases

Award of special damages of $28,500, $21,000, and $23,500, respectively, to three workers as result of exposure to asbestos were excessive, but new trial motion would be denied as to award of special damages on condition that such workers file remittitur for cost of future medical monitoring, discounted to present value, in amount actually substantiated by their expert testimony. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[24] Federal Civil Procedure ⚷2377
170Ak2377 Most Cited Cases

What if any portion of compensatory damages awarded worker as result of exposure to asbestos was correctly awarded for physical injury and what might have been incorrectly awarded for fear of cancer in absence of evidence of functional impairment was purely speculative, and thus, motions for remittitur based on claim that compensatory damages were excessive due to fear of cancer awards would be denied, in suit brought against manufacturers of asbestos products. Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

[25] Damages ⚷130.1
115k130.1 Most Cited Cases
(Formerly 115k130(1))

[25] Federal Civil Procedure ⚷2347
170Ak2347 Most Cited Cases

Award of damages of $15,000 general and $28,500 special, $15,000 general and $21,000 special, and

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$10,000 general and $23,500 special to three workers, respectively, as result of exposure to manufacturers' asbestos products were excessive and miscarriage of justice would result if verdicts were allowed to stand, thus warranting new trial; uncontroverted evidence indicated that such workers were not functionally impaired in any way. Fed.Rules Civ.Proc.Rules 50(c), 59, 28 U.S.C.A.
***1565** Timothy J. Holzer, Sterns & Ingram, Honolulu, Hawaii, for plaintiffs.

Roy F. Hughes, Honolulu, Hawaii, for Owens-Corning Fiberglas Corp.

George W. Playdon, Reinwald, O'Connor, Marrack, Hoskins & Playdon, Honolulu, Hawaii, for The Celotex Corp. and Raymark Industries, Inc., Successor to RAybestos-Manhattan, Inc.

William S. Hunt, Paul, Johnston, Alston & Hunt, Honolulu, Hawaii, for Pittsburgh Corning Corp.

John S. Nishimoto, Patricia T. Fujii, Libkuman, Ventura, Ayabe, Chong & Nishimoto, Honolulu, Hawaii, for Fibreboard Corp., Owens-Illinois, Inc., Owens- Corning Fiberglas Corp., and Pittsburgh Corning Corp.

Jerold T. Matayoshi, Greeley, Walker & Kowen, Honolulu, Hawaii, for Owens- Illinois, Inc.

Robert G. Frame, Alcantara & Frame, Honolulu, Hawaii, James L. Miller, Brobeck, Phleger & Harrison, San Francisco, Cal., for Fibreboard Corp.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE FOR NEW TRIAL OR FOR REMITTITUR

SPENCER WILLIAMS, District Judge.

These cases were consolidated for trial from Trial Groups II and IV. Plaintiffs ***1566** claim damages for bodily harm and emotional distress as a result of alleged exposure to defendants' asbestos products. With respect to certain plaintiffs in Trial Group II, defendants move for judgment notwithstanding the verdict, or in the alternative, for new trial or for remittitur.

Pursuant to the request of this court, the parties to this litigation have also filed briefs on the issue of emotional damages for fear of cancer due to asbestos exposure. Specifically, the issues presented concern the time when a cause of action accrues and what constitutes a prima facie case under Hawaii law for fear of cancer. The following comprises this court's ruling on these questions and other related issues.

BACKGROUND

I. ASBESTOS EXPOSURE

Diseases caused by inhalation of asbestos fibers are unique. In the case of pleural plaques, for example, the mean latency period between the exposure and plaque development is twenty years. [FN1] There are several types of asbestos-related diseases which for the most part are diseases of the lung. [FN2] Often the development of these diseases bears little or no relationship to the degree of exposure. [FN3] In many cases, the symptoms of asbestos-related lung diseases parallel the symptoms of other lung diseases as well as the normal consequences of advancing age. [FN4]

FN1. Rosenstock and Hudson, "The Pleural Manifestations of Asbestos Exposure," *Occupational Medicine: State of the Art Reviews,* Vol. 2, No. 2 at 387 (April--June 1987).

FN2. Such diseases range from a rare type of cancer, mesothelioma, to asbestosis. Asbestosis is marked by the overgrowth of connective tissue in the lung, which may or may not lead to cancer. *See Eagle-Picher Industries, Inc. v. Cox,* 481 So.2d 517, 528 (Fla.App. 3d Dist.1985).

FN3. Some studies indicate that mesothelioma can develop from very low levels of asbestos exposure. *See* Selikoff, "Asbestos-Associated Disease" in *Asbestos Litigation,* 21, 48 (W. Alcorn ed. 1982).

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FN4. Examples of such lung diseases would be asthma, chronic bronchitis and emphysema. *See* American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) at 108-11 for a discussion of possible parallel symptoms.

Frequently, persons claiming damages from exposure to asbestos reflect no objectively observable disablement which is traditionally the basis of tort litigation. For example, significant external damage to skin and other tissue can result in blood loss, pain, observable physical impairment, and anguish due to disfigurement, followed by loss of wages and dramatic changes in lifestyle. While some of the lung diseases caused by asbestos, such as mesothelioma and asbestosis, typically involve some of these indicia of injury, mere lung scarring or pleural plaques or pleural thickening frequently do not involve these indicia.

Many, although by no means all, claims of injury are based on subjective declarations of shortness of breath, tiredness and general lassitude. X-rays may or may not show the presence of asbestos-induced changes in the lung. [FN5] Even many forms of pulmonary analysis are not definitive in measuring impairment. [FN6] It is not surprising that extremely well- qualified experts have widely differing opinions as to the significance of these tests.

FN5. For example, the correlation between physiological and radiographic abnormalities in asbestosis is poor. *Guides to the Evaluation of Permanent Impairment* at 110.

FN6. In benign pleural disease, one difficulty lies in establishing pulmonary function parameters. Rosenstock and Hudson at 395.

All of the above indicates a need for some form of easily verifiable standard for determining whether an "injury" exists and when such injury warrants an award of compensation.

II. ASBESTOS LITIGATION IN GENERAL

It has been estimated that over twenty million Americans have suffered significant exposure to asbestos fibers. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1316 (5th Cir.1985). Most of these cases with which this court is familiar arise from various levels of exposure of shipyard workers from the late 1930's to and including current workers. No known estimate ***1567** has been made of the number of other possible types of exposure cases.

The long term impact of asbestos litigation on the judicial system will remain foreboding unless and until the law determines when asbestos injuries are ripe for litigation. For example, does the mere presence of asbestos fibers constitute injury? Would physiological reactions to asbestos exposure, such as pleural thickening or pleural plaques, without disabling consequences, be sufficient to support a claim for damages absent disabling consequences? Should there be objective guidelines for fear of cancer claims?

DAMAGES

I. PHYSICAL INJURIES

[1][2][3] In addition to their emotional distress claims, plaintiffs seek damages for physical injuries due to asbestos exposure. As in all other jurisdictions, damages for bodily harm in Hawaii must be reasonable. *Campbell v. Animal Quarantine Station,* 63 Haw. 557, 563, 632 P.2d 1066, 1070 (1981). Traditionally, damages fall into two categories: special and general damages. Special damages compensate claimants for specific out-of- pocket financial expenses and losses. General damages provide compensation for pain, suffering and emotional distress. While the assessment of general damages is generally left to the judgment of the trier of fact, there is nevertheless some assurance of reasonableness which is a question of law for the court.

An award for physiological reactions to asbestos exposure without more is unreasonable. It is sheer speculation to measure the loss a plaintiff may have suffered for pleural plaques alone since sub-clinical conditions such as pleural plaques or pleural thickening are not normally associated with physical impairment. [FN7] As the Hawaii Supreme Court

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has stated, "[w]here substantial (as distinguished from nominal) damages are claimed ... there should be evidence from which there can be made a reasonable ascertainment of the damage." *City and County of Honolulu v. Plews,* 55 Haw. 199, 211, 516 P.2d 1259, 1267 (1973). In 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. Other courts have expressed doubts that physiological reactions to harmful substances introduced into the body constitute physical injury without a showing of chronic pain or impairment. *See e.g. Ayers v. Jackson Township,* 189 N.J.Super. 561, 461 A.2d 184 (N.J.Super.L.1983), *aff'd in part and rev'd in part on other grounds,* 106 N.J. 557, 525 A.2d 287 (1987).

FN7. Pleural plaques, pleural thickening and the ingestion of asbestos fibers alone may constitute a "technical invasion of the integrity of the plaintiff's person by ... harmless, but offensive, contact ..." thereby entitling plaintiffs to nominal damages. Keeton, *Prosser and Keeton on the Law of Torts* § 9 at 40 (5th ed. 1985), *cited with approval in Kalilikane v. McCravey,* 69 Haw. 145, 737 P.2d 862, 866 (1987). However, such technical, yet harmless invasions would not give rise to compensatory general damages.

[4] Plaintiffs must show a compensable harm by adducing objective testimony of a *functional impairment* due to asbestos exposure. A claimant's subjective testimony as to shortness of breath and fatigue without more is not sufficient. In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment is not enough. [FN8]

FN8. Generally, speculative harm or threat of future harm is not compensable. *See e.g. Alhino v. Starr,* 112 Cal.App.3d 158, 177, 169 Cal.Rptr. 136 (1980). One court which specifically addressed the issue of whether subclinical injuries, such as pleural plaques and pleural thickening, were compensable, ruled that they were not compensable. *Burns v. Jaquays Min. Corp.,* 156 Ariz. 375, 752 P.2d 28, 30 (App.1987), *citing Schweitzer v. Consolidated Rail Corp.,* 758 F.2d 936, 942 (3d Cir.), *cert. denied,* 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985). The *Burns* court made this ruling even though it assumed that many of the plaintiffs before it likely would develop asbestosis at some future date. *Id.*

However, should plaintiffs later develop asbestos-caused cancer or other injuries that are accompanied by indications of physical impairment, they may later bring suit for those injuries within the time prescribed ***1568** by the applicable statute of limitations. As this court has previously found, for example, the development of an asbestos-related cancer in a plaintiff at some later date would give rise to a cause of action separate and distinct from any injuries plaintiffs currently may be suffering. [FN9]

FN9. *See Order Re Pretrial Motions Group II Cases* (D. Hawaii November 5, 1988) (Williams, J.), *citing Herber v. Johns-Manville Corp.,* 785 F.2d 79, 82 (3d Cir.1986). By the same reasoning in *Herber,* the subsequent development of a condition associated with objectively verifiable physical impairment in a plaintiff would be a cause of action separate and distinct from any claims relating to asbestos fibers in the lung, pleural plaques or pleural thickening.

II. EMOTIONAL DISTRESS

A. *The Development of Emotional Damages in Hawaii*

[5] In *Rodrigues v. State,* 52 Haw. 156, 472 P.2d 509 (1970), the Hawaii Supreme Court recognized negligent infliction of emotional distress as an independent cause of action. The *Rodrigues* court limited claims to *serious* emotional distress by permitting recovery only where "a reasonable man,

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normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." *Rodrigues,* 52 Haw. at 173, 472 P.2d at 520. In addition to confining recovery only to serious claims, *Rodrigues* further limited recovery on general tort principles to those who were foreseeably endangered by the particular conduct involved. 52 Haw. at 174, 472 P.2d at 521.

Claimants in *Rodrigues* sought damages for mental anguish arising from the negligent flooding of their home with its consequential adverse financial loss to plaintiffs. In allowing recovery, the *Rodrigues* court found that the likelihood of opening the floodgates to fraudulent claims and potentially unlimited liability was of little import in fashioning the new standard. 52 Haw. at 173, 472 P.2d at 520.

A review of the situations in which the *Rodrigues* standard has been applied reveals significant distinctions between the interests protected in those factual settings and the type of harm allegedly sustained by the plaintiffs in asbestos cases. In *Rodrigues,* for example, the claimants' new home was severely damaged. In many of the asbestos cases before this court, it is unclear whether a plaintiff has suffered a compensable injury at all.

In each of the cases subsequent to *Rodrigues,* there was some underlying compensable harm which triggered the emotional anguish. In *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758 (1974), the Hawaii Supreme Court permitted a child to recover damages for emotional distress where the child witnessed the death of his step-grandmother. Although the child was not related by blood to the decedent, the *Leong* court approved the application of *Rodrigues* to sustain the mental anguish award.

In another key case, *Kelley v. Kokua Sales and Supply, Ltd.,* 56 Haw. 204, 532 P.2d 673 (1975), the Hawaii Supreme Court declined to sustain emotional damages. The administrator of Kelley's estate sought damages for emotional distress where Kelley suffered a fatal heart attack upon news of his daughter's and granddaughter's death in an automobile accident. Defendant's negligence in Hawaii caused the accident, but decedent received word of the accident in California. The Hawaii Supreme Court applied *Rodrigues* but affirmed the granting of defendant's motion for summary judgment. The court concluded that since the accident occurred in Hawaii and decedent was in California, defendant owed decedent no duty of care to refrain from the negligent infliction of emotional distress.

Finally, in *Campbell, supra,* the Hawaii Supreme Court affirmed an award of emotional damages where the family's dog was negligently destroyed. The trial court awarded the family damages for defendant's negligent handling of the dog and for the family's emotional distress as a result of the dog's death. In upholding the damages for emotional distress, the *Campbell* court specifically held that the *Rodrigues* standard governed and that expert medical testimony concerning the claimant's fear was not necessary in order to award a reasonable amount of damages. ***1569** *Campbell,* 63 Haw. at 563, 632 P.2d at 1071.

[6] The *Rodrigues* court adopted a reasonable person standard for recovery of emotional distress in Hawaii. *Rodrigues,* 52 Haw. at 173, 472 P.2d at 520. Having reviewed the cases in which Hawaii courts applied *Rodrigues,* this court finds as a matter of law that fear based on self- serving declarations is not reasonable absent an underlying compensable harm. *Rodrigues* and its progeny involved cases of mental anguish over past, not prospective, harm.

The Hawaii Supreme Court created a cause of action for mental anguish independent of any claims for physical injuries the claimant personally may or may not have suffered. However, *Rodrigues* did not unleash a cause of action independent of *any* type of underlying compensable harm. We are unaware of any authority in Hawaii which permitted the award of emotional damages in the absence of some underlying compensable harm.

B. *Scope of the Rodrigues Standard*

[7] Plaintiffs contend that the *Rodrigues* standard for recovery is applicable only to cases not involving physical injury. Where physical injury is present, as plaintiffs contend in these cases, plaintiffs argue that mental anguish is compensable as an element of general damages. Plaintiffs are correct to the extent that any mental anguish claimants suffered as a result of asbestos-induced physical damage is compensable as an element of general damages.

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[8] This court, in fact, instructed the jury to award damages for any mental suffering *caused* by the defendants. Although plaintiffs claim fear of cancer in the present, such fear relates to future events which may or may not have had their genesis in the defendants' alleged wrongdoing in the past. This fear relates to a specific event which may or may not occur in the future. Such fear can hardly be characterized as *general* mental anguish for harm *caused* in the past by the defendants.

Alternatively, plaintiffs argue that even if plaintiffs suffered no physical injuries, the *Rodrigues* standard does not require proof of "physical effects," such as testimony from psychiatrists or counselors. For support, plaintiffs in part rely on *Dold v. Outrigger Hotel,* 54 Haw. 18, 501 P.2d 368 (1972) for the proposition that Hawaii law does not require the "opinion of any witness ... to fix a reasonable amount" when awarding damages for emotional distress. *Dold,* 54 Haw. at 21, 501 P.2d at 371. Not only is this portion of the *Dold* opinion *dictum,* plaintiffs' reliance on *Dold* is also misplaced because the *Dold* instructions involved the standard for emotional distress as part of general damages. As this court has found, fear of cancer damages are not part of general damages.

[9] Defendants urge this court to find that Hawaii does not permit recovery for fear of cancer in strict products liability cases. Because strict products liability is not grounded in principles of fault, defendants maintain that recovery for mental anguish would be virtually unlimited. Defendants distinguish *Rodrigues* from strict liability cases by noting that *Rodrigues* was a negligence action where the negligence principle of foreseeability served as a limit on recovery.

However, the recovery of emotional distress damages is an independent cause of action in Hawaii. As stated by the *Rodrigues* court, "the interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection." *Rodrigues,* 472 P.2d at 520. The jury was given the *Rodrigues* negligence instructions on the issue of emotional distress damages. Therefore, the fear of cancer instructions were not tied to plaintiffs' strict product liability claims, but were given as an independent cause of action sounding in negligence.

C. *The Governing Standard for Emotional Distress*

[10] Accordingly, this court holds that *Rodrigues* requires a compensable harm underlying the emotional distress before recovery may be had for mental anguish. Plaintiffs may have a generalized fear of cancer, but that fear would not be reasonable absent a knowledge of functional impairment. ***1570** All cases subsequent to *Rodrigues* involved a type of harm which triggered the mental anguish. A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer. [FN10]

FN10. For example, one study found, with respect to the general population of Hawaii, a risk ratio of cancer mortality among the Pearl Harbor Naval Shipyard workers studied to vary between 1.4 and 1.7, depending on the length of exposure. Kolonel, "Cancer Occurrence in Shipyard Workers Exposed to Asbestos in Hawaii," *Cancer Research* 45, 3924 (August 1985).
The above study indicated that the incidence of lung cancer development among shipyard workers would be approximately sixty- seven per million men per year. *Id.* at 3925.

[11] Should a plaintiff satisfy this implied requirement of *Rodrigues,* then the *Rodrigues* "cannot adequately cope" standard would apply to that particular case. The opinion of an expert tending to show a functional impairment based on pulmonary and roentgenographic tests would establish a prima facie case for physical impairment. Such tests would include simple spirometry, gas diffusion capacities, measured exercise capacity and arterial blood gases. [FN11]

FN11. *Guides to the Evaluation of Permanent Impairment* at 111-14.

[12] This implied requirement of an underlying compensable harm should not be confused with former requirements such as "impact" and "physical

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manifestation of emotional distress." [FN12] This court finds that *Rodrigues* did indeed reject those former bars to recovery. However, this court maintains that *Rodrigues* did not dispense with the requirement that there must be some type of compensable harm, either to the plaintiff, a third party or property, in order to trigger the mental anguish.

FN12. *See Leong, supra,* for a good discussion of the previous law.

III. STATUTE OF LIMITATIONS

[13] This court has ruled that a cause of action for bodily harm and emotional distress caused by asbestos exposure does not arise until an objectively verifiable functional impairment develops. The two-year statute of limitations in Hawaii for personal injury begins to run when the claimant knew, or through the exercise of reasonable diligence should have known "of his injury, the defendant's negligence ... and the causal connection between the two." *Carvalho v. Raybestos-Manhattan, Inc.,* 794 F.2d 454, 456 (9th Cir.1986). Therefore, the statute of limitations does not begin to run until plaintiffs knew or should have known that they have suffered the functional impairment, that defendants manufactured a defective product and that there exists a causal connection between the two.

A consideration of when the statute of limitations would begin to run for emotional damages without underlying compensable harm provides further support for requiring such harm. Without a triggering event, a plaintiff could arbitrarily choose a date on which that plaintiff claims he or she could not adequately cope with fear of cancer. This possibility seriously undermines the policy that at some point in time the law should not recognize a claim.

Conversely, defendants could gather evidence that plaintiffs knew or should have known at a time convenient for the defendants that plaintiffs' prior history of asbestos exposure might lead to cancer. A medical diagnosis of pleural changes would not necessarily defeat such an argument because such changes are, at bottom, markers of asbestos exposure, exposure of which most plaintiffs surely were well aware before diagnosis. [FN13] A regime of recovery for emotional distress not anchored to an underlying compensable harm presents boundless headaches in adjudicating statute of limitations problems.

FN13. Absent functional impairment, one study noted that the main benefit from detecting asbestos-induced benign pleural disease is the use of these abnormalities as markers in epidemiologic investigations. Rosenstock and Hudson at 401.

IV. TRIAL GROUP II MOTIONS FOR J.N.O.V.

Defendants Fibreboard, Pittsburgh Corning Corporation, Owens-Corning Fiberglas, ***1571** the Celotex Corporation and Raymark Industries ("defendants") move for judgment notwithstanding the verdict, or in the alternative for new trial or for remittitur with respect to the jury verdicts awarded plaintiffs Renio, Kuon, Yonashiro, Sakauye, Chung and for new trial or for remittitur with respect to Lau. The jury made the following awards to plaintiffs: Renio received $15,000 in general damages and $28,500 in special damages; Kuon received $15,000 in general damages and $21,000 in special damages; Yonashiro received $10,000 in general damages and $23,500 in special damages; Sakauye received $15,000 in general damages and $20,000 in special damages; Chung received $85,000 in general damages and $15,500 in special damages; and Lau received $105,000 in general damages and $45,000 in special damages. Defendants moved for directed verdict after the close of plaintiffs' case-in-chief and renewed their motions at the close of all the evidence.

Defendants attack the jury awards on two general grounds. First, defendants argue that plaintiffs failed to sufficiently identify defendants' products as a substantial factor contributing to plaintiffs' injuries. Second, defendants aver that the jury verdicts were not supported by the medical evidence relating to physical injuries and emotional distress.

A. *Legal Standards*

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1. Judgment Notwithstanding the Verdict

[14] The standard which this court must apply in ruling upon a directed verdict is the same standard as that for judgment notwithstanding the verdict. *Hallmark Industry v. Reynolds Metals Co.,* 489 F.2d 8, 13 (9th Cir.), *cert. denied* 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1973). This court denied defendants' motions for directed verdict in keeping with the better practice that the trial court should reserve ruling upon a motion for directed verdict until after the jury returns a verdict. 9 Wright & Miller, *Federal Practice and Procedure:* Civil § 2533. A motion for judgment notwithstanding the verdict may be granted only if the motion for directed verdict should have been granted. *Walker v. KFC Corp.,* 515 F.Supp. 612, 615 (S.D.Cal.1981), *aff'd in part and rev'd in part on other grounds,* 728 F.2d 1215 (9th Cir.1984).

[15] When reviewing the propriety of this court's denial of defendants' renewed motion for directed verdict at the close of all the evidence, this court will judge the case as it stood at the time the renewed motion was denied. Wright & Miller, *supra,* § 2534. Even though this court may have erred in denying defendants' first motion for directed verdict at the close of plaintiffs' evidence, such error is cured if testimony admitted on defendants' behalf repairs the shortcomings of plaintiffs' case. *Id.; see also Trustees of Univ. of Pa. v. Lexington Ins. Co.,* 815 F.2d 890, 903 (3d Cir.1987); *Peterson v. Hager,* 724 F.2d 851, 854 (10th Cir.1984); *Newman v. Brengle,* 250 F.2d 660, 661 (7th Cir.1957), *cert. denied,* 356 U.S. 951, 78 S.Ct. 916, 2 L.Ed.2d 844 (1958); *Auto Transport v. Potter,* 197 F.2d 907 (8th Cir.1952).

[16] This court may grant motions for judgment notwithstanding the verdict only when there can be but one reasonable conclusion as to the proper judgment. *Peterson v. Kennedy,* 771 F.2d 1244, 1252 (9th Cir.1985), *cert. denied,* 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986). When ruling on a motion for judgment notwithstanding the verdict, "the trial judge cannot reweigh the evidence or consider the credibility of the witnesses." *Kay v. Cessna Aircraft Company,* 548 F.2d 1370, 1372 (9th Cir.1977). This court must view all evidence in the light most favorable to the non-moving party. *Id.*

2. New Trial

[17] Federal Rule of Civil Procedure 59 authorizes new trials "for any of the reasons for which new trials have heretofore been granted in actions at law ..." As opposed to the standard for judgment notwithstanding the verdict, a district court in its discretion may weigh the evidence in determining whether to grant a new trial. Wright & Miller, *supra,* § 2531. A district court may grant a new trial for a variety of reasons, including the prevention of what it ***1572** finds to be a miscarriage of justice. *City of Phoenix v. Com/Systems, Inc.,* 706 F.2d 1033, 1036 (9th Cir.1983).

3. Remittitur

[18] Remittitur is appropriate under Federal Rule of Civil Procedure 59 for any damage award which this court in its discretion finds excessive. Wright & Miller, *supra,* § 2815; *see also Minthorne v. Seeburg Corp.,* 397 F.2d 237 (9th Cir.1968). This court may deny any motion for new trial conditional upon plaintiffs' filing of a remittitur in a stated amount. Wright & Miller, *supra,* § 2807. If plaintiff does not file such remittitur, the motion for new trial will be granted. Wright & Miller, *supra,* § 2815.

B. *Product Identification*

[19] The defendants contend that no reasonable juror could find that plaintiffs identified their particular products sufficiently as a matter of law to link defendants' products with plaintiffs' alleged injuries. This court has previously ruled that plaintiffs need not show that a particular plaintiff was working with a particular defendant's product on a certain ship; rather, "the presence [of the product at the shipyards] is enough." Proceedings at Trial, Volume X, at 2105-2106. This ruling applies as the law of the case. This court is unaware of any new law within the Ninth Circuit which would warrant a reversal of this ruling.

This court finds that each plaintiff's testimony could support the jury's finding that every plaintiff worked in the vicinity of asbestos ripout and/or installation operations. From the testimony of John Kaili, Martin Sampaga, Peter Demmer, the deposition testimony of John Kaili and the Offer of

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Proof of Harry Abilla, the jury could have reasonably concluded that each defendant's product was present at the asbestos ripout and/or installation operations. A Dr. Kenneth Cohen testified that each plaintiff could have been within the range of asbestos exposure in the shipyards without necessarily working directly with asbestos product. Trial Transcript at 276-79. Viewed as a whole, this evidence forms a sufficient basis from which the jury could have reasonably found that the defendants' products were substantial factors contributing to plaintiffs' alleged injuries.

Defendants additionally assert that production of some asbestos products was halted well before plaintiffs could have conceivably been exposed to these products. As this court has ruled on prior occasions, cessation of production is not determinative where asbestos-containing products often are warehoused for years before being used. *Order Re: Pretrial Motions, Group II Cases* (D. Hawaii November 5, 1988). Equally unavailing are defendants' arguments that the jury verdicts were against the weight of the evidence where the jury apportionment of liability did not correspond to the evidence. Incongruous jury verdicts will be upheld so long as there was a reasonable basis for the finding. *Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506, 524 (5th Cir.1984), *vacated in part en banc, and questions certified to State Supreme Court,* 750 F.2d 1314 (5th Cir.1985).

C. *Medical Evidence*

[20] Plaintiffs' expert witness, Dr. Druger, identified "pulmonary function abnormalities" in Mr. Sakauye as the result of asbestos exposure. Trial Transcript at 994. Dr. Druger also testified that Mr. Chung suffered an impairment due to asbestosis. Trial Transcript at 1595-98. Accordingly, defendants' motions for judgment notwithstanding the verdict, or in the alternative for new trial or remittitur regarding Mr. Sakauye and Mr. Chung are hereby DENIED.

[21] Concerning Mr. Lau, defendants are not moving for judgment notwithstanding the verdict but are only moving for a new trial or remittitur on the basis that the jury could not have reasonably found that Mr. Lau suffered from fear of cancer. This argument must fall because this court refuses to speculate whether the amount of compensatory damages awarded to Mr. Lau included any sum for his alleged cancerphobia. Accordingly, defendants' motions for new trial or remittitur regarding Mr. Lau on the issue of compensatory damages are hereby DENIED.

***1573** [22] Regarding plaintiffs Renio, Kuon and Yonashiro, the evidence is uncontroverted that none of these men are suffering from a functional impairment due to asbestos exposure. In accordance with this court's ruling on physical injury and cancerphobia, *supra,* the lack of any evidence pertaining to an objectively verifiable functional impairment leads but to one conclusion: that the jury's award of damages to plaintiffs Renio, Kuon and Yonashiro for asbestos-related injuries or for fear of cancer is unsupported by the record. Accordingly, defendants' motions for judgment notwithstanding the verdict regarding plaintiffs Renio, Kuon and Yonashiro are hereby GRANTED.

D. *Remittitur*

1. Special Damages

[23] This court finds that the jury's awards for special damages as to plaintiffs Chung, Lau and Sakauye were excessive. [FN14] The jury's awards exceeded even the evidence which plaintiffs' expert presented. Defendants correctly argue that any amount the jury awarded for costs of transportation, as plaintiffs contend, was excessive because plaintiffs simply failed to produce evidence to that effect.

> FN14. Because this court has granted defendants' motions for judgment notwithstanding the verdict as to plaintiffs Renio, Kuon and Yonashiro, defendants' remaining motions as to these plaintiffs are moot.

Therefore, this court will deny defendants' motions for new trial with respect to the jury's award of special damages to Chung, Sakauye and Lau on the condition that these plaintiffs file a remittitur for the cost of future medical monitoring, discounted to present value, in the amount actually substantiated by plaintiffs' expert testimony. Such remittitur must be filed within thirty days from the date this

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order is filed or defendants' motions for new trial with respect to plaintiffs Sakauye, Chung and Lau on the issue of special damages will be deemed granted.

2. Compensatory Damages

[24] Defendants also maintain that all compensatory damage awards were excessive due to the jury's award for fear of cancer where there was no evidence of functional impairment proximately caused by defendants. It would be pure speculation for this court to determine which portion of the compensatory damages was correctly awarded for physical injuries and which portion may have been incorrectly awarded for fear of cancer. Therefore, defendants' motions for remittitur regarding compensatory damage awards are hereby DENIED.

E. *Conditional Grant of Certain Motions for New Trial*

[25] Because this court has granted defendants' motions for judgment notwithstanding the verdict with respect to plaintiffs Kuon, Renio and Yonashiro, Federal Rule of Civil Procedure 50(c) requires this court to conditionally determine whether defendants' motions for new trial concerning plaintiffs Kuon, Renio and Yonashiro should be granted or denied should the judgment be vacated or reversed on appeal. This court hereby conditionally GRANTS defendants' motions for new trial with respect to plaintiffs Renio, Kuon and Yonashiro.

This court within its discretion conditionally finds the award of damages excessive in the cases of Renio, Kuon and Yonashiro because those plaintiffs were not functionally impaired in any way. Additionally, this court finds that the evidence relating to these plaintiffs' fear of cancer is unpersuasive. In making this conditional ruling for new trial, this court finds that a miscarriage of justice would result if these verdicts were allowed to stand.

Accordingly, defendants' motions for judgment notwithstanding the verdict, or in the alternative for new trial or for remittitur are hereby GRANTED in part and DENIED in part to the extent provided herein.

IT IS SO ORDERED.

734 F.Supp. 1563, Prod.Liab.Rep. (CCH) P 12,613

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34

Court of Special Appeals of Maryland.

OWENS-ILLINOIS, et al.
v.
Othello ARMSTRONG, et al.
Frederick STORMER, et al.
v.
EAGLE-PICHER INDUSTRIES, INC.

No. 933, Sept. Term, 1990.

June 26, 1991.

Shipyard workers and warehouseman brought suit against manufacturers, installers, and suppliers of asbestos-containing insulation products on theories of negligence and strict liability. The Circuit Court, Baltimore City, Clifton J. Gordy, Jr., J., entered judgments for two shipyard workers and entered judgments against third shipyard worker and against warehouseman. In consolidated appeals by manufacturer, worker, and warehouseman, the Court of Special Appeals, Bishop, J., held that: (1) dust count report conducted by employer at shipyards was not admissible; (2) manufacturer was not entitled to judgment on issue of proximate cause despite its claim that no direct evidence was presented that workers would have heeded warnings about dangers of asbestos exposure had they been given; (3) for purposes of noneconomic damages cap applicable to causes of action arising on or after July 1, 1986, cause of action in negligence or strict liability would be considered to arise when facts existed to support each element of cause of action, not at time cause of action accrued pursuant to discovery rule; (4) defendant manufacturer of asbestos-containing insulation products was not entitled to reduction in compensatory awards for shipyard workers who developed asbestosis by entire amount of settlement with codefendant manufacturer, which included amounts designated as settlement of punitive damage claims; and (5) worker and warehouseman were not entitled to damages for pleural plaques or pleural thickening.

Affirmed.

West Headnotes

[1] Evidence ⚷351
157k351 Most Cited Cases

Dust count report for employer's shipyards made at request of employer's vice president was not admissible in suit by shipyard workers for injury from exposure to asbestos-containing insulation products; the report was not reliable and did not qualify for business records exception to hearsay rule. Code, Courts and Judicial Proceedings, § 10-101.

[2] Products Liability ⚷96.1
313Ak96.1 Most Cited Cases
(Formerly 313Ak96)

Definition of term "substantial factor" in jury instruction in shipyard workers' suit on negligence and strict liability theories for injury allegedly suffered due to exposure to asbestos-containing insulation products fairly and accurately conveyed meaning of term substantial factor by stating that it was required to be shown that workers worked in proximity to respirable asbestos fibers, and there was no need to include additional requirement of frequent and regular exposure, where none of the medical experts quantified exact exposure necessary to cause asbestosis.

[3] Products Liability ⚷62
313Ak62 Most Cited Cases

Manufacturer of asbestos-containing insulation product was not entitled to judgment on proximate cause issue against shipyard workers on negligence and strictly liability claims for injury allegedly suffered from exposure to asbestos-containing product on theory that no direct evidence was presented that workers would have heeded warnings about dangers of asbestos exposure if they had been given, even though one of the workers smoked cigarettes for almost ten years despite mandatory health warnings on cigarette packaging. Md.Rule 2-519(b).

[4] Negligence ⚷372
272k372 Most Cited Cases
(Formerly 272k56(1.3))

[4] Negligence ⚷405
272k405 Most Cited Cases
(Formerly 272k56(1.3))

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Proximate cause is necessary element of cause of action in both negligence and strict liability.

[5] Negligence ⚷1676
272k1676 Most Cited Cases
(Formerly 272k134(11))

Proximate cause required to find liability for negligence and strict liability may be proven by circumstantial evidence.

[6] Damages ⚷91(1)
115k91(1) Most Cited Cases

Evidence supported award of punitive damages against manufacturer of asbestos- containing insulation products in suit by shipyard workers exposed to such products; medical and industrial literature by 1935 established that asbestos could cause life-threatening diseases in humans, manufacturer began safety program for its workers in 1952, but did not suggest or initiate safety program for workers involved in application of its products, and plaintiff workers worked between 1941 and 1975 with or near products and in closed rooms where clouds of dust were generated, in exposure many times the accepted safe level.

[7] Statutes ⚷181(1)
361k181(1) Most Cited Cases

In construing statute, Court of Special Appeals attempts to effectuate intent of legislature.

[8] Statutes ⚷188
361k188 Most Cited Cases

In construing statute, Court of Special Appeals looks first to plain language of statute which represents legislature's final expression of its intended goal.

[9] Negligence ⚷202
272k202 Most Cited Cases
(Formerly 272k1)

Cause of action in negligence requires evidence of duty owed by defendant plaintiff, breach of that duty by defendant, injury to plaintiff, and injury proximately caused by defendant's breach.

[10] Products Liability ⚷5
313Ak5 Most Cited Cases

Cause of action in strict liability requires evidence that plaintiff was injured, defendant's product caused injury, and defendant's product was defective.

[11] Damages ⚷127
115k127 Most Cited Cases

For purposes of noneconomic damage cap applicable to causes of action arising on or after July 1, 1986, cause of action in negligence or strict liability would be considered to arise when facts existed to support each element of cause of action, not when cause of action accrued pursuant to discovery rule. Code, Courts and Judicial Proceedings, § 11-108(b).

[12] Damages ⚷127
115k127 Most Cited Cases

Asbestosis of shipyard worker exposed to asbestos-containing insulation products who also smoked cigarettes for 40 years developed prior to July 1, 1986, so noneconomic damage cap applicable to causes of action arising on or after that date did not control worker's claim for damages from manufacturer; medical experts put latency period of asbestosis at 15 to 30 years, worker's exposure to asbestos began in 1942 and continued at least until he left shipyards in 1963, and worker was diagnosed as having asbestosis based upon May 1987 medical examination. Code, Courts and Judicial Proceedings, § 11- 108(b).

[13] Constitutional Law ⚷303
92k303 Most Cited Cases

[13] Damages ⚷94
115k94 Most Cited Cases

Punitive damage awards of $1 million to each of two shipyard workers who developed asbestosis against manufacturer of asbestos-containing insulation products with which workers worked did not violate due process rights of manufacturer, which claimed it was being repeatedly punished for the same conduct as punitive damages had been assessed against it in prior cases involving asbestos exposure from same products. U.S.C.A. Const.Amends. 5, 14; Const.Declaration of Rights,

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Art. 24.

[14] Damages ⚷63
115k63 Most Cited Cases

The Uniform Contribution Among Tort-feasors Act was applicable to aggregate compensatory award to shipyard workers who developed asbestosis against manufacturers of asbestos-containing insulation products to which workers were exposed. Code 1957, Art. 50, § 19.

[15] Damages ⚷87(1)
115k87(1) Most Cited Cases

Punitive damages are assessed against each defendant individually and are not held as joint and several liability among joint tort-feasors.

[16] Damages ⚷63
115k63 Most Cited Cases

Settlement of punitive damage claim by one joint tort-feasor will not reduce compensatory or punitive damage awards against remaining joint tort-feasors.

[17] Compromise and Settlement ⚷3
89k3 Most Cited Cases

Settlement which involves compensatory and punitive damages or claims pertains to two distinct liabilities, so may properly reflect those liabilities separately.

[18] Damages ⚷63
115k63 Most Cited Cases

Defendant manufacturer of asbestos-containing insulation products was not entitled to reduction in compensatory awards for shipyard workers who developed asbestosis by entire amount of settlement with codefendant manufacturer, which included amounts designated as settlement of punitive damage claims, but was entitled to reduction only by amount designated as settlement of compensatory damage claims, in accordance with the compensatory setoff for settlements mandated by the Uniform Contribution Among Tort-feasors Act. Code 1957, Art. 50, § 19.

[19] Trial ⚷203(1)
388k203(1) Most Cited Cases

Party may have its theory presented to jury only if it is correct exposition of law and there is evidence to support its theory.

[20] Products Liability ⚷87.1
313Ak87.1 Most Cited Cases
(Formerly 313Ak87)

To have cause of action based on claims of product liability or negligence law submitted to jury, plaintiff must produce evidence of legally compensable injury.

[21] Damages ⚷185(1)
115k185(1) Most Cited Cases

Workers exposed to asbestos-containing insulation products could not recover damages for pleural plaques or pleural thickening, where medical experts testified that pleural plaques and pleural thickening had no health significance and did not cause any pain, dysfunction, symptoms, or problems; alteration of pleura was not by itself legally compensable injury.

[22] Damages ⚷163(1)
115k163(1) Most Cited Cases

Compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that plaintiff suffered loss or detriment.
****546*704** Patrick C. Smith (F. Leigh Swann and Whiteford, Taylor & Preston, on the brief), Baltimore, for appellant, Owens-Illinois.

Shepard A. Hoffman (Harry Goldman, Jr., William A. Musto and Goldman & Skeen, P.A., on the brief), Baltimore, for appellants, Stormer and Celozzi.

Shepard A. Hoffman (William Musto, Harry Goldman, Jr. and Goldman & Skeen, P.A., on the brief), Baltimore, for appellees, Armstrong and Wood.

Kristine A. Crosswhite, Miles & Stockbridge, on the brief, Baltimore, for appellee, Owens Corning Fiberglas.

Diane V. D'Aiutolo, Frederick C. Leiner and Tydings & Rosenberg, on the brief, Baltimore, for appellee, Fibreboard Corp.

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Edward F. Houff and Church & Houff, on the brief, Baltimore, for appellee, GAF Corp. and Armstrong World Industries, Inc.

***705** Patrick C. Smith, F. Leigh Swann and Whiteford, Taylor & Preston, on the brief, Baltimore, for appellees, Owens-Illinois, Inc., Keene Corp. & ACandS, Inc.

Argued before BISHOP, ALPERT and DAVIS, JJ.

BISHOP, Judge.

This appeal involves the consolidated cases of three shipyard workers, Othello Armstrong, Forrest Wood, and Dominic Celozzi, and one warehouseman, Frederick Stormer, who sued companies that manufactured, installed or supplied asbestos-containing insulation products. All four cases were submitted to the jury on the claims of negligence and strict liability, based on the contention that the asbestos-containing insulation products were defective. For clarity, we shall divide our discussion of the cases into two sections. In section I, we will address the appeal of Owens-Illinois, Inc. from judgments in favor of Othello Armstrong and Forrest Wood and his wife, Loretta. In section II, we will address the appeals of Frederick Stormer and his wife, Alice, and Dominic Celozzi and his wife, Beatrice, from judgments in favor of Eagle-Picher Industries, Keane Corporation and Owens-Corning Fiberglas, and ACandS, Inc., Armstrong World Industries, Celotex Corporation, Eagle-Picher Industries, Fiberboard Corporation, GAF Corporation, ****547** Owens-Corning Fiberglas and Owens-Illinois, Inc., respectively.

I.

The appeal of Owens-Illinois, Inc. is derived from the cases of Othello Armstrong versus Eagle-Picher Industries, Owens-Corning Fiberglas and Owens-Illinois, Inc. and Frederick and Loretta Wood versus Owens-Corning Fiberglas and Owens-Illinois, Inc. The jury returned verdicts in favor of Armstrong and the Woods and against each defendant. Pursuant to Md.Cts. & Jud.Proc.Code Ann. ***706** § 11-109(b) (1989) [FN1], the jury itemized their damage awards. To Armstrong, the jury awarded $730,000 in compensatory damages of which $5,000 was for future medical expenses and the remaining $725,000 for non-economic damages. To Forrest and Loretta Wood, the jury awarded $635,000 in compensatory damages of which $22,000 was for injury to the Woods' marital relationship. The jury also determined that there was sufficient evidence to allow an award of punitive damages against Owens-Illinois, Inc. and Owens- Corning Fiberglas. After the compensatory damage awards, but before the punitive damage amount was determined, Owens-Corning Fiberglas settled both cases. Armstrong settled for $304,166.33 of which $243,333.33 was designated as settlement of the compensatory damage award and $60,833 as settlement of the punitive damage claim. The Woods settled for $409,625 of which $328,500 was designated as settlement of the compensatory damage award and $82,125 as settlement of the punitive damage claim. Two days later, the jury returned a punitive damage award against Owens-Illinois, Inc. of $1,000,000 in each case.

FN1. Section 11-109(b) provides:
Itemized award--As part of the verdict in any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, the trier of fact shall itemize the award to reflect the monetary amount intended for:
(1) Past medical expenses;
(2) Future medical expenses;
(3) Past loss of earnings;
(4) Future loss of earnings;
(5) Noneconomic damages; and
(6) Other damages.

At a post-trial motions hearing, the compensatory damage award in the Armstrong case was reduced by one-third to $486,666.67 due to the settlement with Owens-Corning Fiberglas pursuant to the Uniform Contribution Among Tort- feasors Act, Md.Code Ann. art. 50, § 19 (1986). The compensatory damage award in the Wood case was reduced by one-half to $317,500 for the same reason. Owens-Illinois, Inc. and Eagle-Picher Industries filed motions for new trial, revision of the judgment, judgment notwithstanding the verdict and

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remittitur. The court denied the motions and entered final judgments on the verdicts. Owens-Illinois, ***707** Inc. and Eagle-Picher Industries appealed. The appeal of Eagle-Picher Industries, however, has been stayed by its filing of a bankruptcy petition under Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Ohio and thus, Owens-Illinois, Inc. is the sole appellant in these two cases.

Issues Presented

Appellant Owens-Illinois, Inc. presents seven issues which we have re- worded and re-ordered as follows:

1. Whether the court erred when it failed to admit into evidence a report of a dust count conducted at its Baltimore shipyards by the Bethlehem Steel Corporation;

2. Whether the court committed reversible error when, in its jury instructions, it refused to define the term "substantial factor";

3. Whether the court erred when it denied appellant's motion for judgment on the issue of proximate cause;

4. Whether the court erred when it denied appellant's motion for judgment on the issue of punitive damages because appellees Armstrong and the Woods failed to introduce sufficient evidence that Kaylo, an asbestos-containing product, was made by appellant with substantial knowledge of a danger to appellees and a gross indifference to that danger;

5. Whether the court erred when it failed to reduce Armstrong's compensatory ****548** damages award pursuant to Md.Cts. & Jud.Proc.Code Ann. § 11-108 (1989) which places a cap of $350,000 on non-economic damages;

6. Whether the award of punitive damages violated appellant's right to due process of law by subjecting it to multiple punishments for the same wrong; and

***708** 7. Whether the court erred when it did not off-set the jury awards for appellees Armstrong and the Woods by both the compensatory and punitive amounts of the settlements with Owens-Corning Fiberglas.

Facts

This appeal concerns the exposure of appellees Armstrong and Wood to Kaylo, an asbestos-containing product used for industrial high temperature thermal insulation in such forms as pipe covering and block insulation. [FN2] Kaylo was manufactured and sold by Owens-Illinois, Inc. from 1948 to 1958. In 1958, Owens-Illinois, Inc. sold the Kaylo product line to Owens-Corning Fiberglas.

FN2. This product is in the form of a 50-60 pound hard block which is separated into manageable pieces with a wooden hammer or a saw. Water is then added to it to make it malleable and it is worked by hand with a trowel, like cement.

Asbestosis is a pulmonary disease caused by the inhalation of asbestos fibers. It is a progressive condition which causes shortness of breath and difficulty in breathing. The disease is present and active from the time the first fiber gets into the lungs. Depending on the amount of damage to the lungs, the symptoms may not appear for twenty or thirty years.

Othello Armstrong was a laborer and then a welder who was employed at various Bethlehem Steel shipyards from 1942 to 1963, where he worked in the engine and boiler rooms of ships. As a laborer, Armstrong swept up the dust and debris left by others who had cut and installed Kaylo pipe coverings. As a welder, he worked in closed boiler and engine rooms while pipe coverers cut and installed Kaylo pipe coverings and boilermakers cut and fitted Kaylo insulation blocks onto boilers. The cutting, fitting and installation of Kaylo pipe coverings and insulation blocks was extremely dusty work. In 1963, he left the shipyards to work as a stationary engineer at Eudowood Plaza. It appears from the record that Armstrong was not exposed to ***709** Kaylo insulation products during the time he worked at Eudowood Plaza from 1963 until his retirement in 1980.

Forrest Wood was a rigger at the Bethlehem Steel

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Key Highway shipyard from 1941 to 1975. As a rigger, Wood primarily assisted other tradesmen in the removal of equipment and materials from ships. This work included assisting pipefitters in the removal and installation of pipe coverings. This work, like that performed by Armstrong, was extremely dusty.

Additional facts will be presented in the discussion of each issue.

Discussion

1.

Whether the court erred when it failed to admit into evidence a dust count report conducted by the Bethlehem Steel Corporation at its Baltimore shipyards.

[1] The dust count report is a four page document written by the Industrial Health Engineer of the Bethlehem Steel Corporation who investigated the exposure of employees to asbestos dust at various Bethlehem Steel Corporation shipyards. The defendants moved for the admission of the dust count report and the plaintiffs objected on the grounds that it was not relevant or trustworthy. Although the court appeared to find that the report qualified as a business record, it refused to admit the report because it found it to be untrustworthy and unreliable. The defendants offered to have a custodian of records testify to the foundational requirements necessary to qualify it as a business record pursuant to Md.Cts. & Jud.Proc.Code Ann. § 10-101 (1989). The court found that a custodian of records could not salvage the admissability problems of the dust count report and restated its ruling. We affirm the ruling of the trial court not only on the basis of that ****549** court's reasoning, but also because the dust report does not qualify as a business record.

***710** "The rule in Maryland is that business records may be introduced, even though hearsay in nature, when the entry meets the test of 'necessity and circumstantial guarantee of trustworthiness.' " *Burroughs Int'l Co. v. Datronics,* 254 Md. 327, 348, 255 A.2d 341 (1969) (citations omitted). The criteria are codified in Md.Cts. & Jud.Proc.Code Ann. § 10-101 (1989) which provides in part:

> A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.... The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.

According to 5 Wigmore on Evidence § 1522 (1974), the typical record entry made in the regular course of business has a circumstantial guarantee of trustworthiness because:

(1) the needs of the entrant and the business require a habit of accuracy and the influence of this habit may be relied upon to prevent mistakes and counteract the possible temptation to make misstatements purposely;

(2) the regular dependence of the business upon the entries will almost certainly detect any errors or misstatements and thus misstatements can be made safely only by a systematic and comprehensive plan of falsification accomplishable only by the most daring and unscrupulous; or

(3) in addition to the first two reasons, the entrant made the record under a duty to an employer or supervisor and thus is under the additional risks of censure and disgrace for any inaccuracies.

Examples of business records which have been found to be admissible under this exception to the hearsay rule are "payrolls, accounts receivable, accounts payable, bills of lading and the like," *Palmer v. Hoffman,* 318 U.S. 109, 114, 63 S.Ct. 477, 480, 87 L.Ed. 645 (1943); statements in a medical record which are "pathologically germane" to the physical condition which caused the patient to seek medical ***711** assistance, *Sarrio v. Reliable Contracts Co.,* 14 Md.App. 99, 101, 286 A.2d 183 (1972); items in a police report which are within the personal observation of the investigating officer, *Aetna Casualty & Surety v. Kuhl,* 296 Md. 446, 454, 463 A.2d 822 (1983); and reports required by law, *Taylor v. Baltimore & Ohio Railroad Co.,* 344 F.2d 281, 285 (2d Cir.1965), *cert. denied,* 382 U.S. 831, 86 S.Ct. 72, 15 L.Ed.2d 75 (1965); *Lewis v. Baker,* 526 F.2d 470, 473-74 (2d Cir.1975).

In *Palmer,* 318 U.S. 109, 63 S.Ct. 477, the Supreme Court held that an accident report made by a railroad of its own initiative which contained a statement of an employee's version of an accident

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was not admissible as a record made in the regular course of business. The Supreme Court detailed the reasons why the report of a private investigation is not admissible under the business record exception to the hearsay rule.

> An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business.... If it did, then any law office in the land could follow the same course.... We would then have a real perversion of a rule designed to facilitate admission of records which experience had shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports.... ****550** The result would be [to] ... cover any system of recording events or occurrences provided it ***712** was "regular" and though it had little or nothing to do with the management of the business as such.

Id. 318 U.S. at 113, 63 S.Ct. at 480. Although stated differently, these findings by the Supreme Court are consistent with the reasons for circumstantial trustworthiness set forth in Wigmore, *supra.* The report was properly excluded because the railroad did not depend on the report, or others like it, to run the daily operation of its railroad business and, thus, it could not be assumed that the report was a product of a necessary habit of accuracy. Moreover, inaccuracies in the report would not have had a detrimental effect on the railroad and therefore would not have been detected by the almost continuous use of the information contained therein. Finally, the entrant was not under a duty to a superior to make the report objectively accurate, and thus the report contained the railroad's version of events.

Similarly, in the case *sub judice,* the dust count report does not meet the criteria of a business record. The investigation and report were not required by law, but were made at the request of one of the company vice- presidents. On its face, the report appears to be a single or, at most irregular, request. Nevertheless, even if dust count reports were made regularly by Bethlehem Steel Corporation, there was nothing to show that they are a necessary component of the daily operation of its business as a steel company. Therefore, the report is not inherently trustworthy as the product of a necessary habit of accuracy, and any inaccuracies would have remained undetected because Bethlehem Steel Corporation did not regularly rely on its contents. Moreover, because Bethlehem Steel Corporation did not apparently depend on the accuracy of the information contained in the report, we cannot infer that the motive behind its creation was objective accuracy rather than the creation of a subjective version of events. The report lacked specificity in the description of the controls in the investigation. The report does not provide a measure of the amount of asbestos dust present during the dust counts, the distance ***713** between those carrying dust collecting air filters and the source of the asbestos dust or the amount of time the air filters sampled the asbestos dust that was present. There is nothing that a custodian of records could add to alter this ruling.

This dust count report is also clearly distinguishable from a police report. The making of a police report is a regular requirement of police duty. The making of the dust count report is not a requirement of operating Bethlehem Steel Corporation. Police reports are made by third party police officers. The dust count report was made by Bethlehem Steel Corporation for its own use.

The trial court did not exclude the report because it failed the business record test but, rather, for unreliability, based on substantially the same reasons that we have stated *supra.* In other words, the reasons the trial court gave were those that disqualify the report as a business record. The Court did not err in excluding the report either because of its lack of reliability for the reasons it gave or because, as we hold, it did not qualify as a business record for the same reasons.

2.

Whether the court committed reversible error when

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it failed to define the term "substantial factor" in the instructions to the jury.

[2] The court instructed the jury as follows:

> In order for a plaintiff to recover against a particular defendant, certain things must be shown--must be proved by the plaintiffs by a preponderance of the evidence. You must determine whether each plaintiff has proven by a preponderance of the evidence that he has asbestosis, he worked in proximity to and inhaled respirable asbestos fibers from the products of a particular defendant. It must be shown that a product or product manufactured or supplied by that defendant, by a particular ***714** defendant ****551** was a substantial factor in causing the asbestosis.
>
> If no product manufactured or supplied by a particular defendant was a substantial factor in causing the asbestosis, then that defendant has no responsibility, and the defendant is out right away.
>
> Unless there is a product that was manufactured or supplied by a particular defendant which was a substantial factor in causing the asbestosis, there is no responsibility on the part of that defendant.

Appellant contends that this instruction did not define sufficiently the term "substantial factor" and proposed the following instruction which included an expanded explanation:

> Question # 4 on the jury interrogatories requires you to make a finding as to whether exposure to the products of a particular defendant was a substantial factor in causing asbestosis.
>
> The products of a particular defendant may be considered a legal cause of an injury only if the exposure of a particular plaintiff to those products was a substantial factor in causing the injury. The word substantial used in this context means that the products must have had such an effect in producing the harm as to lead reasonable men to believe that the exposure to those products by themselves was a direct cause of the injury.
>
> The plaintiffs must prove by a preponderance of the evidence that inhaled, respirable asbestos fibers from the asbestos products of a particular defendant were a substantial cause of asbestosis. In order to prove this, the plaintiffs must show that each of them worked in proximity to any of the defendants' asbestos-containing products with enough frequency and with enough regularity so that the inhaled fibers from the products substantially contributed to the claimed asbestosis of each plaintiff.

In *Eagle-Picher v. Balbos,* 84 Md.App. 10, 42-45, 578 A.2d 228 (1990), we addressed the same issue under similar ***715** circumstances. In fact, the instruction given and the alternate requested instruction in the case *sub judice* were almost word for word from their counterparts in *Balbos.* In *Balbos,* we divided the alternate instruction into three parts which were summarized as "(1) the product of a *particular* defendant, (2) was a *substantial* factor in causing the plaintiffs' injuries, and (3) each plaintiff worked in *proximity* to these products with *frequency* and *regularity.*" *Id.* at 44, 578 A.2d 228 (emphasis in original). As in *Balbos,* the controversy in the case *sub judice* centers around the third portion of the instruction--whether it was sufficient to state that it must be shown that each plaintiff worked "in proximity to respirable asbestos fibers" without adding "with frequency and regularity." We believe it was.

None of the medical experts quantified the exact exposure necessary to cause asbestosis. It was for the jury to determine whether a plaintiff was exposed to each defendant's asbestos product so that he inhaled respirable fibers and, if they found the answer to be yes, to determine whether the inhalation was sufficient to be a substantial factor in causing the plaintiff's asbestosis.

In *Balbos,* we quoted with approval from Prosser and Keaton, *The Law of Torts* § 41, at 267 (5th ed. 1984) which stated, "It has been considered that 'substantial factor' is a phrase sufficiently intelligent to furnish an adequate guide in instructions to the jury, and that it is neither possible nor desirable to reduce it to any lower terms." *Id.* at 45, 578 A.2d 228. The instruction on this issue given by the court *sub judice,* and the proposed instruction are virtually the same instructions that were before this court in *Balbos.* We rely on our reasoning in that case and hold that the court's instruction fairly and accurately conveyed the term "substantial factor" and did not err when it refused to grant appellant's requested instruction. Md. Rule 2-520(c). [FN3]

FN3. Md. Rule 2-520(c) provides:
The court may instruct the jury, orally or in

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writing or both, by granting requested instructions, by giving instructions of its own, or by combining any of these methods. The court need not grant a requested instruction if the matter is fairly covered by instructions actually given.

****552 *716** 3.

Whether the court erred when it denied appellant's motion for judgment on the issue of proximate cause.

[3] It is undisputed that appellant never warned appellees Armstrong and Wood about the dangers of asbestos exposure from Kaylo products. Appellant contends, however, that the court erred when it did not grant its motion for judgment pursuant to Md. Rule 2-519, because there was no direct evidence that either Armstrong or Wood would have heeded warnings had they been given. We disagree and explain.

Md. Rule 2-519(b) provides:

> When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

The standard by which a trial judge should evaluate a motion for judgment is the same as that applied when ruling on a judgment n.o.v., Md. Rule 2-532, i.e. "[a] party is not entitled to judgment [as a matter of law] unless evidence on the issue and all inferences fairly deducible therefrom, when viewed in the light most favorable to the party against whom the motion is made, are such as to permit only one conclusion with regard to the issue." *Smith v. Miller,* 71 Md.App. 273, 278, 525 A.2d 245 (1987). In other words, "if there is any competent evidence, however slight, leading to support the plaintiff's right to recover, the case should be submitted to the jury...." ***717***Montgomery Ward & Co. v. McFarland,* 21 Md.App. 501, 513, 319 A.2d 824 (1974).

Upon review of the record, we find direct evidence that Wood would have heeded warnings about the health hazards of Kaylo products had they been given. On direct examination, Wood stated, "Nobody told you to get--that it [Kaylo] was unhealthy or that it would hurt you. If they had, I would have got [sic] out of there." This is sufficient to defeat appellant's motion for judgment with regard to Wood. We did not find any direct evidence, however, that appellee Armstrong would have heeded health warnings had they been given.

Appellant contends that it was entitled to judgment as a matter of law because there was no direct evidence that Armstrong would have altered his behavior had he been warned, and there was evidence that he smoked cigarettes from 1966 until he quit in the mid-1970's despite mandatory health warnings on cigarette packaging. Therefore, according to appellant, the lack of a warning cannot be the proximate cause of Armstrong's asbestosis. We disagree because Md. Rule 2-519(b) requires that we view not only the direct evidence, but "all inferences fairly deducible therefrom" in the light most favorable to the non-moving party before we grant judgment as a matter of law. The issue then becomes whether it may be inferred from the facts and circumstances presented that Armstrong would have heeded any warnings had they been given.

[4][5] Proximate cause is a necessary element of a cause of action in both negligence, *Yousef v. Trust Sav., F.S.B.,* 81 Md.App. 527, 535-36, 568 A.2d 1134 (1990), and strict liability, *Phipps v. Gen. Motors Corp.,* 278 Md. 337, 344, 363 A.2d 955 (1976), and it may be proven by circumstantial evidence. *McSlarrow v. Walker,* 56 Md.App. 151, 159, 467 A.2d 196 (1983), *cert. denied,* 299 Md. 137, 472 A.2d 1000 (1984); *Rafferty v. Weimer,* 36 Md.App. 98, 102, 373 A.2d 64 (1977). In a strikingly similar situation, the Second Circuit in ***718***Raney v. Owens-Illinois, Inc.,* 897 F.2d 94 (2d Cir.1990), upheld the District Court's refusal to decide this issue as a matter of law.

> ****553** Ultimately, the issue is whether the facts and circumstances presented by the plaintiff in a particular case permit a jury reasonably to infer that a warning, reasonably required, would have been heeded. In this case, it was reasonable to infer that Raney would have heeded a manufacturer's warning. There was no evidence that Raney was aware of asbestos hazards, and

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> might not agree that an asbestos worker would have sought other employment had he been warned of asbestos hazards, a prediction as to what a worker, alerted to the hazards, would have done is generally within the range of reasonable dispute that makes matters appropriate for submission to a jury. Evidence that Raney, who had begun smoking and perhaps had become addicted years before cigarette health warnings appeared, did not stop smoking after such warning, even if admissibility is assumed, is, at most, a circumstance for the trier of fact to consider in deciding whether an asbestos warning would have been heeded. Such evidence does not preclude a finding in plaintiff's favor. As Judge Dearie [of the District Court] noted, a jury could reasonably conclude that Raney would have adjusted his conduct more significantly to asbestos warnings than to cigarette warnings or that his union would have precipitated action to protect his welfare.

Id. at 96. We find the reasoning in *Raney* persuasive for it is in accord with the natural and general rule that persons are presumed to act for self-preservation absent *proof* to the contrary. *Md. Central R.R. v. Neubeur,* 62 Md. 391, 402 (1884); *Nizer v. Phelps,* 252 Md. 185, 204, 249 A.2d 112 (1969).

In the case *sub judice,* Armstrong was unaware of the health hazards of the asbestos in the dust from Kaylo products. Armstrong was also a smoker for forty years. This, however, is not enough evidence to find as a matter of law that he would have ignored warnings about the dangers of asbestos. Viewing this evidence and the reasonable ***719** inferences therefrom as enunciated in *Raney, Neubeur* and *Nizer* in the light most favorable to Armstrong, we find the evidence sufficient for a jury to infer, reasonably, that Armstrong would have heeded any warnings given because people generally act to protect themselves from known dangers. We hold that there was sufficient evidence for a fact finder to infer that the failure of appellant to warn him of the health hazards of exposure to the dust from Kaylo products was the proximate cause of his asbestosis. Consequently, we hold that the motion for judgment was properly denied.

4.

Whether the court erred when it denied appellant's motion for judgment on the issue of punitive damages because appellees Armstrong and the Woods failed to introduce sufficient evidence that Kaylo, an asbestos-containing product, was made by appellant with substantial knowledge of a danger to appellees and a gross indifference to that danger.

[6] In *Eagle-Picher v. Balbos,* we set forth the evidentiary standard for an award of punitive damages.

> Wanton or reckless conduct, as opposed to actual malice, will suffice to support an award of punitive damages in a product liability action. Wanton and reckless conduct, however, requires far more than mere negligence, or what may be casually inferred from it. It requires *direct evidence* of substantial knowledge on the part of the manufacturer that the product is, or is likely to become, dangerous, and a gross indifference to that danger.

84 Md.App. at 72-73, 578 A.2d 228 (citations omitted) (emphasis in original). In the case *sub judice,* the jury awarded punitive damages of $1,000,000 against appellant in each case. We will reverse only if the appellees failed to present any evidence, as required by the implied malice standard, of appellant's wanton indifference or reckless disregard for ***720** the rights of others. *Exxon Corp. v. Yarema,* 69 Md.App. 124, 163, 516 A.2d 990 (1986).

Appellees produced evidence that appellant possessed substantial knowledge that Kaylo was, or was likely to become, dangerous. ****554** By 1935, the medical and industrial literature had established that asbestos could cause life-threatening diseases in humans. It is reasonable to charge appellant with this knowledge. *See Balbos,* 84 Md.App. at 77, 578 A.2d 228.

In February 1943, appellant contacted Saranac Laboratories to have them examine the health hazards of airborne dust from Kaylo insulation products to employees "in the plant where the material is made or where it may be sawed to desired dimensions, and also considered from the standpoint of applicators or erectors at the point of use." One month later, Saranac Laboratories notified appellant that the composition of Kaylo suggested that it "had all the ingredients of a first

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class hazard." Appellant instructed Saranac Laboratories to continue its investigations.

In November 1948, Saranac Laboratories issued to appellant an interim report which stated that Kaylo is capable of causing asbestosis in test animals and "should be handled industrially as a hazardous dust." The interim report also stated that "very small numbers of [asbestos] fibers are capable of producing asbestosis," that the development of asbestosis may be delayed and that a Kaylo safety program was necessary. The interim report was forwarded to appellant with a cover letter which stated that Kaylo is capable of causing asbestosis and that Kaylo must be regarded as a potentially hazardous material. The cover letter closed with the following statement:

> [O]ur findings regarding Kaylo are less favorable than anticipated. However, since Kaylo is capable of producing asbestosis, it is better to discover it now in animals than later in industrial workers. Thus the company, being forewarned, will be in a better position to institute adequate control measures for safeguarding exposed employees and protecting its own interests.

***721** In a letter from Saranac Laboratories dated June 1, 1950, addressed to W.G. Hazard of the Industrial Relations Division of Owens-Illinois Glass Company, Saranac warned that

> at this time ... the findings permit [a conclusion that] Kaylo dust on inhalation by experimental animals ... does produce the asbestotic type of reaction in the lungs and, therefore, we believe every precaution should be taken to minimize exposure of industrial employees.

Again, on February 7, 1952, Saranac, in the letter transmitting its final report, [FN4] stated:

> The results of the investigation with animals show that Kaylo dust is capable of producing a peribronchiolar fibrosis typical of asbestosis.... Although extrapolation from animal to human experience is difficult, nevertheless the results of the study indicate that every precaution should be taken to protect workers against inhaling the dust. Therefore, control measures should be directed to reducing the amount of atmospheric dust, especially at those points of operation where dust is generated. Our report of May 29, 1951, concerning the industrial hygiene survey may be of help to you in this regard.

Finally, on October 5, 1955, in an intra-company memorandum, appellant expressed its knowledge that Kaylo dust could cause asbestosis.

Appellees also produced evidence that appellant exhibited a gross indifference to the dangers of Kaylo products. As early as 1946, the generally accepted safe level of exposure was five million particles of asbestos dust per cubic foot of air (mppcf). Five mppcf is invisible to the unaided eye. Fifteen mppcf in perfect light can barely be seen by the unaided eye. Five mppcf, however, was intended as a guide and not as a fine line between safe and dangerous conditions.

***722** Appellees produced evidence that they were exposed to clouds of asbestos dust that covered their bodies. Wood testified that the dust "would fly like snowflakes" all over the place. When a valve was broken, the dust would circulate all around ****555** and on everybody close to it. Armstrong testified that the dust from the insulation

> "was on your arms, on your clothes, in your nose and your eyebrows and mustache ... and your hair, wherever your head wasn't covered, it was there."

In November 1952, appellant began a safety program for its workers in the warehouse and shipping departments of its Berlin, New Jersey Kaylo Plant which included chest x-rays, the installation of exhaust equipment and the distribution of respirators. No safety program, however, was suggested or initiated for workers involved in the application of Kaylo products. Appellant also failed to place warnings on its Kaylo products and did not distribute any literature warning about the known hazards of asbestos exposure from Kaylo products. In fact, it may be inferred reasonably that appellant took steps to limit the publication of the dangers of Kaylo products. In 1952, before Saranac Laboratories published its final report on asbestos exposure from Kaylo

FN4. In Balbos, we noted, "[t]he report, however, as does other available medical literature, only documents hazards involved with heavy exposure to the product's dust generated during the manufacturing and application process." *Balbos,* 84 Md.App. at 77-78, 578 A.2d 228.

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products, it submitted to appellant a draft copy with the statement that in publishing the report "reference will be made only to hydrous calcium silicate and not to 'Kaylo' thus the interest of your company will be safeguarded. Of course, the final manuscript will be forwarded for your review before being released to the publisher." In the 1955 intra-company memorandum, previously mentioned, appellant referred to the published report of Saranac Laboratories with the statement, "The names 'Kaylo' and 'Owens-Illinois' appear nowhere in the article. It's completely anonymous."

In *Balbos,* 84 Md.App. 10, 578 A.2d 228, we reversed the jury's award of punitive damages against Owens-Illinois, Inc. based on a documentary record that differed by only ***723** one document from that in the case *sub judice;* [FN5] however, *Balbos* is distinguishable from this case. First, the plaintiff employees in *Balbos* did not work with or in proximity to Kaylo products, but relied on the drift theory to demonstrate exposure. *Id.* at 75-79, 578 A.2d 228. This type of asbestos exposure was not tested directly by Saranac Laboratories. In the case *sub judice,* appellees worked with or near Kaylo products in enclosed rooms where clouds of dust were generated. This was similar to the test conditions in the Saranac Laboratory experiments. Second, the employees in *Balbos* did not contend that they were "exposed to levels of asbestos in excess of levels that were generally accepted as safe at the time." *Id.* at 77, 578 A.2d 228. In the case *sub judice,* appellees and their co-workers testified to exposures to Kaylo dust which were many times the accepted safe level. Based on the foregoing, and unlike *Balbos,* the appellants here demonstrated through direct evidence that Owens-Illinois had substantial knowledge of the dangers inherent in the use of their product and that, based on their failure to act on that knowledge, they were grossly indifferent to those dangers to the extent that their failure to act amounted to a wanton and reckless disregard for the plaintiffs. Therefore, we hold the evidence sufficient to sustain the court's denial of appellant's motion for judgment and the jury's award of punitive damages.

FN5. At oral argument, all parties agreed that the additional document was inconsequential. It was not referred to in any of the briefs.

5.

Whether the court erred when it failed to reduce Armstrong's compensatory damages award in accordance with the non-economic cap on damages in Md.Cts. & Jud.Proc.Code Ann. § 11-108 (1989).

Section 11-108 provides in part:

(b) *Limitation on $350,000 established.*--In any action for damages for personal injury in which the cause of ***724** action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000.

Owens-Illinois, Inc. maintains that because appellee Armstrong was first diagnosed with asbestosis in September 1987, his damage award was subject to § 11-108(b) and, therefore, the trial court should have ****556** reduced the award accordingly. We disagree.

[7][8] In construing a statute, we attempt to effectuate the intent of the legislature. *Katz v. Wash. Sub. San. Comm.,* 284 Md. 503, 513, 397 A.2d 1027 (1979). We look first to the plain language of the statute for this is the legislature's final expression of its intended goal. *Morris v. Prince George's County,* 319 Md. 597, 603, 573 A.2d 1346 (1990). In doing so, "we assume that the words of the statute are intended to have their natural, ordinary and generally understood meaning in the absence of evidence to the contrary." *Brodsky v. Brodsky,* 319 Md. 92, 98, 570 A.2d 1235 (1990). At issue in the instant case is the meaning of the phrase "cause of action arises."

[9][10] "A cause of action, in common legal parlance, is a state of facts which would entitle a person to sustain an action and to seek a judicial remedy on his behalf." *Woodfork v. Marine Cooks & Stewards Union,* 642 F.2d 966, 971 (5th Cir.1981); *see also Cope v. Anderson,* 331 U.S. 461, 466, 67 S.Ct. 1340, 1342, 91 L.Ed. 1602 (1947). According to Black's Law Dictionary, the word "arise" means "[t]o spring up, originate, to come into being or notice...." A cause of action in negligence requires evidence of each of the following: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty by the defendant, (3) an injury to the plaintiff, and (4) that the injury was proximately caused by the defendant's breach. *Pennwalt Corp. v. Nasios,* 314 Md. 433, 453, 550 A.2d 1155 (1988). A cause of action in strict

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liability requires evidence that (1) the plaintiff was injured, (2) the defendant's product caused the injury and (3) the defendant's product was defective. *Id.* at 453-54, 550 A.2d 1155. Thus, a "cause of action arises" in ***725** negligence or strict liability when facts exist to support each element.

[11] In the case *sub judice,* Owens-Illinois, Inc. contends that a cause of action does not arise until it is discovered. This contention is based on the "discovery rule" which provides that the statute of limitations will not begin to run until a plaintiff's cause of action accrues which is "when he ascertains, or through the exercise of reasonable care and diligence should have ascertained, the nature and cause of his injury." *Harig v. Johns-Manville Products,* 284 Md. 70, 83, 394 A.2d 299 (1978). [FN6] In essence, Owens-Illinois, Inc. argues that the word "arises" as used in § 11-108(b) has the same meaning as the term "accrues." We disagree.

> FN6. The "discovery rule" was developed to protect plaintiffs against whom a tort which is of "inherently unknowable character" has been committed from the harsh consequences of the general rule that the statute of limitations against a right or cause of action begins to run from the date of the alleged wrong. *Harig,* 284 Md. at 76-77, 394 A.2d 299.

In *Harig,* the Court of Appeals extended the discovery rule to "situations involving the latent development of disease." 284 Md. at 83, 394 A.2d 299. In doing so, the Court did not alter the moment at which the cause of action was deemed to have begun, but only delayed the running of the statute of limitations.

> Like the victim of undiscoverable malpractice[,] a person incurring disease years after exposure cannot have known of the existence of the tort until some injury manifests itself. In neither case can the tort victim be charged with slumbering on his rights, for there was no notice of the existence of a cause of action. This feature distinguishes these situations from ordinary tort cases, which require no exception to the general rule that knowledge of the wrong is immaterial, because usually some harm will be apparent to a reasonably diligent plaintiff. In cases where the initial injury is inherently unknowable, however, the statute of limitations should not begin to ***726** run until the plaintiff should reasonably learn of the cause of action. Avoiding possible injustice in such cases outweighs the desire for repose and administrative expediency, which are the primary underpinnings of the limitations statute.

Id. at 80, 394 A.2d 299 (citations omitted). Based on the foregoing, a cause of action ****557** still arises when the facts exist to support each element, but does not accrue for purposes of the statute of limitations until it is discovered. Consequently, in the case *sub judice,* where the date of Armstrong's injury is at issue, § 11-108(b) is controlling only if Armstrong's asbestosis came into existence after July 1, 1986.

[12] Armstrong was diagnosed as having asbestosis in September 1987 based on a medical examination from the previous May. The evidence, even when viewed in the light most favorable to appellant, demonstrates that Armstrong must have had asbestosis prior to July 1, 1986. Appellant's medical expert, Dr. Steven Schonfeld, testified that asbestosis has a latency period of fifteen to twenty years. Armstrong's medical expert, Dr. Thomas Hobbins, put the latency period at twenty to thirty years. Both experts agreed that exposure to large doses of asbestos will result in a shorter latency period. It was also undisputed that asbestosis will continue to develop after one is no longer exposed to asbestos because asbestos fibers stay in the lungs forever and asbestosis progresses as long as there are asbestos fibers in the lungs.

Armstrong's exposure to asbestos began in 1942 and continued for at least twenty-one years until he left the Bethlehem Steel Shipyards in 1963. Armstrong was exposed to heavy doses of asbestos. He testified that he was often covered with Kaylo dust. Assuming the longest latency period of thirty years, July 1, 1986 was fourteen years more than required for asbestosis to develop under "normal" exposure.

***727** Armstrong also complained that he has suffered from shortness of breath, a symptom of asbestosis, since the early 1980's. Armstrong was also a smoker for forty years, who quit in the mid-1970's. His shortness of breath was evidence that he had asbestosis beginning in the early 1980's,

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but his years of smoking make this far from conclusive.

The issue in the case *sub judice* was whether Armstrong had asbestosis. Armstrong's medical experts testified that he did, while appellant's medical experts testified that he did not. The jury must have believed Armstrong's medical experts. There was, and can be, no dispute that July 1, 1986 was well beyond the latency period of asbestosis for one exposed to asbestos in often heavy doses from at least 1942 to 1963. It is inconceivable that Armstrong's asbestosis came into existence between July 1, 1986 and his medical examination in May 1987. Armstrong's asbestosis must have developed prior to July 1, 1986. We hold that his damage award is not controlled by the cap on non-economic damages.

6.

Whether the award of punitive damages violated appellant's right to due process of law by subjecting it to multiple punishments for the same wrong.

[13] Appellant contends that the punitive damage awards in the Armstrong and Wood cases violated its due process rights guaranteed by Article 24 of Maryland's Declaration of Rights and the Fifth and Fourteenth Amendments to the United States Constitution. Appellant maintains that it is being repeatedly punished for the same conduct because punitive damages were assessed against it in previous cases involving asbestos exposure from Kaylo products. We disagree and explain.

Appellant bases its contention on the assumption that the punitive damage awards in the case *sub judice* are for the same wrong as punitive damage awards in prior asbestos litigation. A similar contention was rejected by the Fifth ***728** and Second Circuit Courts in *King v. Armstrong World Industries, Inc.,* 906 F.2d 1022 (5th Cir.1990) and *Simpson v. Pittsburgh Corning Corp.,* 901 F.2d 277 (2d Cir.1990), *cert. dismissed,* 497 U.S. 1057, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990), because the evidence demonstrated that the punitive damage awards were only for the harm inflicted upon the specific plaintiffs in each case. Both federal courts found that the evidence in the prior asbestos cases reflected only the harm inflicted upon the plaintiffs in those suits and not the entire harm caused by the defendants' actions. The juries in ****558** those cases were instructed to return a punitive damage award which was appropriate only for the case before it. *King,* 906 F.2d at 1030; *Simpson,* 901 F.2d at 281. Similarly, in the cases before them on appeal, neither the evidence nor the jury instructions pertained to the totality of the defendants' misconduct. Rather, the cases involved only the acts of the defendants against the plaintiffs in their respective trials. In *Simpson,* the Court also determined that there was no evidence that the $375,000 in punitive damages assessed against Pittsburgh Corning Corp. in its two previous asbestos cases "was even close to whatever limit due process might impose on the total punitive damages that may be assessed against Pittsburgh Corning for its misconduct with respect to asbestos warnings." 901 F.2d at 281. Consequently, it affirmed the punitive damage award of $2,300,000 assessed against Pittsburgh Corning Corp. *Id.*

Similarly, in the case *sub judice,* the evidence and the jury instructions pertained only to the harm inflicted by the defendants upon the Woods, Armstrong and the other plaintiffs before it. The jury returned punitive damage awards in favor of the Woods and Armstrong for $1,000,000 dollars each. The evidence, jury instructions and the size of the punitive damage awards demonstrate that the punitive damage awards were neither for the totality of the harm caused by appellant's misconduct nor for any misconduct beyond this case. The evidence also demonstrates that previously Owens- Illinois has been subject to a total of $2,000,000 in ***729** punitive damage awards. As Owens-Illinois is a defendant in over 68,000 asbestos cases, $2,000,000 does not appear to represent Owens-Illinois' complete punitive liability. Moreover, combined with the present award Owens-Illinois' total punitive damage liability, $4,000,000 to date, does not approach the limit due process might impose. The record before us does not demonstrate that Owens- Illinois is being punished repeatedly for a single misconduct and therefore, the punitive damage awards in the case *sub judice* did not violate its right to due process under either the Maryland Declaration of Rights or the Federal Constitution.

7.

Whether the court erred when it did not off-set the

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jury awards for the Woods and Armstrong by the entire amount of the settlements with Owens-Corning Fiberglas.

Owens-Corning Fiberglas settled with the Woods and Armstrong after the jury returned compensatory damages awards of $730,000 and $657,000, respectively. Armstrong settled for $304,166.33 of which $243,333.33 was designated as settlement of the compensatory damage award and $60,833 was designated as settlement of the punitive damage claim. The $243,333.33 designated as the compensatory settlement equalled one-third of the total compensatory award. The Woods settled for $409,625 of which $328,500 was designated as settlement of the compensatory damage award and $82,125 was designated as settlement of the punitive damage claim. The $328,500 designated as the compensatory settlement equalled one-half of the total compensatory award. Two days after returning the awards for compensatory damage, the jury returned verdicts against Owens-Illinois for punitive damages of $1,000,000 in each case. After a post-trial hearing, the court, pursuant to the Uniform Contribution Among Tortfeasors Act, reduced the compensatory awards by the amount designated as the compensatory settlement. Appellant contends that the compensatory awards should have been reduced by the entire ***730** settlement, which included the amounts designated as settlement of the punitive damage claims. We disagree and explain.

The Uniform Contribution Among Tortfeasors Act (UCATA), Md.Code Ann. art. 50, § 19 (1986), provides:

> A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides; but reduces the claim against the other tort-feasors in the amount of the consideration paid for the release, or in any amount or proportion by which the ****559** release provides that the total claim shall be reduced, if greater than the consideration paid.

[14] In *Exxon Corp. v. Yarema,* 69 Md.App. 124, 134-38, 516 A.2d 990 (1986), we held that UCATA pertained only to compensatory damages and therefore a settlement by one joint tortfeasor would not reduce the punitive damage award against any others. UCATA was enacted to prevent a plaintiff from repeatedly collecting for the same injury caused by multiple defendants. As a result, the UCATA gives credit to a defendant for any payments made to a plaintiff that reduces the common liability. *Id.* at 136, 516 A.2d 990. Multiple tortfeasors are jointly and severally liable for the injuries suffered by the plaintiff and, thus, UCATA is clearly applicable to an aggregate compensatory award for these injuries. *Id.*

[15] Punitive damages, on the other hand, are assessed against each defendant individually and are not held as a joint and several liability among joint tortfeasors. In *Yarema,* we stated:

> In contrast, the award of punitive damages does not attempt to compensate the plaintiff for harm suffered by him but rather is exemplary in nature and is over and above any award of compensatory damages. The fundamental purpose of a punitive damage award is to punish the wrongdoer for misconduct and to deter future egregious conduct by others.

***731** *Id.* (citations omitted). To accomplish this purpose, punitive damages are assessed against a defendant individually based on the degree of culpability or the existence of malice on the part of each defendant and thus are not held as a joint and several liability by joint tortfeasors. *Id.* at 137-38, 516 A.2d 990 (citations omitted).

[16][17] Similarly, we hold that the settlement of a punitive damage claim by one joint tortfeasor will not reduce compensatory or punitive damage awards against the remaining joint tortfeasors. A compensatory award is a joint and several liability against all the joint tortfeasors while a punitive damage award is, and can only be, an individual liability. A settlement which involves both compensatory and punitive damages or claims pertains to two distinct liabilities and may, therefore, properly reflect both liabilities separately.

[18] Owens-Illinois contends that to allow a plaintiff to apportion his or her settlement between compensatory and punitive damages invites abuse because it will permit a plaintiff to concoct a settlement with one defendant with a minimal compensatory amount and a maximum punitive settlement and thereby, minimize the compensatory set-off mandated by UCATA. While we agree that abuse may be theoretically possible, we do not find any *sub judice.* The compensatory settlement in

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both cases was at least three times the punitive damages settlement and it equalled the pro-rata share of Owens-Illinois' compensatory liability under UCATA. Moreover, the punitive damage settlement was less than one-tenth of the punitive damage award against Owens-Illinois. Therefore, it does not appear on the face of the settlement agreement that appellees gained anything through chicanery or abuse. Consequently, the court did not err when it reduced appellant's liability only by the amount of the compensatory settlement.

II.

The appeal of Frederick and Alice Stormer is from a judgment in favor of Eagle-Picher Industries, Keane Corporation ***732** and Owens-Corning Fiberglas. The appeal of Dominic and Beatrice Celozzi is from a judgment in favor of ACandS, Inc., Armstrong World Industries, Celotex Corporation [FN7], Eagle-Picher Industries, Fiberboard Corporation, GAF Corporation, Owens-Corning Fiberglas and Owens-Illinois, Inc. Since the jury found that Frederick Stormer and Dominic Celozzi did not suffer from asbestosis, judgment was entered in favor ****560** of the defendants. The Stormers and the Celozzis filed motions for new trial which were denied.

FN7. The proceedings in this appeal as they pertain to the Celotex Corporation have been stayed by its filing of a bankruptcy petition in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division.

Issue Presented

Whether the court committed reversible error when it instructed the jury that damages could not be awarded solely for the medical condition of pleural plaques or pleural thickening.

Facts

Frederick Stormer worked as a stockman for the Wallace and Gale Company for six months in 1942. As part of his job, Stormer sorted and stacked asbestos- containing pipe coverings. He then became a warehouseman for Lever Brothers where he worked near pipes covered with asbestos-containing insulation for twenty-eight years. Dominic Celozzi was employed as a coppersmith at the Bethlehem Sparrows Point shipyard from 1937 to 1975. As part of his job, Celozzi worked with and near asbestos-containing insulation products in the engine and boiler rooms of ships.

Stormer and Celozzi presented evidence that they developed pleural plaques and pleural thickening from exposure to asbestos. They also presented evidence that they suffered from asbestosis. As we stated, *supra,* asbestosis is a scarring of the lungs caused by asbestos fibers which results in shortness of breath and difficulty in breathing. ***733** Pleural plaques and pleural thickening result from the scarring of the pleura, the thin membrane that keeps the lungs contained and configured to the chest wall and diaphragm. When asbestos fibers are inhaled into the lungs, they may pierce through the smallest airways into the pleura. The fibers that reach the pleura cause a localized reaction which results in a deposit of scar tissue. When the scarring of the pleura is localized, it is known simply as a pleural plaque. When the scarring is widespread, it is referred to as pleural thickening.

All of the medical experts agreed that pleural plaques and pleural thickening are an alteration of an otherwise healthy pleura. They also agreed that pleural scarring does not constitute any loss or detriment. Appellants' two medical experts often used the word "injury" to describe pleural scarring, yet they testified that pleural plaques and pleural thickening do not affect the human body, do not shorten life expectancy, do not cause complications or problems, do not cause pain and cannot be felt. Appellees' three medical experts testified that pleural plaques and pleural thickening have no health significance and do not cause any pain, dysfunction, symptoms or problems.

Based upon this evidence, the court instructed the jury as follows:

> You have heard testimony that one or more of these plaintiffs may have developed pleural plaques or pleural thickening as a result of exposure to asbestos. You are instructed that there is no evidence that pleural plaques or pleural thickening cause any impairment or disability. If you find that a plaintiff has only pleural plaques and/or pleural thickening and not

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asbestosis, then your answer to question one [on the verdict sheet] should be no as to that plaintiff. No damages may be awarded solely because of the pleural plaques or pleural thickening.

Question one on the verdict sheet instructed the jury that if they found that either Stormer or Celozzi did not have asbestosis they should not proceed any further in their deliberation of that case. The jury determined that neither ***734** Stormer nor Celozzi suffered from asbestosis and judgment was entered in favor of the defendants.

Discussion

[19][20][21] A party may have its theory presented to the jury only if it is a correct exposition of the law and there is evidence to support its theory. *Myers v. Alessi,* 80 Md.App. 124, 130-31, 560 A.2d 59 (1989). To have a cause of action based on claims of product liability or negligence law submitted to the jury, the plaintiff must produce evidence of a legally compensable injury. *Wright v. Eagle-Picher Industries,* 80 Md.App. 606, 615, 565 A.2d 377 (1989); Md. Rule 2-519. In the case *sub judice,* the evidence produced by Stormer and Celozzi ****561** demonstrated that pleural plaques and pleural thickening alter the pleura, but do not cause any loss or detriment. Consequently, the court's instruction on pleural plaques and pleural thickening was error only if mere alteration of the pleura is a legally compensable injury. We hold that it is not.

Sections 388 and 402A of The Restatement (Second) of Torts (1965) identify "harm" as one of the necessary elements of a cause of action in both negligence and strict liability. The Restatement, in Section 7(2), defines "[t]he word 'harm' [as] used throughout the Restatement ... to denote the existence of loss or detriment in fact of any kind to a person resulting from a cause." Comment b to section 7 further explains that " '[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing.... In so far as physical changes have a detrimental effect on a person, that person suffers harm." These definitions, as used in the Restatement (Second) of Torts, have been cited with approval in Maryland. *See Phipps v. Gen. Motors Co.,* 278 Md. 337, 340-41, 363 A.2d 955 (1986) (adopting § 402A); *Twombley v. Fuller Brush Co.,* 221 Md. 476, 492, 158 A.2d 110 (1960) (adopting § 388); *Hearst Corp. v. Hughes,* 297 Md. 112, 118, 466 A.2d 486 (1983) (discussing § 7).

***735** Stormer and Celozzi contend that their pleural scarrings are nonconsented alterations of their bodies and as such are grounds for compensation. In support of their contention, they cite the Restatement (Second) of Torts § 15, comment a (1965) which discusses the topic of "battery" and provides, "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." This is, however, only a partial quote from comment a which continues, "A contact which causes no bodily harm may be actionable as a violation of the right to freedom from the *intentional* infliction of offensive bodily contact." (Emphasis added). Section 15 is inapposite, therefore, because it broadly defines bodily harm only in the context of an action based on the intentional tort of battery. A similar argument was rejected in *Wright v. Eagle-Picher,* 80 Md.App. 606, 615, 565 A.2d 377 (1989). *See also In re Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563, 1567 (D.Haw.1990) ("Plaintiffs must show a compensable harm by adducing objective testimony of a *functional impairment* due to asbestos exposure.... In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functionable impairment is not enough." (Emphasis in original) (footnote omitted)).

[22] In Maryland, compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that the plaintiff suffered a loss or detriment. In the case *sub judice,* the medical evidence was clear and uncontradicted that pleural scarring does not cause a functional impairment or harm as defined in the *Restatement* § 7, *supra.* Consequently, the court did not err when it instructed the jury that damages were not to be awarded merely for pleural plaques or pleural thickening.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

591 A.2d 544, 87 Md.App. 699, Prod.Liab.Rep.

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C
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Thomas BOWERMAN, et al.,
v.
UNITED ILLUMINATING, et al.

No. X04CV 940115436S.

Dec. 15, 1998.

Memorandum of Decision on Defendants' Motion for Summary Judgment

KOLETSKY.

***1** In fifteen separate lawsuits, approximately one hundred and nine plaintiffs filed personal injury actions against the defendants, United Illuminating Company (UI), ABB C-E Services, Inc. (ABB), New England Abatement Resources, Inc. (NEAR) and Allwaste Asbestos Abatement, Inc. (Allwaste), for their alleged exposure to asbestos while working at the Harbor Station Power Plant located in Bridgeport, Connecticut. The five plaintiffs in the case of *Bowerman, et al v. United Illuminating, et al* ., No. X04-CV-94-0115436-S, and the five plaintiffs in the case of *Goodall, et al. v. United Illuminating, et al.*, No. X04-CV-95-0115437-S, are the "test plaintiffs" for purposes of the defendants' motion for summary judgment.

The critical issue in this matter is whether the plaintiffs, who claim exposure to asbestos, can maintain an action in negligence absent the manifestation of symptoms of any asbestos-related disease.

In 1993, the plaintiffs worked at the Bridgeport Harbor Station as boilermakers, steamfitters, welders, plumbers or pipefitters. During the same period of time, an asbestos abatement project was undertaken at this UI facility. UI contracted with ABB, NEAR and Allwaste for repairs and asbestos removal. The plaintiffs claim that, because of the actions of these defendants, they were exposed to asbestos and suffered injuries as a result thereof.

The amended complaint states three causes of action against each defendant: negligence; reckless and wanton misconduct; and intentional misconduct. The plaintiffs allege that, as a result of the defendants' conduct, they incurred the following injuries:

1. scarring of their lung tissue caused by inhalation of asbestos dust and fibers;
2. permanent implantation of [carcinogenic] asbestos fibers in plaintiffs' lungs;
3. an increased risk of developing lung cancer, mesothelioma, and other asbestos-related diseases; and
4. a present fear, apprehension and anxiety about developing asbestos-related diseases including cancer.

It is also claimed that they will incur future medical expenses relating to continuing medical surveillance to monitor whether plaintiffs' exposure causes health problems.

For the purposes of this summary judgment motion only, the plaintiffs and the defendant submitted a Joint Statement of Undisputed Facts dated April 17, 1998. In that document, the parties agreed to a number of facts, including the following:

> Asbestos abatement at the Harbor Station project was conducted from October 2, 1993 until November 25, 1993. The ten plaintiffs have not manifested physical symptoms of an injury, illness or disease that could be asbestos- related. Six of the ten plaintiffs have not been diagnosed with an injury, illness or disease that could be asbestos-related.

One plaintiff was diagnosed with bibasiliar fibrosis in 1990. Plaintiffs' medical expert reported this plaintiff revealed no evidence of an asbestos-related disease.

***2** One plaintiff was diagnosed with a restrictive ventilatory defect, with borderline diffusing capacity, in 1994. Plaintiffs medical expert reported this plaintiff revealed no evidence of an asbestos-related disease.

Two of the plaintiffs have been diagnosed with an injury, illness or disease that could be asbestos-related. One plaintiff was diagnosed with

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pleural thickening on the right and obstructive pulmonary impairment. The other plaintiff was diagnosed with 0/1 ILO reading and bilateral circumscribed pleural thickening.

None of the four plaintiffs referenced in the previous three paragraphs have had a doctor causally connect their conditions to asbestos exposure at Harbor Station. No plaintiff has undergone a lung tissue biopsy, received a medical diagnosis of lung tissue scarring as a result of his presence at Harbor Station or has received any treatment for asbestos-related injury, illness or disease. With the exception of one plaintiff, plaintiffs' claims for emotional distress arise solely from the fear of a future asbestos-related illness or disease.

The defendants filed a motion for summary judgment, with separate appendix, affidavits and exhibits, on May 1, 1998, seeking judgment on all counts of the plaintiffs' amended complaint, on the following grounds: 1) plaintiffs do not allege an actionable harm; 2) plaintiffs cannot prove to a reasonable degree of medical certainty that the defendants proximately caused their alleged injuries; 3) plaintiffs cannot recover for an increased risk of a future injury because they did not suffer a present injury; and 4) plaintiffs' claims of emotional distress are objectively unreasonable. The plaintiffs filed a memorandum in opposition, with accompanying attachments, affidavits and exhibits, on July 20, 1998. Thereafter, the defendants filed a reply to the plaintiffs' objection to the defendants' motion for summary judgment on August 10, 1998, and the plaintiffs filed a response to the defendants' reply, with accompanying affidavits, on August 21, 1998.

"Summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party ... Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact ... a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue ... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court [in support of a motion for summary judgment]." (Citations omitted; internal quotation marks omitted.) *Home Ins. Co. v. Aetna Life & Casualty Co.,* 235 Conn. 185, 202-03, 663 A.2d 1001 (1995). "A 'material' fact has been defined adequately and simply as a fact which will make a difference in the result of the case." *Catz v. Rubenstein,* 201 Conn. 39, 48, 513 A.2d 98 (1986).

***3** To successfully maintain an action in negligence, a plaintiff must demonstrate: 1) that the defendant has acted in a tortious manner; 2) that the plaintiff has sustained *actual injury* as a result of the defendant's actions; and 3) that the plaintiff knows of the causal connection between the defendant's tortious conduct and the resulting injury to the plaintiff. *BellSouth Telecommunications, Inc. v. W.R. Grace & Co.,* 77 F.3d 603 (2nd Cir.1996); *Dennis v. ICL, Inc.,* 957 F.Supp. 376, 379 (D.Conn.1997). Regardless of any breach of a standard of care by a defendant, a *compensable injury* must occur in order for an action in negligence to survive. *Barrett v. Danbury Hospital,* 232 Conn. 242, 252-53, 654 A.2d 748 (1995). The initial question, therefore, is whether the scarring of lung tissue and implantation of asbestos fibers in the lungs due to asbestos exposure, as alleged in the plaintiffs' amended complaint, are compensable injuries as a matter of law. The plaintiffs claim that, although there are currently no physical symptoms of an asbestos-related disease, the inhalation of asbestos fibers caused a biological-physical harm to the lung tissue which has not yet manifested itself. There are no Connecticut cases addressing this precise issue.

An injury occurs when a party suffers some form of actionable harm, although the harm need not have reached its fullest manifestation for a cause of action to accrue. *Burns v. Hartford Hospital,* 192 Conn. 451, 460, 472 A.2d 1257 (1984). "Actionable harm occurs when the plaintiff discovers or should discover, through the exercise of reasonable care, that he or she has been injured and that the defendant's conduct caused such injury." *Champagne v. Rabestos-Manhattan, Inc.,*

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212 Conn. 509, 521, 562 A.2d 1100 (1989).

As to what constitutes an "injury" or "harm," section 7 of the Restatement of Torts, Second, provides the following definitions:

> The word "injury" ... denote[s] the invasion of any legally protected interest of another.
> The word "harm" ... denote[s] the existence of loss or detriment in fact of any kind to a person resulting from any cause.
> The words "physical harm" ... denote the physical impairment of the human body ...

In the "Comment" section of the Restatement, it is noted that "harm" implies "a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes or alterations may be either beneficial, detrimental or of no consequence to a person. In so far as physical changes have a detrimental effect on a person, that person suffers harm."

Although no Connecticut courts have had the occasion to rule upon the issue of whether or not the scarring of lung tissue and the implantation of fibers in the lungs due to asbestos exposure constitute a detrimental physical harm, there are decisions in other jurisdictions concluding asymptomatic plaintiffs have no actionable claims under such circumstances.

***4** In *Eagle-Picher Industries, Inc., v. Liberty Mutual Insurance,* 682 F.2d 12, 18, (1st Cir.1982), the court noted that even when asbestos fiber becomes embedded in the lungs and the scarring process has begun, disabling disease or death is by no means inevitable. For this reason, many courts fail to recognize a viable claim until after some physical manifestation of an asbestos-related disease. In *Borel v. Fibreboard Paper Products Corp.,* 493 F.2d 1076, 1102 (5th Cir.1973), for example, after remarking that a worker's present condition is the biological product of many years of exposure to asbestos dust, the court noted that "courts have consistently held that the cause of action does not accrue until the effects of such exposures manifest themselves."

The District Court in Hawaii was even more specific when it concluded that "the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment" is not an injury sufficient to support a claim for damages. *In re Hawaii Federal Asbestos Cases,* 734 F.Supp. 1563, 1567 (D.Hawaii 1990). Similarly, in *Simmons v. Pacor, Inc.,* 543 Pa. 664, 674 A.2d 232, 239 (Pa.1996), the Pennsylvania Supreme Court held that asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action. The court went on to say that the plaintiffs are not precluded, however, from subsequently commencing an action for an asbestos-related injury when symptoms develop and physiological impairment begins.

Plaintiffs' argument in the present case that, although asymptomatic, the plaintiffs have suffered some type of "pathological harm" due to their inhalation of asbestos, is an argument which has failed in the following cases. *In Schweitzer v. Consolidated Rail Corp.,* 758 F.2d 936, 942 (3rd Cir.1985), the court held that *"subclinical* injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." (Emphasis added.) In *Bernier v. Raymark Industries, Inc.,* 516 A.2d 534, 543 (Me.1986), the court concluded that subclinical injury is not an actionable injury under tort law "even assuming that any inhalation of asbestos dust immediately causes microscopic injury to lung tissues ..." See also *Anchor Packing v. Grimshaw,* 115 Md.App. 134, 692 A.2d 5, 17 (Md.App.1997), wherein the court held that "cellular changes resulting from asbestos exposure, such as pleural plaques and thickening, alone" does not constitute a legally compensable injury.

Another line of cases denying relief for exposure without the manifestation of physical injuries involves claims brought pursuant to the Federal Employers' Liability Act (FELA). Although not controlling precedent in this case, those cases hold that actional injury under FELA does not exist until the accumulated effect of the inhalation of or exposure to deleterious substances manifests itself as a physical injury. *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997); *Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Amendola v. Kansas City Southern Railway Co.,* 699 F.Supp. 1401 (W.D.Mo.1988). "The words

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'physical impact' do not encompass every form of 'physical contact.' And, in particular, they do not include a contact that amounts to no more than an exposure ..." *Metro-North Commuter Railroad Co. v. Buckley, supra,* 2118.

***5** There are other cases, however, in which the courts have concluded that whether such injuries as those alleged by the plaintiffs in the present case are actionable injuries is a question of fact rather than a matter of law. In *Bryson v. Pillsbury Co.,* 573 N.W.2d 718 (Minn.App.1998), the court held that the trier of fact should determine whether asymptomatic chromosome damage constituted a legally compensable present injury. The New Jersey Supreme Court, in *Caterinicchio v. Pittsburgh Corning Corp.* 605 A.2d 1092 (N.J.1992), concluded that the question was factual and remained within the province of the trier of fact because the plaintiffs' medical experts and the defendants' medical experts disagreed on the critical issue whether the plaintiffs' pleural thickening and pleural plaques constituted a physical injury.

In another case, claiming damages based upon exposure to contaminated air and drinking water, the District Court in Minnesota stated: "[T]his Court cannot rule as a matter of law that plaintiffs' alleged injuries are not 'real' simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have sufficient present harm." *Werlein v. United States,* 746 F.Supp. 887, 901 (D.Minn.1990). A Third Circuit decision, decided under Pennsylvania law, similarly concluded that with respect to asbestos-related pleural thickening, substantial medical disagreement over the classification of such a "condition" prevented the court from declaring it to be an injury as a matter of law. "This question is factual and remains within the province of the trier of fact." *Howell v. Celotex Corp.,* 904 F.2d 5 (3rd Cir.1990).

This court is persuaded that the better line of reasoning warrants the conclusion that whether or not the scarring of lung tissue and implantation of asbestos fibers in the lungs constitute a compensable legal harm is an issue of fact if there is evidence showing such conditions to be detrimental and if there is evidence showing the existence of such conditions in the plaintiffs. Although the plaintiffs contend that their expert, Dr. Cullen, opined that a biological-physical harm occurs to the lung tissue almost immediately after the inhalation of asbestos fibers, an examination of his affidavits does not reveal any such statement. The nearest approximation appears to be the statement in paragraph 6 of his letter to Attorney Shafner dated July 9, 1998, wherein he says:

> There is ample evidence that asbestos is ingested by certain cells within the respiratory tract and other organs which, in turn, leads those cells to incite an inflammatory response in their vicinity. Within the lung tissue, it is most likely that the inflammatory response itself initiates and promotes carcinogenesis in the epithelial cells, eventually leading to ... lung cancer ... In any event, I think that the best evidence at the present time suggests that within the lung, the most important aspect of carcinogenesis relates to inflammation and in the pleura, probably direct interaction and tumor initiation via genetic change.

***6** Dr. Cullen, at paragraph 12 of his letter, addresses pleural changes.

Individuals who have asbestos-related pleural changes have, as a group, clearly experienced substantial asbestos exposure which is the basis for such pleural changes. In general, as a group, they are also reasonably older since it takes approximately 20 years from first exposure for the appearance of asbestos-related pleural changes. Having said that, in most epidemiologic studies which have looked at the question, individuals with pleural changes compared to co-workers without such pleural changes, appear to have a higher risk of developing asbestos-related malignancy. The basis for this is uncertain and may relate to the fact that as a group they have had more exposure to asbestos or may relate to the fact that as a group they have more evident biological responsiveness to asbestos than that group which has been exposed but has shown no pleural response. In any event, it is not that the pleural plaques are, themselves, are [sic] pre-malignant or auger malignancy, but only that they serve as a good marker for previous exposure and/or biologic responsiveness and, therefore, help us select a group which probably has a somewhat higher risk of developing lung cancer and/or mesothelioma than others who appear

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comparable in other ways.

The Court holds that Dr. Cullen's statements, taken as a whole, do not characterize the conditions alleged in plaintiffs' amended complaint as detrimental physical harms or state that those conditions constitute "bodily changes" as commented upon in the Restatement of Torts, Second.

Even if the Court were to conclude that Dr. Cullen's remarks are sufficient to establish that such conditions are detrimental and constitute an actionable harm, nothing has been submitted to demonstrate that these particular plaintiffs suffer from either of the alleged conditions. Simply stated, the plaintiffs have failed to put this matter in issue.

At oral argument on this motion for summary judgment, plaintiffs' counsel contended that it is a reasonable inference that some of the plaintiffs have asbestos fibers in their lungs. In addition, it is claimed that the opinions of Dr. Cullen expressed in his letters dated July 9, 1998 and August 18, 1998, support the plaintiffs' claims that they are reasonably certain to have suffered a harm due to their inhalation of asbestos and that these opinions are based upon reasonable medical probability rather than mere speculation or conjecture. The court disagrees.

The letters of Dr. Cullen speak generally to risks of exposure to asbestos. Nowhere can the statement be found that these plaintiffs suffered scarring of the lung tissue and permanent implantation of asbestos fibers in their lungs as a result of their inhalation of asbestos at the Harbor Station. What he does say, at paragraph 11 of his letter dated July 9, 1998, is that he believes "it would be fair to say that even at the low levels postulated under the limited exposure assumption, there could be some biologic response to asbestos exposure in the men at the harbor station, I do not believe that his [sic] could be ascertained by any known clinical testing, including lung biopsy, in view of the fact that the changes are likely to be relatively slight compared to the normal variation seen in industrial workers who have been exposed to a wide variety of air pollutants and toxins over a working career."

***7** Not only does this statement fail to rise above the level of "speculation and conjecture," but the plaintiffs' medical expert has even concluded that there is no way to demonstrate that these plaintiffs suffer from the conditions alleged in the amended complaint. His letter dated August 18, 1998, does nothing to further the plaintiffs' claims. He does give an opinion with respect to medical monitoring for these plaintiffs: "I have recommended medical monitoring of asbestos-exposed individuals at intervals appropriate to their level of exposure as I have for all asbestos-exposed individuals." His recommendation, therefore, is that medical monitoring is needed for anyone exposed to asbestos. He does not say that these particular plaintiffs require monitoring because of the biologic harms already incurred as a result of their exposure at the UI facility.

In addition to Dr. Cullen's affidavits, the individual plaintiffs have submitted affidavits in support of their objection to the defendants' motion for summary judgment. One of the affidavits (Affidavit of Samuel Ray) contains the statement: "I have trouble breathing from time to time, and I believe it is related to the asbestos exposure I have had throughout my 29-year career as a boilermaker." This subjective statement, without any medical documentation to support it, is insufficient to demonstrate that this symptom actually resulted from this plaintiff's claimed exposure to asbestos at the Harbor Station. It does not rise to the level of establishing a genuine issue of material fact as to whether the plaintiff's alleged asbestos exposure is the cause of his current shortness of breath. "The medical effect upon the human system of the infliction of injuries, is generally not within the sphere of the common knowledge of a lay witness ..." *Aspiazu v. Orgera,* 205 Conn. 623, 631, 535 A.2d 338 (1987).

No causal connection has been shown between the inhalation of asbestos and the "harm" alleged to have been suffered by these plaintiffs. At the outset, one must show the fact of "damage." *Simon v. New Haven Board & Carton Co., Inc.,* 516 F.2d 303, 306 (2nd Cir.1975). Further, the plaintiffs must demonstrate that the defendants' actions were the proximate cause of the plaintiffs' injuries. *Fleming v. Garnett,* 231 Conn. 77, 85, 646 A.2d 1308 (1994) . Proximate cause establishes a reasonable connection between the acts or omissions of the defendants and the harm suffered by the plaintiffs. *Stewart v. Federated Dept. Stores, Inc.* 234 Conn.

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597, 662 A.2d 753 (1995).

"To be entitled to damages a plaintiff must establish a causal relation between the injury and the physical condition which he claims resulted from it ... This causal connection must rest upon more than surmise or conjecture ... A trier is not concerned with possibilities but with reasonable probabilities ... [The causal relationship between an injury and its later physical effects may be established] by the direct opinion of a physician, by his deduction by the process of eliminating causes other than the traumatic agency, or by his opinion based upon a hypothetical question." (Citations omitted.) *Aspiazu v. Orgera,* 205 Conn. 623, 630-31, 535 A.2d 338 (1987); *Struckman v. Burns,* 205 Conn. 542, 554, 534 A.2d 888 (1987); *Budney v. Zalot,* 168 Conn. 388, 388-89, 362 A.2d 861 (1975). "Any expert opinion that describes a 'condition' as possible or merely fifty-fifty is based on pure speculation." *Aspiazu v. Orgera, supra,* 632.

***8** The plaintiffs have failed to meet the requisite standard of reasonable medical probability. Not only have they failed in demonstrating that these plaintiffs have lung scarring and implantation of asbestos fibers in their lungs, they have also failed to establish any connection between the defendants' alleged conduct and the harm they claim resulted from it. The plaintiffs "failed to prove the injur[ies], and therefore could not prove causation." *LaBieniec v. Baker,* 11 Conn.App. 199, 208, 526 A.2d 1341 (1987).

The plaintiffs' amended complaint also alleges that as a result of the defendants' conduct, the plaintiffs suffer an increased risk of developing lung cancer, mesothelioma, and other asbestos-related diseases.

"[I]n a tort action, a plaintiff who has established a breach of duty that was a substantial factor in causing a present injury which has resulted in an increased risk of future harm is entitled to compensation to the extent that the future harm is likely to occur." *Petriello v. Kalman,* 215 Conn. 377, 397-98, 576 A.2d 474 (1990). A plaintiff is not burdened with proving the occurrence of the claimed future event is more likely than not, when it is a present risk rather than a future event for which damages are sought. *Id.*, 396, 576 A.2d 474. "[A] plaintiff may recover for the fear of future medical treatment and disability, as distinguished from a recovery for the future disability itself, even if there is only a possibility that such future treatment or disability will take place." *Goodmaster v. Houser,* 225 Conn. 637, 645, 625 A.2d 1366 (1993).

The plaintiffs fail in their claims for increased risk of future harm for the simple reason that they have failed to establish that they personally have suffered present injuries. Without a present injury, under the *Petriello* rationale, there can be no claim for an increased risk of future harm. Even if it is assumed that the scarring of lung tissue and implantation of asbestos fibers in the lungs are compensable present injuries, there is nothing to indicate these plaintiffs have suffered these injuries as a result of actions of the defendant.

The plaintiffs' cause is not furthered by the claim that many of the individual plaintiffs had previous exposure to asbestos and therefore face a higher risk for the development of asbestos-related diseases. Such an argument cannot prevail without the existence of a present injury. Furthermore, such a claim may actually preclude the establishment of proximate cause if a plaintiff's exposure in the present case was minimal in comparison to his total exposure to asbestos over his work life.

In the plaintiffs' amended complaint, it is alleged that their injuries include "a present fear, apprehension and anxiety about developing asbestos- related diseases including cancer" as a result of the negligent and intentional actions of the defendants. The parties' briefs make reference to the negligent and intentional infliction of emotional distress.

***9** It is important to note at the outset that the claims of emotional distress have not been pleaded as separate causes of action. To support an action for negligent infliction of emotional distress, a plaintiff has "the burden of pleading and establishing that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm." *Morris v. Hartford Courant Co.,* 200 Conn. 676, 683, 513 A.2d 66 (1986). There are no such allegations made in the plaintiffs' amended complaint.

To sufficiently plead a cause of action for

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intentional infliction of emotional distress, it must be alleged: 1) that the defendant intended to inflict emotional distress, or that he knew or should have known that emotional distress was a likely result of the defendant's conduct; 2) that the conduct was extreme and outrageous; 3) that the defendant's conduct was the cause of the plaintiff's distress; and 4) that the emotional distress sustained by the plaintiff was severe. *DeLaurentis v. New Haven,* 220 Conn. 225, 266-67, 597 A.2d 807 (1991); *Petyan v. Ellis,* 200 Conn. 243, 253, 510 A.2d 1337 (1986). There are no such allegations in the plaintiffs' amended complaint.

For this reason, the emotional distress alleged to have been suffered by the plaintiffs must be treated as a claim for damages resulting from the alleged negligent and intentional conduct of the defendants. The emotional distress would be the fear of contracting an asbestos-related disease in the future as a result of past exposure to asbestos.

Because the plaintiffs failed to show that they have suffered any present injuries, a claim for emotional distress in this case could only survive if mere exposure to asbestos entitles a claimant to emotional distress damages. There are no Connecticut cases directly on point. The case of *Barrett v. Danbury Hospital,* 232 Conn. 242, 654 A.2d 748 (1995), however, does involve a claim for compensation based upon the plaintiff's fear of contracting a blood- borne disease as the result of the alleged negligent actions of the defendant. The plaintiff had been placed on a stretcher in the defendant's emergency room and came in contact with the blood from a prior patient because of a torn vinyl pad which covered the stretcher. The defendants moved for summary judgment and the court granted the motion.

Our Supreme Court affirmed the trial court's decision, noting that the "trial court did not grant the motion for summary judgment on the basis of a finding that there was no negligence on the part of the defendants. The trial court determined that, regardless of any breach of the standard of care by the defendants, a compensable injury did not result.... [E]ven if the applicable standard had been violated, the plaintiffs' alleged injuries were not compensable as a matter of law." *Id.*, 252-53, 654 A.2d 748.

***10** The plaintiffs' claim that the fear arises from an increased risk of future asbestos-related diseases cannot succeed for the reasons previously discussed, i.e., the plaintiffs have made no showing of present injuries and therefore cannot prevail on a claim for an increased risk of related injuries. *Goodmaster v. Houser,* 225 Conn. 637, 625 A.2d 1366 (1993); *Petriello v. Kalman,* 215 Conn. 377, 576 A.2d 474 (1990). [FN1] For these reasons, the plaintiffs' claims of emotional distress are not viable.

FN1. With respect to the one plaintiff who actually has received treatment for emotional problems, there was no evidence submitted indicating an issue of fact as to a causal connection between the alleged actions of the defendants and the plaintiff's emotional distress.

Counsel for the plaintiffs conceded at oral argument that the claim for medical monitoring expenses does not stand alone. Recovery for such expenses would only be allowable if these plaintiffs have sustained actionable injuries. The court, having ruled that the plaintiffs have furnished no evidence showing the existence of such injuries, concludes that the claim for future medical expenses relating to continuing medical surveillance must fail. [FN2]

FN2. Although the plaintiffs' expert, Dr. Cullen, recommended medical monitoring for these plaintiffs in his letter dated August 18, 1998, he indicated he recommends such monitoring "for all asbestos-exposed individuals." He does not say these particular plaintiffs require monitoring because of the biologic harms already incurred as a result of exposure to asbestos.

The plaintiffs cite the case of *Doe v. Stamford,* 241 Conn. 692, 699 A.2d 52 (1997), in support of their claim for medical monitoring expenses. In *Doe v. Stamford,* the plaintiff police officer sought compensation for past and future unpaid medical testing and treatment under the Workers' Compensation Act (act) for injuries related to HIV

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exposure and tuberculosis. Our Supreme Court concluded that the plaintiff's exposure to an infectious disease constitutes a compensable "injury" under the act. The Court noted that the exposures were sustained in incidents that arose out of and occurred in the course of his employment. Further, the Court stressed the *humanitarian and remedial purposes of the Workers' Compensation Act*. For this reason, the court finds the *Doe v. Stamford* case inapposite to the case at bar.

These plaintiffs are not without a remedy. If and when symptoms of an asbestos-related disease manifest themselves, they can bring a cause of action for their injuries.

Prior to the enactment of General Statutes Sections 52-577a and 52-577c, the statute of limitations applicable to a cause of action based upon a claim of negligent exposure to a substance such as asbestos was Section 52-584. That provision reads, in relevant part, as follows:

Limitation of action for injury to person or property

No action to recover damages for injury to the person ... caused by negligence, or by reckless or wanton misconduct, ... shall be brought but within two years from the date when the *injury* is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of ... (Emphasis added.)

A number of courts have construed the word "injury" in cases in which defendants have moved to dismiss plaintiffs' claims for failure to bring them within the time permitted by the statute. In those cases, the courts held that a cause of action does not accrue until the plaintiff suffers an "actionable harm." The "actionable harm" that would be the "injury" under Connecticut law occurs when the plaintiff discovers or should discover, in the exercise of reasonable care, that he or she has been injured and that the defendant's conduct caused that injury. *Durrett v. Leading Edge Products, Inc.*, 965 F.Supp. 280 (D.Conn.1997). A breach of duty by a defendant, and a causal connection between that defendant's breach of duty and the resulting harm to the plaintiff, are the essential elements of a negligence cause of action. They are, therefore, necessary ingredients for actionable harm which will result in the accrual of the action for limitation purposes. *Catz v. Rubenstein,* 201 Conn. 39, 513 A.2d 98 (1986).

***11** Sections 52-577a and 52-577c were subsequently enacted by the legislature and are now the operative statutes for asbestos claims based upon product liability and personal injury caused by exposure. A plaintiff instituting a product liability claim against a product seller must bring suit within "three years from the date when the *injury,* death or property damage is first sustained or discovered or in the exercise of reasonable care should have been discovered ..." (Emphasis added.) Subsection (e) of Section 52-577a further provides, with respect to asbestos, that "no such action for personal injury ... may be brought by the claimant later than thirty years from the date of last contact with or exposure to asbestos." Again, "injury" has been construed to be first sustained, for purposes of Connecticut's statute of limitations, when the party suffers some form of actionable harm. *Durrett, supra,* 283. In *Champagne v. Raybestos-Manhattan, Inc.,* 212 Conn. 509, 526- 27, 562 A.2d 1100 (1989), the actionable harm occurred when the asbestos- related disease became symptomatic.

In the present case, the applicable statute of limitations is section 52- 577c. That provision reads, in relevant part, as follows:

Limitation of action for damages caused by exposure to a hazardous chemical substance or mixture or hazardous pollutant

(b) Notwithstanding the provisions of sections 52-577 and 52-577a, no action to recover damages for personal injury or property damage caused by exposure to a hazardous chemical substance or mixture or hazardous pollutant released into the environment shall be brought but within two years from the date when the *injury* or damage complained of is discovered or in the exercise of reasonable care should have been discovered. (Emphasis added.)

A cause of action accrues when the "injury" is discovered or should have been discovered, not from the date of the exposure. In construing the term "injury" in Section 52-577c, it is reasonable to conclude it would be given the same judicial

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interpretation applied to the term "injury" in General Statutes Sections 52-584 and 52-577a. [FN3]

FN3. A superior court decision, *Woodford v. Heritage Village,* 1994 WL 632464 (Conn.Super.), held that the two-year limitation period under this statute begins to run on the date the claimant discovered or should have discovered the injury, not the date the alleged negligent action of the defendant occurred. In *Woodford,* the plaintiff had been sprayed in the face with a pesticide, but nothing was submitted to show the injuries manifested immediately after her exposure to the pesticide.

Upon manifestation of symptoms causally related to exposure to asbestos, the two-year limitation period under Section 52-577c would begin to run, i.e., a cause of action for actionable injuries accrues at that point in time. If these plaintiffs do manifest symptoms of an asbestos-related disease, they are not without a remedy under the law.

As previously noted, plaintiffs' amended complaint alleges negligence; reckless and wanton misconduct; and intentional misconduct. The negligence claims against the defendants cannot survive this motion for summary judgment because the plaintiffs have failed to show that they have suffered actionable injuries or a causal connection between the alleged actions of the defendants and harm suffered by the plaintiffs. The causes of action based in reckless and wanton misconduct and intentional misconduct must fail for the same reasons. A legal or proximate causal connection between the conduct of a defendant and the resulting injury to the plaintiff is a necessary element of causes of action in recklessness. *Boehm v. Kish,* 201 Conn. 385, 390, 517 A.2d 624 (1986).

***12** Because there has been no showing that these plaintiffs have suffered compensable harm, there can be no cause of action regardless of whether such conduct could be classified as negligent, reckless or intentional. A breach of a standard of care is immaterial if there are no compensable injuries. *Barrett v. Danbury Hospital,* 232 Conn. 242, 252-53, 654 A.2d 748 (1995). Additionally, "[n]o matter how negligent a party may be, if his act bears no causal relation to the injury, it is not actionable." *Esposito v. Schiff,* 38 Conn.App. 726, 730, 662 A.2d 1337 (1995); *LaBieniec v. Baker,* 11 Conn.App. 199, 206, 526 A.2d 1341 (1987).

"A plaintiff cannot transform a negligence count into a count for willful and wanton misconduct merely by appending a string of adjectives to allegations that clearly sound in negligence." *Brown v. Branford,* 12 Conn.App. 106, 110, 529 A.2d 743 (1987). "[Recklessness] is more than negligence, more than gross negligence. (Citation omitted.) ... Willful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. (Citation omitted.) Its characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. (Citations omitted.) Not only the action producing the injury but the resulting injury also must be intentional." *Dubay v. Irish,* 207 Conn. 518, 532-33, 542 A.2d 711 (1988). Whether conduct amounts to willful, wanton and reckless misconduct becomes strictly a matter of law when the mind of a fair and reasonable man could reach but one conclusion. *Id.*, footnote 10, 534, 542 A.2d 711.

A review of the plaintiffs' amended complaint reveals essentially the same allegations of misconduct for all three causes of action. The court finds that the conduct alleged does not rise to the level of reckless and wanton misconduct or intentional misconduct.

The court finds that the plaintiffs have failed to state a cause of action in negligence, reckless and wanton misconduct or intentional misconduct. The plaintiffs have not established the existence of a material fact that is in issue. Accordingly, the defendants' motion for summary judgment is granted.

1998 WL 910271 (Conn.Super.), 23 Conn. L. Rptr. 589

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873 S.W.2d 187
62 USLW 2640
(Cite as: 873 S.W.2d 187)

Supreme Court of Kentucky.

CAPITAL HOLDING CORPORATION, Movant,
v.
Larry L. BAILEY and Linda Bailey, Respondents.
Larry L. BAILEY and Linda Bailey, Movants,
v.
CAPITAL HOLDING CORPORATION,
Respondent.

Nos. 93-SC-409-DG, 93-SC-428-DG.

March 24, 1994.

Worker and his spouse brought action against building owner for negligence and outrageous conduct causing severe emotional distress arising out of worker's exposure to asbestos while removing pipes and ducts in building. The Jefferson Circuit Court, B.R. Paxton, Special Judge, entered summary judgment for owner, and worker and spouse appealed. The Court of Appeals affirmed as to outrageous conduct claim and reversed as to negligence claim. Owner moved for discretionary review. The Supreme Court, Leibson, J., held that: (1) negligence cause of action had not yet accrued and there was no evidence of harmful change of any nature; (2) issues of fact precluded summary judgment on outrageous conduct claim; and (3) worker and spouse preserved outrageous conduct issue in prehearing statement on appeal.

Reversed and remanded.

Reynolds, Spain, and Wintersheimer, JJ., dissented in part.

West Headnotes

[1] Appeal and Error ⚷863
30k863 Most Cited Cases

Supreme Court's review of summary judgment for defendant is limited to whether facts alleged by plaintiffs and evidence of record supporting their claim at time of dismissal, together with all reasonable inferences therefrom, fail to support claim.

[2] Damages ⚷49.10
115k49.10 Most Cited Cases

[2] Damages ⚷50
115k50 Most Cited Cases

No cause of action had yet accrued to sustain award of damages for negligence against building owner, arising from worker's exposure to asbestos while removing pipes and ducts from building, for either increased risk to worker or his spouse of future harm from asbestos-related disease or emotional distress from fear of such disease; worker and spouse failed to prove that exposure had as yet caused harmful change of any nature, and mere ingestion of toxic substance did not constitute sufficient physical harm upon which to base claim for damages.

[3] Negligence ⚷460
272k460 Most Cited Cases
(Formerly 272k103)

Negligent conduct that causes no harm is not actionable.

[4] Action ⚷53(1)
13k53(1) Most Cited Cases

Rule against splitting causes of action is equitable rule, limiting all causes of action arising out of single "transaction" to single procedure.

[5] Action ⚷53(2)
13k53(2) Most Cited Cases

Worker and spouse were not required, under rule against splitting causes of action, to bring their negligence action against building owner, arising from worker's exposure to asbestos while removing pipes and ducts from building, at same time as action for outrageous conduct causing severe emotional distress, even though outrageous conduct action ripened when they discovered their exposure; negligence claim had not accrued as there was no evidence as yet of harmful change as result of exposure.

[6] Negligence ⚷461
272k461 Most Cited Cases
(Formerly 272k103)

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There is no intrinsic value in physical contact except as defining event to prove tort has occurred, and, thus, physical contact is not sine qua non for awarding damages for negligent conduct where there is immediate harm.

[7] Negligence ⚷200
272k200 Most Cited Cases
(Formerly 272k1)

Failing to act, as well as taking action, may define when liability exists for negligent conduct when there are harmful consequences.

[8] Damages ⚷30
115k30 Most Cited Cases

[8] Negligence ⚷461
272k461 Most Cited Cases
(Formerly 272k103)

It is tangible injury that triggers existence of cause of action for negligence and, once harmful change has occurred, plaintiff may sue for increased risk of future consequences which are presently compensable as part of that cause of action.

[9] Damages ⚷32
115k32 Most Cited Cases

[9] Damages ⚷49.10
115k49.10 Most Cited Cases

Plaintiff may recover for enhanced risk of cancer as well as mental distress if plaintiff first establishes harmful change that resulted from negligent exposure to potentially cancer producing agent.

[10] Torts ⚷5
379k5 Most Cited Cases

[10] Torts ⚷15
379k15 Most Cited Cases

While Kentucky adheres to concept of both "physical contact" and "injury" as threshold requirement to establish tort, contact need not be directly related to injury as long as it is substantial factor in causing result.

[11] Action ⚷53(1)
13k53(1) Most Cited Cases

Rule against splitting cause of action requires that plaintiff include within single action all identifiable future consequences including increased risk of future harm in addition to injuries and damages accrued on date of trial.

[12] Damages ⚷30
115k30 Most Cited Cases

Recovery for increased risk of future harm, when such risk is established as reasonable likelihood, is not new element of damages, but, rather, proof that jury should consider in compensating for future physical pain and mental suffering, future impairment of destruction of earning power, and future medical expenses.

[13] Damages ⚷30
115k30 Most Cited Cases

[13] Damages ⚷95
115k95 Most Cited Cases

In awarding damages for increased risk of future harm, fact finder should take into consideration likelihood of future harm; jury should apportion damages by degree.

[14] Damages ⚷32
115k32 Most Cited Cases

Mere ingestion of toxic substance does not constitute sufficient physical harm upon which to base claim for damages.

[15] Damages ⚷50
115k50 Most Cited Cases

[15] Damages ⚷50.10
115k50.10 Most Cited Cases

Outrageous conduct causing severe emotional distress is intentional tort and physical contact rule has no application.

[16] Judgment ⚷181(33)
228k181(33) Most Cited Cases

Issues of fact as to whether building owner's failure to warn worker, who removed pipes and ducts from basement, about his exposure to asbestos was knowing and reckless precluded summary judgment

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on worker's claim for outrageous conduct causing severe emotional distress.

[17] Appeal and Error ⚷808
30k808 Most Cited Cases

Worker and his spouse preserved for appeal issue of summary judgment for building owner on their claim for outrageous conduct arising out of worker's asbestos exposure in their prehearing statement on appeal, even though they did not specify claim by name in prehearing statement; plaintiffs did not identify their other claims by name, statement addressed issue of whether some type of present illness or injury was required before they could be compensated, owner responded without questioning viability of issue, parties addressed issue on merits in briefs, and owner did not raise any procedural objection until its petition for rehearing. Rules Crim.Proc., Rule 76.03.

[18] Appeal and Error ⚷808
30k808 Most Cited Cases

Failure to observe strict compliance with prehearing statement rule on appeal is not jurisdictional; question is one of substantial compliance with appropriate sanctions primarily dependent upon whether and what prejudice resulted to opposing party; overruling *Howard v. Magoffin Co.*, Ky.App., 734 S.W.2d 499, *Karem v. Greentree Corp.*, Ky.App., 783 S.W.2d 78. Rules Crim.Proc., Rule 76.03.

[19] Appeal and Error ⚷808
30k808 Most Cited Cases

Sanctions provided for in rule governing prehearing conferences on appeal are not to be used as method of docket control and do not justify hypertechnical reading of statement of issues requirement. Rules Crim.Proc., Rule 76.03(3)(i), (12).
***189** Lively M. Wilson, Judith A. Villines, Stites and Harbison, Louisville, for Capital Holding.

J. Michael Poole, Bruce Garrett Anderson, J. Michael Poole & Associates, Louisville, for Baileys.

LEIBSON, Justice.

This case raises complex questions regarding when tort claims accrue for exposing the plaintiff to potentially harmful asbestos-related disease, and whether damages may be recovered when there is no present manifestation of a diseased condition.

The complaint alleged theories of liability based on negligence and outrageous conduct in exposing plaintiff to asbestos, causing increased risk of future injury or disease and severe emotional distress from the fear of developing cancer. It was dismissed with prejudice on summary judgment for the defendant, but the final order further provided that such dismissal "does not bar the Plaintiffs at any time hereinafter from filing any claim against Defendant for damages resulting from an injury or disease related to the asbestos exposure from which their Complaint herein arises." The effect of this order is to preserve plaintiffs' rights to further pursue tort litigation if and when a "disease related to the asbestos exposure" should manifest itself.

[1] Our review of a summary judgment is limited to whether the facts alleged by the plaintiffs and the evidence of record supporting their claim at the time of dismissal, together with all reasonable inferences therefrom, fail to support a claim. *See Paintsville Hosp. Co. v. Rose,* Ky., 683 S.W.2d 255 (1985); *Steelvest, Inc. v. Scansteel Service Ctr.,* Ky., 807 S.W.2d 476 (1991). Thus viewed, the evidence is as follows.

Between August and November of 1987, plaintiff, Larry Bailey, working for his wife's construction company, was engaged in removing pipes and ducts from the basement of the Commonwealth Building, in Louisville, Kentucky. The Commonwealth Building was owned by the defendant, Capital Holding Corporation. [FN1] The defendant was aware of asbestos in the basement of their building, and, according to Bailey, either consciously aware of or recklessly indifferent to its dangerous propensities. Defendant had previously received a report of an analysis and inspection indicating asbestos contamination in the basement and engaged another company to attempt to remove or encapsulate areas that appeared to be "friable." Without telling Bailey of the asbestos, he was hired in August 1987 to remove certain unused sewer pipes from the basement, and he also removed certain steam pipes which he later found out were covered with molded asbestos insulation.

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According to Bailey, he went home each day covered with asbestos dust, albeit unknown to him, thus bringing his wife, Linda Bailey, into direct contact with the asbestos dust, and further contaminating their home with asbestos.

FN1. The position of the Baileys as appellants has been shifted around somewhat by the Court of Appeals' decision. To avoid the confusion which would follow from the terms "appellant" and "appellee," we will refer to the parties by their status at the trial level where Larry and Linda Bailey, his wife, were plaintiffs and Capital Holding was the defendant.

In March 1989 Bailey learned for the first time, from the former superintendent of the Commonwealth Building, that the area where Bailey had been working was contaminated with asbestos. Upon learning that he had been thus exposed to a potentially cancer-producing agent, he went immediately to Dr. William Anderson, a pulmonary specialist, for a physical examination, x-rays and testing. Dr. Anderson determined that Bailey had no present abnormality or manifestation of disease, but further concluded, and so testified, that Bailey has a slightly increased risk of developing asbestosis (a type of pneumoconiosis), and a significantly increased risk of developing mesothelioma (a painful and deadly form of cancer of the membranes surrounding the lungs). At the time of his deposition, Dr. Anderson could not quantify the enhanced risk of Bailey contracting mesothelioma.

After Dr. Anderson examined Bailey, but before his deposition, plaintiffs discovered the presence of two types of asbestos fibers in addition to the one involved in the medical ***190** history at the time of Bailey's medical examination. When Dr. Anderson was deposed he testified that one of these types had a higher risk of developing mesothelioma than the type upon which he based his testimony.

In the trial court the plaintiffs contended the inhalation of the asbestos fibers, standing alone, constituted physical contact sufficient to allow recovery of damages for (1) increased risk of future injury or disease, (2) present and future mental suffering and emotional distress from the fear of developing cancer, and (3) decontamination of their home. [FN2]

FN2. The plaintiffs' claim for expenses in connection with decontamination of their home was dismissed on summary judgment in the trial court, and the Court of Appeals affirmed, stating this claim rested solely on the violation of a statute (KRS 224.20-320) enacted too late to support this cause of action. The Baileys' motion for discretionary review did not include this issue, so we do not consider it.

The Baileys' complaint alleged two different theories of tort liability, negligence and outrageous conduct causing severe emotional distress. In paragraph 9 it seeks damages based on these theories, either collectively or alternatively, for "increased future risk in contracting various forms of cancer and an accompanying fear of contracting cancer in the future."

In the opinion rendered with the summary judgment, the trial court assumed certain "uncontested operative facts." They are:

"1) Plaintiffs were exposed to asbestos, while plaintiff, Larry L. Bailey, was in the employ of defendant, and they have credible evidence to show they have a risk of developing asbestosis or mesothelioma....
2) Neither plaintiff suffers from any present physical injury or illness caused by the conduct of defendant.
3) Plaintiff, Larry L. Bailey, worries that he has contracted a deadly asbestos-related disease; this worrying has drained him both physically and emotionally; and, the resulting stress has caused Mr. Bailey to develop a drinking problem he never had previously, which has caused him to seek professional care.
4) Plaintiff, Linda Bailey, through being in close proximity to her husband, has also been exposed to asbestos which has caused her extreme emotional distress because this exposure coincided in time with her pregnancy." [FN3]

FN3. She later delivered a child who has

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no sign of any asbestos- related disease.

Based on these "operative facts" the trial court concluded summary judgment was appropriate because:

"In the case at bar, plaintiffs have neither an asbestos-related injury nor any x-ray manifestation of a disease."

The original opinion from the Court of Appeals, which was later modified as we will discuss, dealt first with the negligence concept and then with the tort of outrageous conduct causing severe emotional distress.

Turning first to the negligence issues, the Court of Appeals agreed with plaintiffs that the controlling case is *Davis v. Graviss,* Ky., 672 S.W.2d 928 (1984), but rejected their claim that *Davis* allowed a cause of action in present circumstances, stating:

"It is apparent from a reading of *Davis* that the [Supreme] Court recognized only the right to compensation for an increased likelihood of future complications arising from a realized injury other than a mere contact. The [Supreme] Court made this clear when it framed the issue as involving the plaintiff's 'right to compensation *for an injury causing an increased risk of future harm.' Id.* at 930.... In this jurisdiction a present physical injury is a prerequisite to recovery for an increased risk of future harm."

However, the Court of Appeals' opinion agreed with the plaintiffs' contention that the trial court had "improperly dismissed their claim for compensation for the emotional distress suffered by them as a result of the [defendant's] negligence in failing to warn of the presence of asbestos." The Court of Appeals based its decision on cases ("most recently" *Deutsch v. Shein,* Ky., 597 S.W.2d 141 (1980)) sustaining recovery for fright or mental pain and suffering "where there has been some negligent physical contact or impact with the body of the victim, even though ***191** no actual physical injury appears to have occurred." The Court of Appeals then stated:

"The theoretical basis for allowing recovery where there has been impact but no actual physical injury is not perfectly consistent, with the courts, at times, merely dispensing with any requirement of a physical injury while at other times seeming to consider the impact itself, however slight, a physical injury."

The Court of Appeals concluded:

"... the trial court erred in dismissing the [negligence] claims for mental anguish on the ground that no impairment of ability to function or manifestation of disease from exposure to asbestos could be shown. The contact with the asbestos itself is sufficient to support this claim provided, of course, that the other elements necessary to establish a tort in negligence are shown by each of the appellants."

It is from this ruling on the negligence theory that the defendant, Capital Holding, filed a Motion for Discretionary Review seeking relief in our Court.

Turning next to the "tort of outrageous conduct," the Court of Appeals cited our case of *Craft v. Rice,* Ky., 671 S.W.2d 247 (1984), recognizing this tort and adopting Sec. 46 of the *Restatement (Second) of Torts* (1965), and concluded that, without regard to whether there is any present evidence or manifestation of an asbestos-related disease, the operative facts, if proved, will sustain a cause of action.

The Court of Appeals stated:

"The elements of this tort as expressed in § 46 of the Restatement are intentionally or recklessly causing severe emotional distress to another by extreme and outrageous conduct."

As to what conduct constitutes acting "recklessly" for purposes of this tort, the Court of Appeals cited Comment i. to § 46 of the Restatement: a person "acts recklessly" when acting "in deliberate disregard of a high degree of probability that the emotional distress will follow."

The Court of Appeals then concluded:

"The parties do not appear to dispute that the [defendant] was under a duty to warn Mr. Bailey of the presence of asbestos. At the same time, as the record stands, it could be inferred that the [defendant] intentionally failed to do so. It, likewise, could be inferred that the [defendant] should have realized that there was a high probability that severe emotional distress would follow from Mr. Bailey's unwitting exposure to such a dangerous substance as asbestos. We

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cannot say as a matter of law that if the [defendant], with full knowledge of the danger, intentionally failed to warn Mr. Bailey or his employer of the presence of the asbestos, this would not constitute outrageous conduct. The known effects of exposure to this substance are such that we regard it as 'utterly intolerable in a civilized community,' *Restatement (Second) of Torts,* § 46, comment d at p. 73 (1965), that one having a duty to warn of its presence would deliberately fail to do so."

Thus the Court of Appeals concluded the operative facts, if proved, would support a claim for outrageous conduct causing severe emotional distress.

We feel certain that the defendant, Capital Holding, would have appealed this ruling as well as the Court of Appeals' ruling on the negligence aspect of the case, but for the fact that the Capital Holding succeeded, on Petition for Rehearing, in persuading the Court of Appeals to withdraw on procedural grounds this portion of its opinion pertaining to outrageous misconduct.

On Petition for Rehearing Capital Holding claimed that the plaintiffs' argument regarding liability for the tort of outrageous conduct was not preserved for appellate review because the issue was not adequately presented in the CR 76.03 prehearing statement. The Court of Appeals agreed, citing CR 76.03(6) and *Howard v. Magoffin County,* Ky.App., 734 S.W.2d 499 (1987), withdrew the portion of its opinion discussing the tort of outrageous conduct, and affirmed the trial court's summary judgment in this respect. In this state of affairs, the plaintiffs moved for discretionary review in our Court claiming there is no substance to the alleged failure ***192** to comply with CR 76.03(6) and the Court of Appeals improperly denied relief on grounds of procedural default.

[2] For reasons to be stated, we have concluded: (1) on liability for negligence, the Court of Appeals should have sustained the decision of the trial court granting summary judgment to the defendant because no cause of action had yet accrued to sustain an award of damages for either increased risk of future harm from an asbestos-related disease or mental suffering or emotional distress from fear of such disease; (2) on liability for outrageous conduct causing severe emotional distress, the original opinion of the Court of Appeals properly reversed the decision of the trial court granting the motion of the defendant for summary judgment; and (3) the Court of Appeals then erred when it modified its original opinion by withdrawing the portion of the opinion regarding outrageous misconduct on procedural grounds. Thus the summary judgment of the trial court will be affirmed as to the negligence claims and reversed as to the outrageous conduct claims.

I. NEGLIGENCE

Any discussion of liability based on exposing a plaintiff to the potentially harmful effects of an asbestos-related disease due to negligent conduct or failure to warn must center around three cases: *Louisville Trust Co. v. Johns-Manville Products,* Ky., 580 S.W.2d 497 (1979); *Deutsch v. Shein,* Ky., 597 S.W.2d 141 (1980); and *Davis v. Graviss,* Ky., 672 S.W.2d 928 (1984).

In *Louisville Trust Co. v. Johns-Manville Products, supra,* the plaintiff died from "lung cancer ['mesothelioma'], caused by breathing asbestos dust and fibers," and his estate sued Johns-Manville on "a theory of products liability arising from an alleged failure to adequately warn of known dangers associated with the inhalation of asbestos dust." 580 S.W.2d at 498. The issue was whether "to extend the discovery rule of our medical malpractice case to tort actions for injury resulting from a latent disease caused by exposure to harmful substance." *Id.* at 499. We held "that when an injury does not manifest itself immediately, the cause of action should not accrue when the injury was initially inflicted, but when the plaintiff knew or should have known that he had been injured by the conduct of the tortfeasor." *Id.* at 500. The portion of the *Johns-Manville* opinion which is critical for present purposes is a quotation from *Saylor v. Hall,* Ky., 497 S.W.2d 218, 225 (1973) incorporated into the opinion at 580 S.W.2d at 500:

"A cause of action does not exist until the conduct causes injury that produces loss or damage."

Thus we recognized that with a substance capable of causing cancer, just as with any other defective product, no cause of action accrues until the potentially harmful exposure actually "causes injury

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that produces loss or damage."

[3] This rule is fair to both plaintiff and defendant: it protects the plaintiff from a statute of limitations cutting off a cause of action before it accrues, and it affords the defendant the benefit of the traditional principle that for negligent conduct to be actionable it must not only create an unreasonable risk of harm but it must be a substantial factor in causing a harmful result. *See Restatement (Second) of Torts,* Legal Cause, §§ 430-433. Negligent conduct that causes no harm is not actionable.

In *Deutsch v. Shein, supra,* we addressed the so-called "physical contact" requirement in negligence cases. More particularly, we addressed whether the harm resulting from negligent conduct must be produced *directly* by the physical contact, or only *indirectly.* We cited earlier cases noting that proof of physical contact has a "corroborating purpose" and that such purpose is served so long as there is some "minimum" "amount of physical contact or injury. Contact, however slight, trifling, or trivial, will support a cause of action." 597 S.W.2d at 146. We cite the *Restatement (Second) of Torts,* § 431, which, in the process of analyzing the nature of proximate cause states:

> "(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

Thus, in *Deutsch v. Shein,* we recognized the right to recover for negligently exposing a ***193** pregnant plaintiff to potentially harmful x- rays, although there was no proof the x-rays were actually harmful, because such exposure caused harm *indirectly* in that it was sufficient to cause the plaintiff to undergo an abortion.

Deutsch v. Shein does not stand for damages for fear in the absence of injury. The abortion and loss of the baby were substantial injury. Its significance is that harm resulting indirectly as well as directly is compensable so long as the negligent act was a substantial factor resulting in the harm. The trial court's opinion accompanying its summary judgment order in the present case is similar in tone in that it refers to other asbestos exposure cases where the trial court had "previously denied motions for summary judgment and motions for directed verdicts where claimants had x-ray evidence of asbestosis, pleural thickening, or pleural plaque. In those cases, the court interpreted the x-ray evidence to be an 'injury' even though claimants failed to show any actual impairment...." The trial court drew the line here, not at plaintiff's failure to prove the asbestos exposure had caused cancer, but because the plaintiff failed to prove that the asbestos exposure had as yet caused any harmful change of any nature. In effect, the trial court was stating that had there been proof of any such harmful change, it would have triggered the negligence claim and supported all consequential damages.

In *Davis v. Graviss, supra,* we addressed the claimant's "right to compensation for an injury causing an increased risk of future harm and for mental suffering and impairment of earning power resulting from the *fear* caused by the increased risk of future harm." 672 S.W.2d at 930. Emphasis original. We cited *Wilson v. Redken Laboratories, Inc.,* Ky., 562 S.W.2d 633 (1978), recognizing a cause of action for permanently damaging the plaintiff's hair, "a condition causing no physical pain and [only] cosmetic in nature," and *Murray v. Lawson,* Ky., 441 S.W.2d 136 (1969), accepting as "proof of damages ... a disabling 'phobic reaction' to an injury from which [the plaintiff] was otherwise fully recovered." *Id.* We concluded the plaintiff was entitled to recover for both "the increased likelihood of future complications" and the "mental suffering and emotional distress" attaching to the nature of a fracture at the base of the skull which " 'increase[d] her susceptibility to meningitis,' even though future meningitis was not probable but a mere possibility." *Id.* 672 S.W.2d at 931.

> "Thus, where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future complications. Where, as here, that likelihood initiates serious mental distress, this also is compensable." *Id.* at 932.

The critical difference between *Davis v. Graviss* and the present case is that in *Davis v. Graviss,* as in *Deutsch v. Shein,* the cause of action had already accrued: the plaintiff was suing for future consequences where there was a present injury, not, as here, for the potential consequences of a negligent act where no harmful change was yet made manifest.

[4][5] The plaintiffs argue that the rule against

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splitting of causes of action, as discussed in *Kirchner v. Riherd,* Ky., 702 S.W.2d 33 (1986), requires that they presently sue in negligence because their cause of action for outrageous conduct causing severe emotional distress ripened with the discovery of their exposure. The rule against splitting causes of actions, found in *Restatement (Second) of Judgments,* §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a single "transaction" to a single procedure. But it has a number of exceptions, and the present situation provides such an exception because the plaintiffs cannot sue on the negligence claim before the cause of action accrues. This is the same equitable consideration that underlies the decision in the *Louisville Trust Co. v. Johns-Manville Products, supra,* case, extending the discovery rule to a claim otherwise cut off by a statute of limitations, and it is a corollary to our refusal to recognize a statute of repose cutting off a cause of action before it exists (*see Tabler v. Wallace,* Ky., 704 S.W.2d 179 (1985)).

[6][7][8] ***194***Richard v. Adair Hospital Foundation Corp.,* Ky.App., 566 S.W.2d 791 (1978), held there was a cause of action stated against a hospital for refusing to admit a baby suffering from pneumonia for treatment. The baby died hours later after being admitted at a second hospital. We based our decision on the fact that the medical testimony established the child had been "denied a chance of recovery [which] would have been substantially better had treatment been rendered when the child was presented." 566 S.W.2d at 793. There was no physical contact, as such. Thus, there is no intrinsic value in physical contact except as a defining event to prove a tort has occurred, and failing to act as well as taking action may define when liability exists for negligent conduct when there are harmful consequences. But in *Richard v. Adair Hospital,* the increased risk of future harm was compensable only because there was an immediate harm as a result of the defendant's negligent act. Thus physical contact is not the *sine qua non* for awarding damages for negligent conduct where there is immediate harm. It is tangible injury that triggers the existence of a cause of action, and then, once a harmful change has occurred the plaintiff may sue for the increased risk of future consequences which are presently compensable as a part of the cause of action that has accrued. This is consistent with the rule against splitting a cause of action, as discussed in *Kirchner v. Riherd,* Ky., 702 S.W.2d 33 (1986). This rule requires a party to assert all causes of action which may arise from a single "transaction" in a single lawsuit, rather than proceeding piecemeal in multiple actions.

Of the many cases cited from other jurisdictions, the one closest to our Kentucky jurisprudence is *DeStories v. City of Phoenix,* 154 Ariz. 604, 744 P.2d 705 (1987). As in our case, this was an appeal from summary judgment questioning "whether exposure to and inhalation of airborne asbestos particles, which create an increased risk of asbestosis or lung cancer but no immediate physical deterioration, constitute a sufficient physical injury to support a claim for damages for emotional distress," and "whether an increased risk of contracting asbestosis or lung cancer constitutes a legally compensable injury in and of itself." 744 P.2d at 706. The court states the plaintiffs "failed to establish any compensable physical harm." *Id.* at 708.

> "In the instant case plaintiffs adduced no evidence tending to establish the existence of any physical harm or medically identifiable effect from their exposure to asbestos or their associated emotional distress. Accordingly, plaintiffs failed as a matter of law to establish the prerequisite to recovering damages for that emotional distress." *Id.* at 711.

[9] The plaintiffs have urged us to consider *Eagle-Picher Industries, Inc. v. Cox,* 481 So.2d 517 (Fla.App.1985), in support of their claim for damages for fear of cancer. The case involves recovery for negligent infliction of emotional distress due to contact with asbestos. The Florida court states, and we agree, "the essence of the impact rule [is] ... that the outside force or substance, no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious, touch or enter into the Plaintiff's body." *Id.* at 527. But the *Eagle-Picher* case supports the trial judge's analysis of this case rather than the plaintiffs' analysis. In *Eagle-Picher,* the plaintiff had a *present manifestation of physical harm* to support the existence of a cause of action: the plaintiff had "contracted asbestosis, but not cancer, [as well as] an enhanced risk of contracting cancer in the future." 481 So.2d at 519. The Florida court allowed recovery for present injury,

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the asbestosis, and *fear* of contracting cancer, but stopped short of allowing recovery for the increased risk of contracting cancer in the future. As such its holding is more limited than the trial court's decision in the present case, and more limited than what we would allow under *Davis v. Graviss* if here there was presently a demonstrably harmful result from the exposure. Our present decision permits recovery for enhanced risk of cancer as well as mental distress if *first* the plaintiff can cross the threshold of establishing a harmful change has resulted from exposure to the potentially cancer producing agent.

[10][11] As the Court of Appeals' opines, *Davis v. Graviss* recognized "the right to compensation for an increased likelihood of future complications arising from a realized ***195** injury other than a mere contact"; "the plaintiff's 'right to compensation for an injury causing an increased risk of future harm.' " On the other hand, *Deutsch v. Shein* recognized that in a negligence case, while Kentucky adheres to the concept of both "physical contact" and "injury" as a threshold requirement to establish a tort has occurred, the contact need not be directly related to the injury as long as it is a "substantial factor" in causing the result. The rule against the splitting of a cause of action requires that the plaintiff must include within a single action all identifiable future consequences including increased risk of future harm in addition to injuries and damages accrued on the date of trial. *Davis v. Graviss* holds that "where there is substantial evidence of probative value to support it, the jury may consider and compensate for the increased likelihood of future complications. Where, as here, that likelihood initiates serious mental distress, this also is compensable." 672 S.W.2d at 932.

The debate about how to apply *Davis v. Graviss* in awarding damages suggests the case has been misunderstood by some in two respects: (1) as sanctioning separate recovery for a new type of damages in addition to the traditional elements of tort recovery; and (2) as sanctioning recovery in the amount that would be appropriate if such future complications were already fully realized.

[12] 1) A recovery for an increased risk of future harm, when such risk is established as a reasonable likelihood, is not a new element of damages but proof that the jury should consider in compensating for future physical pain and mental suffering, for future impairment or destruction of earning power, and, if there is evidence to support it, for future medical expenses.

[13] 2) In awarding damages for the increased risk of future harm, the fact-finder should take into consideration the degree of the likelihood of future harm. Our law presently recognizes a jury is fully capable of apportioning fault. In like manner, a jury should apportion damages by degree for the increased likelihood of future harm. In this case, if there were now a present manifestation of harm caused by the plaintiffs' exposure to asbestos, in awarding damages for future harm the jury would need to assess how much greater now is the plaintiffs' risk of developing cancer in the future than it was before the tort occurred.

In the *Eagle-Picher* case the plaintiff was *presently* suffering from asbestosis, and nevertheless the court made a policy decision to permit damages for "fear of" contracting cancer but to rule out damages for "enhanced risk of contracting cancer in the future." It did so by stating, "[t]he plaintiff's right to sue for cancer damages if and when he contracts that disease is reserved, and such a suit will not be subject to the rule against splitting causes of action." *Id.* at 529. This rule is unwieldy and unnecessary under *Davis v. Graviss* which permits the finder of fact to evaluate and assess damages for the enhanced risk of contracting cancer, assuming first, of course, that the proof establishes the claim accrued by reason of a demonstrable harmful result from the tortious contact.

[14] Thus we accept defendant's view that mere ingestion of a toxic substance does not constitute sufficient physical harm upon which to base a claim for damages. We make no distinction between damages for "fear of" cancer and damages for enhanced risk of developing the dreaded disease in the future. We base this on the present state of negligence and products liability law in Kentucky, as represented by *Louisville Trust Co. v. Johns-Manville Products Co., Deutsch v. Shein,* and *Davis v. Graviss, supra.* But until such time as the plaintiff can prove some harmful result from the exposure, albeit he need not prove he is already suffering from cancer, his cause of action has yet to accrue.

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II. OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS

[15] The alternative theory of liability stated in the Complaint was for outrageous conduct causing severe emotional distress. *Restatement (Second) of Torts,* § 46. We address the nature of this tort, as we would apply it in Kentucky, in *Craft v. Rice,* Ky., 671 S.W.2d 247 (1984) and ***196***Humana of Kentucky, Inc. v. Seitz,* Ky., 796 S.W.2d 1 (1990). This is an intentional tort, and the physical contact rule has no application:

> "The basis of the cause of action is intentional interference with the plaintiff's rights causing emotional distress, with or without personal injury in the traditional sense. If there has been physical injury with pain to the body or mind, it is incidental to the emotional distress rather than essential to the cause of action.... The plaintiff may have a cause of action for emotional distress from the intentional and unlawful interference with her rights, regardless of whether she suffers any bodily injury from such interference." *Craft v. Rice,* 671 S.W.2d at 249.

In *Humana of Kentucky, Inc. v. Seitz,* while adhering to the principles of *Craft v. Rice,* we held the conduct alleged, mistreatment of the plaintiff by the hospital nursing staff while she was a prenatal patient, failed "to satisfy the threshold requirements for the tort of outrageous conduct." 796 S.W.2d at 1. The alleged misconduct consisted, in the main, of nurses ignoring the plaintiff's cries for help through her distress in the night before the child was delivered. Ultimately she delivered the baby into a bedpan, dead on arrival. We stated:

> "The delay in time before a nurse arrived may well be negligence, but it is hardly intentional, outrageous, or reckless conduct [as required by *Restatement (Second) of Torts,* § 46 (1965)]. All other evidence indicated that the nursing staff carefully and regularly cared for respondent from the time she began suffering pain. The time lapse, *per se,* would only tend to show negligence, not the tortious conduct alleged here." *Id.* at 3.

[16] For purposes of summary judgment the record in this case supports a different conclusion. We infer there will be evidence that for a period of about five months, more or less, Bailey was knowingly and recklessly exposed to asbestos dust and fibers, a potentially cancer producing risk. As the Court of Appeals summarizes:

> "The parties do not appear to dispute that the appellee was under a duty to warn Mr. Bailey of the presence of asbestos. [FN4] At the same time, as the record stands, it could be inferred that the appellee intentionally failed to do so. It, likewise, could be inferred that the appellee should have realized that there was a high probability that severe emotional distress would follow from Mr. Bailey's unwitting exposure to such a dangerous substance as asbestos. We cannot say as a matter of law that if the appellee, with full knowledge of the danger, intentionally failed to warn Mr. Bailey or his employer [his wife] of the presence of the asbestos, this would not constitute outrageous conduct. The known effects of exposure to this substance are such that we regard it as 'utterly intolerable in a civilized community,' *Restatement (Second) of Torts* § 46, comment d at p. 73 (1965), that one having a duty to warn of its presence would deliberately fail to do so."

> FN4. In our Court Capital Holding concedes it knew of the asbestos, but argues there are offsetting facts mitigating the duty to warn. This is, at most, a controverted issue for the trier of fact.

We do not second-guess the Court of Appeals on this assessment of the evidence.

[17] But we do find that the Court of Appeals erred in withdrawing this portion of the opinion addressing the tort of outrageous conduct causing severe emotional distress on procedural grounds. These grounds were raised for the first time on Capital Holding's Petition for Rehearing, wherein it stated: "In the first place, the issue of outrageous conduct was not preserved for appeal by appellants' prehearing statement." Capital Holding was referring to the issues portion of the Baileys' prehearing statement, but the argument fails to develop *why* the issues statement was deficient and there appears to be no reason other than the tort was not specifically designated by name in stating the issues.

Having examined the Baileys' Prehearing

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Statement, we conclude the issues regarding the tort of outrageous conduct were sufficiently addressed. The prehearing statement is part of the prehearing conference rule (CR 76.03), which is an informal procedure added to the appellate process in an ***197** effort to settle cases, or otherwise dispose of them, without the need of a full-blown appeal. While the Baileys did not identify the tort of outrageous conduct *per se* in their prehearing statement, neither did they so identify negligence or failure to warn. Their issues statement tried to focus on, and briefly summarized, the key issues underlying their claims, which is precisely what the prehearing statement intends.

The first two issues addressed "[w]hether Kentucky law requires some type of [present] injury or illness before Plaintiffs can be compensated," and the second "[w]hat constitutes sufficient physical "contact" in order to support plaintiffs' cause of action." The third issue addressed liability "for decontamination of plaintiffs' home." Capital Holding filed a supplemental prehearing statement, which is permitted by CR 76.03(4), which "question[ed] the right of plaintiff to appeal any question of damages for 'decontamination' " but did not otherwise question whether the theories of liability stated in the complaint were viable issues.

The informal nature of the prehearing conference is demonstrated by what followed here, which was a prehearing conference "by telephone conference call on September 11, 1991," at which nothing was resolved. Thereafter, the case proceeded by briefing and argument as the appellate rules required. The Baileys' issues regarding the tort of outrageous conduct causing severe emotional distress were presented in their Appellants' Brief, addressed on their merits in Capital Holding's Appellee's Brief, and argued on the merits in the Court of Appeals. There was no procedural objection until the Petition for Rehearing.

[18][19] We have already had occasion to address the Court of Appeals' abuse of CR 76.03 in *Crossley v. Anheuser-Busch, Inc.,* Ky., 747 S.W.2d 600 (1988). In *Crossley,* the appellants had filed their prehearing statement with the Clerk of the Circuit Court instead of the Clerk of the Court of Appeals as CR 76.03(3) requires, resulting in a delay of "three and a half months [during which] no progress was made toward resolving the case on the merits." *Crossley* holds the action taken by the Court of Appeals in dismissing the appeal for failure to properly file the prehearing statement was an abuse of discretion. The opinion makes it abundantly clear that failure to observe strict compliance with CR 76.03 is not jurisdictional. This being so, the question is one of substantial compliance with appropriate sanctions primarily dependent upon whether and what prejudice resulted to the opposing party, similar to our treatment of CR 76.02(2) in *Ready v. Jamison,* Ky., 705 S.W.2d 479 (1986) and *Foxworthy v. Norstam Veneers, Inc.,* Ky., 816 S.W.2d 907 (1991). The sanctions provided for in CR 76.03(12) are not to be used as a method of docket control, nor do they justify a hypertechnical reading of the statement of issues requirement in CR 76.03(3)(i). There was no reason here for the Court of Appeals to modify its opinion on Petition for Rehearing to withdraw consideration of an issue already fully briefed and argued, and decided on its merits.

Bertelsman & Philips, *Kentucky Practice,* 4th ed. (1992 Supp.), Rule 76.03, p. 185, discusses two recent Court of Appeals cases, *Howard v. Magoffin Co.,* Ky.App., 734 S.W.2d 499 (1987) (cited by the Court of Appeals when it modified the present opinion) and *Karam v. Greentree Corp.,* Ky.App., 783 S.W.2d 78 (1990), as making failure to strictly comply with the rules regarding a prehearing statement into "a serious pitfall to an unwary practitioner." CR 76.03 was not intended as a "pitfall." To the extent these two opinions have made it so, they are overruled.

We come to one final issue, which is whether our decision today vacating and remanding the summary judgment insofar as it denies plaintiffs the right to proceed on their theory of outrageous conduct causing severe emotional distress, but affirming the trial court's decision on the negligence theory of liability, violates the rule against permitting splitting of causes of action, as stated in *Kirchner v. Riherd,* Ky., 702 S.W.2d 33 (1986). It does not, and the reason is because the rule against splitting a single transaction into multiple causes of action does not apply to a negligence action which has not yet accrued. This rule would require the plaintiff to seek relief for future damages ***198** if a cause of action had already accrued, but it has no place in a cause of action which has not yet accrued. The final judgment in the trial court in the present

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case recognized this problem by, in effect, leaving open the plaintiffs' right to pursue their negligence claim when it should accrue by reason of some harmful manifestation resulting from the asbestos-related exposure. Unfortunately, the dismissal also included the claim for outrageous conduct causing severe emotional distress, which had already ripened.

The decision of the Court of Appeals is reversed, and the final judgment of the trial court is reversed insofar as it dismisses plaintiffs' claims for outrageous conduct causing severe emotional distress. The trial court's judgment is otherwise affirmed.

All concur as to I. Negligence."

STEPHENS, C.J., and LAMBERT, LEIBSON and STUMBO, JJ., concur as to II. Outrageous Conduct Causing Severe Emotional Distress"; REYNOLDS, SPAIN and WINTERSHEIMER, JJ., would affirm the trial court's summary judgment dismissing this claim.

873 S.W.2d 187, 62 USLW 2640

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Supreme Judicial Court of Maine.

Desneige BERNIER, et al.
v.
RAYMARK INDUSTRIES, INC.

Argued June 2, 1986.
Decided Oct. 15, 1986.

Questions were certified to the Supreme Judicial Court by the United States District Court for the District of Maine with respect to correct interpretation of defective products statute in relation to wrongful death actions. The Supreme Judicial Court, Scolnik, J., gave answer that: (1) state-of-the-art evidence may be introduced in a failure to warn case under products liability statute when manufacturer seeks to show that he neither knew nor reasonably could have known of dangerous characteristics of product; (2) individuals can recover under wrongful death statute in an action against a manufacturer based on defectiveness of product if decedents could have brought such action; and (3) statute imposing liability on a manufacturer for marketing a defective, unreasonably dangerous product may be applied when inhalation of asbestos dust giving rise to diseases and deaths occurred prior to effective date of statute, but diseases were diagnosed and deaths occurred after that date because diseases did not manifest themselves until that time.

Questions answered.

McKusick, C.J., concurred in part and dissented in part and filed opinion in which Nichols, J., joined.

West Headnotes

[1] Products Liability ⚷8
313Ak8 Most Cited Cases

Statute imposing liability on manufacturers and suppliers marketing defective, unreasonably dangerous products requires that product be in some respect defective before liability will be imposed and, hence, cannot be read as imposing absolute liability. 14 M.R.S.A. § 221.

[2] Products Liability ⚷81.1
313Ak81.1 Most Cited Cases
(Formerly 313Ak81)

State-of-the-art evidence may be introduced in a failure to warn case under products liability statute when manufacturer seeks to show that he neither knew nor reasonably could have known of dangerous characteristics of a product. 14 M.R.S.A. § 221.

[3] Products Liability ⚷14
313Ak14 Most Cited Cases

A manufacturer defending against a defective products charge based on a failure to warn is only required to warn of dangers involved which he knew or should have known. 14 M.R.S.A. § 221.

[4] Products Liability ⚷14
313Ak14 Most Cited Cases

A duty devolves upon a manufacturer to warn only of the dangers that the employment of the reasonable foresight of an expert could reveal. 14 M.R.S.A. § 221.

[5] Products Liability ⚷62
313Ak62 Most Cited Cases

An asbestos product is not defective unless manufacturer knew or should have known of product's danger at time of distribution; rejecting *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539. 14 M.R.S.A. § 221.

[6] Products Liability ⚷14
313Ak14 Most Cited Cases

Actionability of a product should be determined according to knowledge and information available to manufacturer at time of distribution when consumer alleges that product was unreasonably dangerous because of a failure to give adequate warnings. 14 M.R.S.A. § 221.

[7] Death ⚷13
117k13 Most Cited Cases

Statute authorizing recovery of damages whenever a death of a person is caused by "wrongful act, neglect or default" and act, neglect or default is

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such as would, if death had not ensued, have entitled injured party to recover authorizes a cause of action not only in cases of neglect but also in cases of wrongful acts and, as such, encompasses actions under statute imposing liability on manufacturers marketing defective, unreasonably dangerous products; disagreeing with *Ford Motor Co. v. Carter*, 239 Ga. 657, 238 S.E.2d 361. 14 M.R.S.A. § 221; 18-A M.R.S.A. § 2-804.

[8] Products Liability ⚷19.1
313Ak19.1 Most Cited Cases
(Formerly 313Ak19)

Statute imposing liability upon those who market defective, unreasonably dangerous products does not limit class of plaintiffs to the persons actually harmed by defective product. 14 M.R.S.A. § 221.

[9] Products Liability ⚷19.1
313Ak19.1 Most Cited Cases
(Formerly 313Ak19)

For liability to exist under defective products statute, person injured must be a person who might reasonably be expected to use or consume goods in question. 14 M.R.S.A. § 221.

[10] Death ⚷15
117k15 Most Cited Cases

Individuals can recover under wrongful death statute in an action against a manufacturer based on defectiveness of a product if decedents could have brought such action. 14 M.R.S.A. § 221; 18-A M.R.S.A. § 2-804.

[11] Products Liability ⚷71
313Ak71 Most Cited Cases

A cause of action arises under defective products statute when a person has a judicially recognizable claim against a manufacturer. 14 M.R.S.A. § 221.

[12] Products Liability ⚷17.1
313Ak17.1 Most Cited Cases
(Formerly 313Ak17)

Inhalation of asbestos dust does not constitute the physical harm that gives rise to a judicially recognizable claim against a manufacturer under defective products statute. 14 M.R.S.A. § 221.

[13] Products Liability ⚷17.1
313Ak17.1 Most Cited Cases
(Formerly 313Ak17)

A judicially recognizable claim for an asbestos-related injury under defective products statute does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss, and damage or suffering from a defective, unreasonably dangerous product. 14 M.R.S.A. § 221.

[14] Products Liability ⚷2
313Ak2 Most Cited Cases

Statute imposing liability on a manufacturer for marketing a defective, unreasonably dangerous product may be applied when inhalation of asbestos dust giving rise to diseases and deaths occurred prior to effective date of statute, but diseases were diagnosed and deaths occurred after that date because diseases did not manifest themselves until that time. 14 M.R.S.A. § 221; 18-A M.R.S.A. § 2-804.

***535** McTeague, Higbee, Libner, Reitman, MacAdam & Case, G. William Higbee (orally), Brunswick, for plaintiffs.

Thompson, McNaboe & Ashley, Thomas R. McNaboe (orally), Mark G. Furey, Portland, for defendant.

Bernstein, Shur, Sawyer & Nelson, Peter J. Rubin (orally), Linda A. Monica, Portland, for intervenors.

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, WATHEN and SCOLNIK, JJ.

SCOLNIK, Justice.

The United States District Court for the District of Maine has certified to this court the following questions of Maine law pursuant to 4 M.R.S.A. § 57 (Supp. 1985-1986) and Rule 76B of the Maine Rules of Civil Procedure:

(1) Whether evidence of the state-of-the-art is admissible in an action based on 14 M.R.S.A. § 221 when the product defect alleged is a failure to

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warn;
(2) whether damages allowed under Maine's Wrongful Death Act are recoverable in an action based on 14 M.R.S.A. § 221; and
(3) whether 14 M.R.S.A. § 221 may be applied where all inhalation of the asbestos dust which caused the diseases and deaths complained of occurred before October 3, 1973, the effective date of the statute, but where the diseases were diagnosed and the deaths occurred after October 3, 1973.

The requirements for our acceptance of the questions of law from the federal court are met. *See* ***536*Hiram Ricker & Sons v. Students International Mediation Society,** 342 A.2d 262, 264 (Me.1975). [FN1] We answer the first two questions in the affirmative. We also answer yes to the third question, but in only the limited way described in this opinion.

FN1. In *Hiram Ricker & Sons,* we identified several requirements that must be met before a certified question will be considered. One requirement is that the answer to the question presented must "have controlling impact on a decision of the merits of the cause generally." 342 A.2d at 264. Another requirement is that "all material facts have been either agreed upon or resolved, and the case is in such posture that our decision will, in at least one alternative, be '*determinative of the cause.*' " *Id.* (quoting *White v. Edgar,* 320 A.2d 668, 674-75 n. 10 (Me.1974) (emphasis in original)).

I. *Background*

Subject matter jurisdiction of the United States District Court in this case is based solely on diversity of citizenship. Thus the substantive law of Maine governs the action. The federal court has provided a statement of facts relevant to the present controversy. These facts may be summarized as follows.

Roland Bernier, the deceased husband of the plaintiff, Desneige Bernier, worked for Bath Iron Works (BIW) as a boilermaker from 1942 to 1945. During that tenure, Bernier inhaled asbestos dust from products manufactured and sold by the defendant, Raymark Industries, Inc. (Raymark), then known as Raybestos- Manhattan, Inc. After 1945, Bernier ceased working at BIW. He did not inhale any asbestos dust or fibers after that date. In 1975, he was diagnosed as having pleural mesothelioma, an asbestos induced cancer of the lining of the lungs. He died on February 16, 1979.

Frank Clark, the deceased husband of the plaintiff, Phyllis Clark, worked for BIW as an electrician from the late 1930's to 1948 and again from 1949 to 1970. While employed at BIW, he inhaled asbestos dust and fibers from Raymark products. As a result of his inhalation of the asbestos fibers, Frank Clark contracted lung cancer. His disease was diagnosed in 1978 and he died therefrom in May, 1979.

The plaintiffs sued Raymark in federal court for wrongful death, alleging negligence and strict product liability under 14 M.R.S.A. § 221 (1980) for failure to give adequate warnings on its products that would alert purchasers or foreseeable users of the health hazards posed by the inhalation of asbestos dust. [FN2] Before trial, the plaintiffs asked the trial judge to exclude, with respect to their section 221 claims, so-called state-of-the-art evidence; evidence of what was known or reasonably could have been known by the defendant, or by medical or other experts, about the health hazards created by the inhalation of asbestos fibers at the time the various asbestos products were sold to BIW. The trial judge granted the plaintiffs' request. The plaintiffs proceeded to trial solely under section 221, dropping their negligence claims.

FN2. The complaints also contained a breach of warranty count, but the plaintiffs waived these claims prior to trial.

At the close of the evidence, the defendant moved for a directed verdict, contending, *inter alia,* that the application of section 221 to these cases would constitute an impermissible retroactive application of that statute because Roland Bernier and Frank Clark had not inhaled any asbestos dust from a Raymark product after October 3, 1973, the effective date of section 221. The trial judge denied the motion. In response to special interrogatories,

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the jury returned a verdict in favor of the plaintiffs.

Preliminary to the damages phase of the trial, the defendant argued that the plaintiffs could not recover damages available under Maine's Wrongful Death Act, 18-A M.R.S.A. § 2-804 (1981 & Supp.1985-1986), in an action based on section 221 . The trial judge decided to allow the plaintiffs to present their wrongful death claims and to reserve a ruling on the matter until post- trial motions were presented. The jury awarded damages to the plaintiffs and judgment was entered.

***537** The defendant filed motions for judgments notwithstanding the verdict and for new trials, renewing its contentions that so-called state-of-the-art evidence was improperly excluded, that damages for wrongful death are not recoverable in an action based on section 221, and that section 221 cannot be applied when all inhalation of the asbestos dust from the defendant's product occurred prior to the effective date of the statute. The certified questions from the federal court to this court followed.

II. *Admissibility of State-of-the-Art Evidence*

[1] The first issue is whether state-of-the-art evidence is admissible in an action based on 14 M.R.S.A. § 221 when the product defect alleged is a failure to warn. Maine's strict liability statute, section 221, imposes liability on manufacturers and suppliers who market defective, unreasonably dangerous products. The seller becomes subject to liability if an unreasonably dangerous product causes injury to a foreseeable consumer or user. Thus, section 221 does not impose absolute liability on the part of the manufacturer; the product must be in some respect defective before liability will be imposed. *See generally Austin v. Raybestos-Manhattan, Inc.,* 471 A.2d 280, 282-83 (Me.1984). Section 221 provides in full:

> One .who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[2] Courts are divided on the issue whether in determining, for the purpose of strict liability, that a product is defective and unreasonably dangerous because of a failure to warn, [FN3] evidence that the defendant knew or reasonably should have known of the product's dangerousness is relevant, or whether knowledge is automatically imputed to the manufacturer regardless of the blameworthiness of his failure to know. The district court judge stated in this case that the plaintiffs moved to exclude "any evidence in support of the state-of-the-art defense" and that the issue was whether the defendant may introduce such evidence. In the context of this record, we answer the first certified question by stating that under section 221, when the product defect alleged is a failure to warn, the defendants may introduce evidence to show that they neither knew nor reasonably could have known, of the dangerous characteristics of asbestos.

> FN3. A product can be in a defective condition, unreasonably dangerous to the user or consumer as a result of an error in the manufacturing or design process or by the failure to warn of a product hazard. *See* Keeton, *The Meaning of Defect in Products Liability Law--A Review of Basic Principles,* 45 Mo.L.Rev. 579, 586-87 (1980).

[3] The Legislature formulated section 221 directly from section 402A of the *Restatement (Second) of Torts* (1965). [FN4] ***538***Austin v. Raybestos-Manhattan, Inc.,* 471 A.2d at 286; *Adams v. Buffalo Forge Co.,* 443 A.2d 932, 940 (Me.1982). Since section 221 and its legislative history does not have anything to say about whether state-of-the-art evidence is relevant when the product defect is based on a failure to warn, the commentary to section 402A is an appropriate place to begin our analysis. That commentary makes clear that in determining whether a product is defective because of a failure to warn, the

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manufacturer is only required to warn of dangers about which he knew or should have known. Specifically, comment j to section 402A provides:

> FN4. Section 402A provides:
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the *seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger.* Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.
But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of the danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.
Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.
(emphasis added).

[4] Under this standard, when the strict liability defect consists of a failure to warn, reasonableness of the manufacturer's conduct is a factor in determining whether the manufacturer had a duty to warn. The conduct should be measured by knowledge at the time the manufacturer distributed the product. Given the scientific, technological and other information available when the product was distributed, did the manufacturer know or should he have known of the danger. In other words, did he have actual or constructive knowledge of the danger. A product-related danger may be regarded as knowable "if the available scientific data gave rise to a reasonable inference that the danger is likely to exist." Wade, *On The Effect in Product Liability of Knowledge Prior to Marketing,* 58 N.Y.U.L.Rev. 734, 749 (1983). A manufacturer is held to the knowledge and skill of an expert, and is required to test his products and keep abreast of scientific discoveries related to his products, but he has a duty to warn only of dangers that the employment of the reasonable foresight of an expert could reveal. *See Borel v. Fibreboard Prods. Corp.,* 493 F.2d 1076, 1089-1090 (5th Cir.1973) (Wisdom, J.) (applying Texas law), *cert. denied,* 419 U.S. 869 (1974). *See generally* 1A L. Frumer & M. Friedman, *Products Liability* § 12.07[3] (1985). We find no reason to depart from the *Restatement's* commentary for purposes ***539** of interpreting Maine's strict liability statute.

[5] We accordingly reject the plaintiffs' contention that when the product defect is premised on a failure to warn, the manufacturer's actual or constructive knowledge of his product's danger is irrelevant. A clear majority of courts, relying on comment j of section 402A of the *Restatement,* have concluded that an asbestos product is not defective unless the manufacturer knew or should have known

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of the product's danger at the time of distribution. *See, e.g., Jackson v. Johns-Manville Sales Corp.,* 727 F.2d 506, 515 (5th Cir.1984) (applying Mississippi law), *aff'd in part, rev'd in part,* 750 F.2d 1314 (5th Cir.1985) (en banc); *questions of state law certified,* 757 F.2d 614 (5th Cir.1985) *certification declined,* 469 So.2d 99 (Miss.1985), *aff'd,* 781 F.2d 394 (5th Cir.1986) (en banc), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986). *Hardy v. Johns- Manville Sales Corp.,* 681 F.2d 334 (5th Cir.1982) (applying Texas law); *Karjala v. Johns-Manville Sales Corp.,* 523 F.2d 155, 158-59 (8th Cir.1975) (applying Minnesota law); *Borel v. Fibreboard Paper Prods. Corp.,* 493 F.2d 1076, 1088 (5th Cir.1973) (applying Texas law), *cert. denied,* 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1971). *See also Carter v. Johns-Manville Sales Corp.,* 557 F.Supp. 1317, 1320 (E.D.Tex.1983); *Daniels v. Combustion Engineering, Inc.,* 583 S.W.2d 768, 773 (Tenn.App.1978). *See generally* W. Prosser & W. Keeton, *The Law of Torts,* § 99, at 697 (5th ed. 1984); Keeton, *The Meaning of Defect in Products Liability Law--A Review of Basic Principles,* 45 Mo.L.Rev. 579, 586-87 (1980); Wade, *supra.* at 760- 61.

In the decision primarily relied on by the plaintiff, *Beshada v. Johns- Manville Prods. Corp.,* 90 N.J. 191, 447 A.2d 539 (1981), the New Jersey Supreme Court held that an asbestos manufacturer's knowledge of his product's defect in a failure-to-warn case is irrelevant for purposes of products liability. 447 A.2d at 546-49. It reasoned that to predicate a manufacturer's liability on whether he knew or should have known of the danger is to revert to a negligence standard, thus defeating the purpose of strict liability. *Id.* Between the producers of a dangerous product and innocent victims of a dangerous condition created by a failure to warn, the court reasoned that it is fairer that the latter "should bear the unforeseen costs of the product." *Id.* at 549. *See also Kisor v. Johns-Manville Corp.,* 783 F.2d 1337 (9th Cir.1986) (applying Washington law).

The New Jersey Supreme Court, however, has subsequently limited *Beshada* to the "circumstances giving rise to its holding" and adopted the foreseeability test in comment j of section 402A that, in a warning context, actual or constructive knowledge on the part of the manufacturer at the time of distribution is relevant in determining the applicability of strict liability. *Feldman v. Lederle Labs.,* 97 N.J. 429, 479 A.2d 374, 388 (1984). In so doing, the court recognized that the requirement that the danger be reasonably foreseeable at the time the product is sold is an important limitation on the seller's liability. To impose liability on a manufacturer, who at the time of distribution was not aware and from a scientific view point could not be aware of the danger that caused the injury, would make the manufacturer the virtual insurer of his product. As Judge Wisdom explained in *Borel v. Fibreboard Paper Prods. Corp.,* 493 F.2d at 1088,

> Here, the plaintiff alleged that the defendant's product was unreasonably dangerous because of the failure to give adequate warnings of the known or knowable dangers involved. As explained in comment j to section 402A, a seller has a responsibility to inform users and consumers of dangers which the seller either knows or should know at the time the product is sold. The requirement that the danger be reasonably foreseeable, or scientifically discoverable, is an important limitation of the seller's liability. In general, "[t]he rule of strict liability subjects the seller to liability to ***540** the user or consumer even though he has exercised all possible care in the preparation and sale of the product." Section 402A, Comment a. *This is not the case where the product is alleged to be unreasonably dangerous because of a failure to give adequate warnings. Rather, a seller is under a duty to warn of only those dangers that are reasonably foreseeable.* The requirement of foreseeability coincides with the standard of due care in negligence cases in that a seller must exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger.

(emphasis added and omitted, footnote omitted).

[6] We conclude that section 221 does not impose absolute liability. When a plaintiff alleges that a defendant's product was unreasonably dangerous because of a failure to give adequate warnings, the actionability of the product should be determined according to the knowledge and information available to the manufacturer at the time of distribution. A strict liability failure-to-warn case does resemble a negligence action because the reasonableness of the manufacturer's conduct is the critical issue. A manufacturer has a responsibility

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to inform users and consumers of dangers about which he either knows or should know at the time the product is sold. Accordingly, state-of-the-art evidence is relevant in determining whether the defendant is liable in a failure-to-warn case based on 14 M.R.S.A. § 221. We answer the first question in the affirmative.

III. *Wrongful Death*

The second issue presented is whether damages allowed under Maine's Wrongful Death Act are recoverable in an action based on 14 M.R.S.A. § 221. Maine's Wrongful Death Act, 18-A.M.R.S.A. § 2-804, provides in relevant part:

> (a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person or the corporation that would have been liable if death had not ensued shall be liable for damages as provided in this section, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as shall amount to a felony.

The defendant contends that the phrase "wrongful act, neglect or default" in section 2-804 denotes only fault-based conduct and since section 221 imposes liability without fault, a wrongful death action cannot be maintained. Although one court has adopted this view in interpreting similar statutes, *see Ford Motor Co. v. Carter,* 239 Ga. 657, 238 S.E.2d 361, 365 (1977), we think the position is untenable.

[7] By its own terms, section 2-804 is not limited to situations where the death producing conduct is based on fault. The statute authorizes a cause of action not only in cases of neglect but also for "wrongful acts." Under section 221, the manufacturer commits a wrongful act when he puts a defective or unreasonably dangerous product into the stream of commerce. *See Austin v. Raybestos-Manhattan, Inc.,* 471 A.2d at 285; *Adams v. Buffalo Forge Co.,* 443 A.2d at 941. An action based on section 221 is clearly encompassed within our wrongful death statute.

[8][9][10] We also find without merit defendant's argument that the plaintiffs cannot maintain a wrongful death action because section 221 limits recovery only to persons who have been physically injured by a defective product. Nothing in section 221 limits the class of plaintiffs to the persons actually harmed. The statute merely states that for liability to exist, the person injured must be a person who might reasonably be expected to use or consume the goods in question. Furthermore, the long recognized test for determining whether a wrongful death action can be ***541** maintained is whether the deceased, if living, could have recovered damages. *See Klingerman v. Sol Corp. of Maine,* 505 A.2d 474, 475 (Me.1986); *Metrinko v. Witherell,* 134 Me. 483, 485, 188 A. 213, 214 (1936). Under this test, if the decedents could have brought an action under section 221, the plaintiffs can recover under the wrongful death statute in an action based on 14 M.R.S.A. § 221. Accordingly, we answer the second question in the affirmative.

IV. *Applicability of Section 221*

[11] The final issue is whether section 221 applies when the inhalation of the asbestos dust that caused the diseases and deaths complained of occurred before the effective date of the statute, October 3, 1973, *see* P.L. 1973, ch. 466, but the diseases were not diagnosed and deaths did not occur until after that date. Roland Bernier last inhaled the asbestos fibers from the defendant's product in the period from 1942 to 1945, while Frank Clark last inhaled asbestos material in 1970. The defendant argues that to allow recovery in these circumstances constitutes an impermissible retroactive application of the statute.

In *Adams v. Buffalo Forge Co.,* 443 A.2d at 941-44, we analyzed the problem of retroactively applying section 221 and examined the Legislature's purpose in specifying the statute's temporal application. In that case, the defendant, a manufacturer of an allegedly defective drill press, sold the product before October 3, 1973, but the plaintiffs were not injured by that product until 1979. [FN5] The defendant argued that section 221 did not apply "if any operative event--whether that event is the sale of the product or the injury-- ... occurred before October 3, 1973." 443 A.2d 939-40.

FN5. The plaintiff who was physically

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injured by the drill press was joined by his wife in his suit against the manufacturer.

We pointed out in *Adams* that section 2 of P.L.1973, ch. 466, which enacted 14 M.R.S.A. § 221, provided that "[t]his Act shall not be construed to affect *any cause of action arising prior to the effective date of this Act.* " *Adams v. Buffalo Forge Co.,* 443 A.2d at 942 (quoting P.L. 1973, ch. 466, § 2) (emphasis in original). Emphasizing our view that "a cause of action alleging strict liability is one which sounds in *tort,* not contract," *id.* at 940 (emphasis in original), we said:

> We think it erroneous ... to describe the sale of goods as the operative event upon which liability must stand or fall.... Actual liability is established only when "physical harm [is] thereby caused to a person." 14 M.R.S.A. § 221.

Id. at 942. We rejected the contention "that Section 221 does not apply merely because the sale of the allegedly defective, unreasonably dangerous product occurred prior to the effective date of the statute ...," and held that the "[p]laintiffs' cause of action did not arise prior to the effective date of Section 221 and is not precluded by the provisions of section 2 [of P.L. 1973, ch. 466]." *Id.* at 942.

[12] A cause of action arises under section 221 when a person has a *judicially recognizable* claim against a defendant. *See Adams v. Buffalo Forge Co.,* 443 A.2d at 943. [FN6] To answer the third certified question, ***542** we must decide whether the decedents had judicially recognizable claims against the defendant before October 3, 1973 because all of the asbestos dust that caused their injuries was inhaled before that date. The issue, narrowly stated, is whether inhalation of asbestos dust constitutes the physical harm that gives rise to a judicially recognizable claim against the defendant. We conclude that inhalation alone is insufficient to give rise to such a claim.

FN6. In reaching this conclusion in *Adams,* we relied upon *Williams v. Ford Motor Company,* 342 A.2d 712, 718 (1975), a case involving the question of when a negligence action for injuries caused by a defective automobile arises or accrues under the applicable statute of limitations. The Legislature did not define when a "cause of action arises" in section 2 of P.L. 1973, ch. 466. In the absence of any explicit legislative direction, the process of defining this term is a judicial function. *See Myrick v. James,* 444 A.2d 987, 989-90 (Me.1982). Thus, reliance upon persuasive statute of limitations cases to determine "the precise substantive elements of [a] particular cause of action," *see Williams v. Ford Motor Co.,* 342 A.2d at 714 (emphasis omitted), is appropriate. Principles articulated in *Williams* were applicable, by analogy, in *Adams* because *Williams* involved a products liability action where the plaintiffs sustained injuries at the same time that the harm-causing impact occurred. We have yet to decide, in the context of the statute of limitations, when a tort cause of action arises or accrues for injuries associated with exposures to toxic substances that generate noticeable diseases only years after exposure. Although we adopted the "discovery rule" for certain malpractice cases, *see Myrick v. James,* 444 A.2d at 996; *Anderson v. Neal,* 428 A.2d 1189, 1192 (Me.1981), we must look to other jurisdictions for the appropriate analogous authority applicable to the case at bar. *See infra* note 7.

The nature of the physical injuries in the instant case is different from that in *Adams.* In *Adams,* contact with the defendant's product and the realization of physical injury associated with that contact occurred simultaneously. Bernier and Clark, on the other hand, came into contact with the defendant's asbestos products long before they were diagnosed as having diseases caused by those products. Although their contact with the harm-causing product occurred before the effective date of section 221, we cannot conclude from that fact alone that they also had physical injuries that would confer upon them judicially cognizable causes of action in tort before that date.

There is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury. As a leading treatise on tort law explains:

> Actual loss or damage resulting to the interests of another [is a necessary element of a negligence

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cause of action].... The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered.

W. Prosser & W. Keeton, *supra,* § 30, at 165.

In the context of asbestos-related injuries, it can take anywhere from ten to forty years from the time of actual asbestos fiber inhalation for injuries or diseases, if any, to manifest themselves. *See Jackson v. Johns-Manville Sales Corp.,* 750 F.2d 1314, 1336 (5th Cir.1985); *questions of state law certified,* 757 F.2d 614 (5th Cir.1985) *certification declined,* 469 So.2d 99 (Miss.1985), *aff'd,* 781 F.2d 394 (5th Cir.1986) (en banc), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); *Wilson v. Johns- Manville Sales Corp.,* 684 F.2d 111, 115, n. 21 (D.C.Cir.1982); *Norton v. C.P. Blouin, Inc.,* 511 A.2d 1056, 1061 (Me.1986). Because persons who inhale asbestos fibers may not know at the time that they will contract an asbestos-related disease, or indeed, may in some instances never contract such a disease, we are unable to conclude that a cause of action arises upon such inhalation, impact or exposure. [FN7] The actionable harm is the manifestation of disease in the body, not the exposure to the potentially hazardous substance ***543** or some more abstract invasion of a person's legally protected interests. *Cf. Urie v. Thompson,* 337 U.S. 163, 170, 69 S.Ct. 1018, 1024, 93 L.Ed. 1282 (1949) (time of accrual of a railroad foreman's claim for damages resulting from his contraction of silicosis is when the accumulated effects of the substance manifest themselves). Even assuming that any inhalation of asbestos dust immediately causes microscopic injury to lung tissues, we conclude that the subclinical injury resulting from such inhalation is "insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law." *See Schweitzer v. Consolidated Rail Corp.,* 758 F.2d 936, 942 (3rd Cir.1985), *cert. denied,* 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed. 152 (1985).

FN7. We find persuasive statutes of limitation cases in other jurisdictions that have determined when strict liability causes of action arise or accrue for plaintiffs exposed to asbestos dust. The majority of these cases hold that such a cause of action does not accrue until the plaintiff discovers or, in the exercise of reasonable care and diligence, should discover the fact that he is suffering from an asbestos-related disease. *See, e.g., Clutter v. Johns-Manville Sales Corp.,* 646 F.2d 1151 (6th Cir.1981) (cause of action for asbestosis accrues upon "manifestation" of the disease) (applying Ohio law); *Karjala v. Johns Manville Prods. Corp.,* 523 F.2d 155, 160-61 (applying "discovery" rule for determining when a cause of action accrues for a person suffering from asbestosis (under Minnesota law); *Borel v. Fibreboard Paper Prods. Corp.,* 493 F.2d 1076, 1102 (asbestosis) (applying Texas law), *cert. denied,* 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974); *Harig v. Johns-Manville Prods. Corp.,* 284 Md. 70 394 A.2d 299 (1978) (mesothelioma); *Louisville Trust Co. v. Johns-Manville Prods. Corp.,* 580 S.W.2d 497, 501 (Ky.1979) (mesothelioma); *Nolan v. Johns- Manville Asbestos,* 85 Ill.2d 161, 52 Ill.Dec. 1, 421 N.E.2d 864 (1981) (asbestosis); *Coyne v. Porter-Hayden Co.,* 286 Pa.Super. 1, 428 A.2d 208 (1981) (asbestosis). Other cases involving injuries associated with other toxic substances that do not cause noticeable physical harm until years after exposure reach the same conclusion. *E.g., Urie v. Thompson,* 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (silicosis); *Barnes v. A.H. Robbins Co.,* 476 N.E.2d 84 (Ind.1985) (injuries caused by intrauterine device); *Raymond v. Eli Lilly & Co.,* 117 N.H. 164, 371 A.2d 170 (1977) (DES). While these authorities are helpful because they provide insights into the elements that make up judicially cognizable "toxic tort" causes of action, we need not here decide whether a "discovery" rule applies to a case such as the one at bar for statute of limitations purposes.

The *Schweitzer* court arrived at this conclusion in

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determining whether asbestos-related actions under the Federal Employers' Liability Act (F.E.L.A.) existed before the filing of the defendants' bankruptcy petitions so as to qualify such claims as dischargeable. That Court explained:

> If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill.... Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered.

Id. at 942.

In even stronger language, the Fifth Circuit, in the context of an asbestos- related strict liability claim based upon "failure-to-warn" under Mississippi law, stated:

> In a sense, the injury in this case is the inhalation of asbestos fibers. It was not an *actionable* injury, however, meaning it was not legally cognizable, until at least one evil *effect* of the inhalation became manifest. There was no cause of action at all, in other words, until the asbestosis appeared.

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 412 (5th Cir.1986) (emphasis original), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 473 (1986).

[13] We agree with the reasoning of these federal courts. Having reaffirmed our conclusion in *Adams* that a strict liability claim brought pursuant to section 221 sounds in tort, we construe that statute to protect interests of injured parties according to "generally applicable principles of tort law." Those principles lead us to conclude that in actions under section 221 involving asbestos-related injuries, a judicially recognizable claim does not arise until there has been a manifestation of physical injury to a person, sufficient to cause him actual loss, damage or suffering from a defective, unreasonably dangerous product.

[14] On this record, we are unable to determine at what point in time, between the last inhalation of asbestos dust and the death of each decedent, such a manifestation occurred. We are constrained by the record before us to declare only that inhalation of asbestos dust, without more, is not a physical injury giving rise to judicially recognizable causes of action under section 221.

In conclusion, we answer the certified questions as follows:

> ***544** 1. Yes; the defendants may introduce evidence to show that they neither knew nor reasonably could have known, of the dangerous characteristics of asbestos;
> 2. yes; damages allowed under Maine's Wrongful Death Act are recoverable in an action based on 14 M.R.S.A. § 221; and
> 3. yes; 14 M.R.S.A. § 221 may be applied where all inhalation of the asbestos dust that caused the diseases and deaths complained of occurred prior to October 3, 1973, but where the diseases were diagnosed and the deaths occurred after that date if the decedents' diseases did not manifest themselves until after that date.

The Clerk will transmit the foregoing instructions to the District Court of the United States, District of Maine.

ROBERTS, WATHEN, JJ. and VIOLETTE, A.R.J. concurring.

McKUSICK, Chief Justice, with whom NICHOLS, Justice, joins, concurring in part and dissenting in part.

I fully concur with the court's answers to questions 1 and 2. My nonconcurrence relates exclusively to the court's answer to the third question certified by the United States District Court. The 1973 Legislature enacted 14 M.R.S.A. § 221 [FN1] effective October 3, 1973, to impose upon manufacturers and other sellers of products a strict liability in addition to the common law tort of negligence. The third certified question requires us to determine, in the particular set of circumstances presented by the cases at bar, the intent of the 1973 Legislature as to the temporal application of section 221. Specifically, we are asked whether the 1973

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Legislature intended that the new statutory tort of strict liability was to apply to the category of fact circumstances represented by the *Bernier* and *Clark* cases, namely, cases where *both* the sale *and* the harm-causing impact upon the users occurred prior to October 3, 1973. My answer to that question is simply no.

FN1. P.L. 1973, ch. 466, which enacted what is now 14 M.R.S.A. § 221 (1980), reads in full as follows:
Sec. 1. R.S., T. 14, c. 10, additional. Title 14 of the Revised Statutes is amended by adding a new chapter 10 to read as follows:

CHAPTER 10
LIABILITY

§ 221. Defective or unreasonably dangerous goods
One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.
Sec. 2. Application. This Act shall not be construed to affect any cause of action arising prior to the effective date of this Act. The effective date of that Act was October 3, 1973.

I.

True to established principles of statutory interpretation, we can determine the 1973 legislative intent only by a conventional analysis applied directly to all available materials that are relevant to construing section 221 in the particular factual circumstances here presented. Our task in analyzing the scanty expressions of intent is to select an interpretation that we can say "with reasonable confidence [is] the most plausible alternative on the basis of the text and proper context." R. Dickerson, *The Interpretation and Application of Statutes* 221 (1975). That analysis shows, to at least a level of reasonable confidence, that the most plausible interpretation of the 1973 legislative intent dictates a negative answer to question 3. The 1973 Legislature meant that, in cases where the harm-causing impact had already occurred before it enacted the strict liability statute, the ***545** rights and liabilities of the parties would continue to be governed solely by the common law rules of negligence.

Any statutory analysis must start with the text being interpreted, in this case P.L. 1973, ch. 466 (*see* n. 1 above). *See Perry v. Hartford Accident and Indemnity Co.,* 481 A.2d 133, 138 (Me.1984). Chapter 466 expressly contained only a partial rule of temporal *non* applicability; in its second section it provided that section 221 "shall *not* be construed to affect any cause of action arising prior to [its] effective date...." (Emphasis added) On the facts involved in *Adams v. Buffalo Forge Co.,* 443 A.2d 932, 942 (Me.1982) (post-1973 harm-causing impact), we found that provision of little help because, drafted in negative form, it does not provide a statement of the actions to which section 221 *does* apply. Nonetheless, the 1973 Legislature's explicit *restriction* on section 221's application does serve to reinforce "the fundamental rule of statutory construction strictly followed by this Court that all statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used." *Miller v. Fallon,* 134 Me. 145, 148, 183 A. 416, 417 (1936). *See also Terry v. St. Regis Paper Co.,* 459 A.2d 1106, 1109 (Me.1983) ("the Legislature [must] express its intent to apply a statute retroactively in 'strong, clear and imperative language' ") (quoting *Barrett v. Herbert Engineering, Inc.,* 371 A.2d 633, 635 n. 1 (Me.1977)). That explicit restriction expressed in negative form shows the 1973 Legislature's sensitivity to the unfairness of imposing a new or additional liability on the basis of past events upon

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someone who cannot do anything to avoid or mitigate that liability. Nothing in section 221, or in P.L. 1973, ch. 466 that enacted it, affirmatively directs by either clear expression or necessary implication that the strict liability newly created by statute should apply in the *Bernier-Clark* situation. That fact in itself is enough to require a negative answer to question 3.

In any event, there are additional reasons to believe that the 1973 Legislature did not intend section 221 to apply to the *Bernier-Clark* factual circumstances. The negative restriction imposed by section 2 of the 1973 enacting statute (*see* n. 1 above) upon the scope of section 221 fits closely the fact situation represented by the cases at bar. Such was not true in *Adams.* There we pointed out that on the *Adams* facts no section 221 cause of action had arisen prior to the 1973 date because both the use of the unreasonably dangerous drill press by the plaintiff and his coincident injury did not occur until 1979. The plaintiff user obviously had no possible cause of action on account of the offending drill press until that time because before then no "physical harm [had been] thereby caused to a person," the second requirement of section 221. In contrast, in the cases at bar the offending asbestos products sold by defendant Raymark Industries, Inc. had had their full and only harm-causing impact upon Mr. Bernier and Mr. Clark well before October 3, 1973--indeed about 30 years earlier for Mr. Bernier. No matter whether by October 3, 1973, objective symptoms of those asbestos-caused injuries had appeared, or whether by then the cause of those symptoms had been diagnosed, we now know as an unfortunate but irreversible fact that Mr. Bernier and Mr. Clark had suffered, during the period of time they inhaled asbestos dust, harm to their bodies that led to their disease and death. Regardless whether a court might declare that technically the *Bernier-Clark* cause of action did not arise at the time of the harm-causing impact, section 2 provides powerful evidence of a legislative distaste for imposing its new, enlarged strict liability upon a set of critical facts that as to both the potential plaintiff and the potential defendant were over and done with before October 3, 1973. That evidence of intent had no application to the *Adams* fact situation.

Considerations of common fairness, which we may confidently assume guided ***546** the 1973 Legislature in enacting chapter 466, support the foregoing analysis of that Legislature's intent. In the context of the particular facts of the *Bernier* and *Clark* cases, I believe that fair-minded legislators were not likely to have imposed strict liability upon the manufacturer cumulatively to the existing common law liability for negligence. Here the sole product defect alleged by plaintiffs arose out of defendant's failure to warn of dangers of the product. In the *Bernier-Clark* situation, any opportunity to warn the user or to recall or redesign the product expired as soon as the user was last exposed to it--long before 1973. Once Mr. Bernier and Mr. Clark inhaled the asbestos dust, they had already suffered the only harm-causing impact that a warning might have spared them. In the physical harm done by dangerous products, as elsewhere, "the moving finger writes; and, having writ, moves on." *Rubaiyat of Omar Khayyam* (Edward Fitzgerald trans. 1952) at 66. In sharp contrast to the situation of defendant Raymark vis-à-vis Mr. Bernier and Mr. Clark, the manufacturer of the drill press that caused the 1979 injury to Mr. Adams had a six-year opportunity after enactment of section 221 to recall the drill press or to warn the user of its danger. To find whether the 1973 Legislature meant to treat the *Adams* and the *Bernier-Clark* situations in exactly the same way, we must examine section 221 "in the transforming light of [the] real life situation." *Lagasse v. Hannaford Bros. Co.,* 497 A.2d 1112, 1117 (Me.1985). After seeking legislative intent, the *Adams* court (443 A.2d at 944) concluded that the 1973 "Legislature could rationally and properly intend the occurrence of [the] injury" to the drill press user to be the event bringing the user's claim under section 221. It, however, cannot be concluded on the *Bernier-Clark* facts, where the manufacturer had no post-1973 opportunity for warning or recall, that nonetheless "the Legislature could rationally and properly intend" to impose the additional, heightened strict liability upon the manufacturer. It contradicts basic tenets of fairness to assume that the 1973 Legislature--without saying so explicitly or by necessary implication--intended to give a cause of action in strict liability where the manufacturer lacked any means whatever of preventing or mitigating harm from a product sold long in the past.

In sum, standard methods of statutory construction lead to a negative answer to the third certified question.

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II.

The court's opinion reaches a contrary conclusion as a result of its failure to seek out the intent of the 1973 Legislature as to the *Bernier-Clark* circumstances. In my judgment the opinion goes astray in several specific respects. First, rather than approaching the third question as one involving the 1973 Legislature's intent, the court's opinion cites *Adams* (443 A.2d at 943), without quoting it, for the court's present pronouncement that "[a] cause of action arises under section 221 when a person has a *judicially recognizable* claim against a defendant." (*See* p. 541) The court's opinion then goes through a doctrinal exercise--completely detached from what the 1973 Legislature in context is likely to have intended--to determine when *this court,* not the Legislature, would view Mr. Bernier and Mr. Clark to have judicially recognizable claims. The court's present reading of *Adams* as laying down for all fact situations a rule of temporal application that doctrinally controls our answer to question 3 is, I believe, entirely unjustified. Our fact-specific finding of legislative intent [FN2] in the radically different circumstances involved in *Adams* (all harm-causing impact ***547** there having occurred *after* the effective date of section 221) tells us nothing of what the 1973 Legislature intended in the *Bernier- Clark* situation (all harm-causing impact here having occurred before 1973). Our task here is to find the 1973 Legislature's intent on the specific *Bernier- Clark* facts, *not* to make a theoretical doctrinal extension of a rule abstracted from the specific legislative intent found by us on the very different *Adams* facts.

> FN2. In *Adams* we laid out with particularity the process by which our conclusion was there reached:
> [W]e look first to the intent of the Legislature as to the application of Section 221 and to the events it intended to be significant in the determination of legal consequences under Section 221.
> 443 A.2d at 942. Any such approach is conspicuously absent from the court's opinion in the case at bar.

Second, the court's opinion treats the 1973 enactment as if section 2 had been written to read: "This Act shall apply to any cause of action arising after the effective date of this Act." That is *not* how the 1973 Legislature framed section 2. *See* n. 1 above. By section 2 the Act was *not* to be construed to affect any cause of action *arising prior to* its effective date, but section 2 did not say conversely that all causes of action arising after October 3, 1973 would be "affected" or controlled by the new Act. Least of all did section 2 say that any and all causes of action that this court might later find became "judicially recognizable" after October 3, 1973, were to be controlled by section 221. Even though the court's opinion in the cases at bar declares that the cause of action on the *Bernier-Clark* facts arises when discovered, rather than at the time of harm-causing impact, section 2 of the 1973 statute did *not* say that the new strict liability should then automatically apply in those particular fact circumstances. *See Adams,* 443 A.2d at 942. To find the intent of the 1973 Legislature, we must look at the whole text *and* context of the 1973 enactment, not at just a reconstructed section 2.

Third, beyond *Adams,* the court's opinion in answering question 3 relies upon cases from outside Maine that decide issues entirely different from the question certified to us. All but two of those out-of-state cases are statute-of-limitation cases (*see* at p. 542 n. 7), which applied a discovery rule for determining whether a subsisting cause of action was time-barred; not whether a legislature is likely to have intended to create an additional strict liability cause of action against manufacturers whose products had already completed their harm-causing impact upon users. The equitable and other policy considerations leading a court to apply a discovery rule in order to defer the start of a period of limitations are obviously very different from the public considerations the 1973 Legislature would weigh in deciding the temporal applicability of a cumulative, heightened liability it was imposing on product manufacturers effective October 3, 1973. Note that the 1973 Legislature was *not* cutting off the existing negligence cause of action. Rather, it was creating a second, additional cause of action and we must find *when* the 1973 Legislature intended the second layer of liability to start to apply to defective products.

The judicial lawmaking in adopting a discovery rule [FN3] in the out-of- state cases relied upon by

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the court's opinion involved an equitable balancing of the interests of the competing parties in light of the purposes of statutes of limitation; those purposes "include encouraging promptness in instituting actions, suppressing stale or fraudulent claims, and avoiding inconvenience which may stem from delay when it is practicable to assert rights." *Harig v. Johns-Manville Products Corp.,* 394 A.2d 299, 302 (Md.1978). *See also Raymond v. Eli Lilly & Co.,* 117 N.H. 164, 170, 371 A.2d 170, 174 (1977). It is true that, in creating a new and cumulative cause of action, the 1973 Legislature would also take into account considerations of fairness as between the potential litigants. Those considerations, however, would have little or nothing to do with the rationale underlying statutes of limitation and they weigh ***548** heavily *against,* rather than *for,* imposing a new, heightened liability upon sellers of products that have already in the past had their unrecallable harm-causing impact upon their users.

FN3. Courts do not adopt a discovery rule as the result of determining legislative intent. Rather, "*the discovery rule is a judicial creation,* fashioned to solve a specific problem, namely, whether the law should preclude recovery for an injury that not even a diligent party may reasonably be expected to discover." *Anthony v. Koppers Co.,* 425 A.2d 428, 432 (Pa.Super.Ct.1980) (emphasis added), *reversed on other grounds,* 496 Pa. 119, 436 A.2d 181 (1981).

With exactly as little or much justification as the out-of-state statute-of- limitation cases, our own recent decisions that for the first time applied a discovery rule in certain circumstances could be cited and relied upon directly by the court's opinion here. *See Myrick v. James,* 444 A.2d 987 (Me.1982) (statute-of-limitation discovery rule applied in medical malpractice cases), *overruling Tantish v. Szendey,* 158 Me. 228, 182 A.2d 660 (1962) (injury from surgeon's leaving foreign object in patient's body occurred at time of operation). *See also Anderson v. Neal,* 428 A.2d 1189 (Me.1981) (statute-of-limitation discovery rule applied in legal malpractice case). Citation of those Maine cases would immediately expose, however, the incongruity of looking to judicial decisions involving statutes of limitation for the purpose of divining what the 1973 Legislature intended on a quite different subject. It is true that in negative terms the 1973 Legislature excluded from being affected by section 221 "any cause of action arising prior to the effective date of this Act." P.L. 1973, ch. 466, § 2, *see* n. 1 above. Although that language bears some resemblance to the language of the statutes of limitation involved in *Myrick* and *Anderson* which bar suits commenced more than a prescribed period "after the cause of action accrues," it takes a bold leap to assert that the similar words were intended by the 1973 Legislature to mean the identical thing in two different contexts. Indeed, if we assume *arguendo* that the 1973 Legislature in selecting the "cause of action arising" language had in mind incorporating by reference judge-made statute-of- limitation rules then existing in Maine, the conclusion is mandated that it intended section 221 *not* to apply to the *Bernier-Clark* circumstances. In 1973 *Tantish v. Szendey, supra,* involving a foreign object left in the body after surgery, was the controlling declaration by the Law Court that a cause of action accrues for statute-of-limitation purposes when a wrongful invasion of the person occurs, even though no manifestation or discovery of that wrong occurs until later. [FN4]

FN4. When the 1973 Legislature was enacting section 221, the Maine rule declared by *Tantish v. Szendey* was by no means unique to this state. In fact, the 1971 edition of *Prosser on Torts* recognized that the older or traditional approach was represented by such cases as *Tantish v. Szendey* and that at that time the discovery rule had been extended beyond medical malpractice claims only by "a sprinkling of cases." *Prosser on Torts* § 30 at 144-45 (4th ed. 1971).

Finally, even under the *Adams* formulation and the out-of-state statute-of- limitation cases cited by the court's opinion, section 221 does not apply on the *Bernier-Clark* facts. *Adams* concluded that the 1973 Legislature "intend [ed] the occurrence of an *injury* to be the event to give an injured party" a cause of action under section 221. *Adams v.*

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Buffalo Forge Co., 443 A.2d at 944 (emphasis added). Although the cited out-of-state cases applied a discovery rule to defer the start of the period of limitation, nearly every one expressly recognized that the injured party had in fact suffered *injury* at a time earlier than the time of discovery. *See, e.g., Harig v. Johns- Manville Products Corp.,* 394 A.2d at 305 ("In cases where the initial injury is inherently unknowable, ... the statute of limitations should not begin to run until the plaintiff should reasonably learn of the cause of action"). Those cases applied a discovery rule, regardless of when the *injury* had occurred, on the basis of considerations relevant to the purposes of statutes of limitation. *Id.* at 302. Thus, the cases cited by the court's opinion do not logically support the ascription to the 1973 Legislature of an intent to impose the new strict liability on products that had already prior to 1973 had their full harm-causing impact upon the plaintiff users.

In sum, error in decisional methodology has led the court's opinion to an end result ***549** that, in my view, is diametrically opposed to what both the text and proper context of section 221 show is the most plausible interpretation of the 1973 Legislature's intent on the *Bernier-Clark* facts.

III.

Despite defendant Raymark's argument framed in constitutional terms (at p. 541), I do not view question 3 as asking whether application of section 221 to the *Bernier-Clark* facts would be unconstitutional. That is here a difficult question, and the answer given by *Adams,* based on the facts of *Adams,* 443 A.2d at 943, does not answer the question for *Bernier* and *Clark.* To respond to question 3, however, we need not decide that difficult constitutional question. There is no imperative at work in legislative affairs that impels new statutory causes of action to go to the brink of unconstitutionality. [FN5] On the contrary, by an established canon of statutory construction, legislators are presumed to avoid constitutional problems. *See Maine Milk Producers v. Commissioner of Agriculture,* 483 A.2d 1213, 1218 (Me.1984). Constitutional concerns as well as an innate sense of fairness would lead the 1973 Legislature, I am confident, to limit the new strict liability to situations like *Adams* where the harm-causing impact occurred after section 221 took effect, leaving unchanged a user's cause of action for injuries caused by previous impact by defective products to be governed by the common law of negligence.

FN5. As said in *Miller v. Fallon,* 134 Me. 145, 148, 183 A. 416, 417 (1936), "It does not follow ... that, because the legislature possessed the power to enact a retroactive statute of limitations, ... it did so in the passage of the amendment under consideration."

I would answer question 3 in the negative; 14 M.R.S.A. § 221 does not apply where all inhalation of the asbestos dust that caused the diseases and deaths complained of occurred before October 3, 1973, regardless of when the physical harm from the dust manifested itself or was diagnosed.

516 A.2d 534, 55 USLW 2242, Prod.Liab.Rep. (CCH) P 11,145

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H

Supreme Court of Indiana.

ALLIEDSIGNAL, INC., A.P. Green Industries, Inc., A.W. Chesterton, Inc., Armstrong World Industries, Inc., Asbestos Claims Management Corp., Asbestos Insulating & Roofing, Bondex International, Inc., Borg-Warner Corp., Brake Materials & Parts, Carlisle Corp., Chrysler Corp., Congoleum Corp., Crane Co., Dana Corp., Firestone Tire & Rubber Co., Flexitallic Gasket Co., Flintkote Co., Ford Motor Co., Gaf Corp., Garlock, Inc., General Motors Corp., General Refractories Co., Georgia-Pacific Corp., Hausman, Kaiser Aluminum & Chemical Corp., Kaiser Gypsum Co., Inc., Kelsey-Hayes Co., Lear Siegler Diversified Holding Corp., Mack Trucks, Inc., Mohawk Mfg. & Supply Co., Moog Automotive, Inc., Moog Automotive, McCord Gasket Co., Muncie Reclamation, Navistar International Transportation Corp., Northrup Grumman Corp., Nuturn Corp., Owens Corning, Owens-Illinois, Inc., Pneumo Abex Corp., Rapid American, Rayloc Co., U.S. Gypsum Co., Uniroyal, Inc., Vellumoid, Inc., W.R. Grace & Co.-Conn., Appellants (Defendants Below),
v.
Shirley OTT, Appellee (Plaintiff Below).

No. 02S04-0111-CV-599.

March 25, 2003.
Rehearing Denied June 9, 2003.

Wife brought wrongful death claims against manufacturers of products containing asbestos. Manufacturers moved to amend answers by adding nonparties, some of whom had filed for bankruptcy. The Superior Court, Allen County, Stanley A. Levine, J., denied the motion. Manufacturers appealed. The Court of Appeals, 774 N.E.2d 82, Vaidik, J., reversed and remanded. Manufacturers sought interlocutory appeal. The Supreme Court, Sullivan, J., held that: (1) product liability statute of repose did not violate state Right to Remedy Clause (overruling *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382), and (2) statute of repose for commercial asbestos-related claims did not violate prohibition against unequal treatment.

Reversed and remanded.

Dickson, J., dissented and filed a separate opinion, in which Rucker, J., concurred.

West Headnotes

[1] Statutes ⚷206
361k206 Most Cited Cases

When reviewing a statute, courts give effect and meaning to every word.

[2] Statutes ⚷181(1)
361k181(1) Most Cited Cases

The court's primary goal when construing the meaning of a statute is to determine the Legislature's intent.

[3] Statutes ⚷188
361k188 Most Cited Cases

Giving deference to legislative intentions, an unambiguous statute is interpreted to mean what it plainly states, and its plain and obvious meaning may not be enlarged or restricted.

[4] Limitation of Actions ⚷31
241k31 Most Cited Cases

Wife's negligence action against manufacturers of asbestos-containing products was governed by ten-year limitations period for products liability actions, rather than ten-year statute of repose applicable to asbestos liability claims. West's A.I.C. 34-20-3-1(b), 34-20-3-2.

[5] Limitation of Actions ⚷95(5)
241k95(5) Most Cited Cases

With respect to asbestos claims brought under the ten-year limitations period for products liability claims, a cause of action accrues at that point at which a physician who is reasonably experienced at making such diagnoses could have diagnosed the individual with an asbestos-related illness or disease. West's A.I.C. 34-20-3-1(b).

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[6] Constitutional Law ⚷321
92k321 Most Cited Cases

[6] Limitation of Actions ⚷4(2)
241k4(2) Most Cited Cases

Ten-year product liability statute of repose did not violate state Right to Remedy Clause that provided that every person, for injury done to him in his person, property, or reputation, will have remedy by due course of law, as applied to wife whose husband died of lung cancer, allegedly caused by asbestos-containing products; wife had additional remedies available to her. (overruling *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382) West's A.I.C. Const. Art. 1, § 12; West's A.I.C. 34-20-3-1(b).

[7] Constitutional Law ⚷205(2)
92k205(2) Most Cited Cases

[7] Limitation of Actions ⚷4(2)
241k4(2) Most Cited Cases

Ten-year statute of repose for commercial asbestos-related claims did not violate prohibition against unequal privileges or immunities, for purposes of negligence action brought by wife whose husband died of lung cancer allegedly caused by asbestos-containing products; the statute created a distinction between asbestos victims and other victims under the product liability act, and wife did not suffer any cognizable harm from the distinction, as asbestos plaintiffs were subject to the same statute of repose as other products liability claims with respect to all defendants other than persons who mined and sold commercial asbestos and certain bankruptcy funds. West's A.I.C. Const. Art. 1, § 23; West's A.I.C. 34-20-3-2.
***1069** Michael A. Bergin, Julia Blackwell Gelinas, Daniel M. Long, Indianapolis, IN, Attorneys for AlliedSignal, Inc.

R. Troy Mulder, Janelle K. Linder, Indianapolis, IN, Attorneys for McCord Gasket Co.

Douglas King, James M. Boyers, Indianapolis, IN, Attorneys for Bondex International, Inc.

Donald Orzeske, Jennifer Blackwell, Indianapolis, IN, Attorney for Borg- Warner Corp.

Knight Anderson, Indianapolis, IN, Attorney for A.W. Chesterton.

Monika Talbot, Indianapolis, IN, Attorney for Ford Motor Co.

Jon L. Williams, Indianapolis, IN, Janet E. Golup, Philadelphia, PA, Attorneys for Amicus Curiae Asbestos Corporation Limited and Bell Asbestos Mines, Ltd.

George T. Patton, Jr., Stephanie F. Holtzlander, Bryan H. Babb, Indianapolis, IN, Attorneys for Amicus Curiae Indiana Legal Foundation.

Michael R. Fruehwald, Andrew J. Detherage, Shelese Emmons, Indianapolis, IN, Attorneys for Amicus Curiae Indiana Manufacturers Association and Indiana Chamber of Commerce.

Neal Lewis, Orland, IN, Robert E. Paul, Philadelphia, PA, Attorneys for Appellee.

ON INTERLOCUTORY APPEAL

SULLIVAN, Justice.

Our state legislature has prescribed general rules governing lawsuits alleging injuries caused by products and special rules in asbestos cases. This opinion analyzes the interaction of these rules and their constitutionality.

Background

Jerome Ott was diagnosed with lung cancer in August 1998. He and his wife, Shirley Ott, filed suit against Defendants, alleging that his lung cancer had been caused by exposure to asbestos-containing products while he was employed at the following times and locations: American Supply (1949-51); International Harvester (1951-53); Transport Motor Express (1953-54); and Jerry Ott Motors (1955-***1070** 83). Jerome Ott died in January 2000. The complaint was then amended to allege that his death had been caused by the same exposure to asbestos.

The Indiana General Assembly has enacted two statutes that limit the period of time within which persons can file lawsuits alleging injuries caused by

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products. One of these statutes, Ind.Code § 34-20-3-1, generally applies to product liability claims; we will refer to this statute in this opinion as "Section 1." The second statute, Ind.Code § 34-20-3-2, specifically applies to at least some asbestos liability claims; we will refer to it as "Section 2." (We note that prior to recodification in 1998, Sections 1 and 2 appeared at Ind.Code § 33-1-1.5-5 and § 33-1-1.5-5.5, respectively.)

This opinion will parse these sections in some detail. For purposes of this *Background* section, it is sufficient to say that Section 2 gives plaintiffs more leeway in filing claims than does Section 1. The Defendants in this case argue that Section 2 only applies to a limited class of defendants and that they are not within that class. As such, they contend, the Otts must proceed against them under the more restrictive Section 1. The Otts respond that Section 2 allows them to proceed against these Defendants and that if it does not, then Section 1 violates Indiana Constitution art. I, § 12, [FN1] as applied to asbestos plaintiffs, and Section 2 violates art. I, § 23. [FN2]

FN1. Ind. Const. art. I, § 12 provides in part: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."

FN2. Ind. Const. art. I, § 23 provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

The trial court agreed with the Defendants that Section 2 did not apply to them but then agreed with the Otts that because it did not, Section 1 was unconstitutional.

Defendants then secured certification from the trial court of this interlocutory appeal. We held an extended oral argument on May 16, 2002.

At the same time that this case was proceeding, four other cases raising the same constellation of issues were presented to us. *Harris v. A.C. & S., Inc.,* 766 N.E.2d 383 (Ind.Ct.App.2002); *Jurich v. Garlock, Inc.,* 759 N.E.2d 1066 (Ind.Ct.App.2001); *Allied Signal, Inc. v. Herring,* 757 N.E.2d 1030 (Ind.Ct.App.2001); *Black v. ACandS, Inc.,* 752 N.E.2d 148 (Ind.Ct.App.2001). In three of these cases, the respective panels of the Court of Appeals held that Section 2 applied to the defendants and so did not have to reach the constitutional issue. *Harris,* 766 N.E.2d at 391; *Herring,* 757 N.E.2d at 1035-37; *Black,* 752 N.E.2d at 154-55. In *Jurich,* the Court of Appeals panel found that Section 2 did not apply to the defendants but it found Section 1 unconstitutional. *Jurich,* 759 N.E.2d at 1070-74, 1077. In summary, the plaintiffs prevailed below in all five of these cases--in three on statutory grounds and in two on constitutional grounds.

Finding that the trial court in this case and the Court of Appeals in *Harris, Jurich, Herring,* and *Black* incorrectly analyzed these issues at least in part, we have accepted jurisdiction in each. (We resolve *Harris,* [FN3] *Jurich,* [FN4] *Herring,* [FN5] and *Black* [FN6] in separate opinions today.)

FN3. *Harris v. A.C. & S.,* 785 N.E.2d 1087 (Ind.2003).

FN4. *Jurich v. Garlock, Inc.,* 785 N.E.2d 1093 (Ind.2003).

FN5. *AlliedSignal, Inc., et al. v. Herring,* 785 N.E.2d 1090 (Ind.2003).

FN6. *Black v. A.C. & S., Inc.,* 785 N.E.2d 1084 (Ind.2003).

***1071** *Discussion*

We will work our way through the statutory issues, turn to the two state constitutional claims, and then finish with a discussion of our Court's decision in *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382 (Ind.1989).

I

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Section 1 provides:

[A] product liability action must be commenced:

(1) within two (2) years after the cause of action accrues; or

(2) within ten (10) years after the delivery of the product to the initial user or consumer.

However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Section 1(b). Section 2 excepts certain asbestos-related actions from the operation of Section 1's ten-year statute of repose. A product liability action based on personal injury, disability, disease, or death resulting from exposure to asbestos may be commenced within two years after the action accrues, without regard to the ten-year statute of repose. Section 2(a). For purposes of this section, "accrual" is defined as the date when the injured person knows that he or she has an asbestos-related disease or injury. Section 2(b). The exception applies only to:

(1) persons who mined and sold commercial asbestos; and

(2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.

Section 2(d).

In summary, the Indiana legislature has outlined the specific time requirements for at least some asbestos-related negligence actions in Section 2, a section distinct from the statute of limitations and period of repose for all other product liability actions outlined in Section 1. While product liability actions under Section 1 have a two-year statute of limitations and a ten-year statute of repose, asbestos-related actions under Section 1 enjoy a different timetable. When a product liability action qualifies under Section 2, there is no firm statute of repose. Rather, a lawsuit must be commenced within two years "after the cause of action accrues," which is defined as "the date when the injured person knows that the person has an asbestos related disease or injury." Sections 2(a) & (b).

The crucial language for our purposes arises in Section 2(d)(1). There the Legislature provided that Section 2 only applies if the defendant is a "person [ ] who mined and sold commercial asbestos." Defendants who do not fall within this classification are entitled to the protection offered by the ten- year statute of repose in Section 1. As such, Defendants argue vigorously that they are not "persons who mined and sold commercial asbestos"; the Otts argue that Defendants are.

[1][2][3] When reviewing a statute, courts give effect and meaning to every word. *Spaulding v. Int'l Bakers Servs., Inc.,* 550 N.E.2d 307, 309 (Ind.1990). This Court's primary goal when construing the meaning of a statute is to determine the Legislature's intent. ***1072***Smith v. State,* 675 N.E.2d 693, 696 (Ind.1996), *appeal after remand,* 695 N.E.2d 909 (Ind.1998) (citing *Freeman v. State,* 658 N.E.2d 68, 70 (Ind.1995)). Given such deference to legislative intentions, an unambiguous statute is interpreted to mean what it plainly states, and its plain and obvious meaning may not be enlarged or restricted. *Ind. Dep't of State Rev. v. Horizon Bancorp,* 644 N.E.2d 870, 872 (Ind.1994).

A

We focus first on the expression "persons who mined and sold." The Defendants argue that to fall within this class of defendants, a person must *both* mine *and* sell. According to the Defendants, because none of them mine asbestos, they do not fall within this class. Prior to *Black,* this was the position taken by several panels of the Court of Appeals and by now-Chief Judge McKinney. *Novicki v. Rapid-American Corp.,* 707 N.E.2d 322, 324 (Ind.Ct.App.1999); *Sears Roebuck and Co. v. Noppert,* 705 N.E.2d 1065, 1068 (Ind.Ct.App.1999) , *trans. denied,* 726 N.E.2d 300 (Ind.1999); *Roberts v. A.C. & S., Inc.,* 1998 U.S. Dist. LEXIS 22635, at *12-13 (S.D.Ind.1998). The Otts make several arguments in response.

First, they say that it is more likely that the Legislature meant the phrase to be read "persons who mined and persons who sold" than "persons who both mined and sold." This is in part because the latter reading renders the words "and sold" superfluous since it is unlikely that there are any entities that mine but do not sell asbestos.

Second, the Otts argue that Section 2 was clearly enacted in recognition of the long latency period

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associated with asbestos-related illnesses. It is inconsistent with that recognition, they contend, to limit claims to the relatively few companies that both mine and sell asbestos, exempting all others that disseminate asbestos and asbestos-containing products into the marketplace.

Third, the Otts maintain that the Defendants' interpretation of "persons who mine and sell" cannot be harmonized with subsection (d)(2), quoted *supra,* that permits lawsuits initiated outside of the ten-year statute of repose to proceed against "funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims." The Otts argue that the Legislature could not have meant for viable companies that sold asbestos but did not mine it to be excluded from liability, but those same companies, if in bankruptcy with the funds described in section (d)(2), to be subject to claims.

We will withhold resolution of this debate for the moment.

B

Regardless of the outcome of the mined "and/or" sold debate, a defendant must sell "commercial asbestos" to be subject to Section 2. While the Otts argue that the expression "commercial asbestos" means any asbestos-containing products, we are persuaded by Judge Barnes's analysis on this point in *Jurich:*

> "Commercial" has been defined as "[o]f, relating to, or being goods, often unrefined, produced and distributed in large quantities for use by industry." American Heritage College Dictionary 280 (3d ed.2000). Jurich cites us to 40 C.F.R. § 61.141 to support her argument that "commercial asbestos" includes any asbestos-containing product. However, our reading of the entirety of this Environmental Protection Agency regulation leads us to the opposite conclusion. The regulation states that "[c]ommercial asbestos means any material containing asbestos that is extracted from ore and ***1073** has value because of its asbestos content." Elsewhere, there are clear indications that the EPA considered "commercial asbestos" to be a bulk product separate from asbestos-containing products, for example: "Fabricating means any processing ... *of a manufactured product that contains commercial asbestos* ...." Id. (emphasis added). Also, "[m]anufacturing means the combining of commercial asbestos ... with any other material(s), including commercial asbestos, *and the processing of this combination into a product.*" Id. (emphasis added). Thus, we agree with *Sears Roebuck and Co. v. Noppert,* 705 N.E.2d 1065, 1068 (Ind.Ct.App.1999), *trans. denied,* to the extent that panel believed "commercial asbestos" did not refer to sellers of "products which contained some components composed of asbestos." Here, the defendants sold asbestos-containing products, not "commercial asbestos," which we conclude refers to either "raw" or processed asbestos that is incorporated into other products. The legislature did not intend [Section 2] to apply to these defendants.

Jurich, 759 N.E.2d at 1070-71. *Accord Roberts,* 1998 U.S. Dist. LEXIS 22635, at *11-12.

C

[4] Our resolution of the "commercial asbestos" issue also guides our decision on the mined "and/or" sold issue. While we think that the arguments made by the Otts as to why all sellers, and not just those who are both miners and sellers, are subject to Section 2 are plausible in isolation, when read together with the "commercial asbestos" requirement we reach the opposite result. We think that the language used by the Legislature represents its conscious intent to subject to Section 2 only those persons who produce raw asbestos--"persons who mine[ ] and s[ell] commercial asbestos"--and leave those who sell asbestos-containing products within the ambit of Section 1.

II

We turn now to an analysis of whether the statutory scheme we have been discussing meets constitutional muster. The Otts contend that, if the statute is construed in the manner we have concluded in part I that it should be, *supra,* it violates both art. I, § 12, and art. I, § 23, of the Indiana Constitution. The trial court agreed. [FN7]

FN7. In *Jurich v. Garlock, Inc.,* 759

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N.E.2d 1066 (Ind.Ct.App.2001), the Court of Appeals found the statute violated art. I, § 12, as applied. *Id.* at 1071-1077. The Court properly found it unnecessary to address art. I, § 23. *Id.* at 1071.

A

Our State Bill of Rights famously provides:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.

Ind. Const. art I, § 12. As discussed *supra,* Section 1 requires a product liability action to be commenced within ten years after the delivery of the product to the initial user or consumer. The trial court acknowledged that this ten-year "statute of repose" was constitutional on its face, see *Dague v. Piper Aircraft Corp.,* 275 Ind. 520, 530, 418 N.E.2d 207, 213 (1981); see also *State v. Rendleman,* 603 N.E.2d 1333, 1336-37 (Ind.1992); but found it to be unconstitutional as applied to the Otts.

In reaching its conclusion, the trial court found our decision in *Martin v. Richey,* 711 N.E.2d 1273 (Ind.1999), controlling. In *Martin,* we held that art. I, § 12,

> ***1074** preclude[s] the application of a two-year medical malpractice statute of limitations when a plaintiff has no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period because, given the nature of the asserted malpractice and the resulting injury or medical condition, plaintiff is unable to discover that she has a cause of action. Stated another way, the medical malpractice statute of limitations is unconstitutional as applied when plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's access to courts and ability to pursue an otherwise valid tort claim.

711 N.E.2d at 1284. The trial court found Mr. Ott's situation to be "virtually identical" to that at issue in *Martin:*

> [A]sbestos caused cancer takes between ten (10) and twenty-five (25) years to manifest itself. Even with the utmost amount of diligence Mr. Ott would not have been able to meet the time restrictions of [Section 1]. No one would have. Just like Ms. Martin, Mr. Ott had an accrued claim, albeit unrecognizable, and was "in the position of having the claim but no practical means of asserting it."

(Appellants' App. at 113)(footnotes and citation omitted).

We think that this analysis paints with too broad a brush. In *Jurich,* Judge Barnes begins with a framework for his art. I, § 12, analysis that we think is helpful here:

> There are at least three contexts in which the statute of repose could be considered in this case. First, is the statute constitutional as applied to a plaintiff who is exposed to asbestos from and injured by a product more than ten years after that product's initial delivery? Second, is the statute constitutional as applied to a plaintiff who is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed? Third, in the absence of evidence of the length of time between a product's initial delivery and an injury ..., can the statute constitutionally be applied to a plaintiff who was injured by a product before [Section 1's] passage?

Jurich, 759 N.E.2d at 1071.

We are constrained to observe that the trial court's analysis does not take into account the first of these three scenarios, *i.e.,* where the first exposure to asbestos does not occur until more than ten years after the asbestos- containing product's initial delivery. We see nothing in the trial court's findings that indicate one way or the other when the plaintiff's first exposure to asbestos occurred relative to the asbestos-containing product's initial delivery. In the event that this period exceeded ten years, the relevant defendants would be protected by the statute of repose. Application of the statute of repose would be constitutional under art. I, § 12: the plaintiff would be in exactly the same position as the plaintiff injured in the plane crash in *Dague* or by the loader in *McIntosh v. Melroe Co.,* 729 N.E.2d 972 (Ind.2000), both cases where the statute of repose was upheld.

We have a less definitive answer to the second of

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Judge Barnes's scenarios-- where a plaintiff is injured by a product within ten years of its initial delivery, but who has neither knowledge of nor any ability to know of that injury until more than ten years have passed. We agree with the trial court and Judge Barnes that the rule of *Martin v. Richey* is implicated. But it is only implicated where the plaintiff's ***1075** cause of action has accrued within the ten-year period.

Here it is difficult to reconcile science and law. On the one hand, injury for this purpose does not occur upon mere exposure to (or inhalation of) asbestos fibers. There is substantial authority on this point. [FN8] On the other hand, we recognize that injury may well occur before the time that it is discovered. As Judge Barnes says, "the very point of" *Martin v. Richey* is that the constitution required access to courts where "she could *not* have known or discovered that she was the victim of malpractice within [the applicable] time frame." *Jurich,* 759 N.E.2d at 1074 (emphasis in original).

FN8. *See Burns v. Jaquays Mining Corp.,* 156 Ariz. 375, 752 P.2d 28, 30 (Ct.App.1987) (citing *Schweitzer v. Consolidated Rail Corp.,* 758 F.2d 936, 942 (3d Cir.1985), *cert. denied,* 474 U.S. 864, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985)) ("[S]ubclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law."); *Bernier v. Raymark Indus., Inc.,* 516 A.2d 534, 542 (Me.1986) ("[I]nhalation alone is insufficient to give rise to [a judicially recognizable] claim.... The actionable harm is the manifestation of disease in the body, not the exposure to the potentially hazardous substance...."); *Simmons v. Pacor, Inc.,* 543 Pa. 664, 674 A.2d 232, 237 (1996) ("[A]symptomatic pleural thickening is not a compensable injury which gives rise to a cause of action.... [N]o physical injury has been established that necessitates the awarding of damages...."); *Locke v. Johns-Manville Corp.,* 221 Va. 951, 275 S.E.2d 900, 905 (1981) ("Simply put, legally and medically there was no injury upon inhalation of defendants' asbestos fibers."). To the extent that *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382 (Ind.1989), holds to the contrary, it is overruled.

[5] We hold that, with respect to asbestos claims under Section 1, a cause of action accrues at that point at which a physician who is reasonably experienced at making such diagnoses could have diagnosed the individual with an asbestos-related illness or disease. *See e.g., Neubauer v. Owens-Corning Fiberglas Corp.,* 686 F.2d 570, 577 (7th Cir.1982) (A "cause of action accrues when the asbestos-caused disease becomes diagnosable--e.g., provable by medical evidence in court."). In this regard, we disapprove Judge Barnes's and the trial court's formulations to the extent that they hold that a cause of action accrues when exposure to asbestos occurs even though a disease does not manifest itself until many years later. In our view, it is only when the disease has actually manifested itself (and therefore could be diagnosed by a reasonably experienced physician) that the cause of action accrues. *Jurich,* 759 N.E.2d at 1075. Thus, *Martin* is implicated only where a cause of action in fact accrues (*i.e.,* a reasonably experienced physician could have diagnosed the plaintiff with an asbestos-related illness or disease) within the ten-year statute of repose, yet the potential plaintiff had no reason to know of the diagnosable condition until the ten-year period had expired.

Based on the foregoing, the statutory scheme might be unconstitutional as applied to the plaintiff if a reasonably experienced physician could have diagnosed Jerome Ott with an asbestos-related illness or disease within the ten-year statute of repose, yet Ott had no reason to know of the diagnosable condition until the ten-year period had expired. We direct the trial court to examine this possibility on remand.

This brings us to the third of Judge Barnes's scenarios--whether, in the absence of evidence of the length of time between a product's initial delivery and an injury, Section 1 can be constitutionally applied to a plaintiff who was injured by a product before Section 1's passage. Judge Barnes argues that such a plaintiff had a ***1076** vested right to pursue such a claim that the

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Legislature could not take away.

Justice Boehm's plurality opinion in *McIntosh* discussed the power of the Legislature to abolish common law remedies. His opinion conclusively demonstrates, we believe, the Legislature's power to do so and we will not repeat his analysis here. *See McIntosh,* 729 N.E.2d at 977-78. But Judge Barnes acknowledges this and makes a slightly different point. The "key distinction," he says, is that the asbestos plaintiff in *Jurich* had "a vested right, not in a rule of common law in the abstract, like the McIntoshes, but because he had been injured by defendant's products at a time when Indiana courts recognized common law product liability actions without an equivalent to the later-enacted ... statute of repose and thus without reference to the length of time a product had been in the stream of commerce." *Jurich,* 759 N.E.2d at 1076.

[6] First, we point out that the statute of repose has been in effect since July 1, 1978. *See* 1978 Ind. Acts. 141, § 28. Even if Judge Barnes is correct, a cause of action would have to accrue (*i.e.,* a reasonably experienced physician would have to have been able to diagnose an asbestos-related illness or disease) before July 1, 1978, for his distinction to make a difference.

But, second, a plaintiff's right to pursue such a claim may in some circumstances be subject to changes in common law or statute. For example, a plaintiff's ability to assert products claims was expanded under the common law, *see, e.g., Cornette v. Searjeant Metal Prods., Inc.,* 147 Ind.App. 46, 258 N.E.2d 652, 656 (1970) (adopting Restatement of Torts (Second) § 402A), and we have held it within the purview of the Legislature to modify or abrogate that expansion. *McIntosh,* 729 N.E.2d at 977-78.

Art. I, § 12, provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, ... shall have remedy by due course of law." Section 1, as we have previously held, does not violate this provision. Furthermore, asbestos plaintiffs have additional remedies under Section 2 where they may pursue miners and sellers of commercial asbestos [FN9] and asbestos bankruptcy funds without regard for Section 1's statute of repose. [FN10] Thus, even if an asbestos plaintiff's claim would not accrue within the normal ten-year period of repose, courts remain open under Section 2.

FN9. A plain reading of the text of the statute demonstrates that plaintiffs who are injured by asbestos released from asbestos-containing products may still pursue the original entity that mined and sold the raw asbestos used to make the asbestos-containing product even if they are no longer able to pursue the manufacturer of the product. The use of "asbestos" in Section 2(a) demonstrates that all asbestos-victims potentially have claims that fall under the exception since all were injured by asbestos, whether in its raw form or released from a manufactured product. Thus, both groups have product liability claims that may fall under Section 2, provided the defendants in the respective actions are miners and sellers of the original, raw asbestos.

FN10. One amicus argues that asbestos plaintiffs have additional remedies under the Worker's Occupational Diseases Compensation Act, Ind.Code § 22-3-7-2, and the Residual Asbestos Injury Fund, Ind.Code § 22-3-11-1. *See* Br. of Amicus Curiae Indiana Legal Foundation at 19- 22.
As we read these materials, however, these remedies seem modest at best.

B

The trial court also found the statute of repose violative of Indiana Constitution art. I, § 23, which provides:

> The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the ***1077** same terms, shall not equally belong to all citizens.

In determining whether a statute complies with or violates this provision, we use the two prong test set out in *Collins v. Day,* 644 N.E.2d 72, 80 (Ind.1994) . However, before we can determine whether the legislative classification is permissible under this test, we need to identify the legislative classification

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at issue. We think the constitutional claim here, reduced to its essentials, is that asbestos victims in Indiana are bound by the statute of repose governing product liability actions when suing particular categories of defendants but are not so constrained when suing others. Thus, the statute creates a distinction between asbestos victims and other victims under the product liability act.

[7] While it is true that such a distinction is created, we find it unnecessary to determine whether the distinction is constitutionally permissible because the classification resulting from the distinction of which the plaintiffs complain, as we have seen, works in favor of asbestos plaintiffs. [FN11] *See Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347-48, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.... The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."). Asbestos plaintiffs are subject to the same statute of repose as other products liability claims with respect to all defendants other than persons who mine and sell commercial asbestos and certain bankruptcy funds. With respect to the latter two classes of defendants, asbestos plaintiffs are not subject to a statute of repose at all. To the extent there is any art. I, § 23 defect, asbestos plaintiffs do not suffer any cognizable harm.

FN11. One amicus argues that Section 2 is unconstitutional as applied to miners of raw asbestos. See Br. of Amici Curiae Asbestos Corporation Limited and Bell Asbestos Mines, Ltd. at 5-17. No party to the current litigation is a miner of raw asbestos. Consequently, given that such a claim does not impact any party in the present case, we will not address Section 2's constitutionality as applied to miners at this time.

III

We believe we should conclude with a brief discussion of *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382 (Ind.1989). In *Covalt,* this Court held that Section 1 did not apply to asbestos cases given the long latency periods for asbestos-related diseases and a resulting inability to discover the injury prior to the expiration of the period of repose. *Id.* at 385-87.

Section 2 was adopted by the Legislature while *Covalt* was pending, *i.e., Covalt* was decided under prior law. *Id.* at 383 n. 1. The rationale for the *Covalt* opinion was that the Court "[could not] say that the Legislature intended the ten year statute of repose to bar claims such as this one, where the injury is the result of protracted exposure to a hazardous foreign substance." *Id.* at 386. The adoption of Section 2 renders that analysis obsolete.

In addition, there are key factual differences between *Covalt* and the present case. *Covalt* involved a plaintiff who worked with raw asbestos. 543 N.E.2d at 383. We stated in *Covalt* that the applicability of the holding in that case was limited to "the precise factual pattern presented," which involved exposure to raw asbestos fibers. *Id.* at 387. Thus, *Covalt* can be read as consistent with the effect of Section 2 in that it relieved asbestos plaintiffs from the statute of repose in a lawsuit against a supplier of commercial asbestos. To the extent that *Covalt* is ***1078** inconsistent with today's opinion, it is overruled.

Conclusion

Having previously granted transfer pursuant to Indiana Appellate Rule 56(A), we now reverse the judgment of the trial court. We remand this matter to the trial court for further proceedings consistent with this opinion.

SHEPARD, C.J., and BOEHM, J., concur. DICKSON, J., dissents with separate opinion, in which RUCKER, J., concurs.

DICKSON, Justice, dissenting.

I strongly disagree with the majority's decision to reverse the trial court's denial of summary judgment in this case. In particular, I believe that the majority is incorrect in: (1) limiting the statutory term "commercial asbestos" to mean only raw

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asbestos; (2) construing "mined and sold" contrary to legislative intent; (3) failing to find a violation of Article 1, Section 12, of the Indiana Constitution; (4) failing to find a violation of Article 1, Section 23, of the Indiana Constitution; and (5) overruling rather than following *Covalt v. Carey Canada, Inc.*

1. Commercial Asbestos

Indiana Code § 34-20-3-2 [FN12] (hereinafter "Section 2") provides an exemption from the general products liability periods of limitation and repose by generally permitting actions for injuries from exposure to asbestos to be commenced within two years after the injured person knows that he or she has an asbestos-related disease or injury. The majority construes the word "commercial" in subsection (d)(1) to limit Section 2's exception to apply only as to claims against defendants "who produce raw asbestos," but not to allow the delayed filing as to defendants "who sell asbestos-containing products." Maj. Op. at 1073.

FN12. Indiana Code § 34-20-3-2 provides:
(a) A product liability action that is based on:
(1) property damage resulting from asbestos; or
(2) personal injury, disability, disease, or death resulting from exposure to asbestos;
must be commenced within two (2) years after the cause of action accrues. The subsequent development of an additional asbestos related disease or injury is a new injury and is a separate cause of action.
(b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.
(c) A product liability action for property damage accrues on the date when the injured person knows that the property damage has resulted from asbestos.
(d) This section applies only to product liability actions against:
(1) persons who mined and sold commercial asbestos; and
(2) funds that have, as a result of bankruptcy proceedings or to avoid bankruptcy proceedings, been created for the payment of asbestos related disease claims or asbestos related property damage claims.
(e) For the purposes of IC 1-1-1-8, if any part of this section is held invalid, the entire section is void.
(f) Except for the cause of action expressly recognized in this section, this section does not otherwise modify the limitation of action or repose period contained in section 1 of this chapter.

In construing a statute, "our primary goal is to determine and effect legislative intent." *Freeman v. State,* 658 N.E.2d 68, 70 (Ind.1995). To give effect to the legislature's intent, we do not consider a statutory provision in isolation but rather consider the statute as a whole and interpret an individual provision so as to harmonize it with other sections of the enactment. ***1079***Indiana Dep't of Pub. Welfare v. Payne,* 622 N.E.2d 461, 466 (Ind.1993); *see also Saylor v. State,* 765 N.E.2d 535, 564 (Ind.2002); *Robinson v. Wroblewski,* 704 N.E.2d 467, 474 (Ind.1998); *Douglas v. State,* 663 N.E.2d 1153, 1156 (Ind.1996); *Hinshaw v. Bd. of Comm'rs of Jay County,* 611 N.E.2d 637, 639 (Ind.1993). "Where statutory provisions are in conflict, no part of a statute should be rendered meaningless but should be reconciled with the rest of the statute." *Robinson,* 704 N.E.2d at 474.

The majority's conclusions in Part I of its opinion are grounded upon its construction of the word "commercial" found in subsection (d)(1) of Section 2. In contrast, however, other provisions in Section 2 demonstrate the legislature's intent to grant Section 2's exemption to all persons injured by exposure to asbestos, regardless of its source. Subsection (a) identifies product liability actions based on "personal injury, disability, disease, or death resulting from exposure to asbestos." Subsection (b) refers generally to any person who "has an asbestos related disease or injury." Section (d)(2) applies to "payment of asbestos related disease claims." These references are in stark contrast to the majority's interpretation of subsection (d)(1) that restricts Section 2's operation to only those persons whose asbestos-related injuries result from exposure to raw asbestos. Considering Section 2 as a whole to ascertain

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legislative intent does not support the majority's decision to deny the benefit of Section 2 to persons whose asbestos-related injuries result from asbestos-containing products, as distinguished from raw asbestos.

On the other hand, appellate courts generally presume that all statutory language is used intentionally. *Preston v. State,* 735 N.E.2d 330, 333 (Ind.Ct.App.2000). Each word should be "given effect and meaning where possible, and no part of the statute is to be held meaningless if it can be reconciled with the rest of the statute." *Allied Signal, Inc. v. Herring,* 757 N.E.2d 1030, 1035 (Ind.Ct.App.2001). Thus, if possible, and if it can be reconciled with the rest of Section 2, we should infer that the insertion of the adjective "commercial" was likely intended to distinguish defendants who produced "commercial asbestos" from those who produced "asbestos." It is altogether unclear, however, what distinction was intended. The Indiana General Assembly did not define the term "commercial" as used in Section 2.

Even the Court of Appeals opinion that the majority finds persuasive, *Jurich v. Garlock,* 759 N.E.2d 1066 (Ind.Ct.App.2001), concludes "commercial asbestos" refers to "either 'raw' *or processed asbestos that is incorporated into other products.*" *Id.* at 1071 (emphasis added). The majority quotes the Environmental Protection Agency regulation that defines "commercial asbestos" as "*any material containing asbestos* that is extracted from ore and *has value because of its asbestos content.*" Maj. Op. at 1072 (*quoting id., quoting* 40 C.F.R. § 61.141 (emphasis added)). By including processed asbestos incorporated into other products, this is a much broader definition than the majority's view that the term is restricted to raw asbestos only. Maj. Op. at 1073.

I remain convinced that, looking to the whole of Section 2 to determine the legislature's intent, the phrase "commercial asbestos" includes asbestos incorporated into products intended for commerce. To construe "commercial" to limit the Section 2 exception only to claims against producers of raw asbestos is inharmonious and irreconcilable with the remainder of Section 2.

2. "Mined and Sold"

Guided by its belief that "commercial asbestos" in Section 2 means "raw asbestos," the majority concludes that the legislature intended Section 2 to permit delayed ***1080** filing only as to claims against persons who both mine and sell raw asbestos. Because the majority's interpretation of "commercial" is questionable, the construction of the phrase "mined and sold" as used in Section 2 becomes critical.

As previously noted, Section 2 provides an exemption from the general products liability periods of limitation and repose by generally permitting actions for injuries from exposure to asbestos to be commenced within two years after the injured person knows that he or she has an asbestos-related disease or injury. Subsection 2(d)(1) states: "This section applies only to product liability actions against ... persons who *mined and sold* commercial asbestos...." (Emphasis added.) The plaintiff urges that the legislature intended the phrase to mean persons who mined *and* persons who sold. The defendant argues that the phrase was meant to limit Section 2 only to actions against persons who *both* mined and sold.

In construing an enactment, the legislative intent will prevail over the literal import of the words. *FGS Enterprises, Inc. v. Shimala,* 625 N.E.2d 1226, 1228 (Ind.1993). The strict literal or selective meaning of individual words should not be overemphasized, but rather the intent must be ascertained from the enactment as a whole. *Shell Oil Co. v. Meyer,* 705 N.E.2d 962, 970 (Ind.1998). While the literal language favors "both mined and sold," there is compelling evidence that the legislature intended to mean "persons who mined and persons who sold." First, as noted by the majority, interpreting the phrase to mean "both mined and sold" renders the words "and sold" superfluous "since it is unlikely that there are any entities that mine but do not sell asbestos." Maj. Op. at 1072. Second, because the obvious purpose of Section 2 is to provide for fairness due to the long latency period associated with asbestos-related illnesses, it is inconsistent for it to apply only to claims against the relatively few companies that both mine and sell asbestos, and essentially to preclude actions against all others that disseminate asbestos and asbestos-containing products. Third, the "both mined and sold" interpretation would prohibit delayed filing of actions against solvent

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companies that sold but did not mine asbestos, but not against such companies in bankruptcy with the funds described in subsection (d)(2). The plaintiff argues that the legislature did not likely intend to thus "immunize solvent companies and place greater burdens on the insolvent ones." Br. of Appellee at 13-14.

In *Black v. ACandS, Inc.,* 752 N.E.2d 148 (Ind.Ct.App.2001), our Court of Appeals thoughtfully addressed the construction of "mined and sold." Writing for the Court, Judge Mattingly-May noted that a reviewing court may "make minor substitutions of words where necessary to give vitality to the legislative intent." *Id.* at 153 (*quoting Dague v. Piper Aircraft Corp.,* 275 Ind. 520, 526, 418 N.E.2d 207, 211 (1981)). She pointed out that the *Dague* court itself, in construing a product liability statute of repose, modified the enacted language by changing the disjunctive "or" to the conjunctive "and" because to literally construe the language would "fl[y] in the face of a clearly contrary legislative intent." *Id.* Judge Mattingly-May persuasively explained:

> The strict literal interpretation urged upon us by the defendants would lead to the illogical result that "asbestos-related actions" were limited to those actions brought against miners of asbestos, and did not include actions against manufacturers and sellers if they did not also mine the product. Because the statute of repose is concerned not with the introduction of the asbestos into the marketplace but with exposure to the hazardous ***1081** foreign substance that causes disease, an interpretation of the statute that permits or denies recovery based solely on the nature of the entity that introduced the asbestos into the marketplace cannot stand. We believe the legislature could not have intended to permit actions against an entity that both mined and sold asbestos but to preclude actions against entities that introduced asbestos into the marketplace as miners only or as sellers only.

Id. at 154 (internal citation omitted). This analysis has since been noted with approval in *Harris v. A.C. & S., Inc.,* 766 N.E.2d 383, 391 (Ind.Ct.App.2002); *Jurich,* 759 N.E.2d at 1069-70; *Herring,* 757 N.E.2d at 1035; *Fulk v. Allied Signal, Inc.,* 755 N.E.2d 1198, 1202 (Ind.Ct.App.2001); *Parks v. A.P. Green, Indus., Inc.,* 754 N.E.2d 1052, 1058 (Ind.Ct.App.2001); and *Poirier v. A.P. Green Services, Inc.,* 754 N.E.2d 1007, 1010 (Ind.Ct.App.2001).

In accord with Judge Mattingly-May's analysis, I am convinced that the legislature intended "persons who mined and sold" to mean "persons who mined and persons who sold."

3. Article 1, Section 12

I also believe that Section 2, as construed by the majority, violates the Right to Remedy Clause, Article 1, Section 12, of the Indiana Constitution. The majority finds otherwise, rejecting the trial court's determination that the ten year product liability statute of repose [FN13] was unconstitutional as applied to the plaintiff. Judge Levine's trial court findings stated:

> FN13. Indiana Code § 34-20-3-1(b) states:
> Except as provided in section 2 of this chapter, a product liability action must be commenced:
> (1) within two (2) years after the cause of action accrues; or
> (2) within ten (10) years after the delivery of the product to the initial user or consumer.
> However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

> [A]sbestos caused cancer takes between ten (10) and twenty-five (25) years to manifest itself. Even with the utmost amount of diligence Mr. Ott would not have been able to meet the time restrictions of IC [34-20-3-1]. No one would have. Just like Ms. Martin [in *Martin v. Richey,* 711 N.E.2d 1273 (Ind.1999)], Mr. Ott had an accrued claim, albeit unrecognizable, and was in the position of having the claim but no practical means of asserting it. Appellants' App. p. 113 (footnotes and citation omitted). Because of this long latency period, asbestos-caused cancer usually does not appear until after the ten-year statute of repose. This is precisely the circumstance that led this Court in *Martin v. Richey* to find that application of the medical malpractice two-year statute of limitations to the facts of that case violated Article 1, Section 12,

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because Martin had "no meaningful opportunity to file an otherwise valid tort claim within the specified statutory period." 711 N.E.2d 1273, 1284 (Ind.1999). We stated:

> [G]iven the nature of the asserted malpractice and the resulting injury or medical condition, plaintiff is unable to discover that she has a cause of action. Stated another way, the medical malpractice statute of limitations is unconstitutional as applied when plaintiff did not know or, in the exercise of reasonable diligence, could not have discovered that she had sustained an injury as a result of malpractice, because in such a case the statute of limitations would impose an impossible condition on plaintiff's ***1082** access to courts and ability to pursue an otherwise valid tort claim.

Id. As we explained in *McIntosh v. Melroe Co.,* 729 N.E.2d 972, 979 (Ind.2000), "[t]he holding in *Martin v. Richey* is that a claim that exists cannot be barred before it is knowable." Likewise here, Jerome Ott was diagnosed with lung cancer in 1998 and died in 2000. The plaintiff alleges that his lung cancer was caused by exposure to asbestos at his various places of employment from 1949 through 1983. Because of the unusually long latency period of asbestos-related cancer, it was impossible for Ott to discover that he had contracted a disease from exposure to asbestos within the statute of repose.

The majority observes "nothing in the trial court's findings that indicate one way or the other when the plaintiff's first exposure to asbestos occurred relative to the asbestos-containing product's initial delivery." Maj. Op. at 1074. This fact is irrelevant to our review of the denial of summary judgment. As the proponent of summary judgment, it was the defendant's burden to establish that the action was commenced in violation of the statutory limitation period. *Burks v. Rushmore,* 534 N.E.2d 1101, 1104 (Ind.1989). To succeed on summary judgment, the defendants were required to demonstrate that there was no genuine issue as to any material fact and that Ott could have discovered that he had sustained an injury in time to comply with the statutory limitation period, as required by *Martin.* Even though this Court in *McIntosh* held that "products that produce no injury for ten years are no longer subject to claims under the Product Liability Act," 729 N.E.2d at 979, the defendants failed to demonstrate that the asbestos exposure produced no injury for over ten years. The defendants' failure of proof supports the denial of summary judgment.

In its application of *Martin,* the majority today creates a new definition of "accrues" and declares that, "with respect to asbestos claims under Section 1, a cause of action accrues at that point at which a physician who is reasonably experienced at making such diagnoses could have diagnosed the individual with an asbestos-related illness or disease." Maj. Op. at 1075. Because this omits consideration of when the injured person (as opposed to a hypothetical physician) becomes aware of his or her own injury, today's new definition of "accrues" is wholly contrary to existing law. "[A] cause of action accrues when the resultant damage of a negligent act is ascertainable or by due diligence could be ascertained...." *Burks,* 534 N.E.2d at 1104 (*quoting Barnes v. A.H. Robins Co., Inc.,* 476 N.E.2d 84, 86 (Ind.1985)). The ascertainability of damage is determined "by evaluation of the nature and circumstances of the information known or reasonably discoverable by [the injured person], beginning at the initial point of his claimed harm." *Id.* at 1104. The legislature itself understands this to be the proper meaning of "accrues." Section 2 explains: "A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos *accrues on the date when the injured person knows* that the person has an asbestos related disease or injury." I.C. 34-20-3-2(b) (emphasis added).

Therefore, and contrary to the majority, *Martin* is clearly implicated when a person injured by exposure to asbestos did not, and could not by the exercise of due diligence, ascertain that he or she had been damaged by the asbestos, regardless of whether the condition hypothetically might have been diagnosed by a reasonably experienced physician within the ten-year statute of repose. Moreover, for the limitation period to bar the claim, it is a defendants' burden to establish a plaintiff's knowledge ***1083** of the asbestos-related injury within the statutory period.

For the reasons expressed in *Martin* and reaffirmed in *McIntosh,* the trial court did not err in finding the product liability statute of repose to violate Article 1, Section 12, as applied to the facts of this case.

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4. Article 1, Section 23

In response to the plaintiff's contention that the statute of repose violates Article 1, Section 23, of the Indiana Constitution, the majority finds that the plaintiff suffered no cognizable harm and declines to address the issue. This conclusion results from the majority's characterization of the essential claim as creating a constitutional distinction between asbestos victims and other victims under the product liability act. This is not the set of unequally treated classes identified in the plaintiff's appeal. To the contrary, the plaintiff alleges that, with the narrow construction of "mined and sold commercial asbestos" adopted by the majority, the statute of repose unconstitutionally grants unequal treatment to those employees who contract asbestos-related diseases from exposure to raw asbestos in contrast to those whose diseases result from exposure to asbestos-containing products. [FN14]

FN14. As an example, the plaintiff questions the resulting unequal treatment of a worker at one plant making brake linings and who was exposed to asbestos fiber causing cancer and another worker in a different city who contracted asbestos-related cancer caused from his exposure to the brake linings manufactured at the first plant. Br. of Appellee at 17.

Article 1, Section 23, commands: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." This clause prohibits a statute from providing disparate treatment to different classes of persons if: (1) the disparate treatment is not reasonably related to inherent characteristics that distinguish the unequally treated classes, or (2) the preferential treatment is not uniformly applicable and equally available to all similarly situated persons. *McIntosh,* 729 N.E.2d at 981; *Martin,* 711 N.E.2d at 1280; *Collins v. Day,* 644 N.E.2d 72, 80 (Ind.1994).

There are no inherent characteristics that distinguish workers with asbestos- related diseases caused by exposure to raw asbestos from those with the same diseases brought about by exposure to manufactured products containing asbestos. Thus the unequal treatment accorded to each class cannot be reasonably related to any inherent differences. With the majority's refusal to construe Section 2 to equally treat all persons with asbestos-related diseases, the product liability statute of repose clearly grants to persons whose diseases derive from raw asbestos substantial privileges and immunities that do not equally belong to identically situated persons whose diseases result from asbestos-containing products. The constitutional violation is apparent.

5. Covalt v. Carey Canada, Inc.

In *Covalt v. Carey Canada, Inc.,* 543 N.E.2d 382 (Ind.1989), this Court held that the product liability statute of repose did not apply to claims arising out of asbestos-related disease:

> Accordingly, because of the long latency period with asbestos-related diseases, most plaintiffs' claims would be barred even before they knew or reasonably could have known of their injury or disease and they would be denied their day in court if the ten year statute of repose were applied. To require a claimant to bring his action in a limited period in which, even with due diligence, he could not be aware that a cause of action ***1084** exists would be inconsistent with our system of jurisprudence.

Id. at 387.

The majority dismisses this holding on grounds that *Covalt* was decided under prior law because the language of Section 2, although then recently adopted, was not applicable to the facts there presented. We noted this fact in *Covalt* and described the effect of the amendment as providing "in pertinent part that an asbestos-related action must be brought within two years of the date when the injured person knows that he has an asbestos-related disease or injury." *Id.* at 383-84 n. 1. The effect of *Covalt* was to determine the application of the statute of repose with respect to asbestos- related claims in a manner quite consistent with that implemented with the legislature's enactment of the ameliorative language of Section 2, allowing access to courts by persons with asbestos-related injuries.

The majority declares that the adoption of Section 2 renders *Covalt*'s analysis "obsolete," Maj. Op. at

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1078, because *Covalt* expressly excluded Section 2 from its determination and noted its uncertainty regarding whether the legislature "intended the ten year statute of repose to bar claims such as this one, where the injury is the result of protracted exposure to a hazardous foreign substance." *Covalt,* 543 N.E.2d at 386. The majority's analysis assumes that Section 2 represents the legislature's intent to bar all such claims except those against producers of raw asbestos. However, if Section 2 is read as the *Covalt* court understood it, to provide a humane, fair, and just exception from the statute of repose for *all* persons whose asbestos- related diseases cannot be ascertained within ten years after exposure, the existence of Section 2 in no way renders *Covalt* obsolete.

Conclusion

For each of the reasons expressed above, I dissent from the majority.

RUCKER, J., concurs.

785 N.E.2d 1068, Prod.Liab.Rep. (CCH) P 16,567

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED JAN 16 2002

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	:	CIVIL ACTION NO. MDL 875 (Including MARDOC, FELA, and TIREWORKER cases)
This Document Relates to: ALL ACTIONS	:	

ADMINISTRATIVE ORDER NO. 8

THE COURT, has previously received the Motion For Case Management Order Concerning Mass Litigation Screenings, and has held a hearing thereon and reviewed the briefs and comments from counsel regarding the issue. The Court notes that a similar situation regarding the massive MARDOC filings was resolved by an administrative order dismissing those cases without prejudice and tolling the applicable statutes of limitations while retaining those actions in a special active status category. The Court feels that this administrative process has worked well with the Court's continued supervision as well as counsel monitoring the cases that become ready for trial or disposition.

Priority will be given to the malignancy and other serious health cases over the asymptomatic claims.

Furthermore, the position of the moving parties, that the screening cases have been filed without a doctor-patient medical report setting forth an asbestos related disease, has not been refuted. The basis of each filing, according to the evidence of the moving parties, is a report to the attorney from the screening company which states that the potential plaintiff has an x-ray reading 'consistent with' an asbestos related disease. Because this report may set in motion the running of any applicable statutes of limitations, a suit is then commenced without further verification. Oftentimes these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may

not suffer any symptoms in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.

The Court has the responsibility to administratively manage these cases so as to protect the rights of all of the parties, yet preserve and maintain any funds available for compensation to victims.

THE COURT FINDS that the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.

IT IS THEREFORE THE ORDER OF THIS COURT:

1. All non-malignant, asbestos related, personal-injury cases assigned to MDL 875 which were initiated through a mass screening shall be subject to administrative dismissal without prejudice and with the tolling of all applicable statutes of limitations. A dismissal order may be prompted by motion of any party and, upon request, shall be subject to a hearing at which time the Court may receive evidence that such case does or does not qualify for administrative dismissal hereunder.
2. Once a case is administratively dismissed, the case will remain <u>active</u> for the Court to continue to entertain settlement motions and orders, motions for amendments to the pleadings, substitutions, and other routine matters not requiring a formal hearing.
3. Any party may request reinstatement to active status of a case by filing with the Court a request for reinstatement together with an affidavit setting forth the facts that qualify the case for active processing. The motion for reinstatement shall be served by mail (known counsel of record for a particular defendant shall suffice) upon all parties (whether previously served or not) and any party may within ten (10) days request a hearing on the motion. The burden at any hearing to reinstate shall be upon the plaintiff to show some evidence of asbestos exposure and evidence of an asbestos-related disease. Exposure to specific products shall not be a requirement for reinstatement.

4. Following reinstatement, counsel shall have thirty (30) days to complete initial service of process and answers will be due twenty (20) days following service.

The Court encourages the parties to work informally upon discovery and settlement of these cases during any period of administrative dismissal and will entertain necessary discovery motions to facilitate the process. The Court will also be available to convene all the necessary parties and to facilitate the progress of the cases that are ready for early settlement decisions, setting of trial dates, and/or remand if desired.

BY THE COURT

Charles R. Weiner

Charles R. Weiner S.J.

Date: 1/14/02

ENTERED

JAN 16 2002

CLERK OF COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED

FILED OCT 16 1997

OCT 16 1997

MICHAEL E. KUNZ, Clerk

By _____ Dep. Clerk

IN RE: ASBESTOS PRODUCTS :
LIABILITY LITIGATION (NO. VI) : CIVIL ACTION NO. MDL 875

This Document Relates to: :

Attachment A :

DISMISSAL ORDER

AND NOW, to wit, this 16th day of October, 1997 it is ORDERED that the referenced cases are dismissed without prejudice. The Statute of Limitations is tolled. Parties are to notify the Court if they wish these cases reactivated.

Charles R. Weiner

Charles R. Weiner, J.

ENTERED: 10/17/97

CLERK OF COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED MAY 2 1996

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (No. VI)	
This Document Relates To: ALL ACTIONS	CIVIL ACTION NO. 2 MDL 875 (Maritime Actions)

Weiner, J. May 1, 1996

MEMORANDUM OPINION AND ORDER

In response to a discovery request of defense counsel, and after several telephone conferences, this Court, on July 18, 1995, entered Pretrial Order No. 6 (MARDOC) directing Plaintiffs' counsel to produce materials in 262 Mardoc cases. Despite being granted several extensions of time to comply with the directives of the July 18, 1995 order, plaintiffs' counsel failed to do so. As a result, defendants moved to dismiss plaintiffs' cases. Following the entry of Show Cause Orders, the Court held a hearing on February 28, 1996 and heard argument and statements of all counsel. The parties have further supplemented their positions with additional written statements. The Court, having considered all of the material presented, will grant the motion of the defendants as modified by the attached order.

MAY 7 1996

Background of Action

On July 29, 1991, the Judicial Panel On Multidistrict Litigation entered an order establishing MDL 875 and consolidating before this Court 26,639 civil asbestos personal-injury lawsuits, pending in 87 federal districts. At that time 4,022 of the actions transferred were in the Northern District of Ohio. The Panel Order provided for the transfer of overlooked cases and newly filed cases as "tag-along actions"[1]. The size of MDL 875 has now grown from 26,639 to 58,478, or an increase of 119.5%. During this same period, the number of cases in MDL 875 from the Northern District of Ohio has risen from 4,022 to 23,154, or an increase of 475.7%. At the same time, this Court has supervised the termination of 4,223 cases in the Northern District of Ohio jurisdiction, primarily traditional, land-based cases. The remaining 18,209 cases are predominantly Mardoc actions. The Panel statistics disclose that this Court has now disposed of more than 20,000 cases[2]. With only 37,000 cases remaining, approximately 50% are the Mardoc actions.

This Court has, in the conduct of its proceedings, taken

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1. Rule 12, Rules of Judicial Panel On Multidistrict Litigation.

2. Although the Panel statistics show 20,560, this Court is aware of substantially more cases that are settled among the parties without the completion of terminating paperwork. Excluding Mardoc actions, this Court believes that the number of remaining cases is between 10,000 and 15,000.

very seriously all of the objectives of the Panel[3] while engaging in its pretrial activities. Where the parties and their counsel have been cooperative and reasonable, the Court has been able to effectuate settlements. A major obstacle occurs, however, when either side displays a lack of trust or credibility, or becomes entrenched and confrontational, such as when the parties refuse to cooperate in the disclosure of basic information which informs all parties of the nature of the claims.

Facts

In the Mardoc cases, there is routinely filed with each action an IDF (Initial Data Form) as required by the standing asbestos orders for the Northern District of Ohio. The information contained on this form is not authenticated, and, except for naming ships that the plaintiff may have sailed on, it provides no real medical or exposure history for the plaintiff. Until recently the parties have been at a standoff; Plaintiffs seek settlements and defendants have demanded proof of an asbestos-related medical condition and exposure to their product.[4] The defendants complain

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3. Judicial Panel On Multidistrict Litigation, Docket No. 875, Order dated July 29, 1991, pages 9-12.

4. This has always been the starting position of the parties; however, in the land cases, the Plaintiffs have learned to supply defendants with medical records, test results, and at least one expert report, together with an affidavit of exposure. In most instances the affidavit of exposure suffices because the worksite of the plaintiff has been subject to thorough discovery and the credibility gap has been narrowed. The defendants then treat the action in the form of a claim and make an offer based upon the historical averages achieved between the plaintiff's attorney and the defendant for the location.

that Plaintiffs have not provided them with the materials they need to make a settlement offer or proceed to trial. Both sides seek assistance of the Court. After several conferences with the parties, the Court entered, on July 18, 1995, Pretrial Order No. 6 (MARDOC), requiring Plaintiffs' counsel to provide to defense counsel the necessary materials[5] in 262 randomly selected cases in order that they could be evaluated for medical and exposure criteria and for settlement. At this Court's scheduled conference on August 18, 1995, Plaintiffs' counsel advised the Court that he could complete the disclosure of the required information in 30 days. The Court ordered that this discovery be produced by plaintiffs to the defendants no later than September 21, 1995. Plaintiffs failed to produce the discovery by the discovery deadline, and after several more telephone conferences, defense counsel moved to dismiss the 261[6] cases. This Court issued Show

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5. The order specifically sets forth the materials to be provided: "copies of all medical records and reports, expert reports, x-ray records and reports, pathology reports, pulmonary function test results and reports, autopsy results and death certificates as applicable, work history and work records, social security records, answers to interrogatories, and evidence of specific exposure to each named defendant in each plaintiff's case.

6. After the process began, it was discovered that one of the 262 numbers was in error and the parties proceeded with the remaining 261.

Cause orders on November 15, 1995, and a subsequent Notice of Hearing on February 1, 1996.

More than 7 months have passed since the Court issued its order of July 18, 1995, and by all rational standards plaintiffs' counsel has had adequate time and opportunity to comply with discovery in these matters. In fact, Plaintiffs have advised the Court that they have produced all of the discovery materials required. At the hearing on February 28, 1996, defendants produced two legal record boxes (approximately 12"H x 14"W x 24"L) which they identified as the total discovery received. Included in the boxes was 261 file folders, many with IDF forms, and many with recent letters from a "B" reader radiologist. It has been this Court's experience that one medical case could easily fill two legal record boxes. The parties agreed that the discovery produced included no documentation or evidence relating to plaintiffs' exposure to specific products. The Court also repeatedly asked Plaintiffs if they had any malignancy cases ready for trial and Plaintiffs did not identify any such cases.

Discussion

The Judicial Panel on Multidistrict Litigation, convinced that the administration of justice in the federal court system was threatened by burgeoning numbers nationally of asbestos related personal-injury lawsuits, sought to relieve the burden, to provide

for uniform case management, and to reduce the transaction costs by transferring these cases to a multidistrict jurisdiction. This Court has remained mindful of the Panel's priorities as set forth in the Panel order of July 29, 1991, and has initiated case management policies in conjunction with counsel representing all parties to achieve these goals.

Plaintiffs' counsel has taken the position that these 261 cases adequately reflect the nature of all of his filings, and that the "package"[7] is now ripe for settlement. Defense counsel, although it was their expert who devised the method for selecting the 261 "random" cases, are more reluctant to characterize the 261 cases as a representative of the whole in all respects, but rather they urge the Court to find that the discovery provided is representative of the whole. Defense counsel urge the Court to dismiss with prejudice the 261 cases due to plaintiffs' counsel's lack of compliance with this Court's orders. Defense counsel also argue that even in the cases where some discovery has been provided, it is insufficient for the cases to proceed to settlement or trial.

The judicial system has been faced with an onslaught of personal injury, asbestos cases for more than twenty years. Plaintiffs have sought damages against a multitude of defendants. The courts have found that asbestos fibers are potentially

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7. Counsel in the asbestos litigation are prone to describe a group of cases, whether it is 5 or 5,000 in number, as a "package".

hazardous to one's health. Sufficiency of exposure remains an unknown, however, and many plaintiffs initiated litigation without injury, but rather with knowledge of exposure. The reasoning supporting this litigation has been the concern for the running of tolling statutes which may begin when the party becomes aware of an injury. Injury can and has been defined in many ways resulting in inconsistent case law and approaches to this type of litigation among the states.

This Court is guided by the principles set forth by Judge Ginsberg in In Re Korean Air Lines Disaster of September 1, 1983, 829 F.2d 1171 (D.C.Cir. 1987). She concludes that a transferee court's responsibility in the context of a 28 U.S.C. §1407 transfer is to follow the law of the transferee circuit, although the law of the transferor jurisdiction merits consideration. In the matter before us, the Court feels that the law of the United States Court of Appeals for the Third Circuit is clear and that the United States Court of Appeals for the Sixth Circuit would draw a similar analysis to this problem.

Pennsylvania has recently joined a growing number of states which have analyzed this problem.

Four years ago Pennsylvania was a "one-injury" state. That is, if an exposed party sought damages as a result of his or her pleural disease which was causing some restriction in lung capacity, the party would also seek damages for fear of contracting other asbestos-related cancers, and for the increased risk in

contracting such malignancies which have longer latency periods. The combination of longer latency periods and separate but multiple diseases flowing from the same exposure caused the Pennsylvania courts to review the course of the products liability law. In 1992, Pennsylvania became a "two injury" state and joined a growing number of states by holding that in asbestos cases, the plaintiff is entitled to bring a second action for a subsequently diagnosed malignancy, thereby eliminating claims for risk and fear, and reducing the potential for speculative damages being awarded for an injury that may not occur. Marinari v. Asbestos Corporation, Ltd., 417 Pa. Super. 440, 612 A.2d 1021 (1992)[8]

Ohio is also among the many states which has adopted this rule. In Quick v. Sun Oil Co., et al., (No. 82-0292, Ct. Comm. Pleas, Lucas Co., Ohio, 10/84), Judge Sumner E. Walters found that the discovery of one asbestos-related disease does not trigger the statute of limitations for other separate and distinct, later-discovered asbestos diseases.

More recently, the issue of injury in an asbestos-related action was tested before the Pennsylvania Supreme Court in Giffear v. Johns-Manville Corporation, et al., (No.J-157-1995, Pa., April 4, 1996) The Giffear Court focused on the distinction between "injury" and "harm", and determined that a physical injury

8. New York, New Jersey, Maryland, Delaware, Indiana, Illinois, California and Hawaii also follow the two-disease rule.

sufficient to maintain a tort action must be accompanied by harm. The Court concluded that asymptomatic pleural thickening or scarring is not a compensable injury which gives rise to a cause of action for damages for a physical injury or for emotional distress. (Supra, pg 10,11,14)

If the action is brought under the Jones Act or the F.E.L.A. statutes, the plaintiff is not relieved from his burden of proof relating to injury. These laws protect the railroad workers and mariners who might otherwise have a problem in proving responsibility for an injury sustained by providing them with a federal cause of action for the same injury against their employer in addition to their tort claims against negligent manufacturers or distributors. While the plaintiff's burden to establish liability may be eased, a compensable injury remains a requirement for recovery. In holding that an action for an asbestos-related injury does not exist in a F.E.L.A. case, Circuit Judge Seitz of the United States Court of Appeals for the Third Circuit Court stated: "We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law....Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suf-

fered." Schweitzer v. Consolidated Rail Corp. (Conrail), 758 F.2d 936, 942 (3d Cir.1985)

Many states have created administrative vehicles to hold in abeyance these asymptomatic cases until counsel finds that the plaintiff is actually suffering from an impairment. Before an action is activated, certain criteria must be met. This Court has found that the use such an administrative device can reduce the Clerk's burden and still provide an atmosphere for settlement between the parties. Illinois, Maryland, Connecticut, Arizona and Hawaii utilize this procedure.

This is the atmosphere that exists today where every plaintiff's counsel has a working agreement with all or most of the principal defendants and the cases are submitted as claims. Criteria has been established and agreed to and this has resulted in large block settlements of cases or trials where there has been a good faith difference of opinion.

Soon after the multidistrict cases were sent to this Court, the Court convened counsel from the New England states and block settlements were achieved and agreements to treat future cases as claims resulted. This procedure has proved effective in many places in the nation and, as a result, there are no real blocks of cases unsettled[9] except for these Mardoc actions. In the

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9. In several instances, plaintiffs may still have remaining in their cases some of the peripheral defendants whose presence represents a very small percentage of the value of the case. In other circumstances, plaintiffs may have settled with all but one primary defendant and these situations are being addressed.

Mardoc actions, none of the defendants have settled and plaintiffs have claims against an average of more than 80 defendants.

Although this Court retains a vigilant concern for all parties to the litigation, the Court has prioritized from the onset the victims of asbestos related disease, and in particular, those who suffer with malignant conditions as well as their families. The Court's focus is to administer these cases as it has all the others by seeing that they are resolved in an equitable and expeditious manner either by settlement or by trial while making certain there will be sufficient resources available to compensate those who are deserving.

Findings

The Court, having spent many hours in conference with all counsel and after a hearing makes the following determinations:

Plaintiffs' counsel has failed to comply with this Court's order of July 18, 1995. Plaintiffs' counsel has admitted that no details relating to exposure have been supplied and most of the documentation is described as new radiologist's reports and IDFs. The defendants claim that **all** medical records, work records, social security records, answers to interrogatories, etc., as

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9. (...continued)
represents a very small percentage of the value of the case. In other circumstances, plaintiffs may have settled with all but one primary defendant and these situations are being addressed.

required by the court order, have not been received by them. Plaintiffs' counsel has supplemented his argument presented at the hearing by submitting a copy of the "medicals" from one of the 261 cases[10]. It contains nine pages, none of which are dated earlier than September, 1995.

The second determination of the Court is that Plaintiffs' counsel has not provided critical material necessary for defendants either to evaluate the cases so that a meaningful dialogue can take place or for the cases to be prepared for trial if that fails. Plaintiffs' counsel categorizes his proof of exposure as follows[11]:

1) Everyone knows that the products of this manufacturer were all over the ships and could be found upon almost every ship;

2) This manufacturer advertised asbestos products in a marine catalogue and therefore it must have made and sold products to which the plaintiff was exposed, and;

3) Counsel has assured the Court that he can and will obtain statements from numerous Chief Engineers that these products were in use all over the ships.

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10. Pablo E. Hernandez v. American Ship, et al., Civil Action No. 90-0000, Northern District of Ohio

11. In this instance the Court is discussing the "manufacturer" defendants, as each plaintiff's sailing record will disclose the vessels upon which he sailed.

Plaintiffs' counsel takes the position that this specific evidence and discovery can await trial preparation and is not necessary for the filing of a case or for the settlement process.

Plaintiffs' counsel has presented, as part of the discovery package, doctor's reports that state that a significant number of the plaintiffs have no asbestos related injury. Defense counsel have advised the Court that the medicals received pursuant to this Court's order of July 18, 1995, infra, consist of a scant number of documents and only recent "medical" reports prepared in November, 1995, after this Court's order of July 18, 1995. The statements made to the Court disclose that only a fraction of the recently diagnosed plaintiffs have an asbestos-related condition, and many of these may be open to question. Numerous cases have either no diagnosis of an asbestos-related condition, or there is scant credible medical evidence. Further, the Court is informed that few, if any, of these plaintiffs have provided any evidence of a compensable injury sufficient to sustain a cause of action.

The Court believes that it is the responsibility of counsel to only file those cases which are ripe and ready to proceed. To file cases by the thousands and expect the Court to sort out the actionable claims is improper and a waste of the Court's time. Other victims suffer while the Court is clogged with such filings.

The Court enters its orders accordingly.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

#113

IN RE: ASBESTOS PRODUCTS :

LIABILITY LITIGATION (No. VI) :

X

FILED MAY 2 1996

This Document Relates To: :

:

ALL ACTIONS :

x

CIVIL ACTION NO. 2 MDL 875

(Maritime Actions)

Order

THE COURT HEREBY ORDERS that the cases filed in the Northern District of Ohio by the Plaintiffs assigned to the Mardoc portion of MDL 875, ARE ADMINISTRATIVELY DISMISSED WITHOUT PREJUDICE AND WITH ALL STATUTES OF LIMITATION TOLLED. The Court is specifically preserving the rights of the named plaintiffs to maintain an action should their circumstances warrant the furtherance of their case. Counsel is advised that this Court shall maintain jurisdiction, and that these cases may be individually reinstated upon application to the Court with the following showing:

1. Each plaintiff requesting reinstatement must provide to this Court satisfactory evidence that the plaintiff has an asbestos-related personal injury compensable under the law.

2. For each defendant which the plaintiff desires to pursue, the plaintiff must provide probative evidence of exposure to products connected to, or supplied, manufactured or installed by said defendant, or, if the defendant is a shipowner, evidence of service upon the defendant's ship(s).

THE COURT FURTHER ORDERS that each case to be reinstated shall be accompanied with the payment of a filing fee, unless such case, both in its present form and in its earlier submissions, contained Jones Act claims ONLY[12]. Counsel shall further be entitled to amend his pleadings as necessary to set forth proper claims, substitute parties and name defendants at the time of reinstatement; PROVIDING HOWEVER, defendants may insert any and all defenses to which they may be entitled. The Court will issue shortly hereafter a list of the affected actions in the Northern

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12. The Court has examined the prior policy of allowing these cases to be filed en mass without filing fees and finds that it is inappropriate to continue. This policy issue has been assigned by Chief Judge George W. White of the Northern District of Ohio to the MDL. Specifically, the Court notes that 28, U.S.C. §1916 provides that certain seamen's suits may proceed without prepayment of costs, but that common law tort actions are not included therein. Plaintiffs' counsel, without payment of any fees, has filed more than 17,000 cases. The costs applicable to these filings are great and the burden and cost to the court system has been considerable.

District of Ohio. All pending motions in these cases are hereby denied without prejudice and with leave to resubmit with the original filing date remaining in effect should the case be reinstated.

For the purposes of appeal, THIS IS NOT A FINAL ORDER.

BY THE COURT

Date: 5/2/96

Charles R. Weiner

Charles R. Weiner, Judge

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL # of pages ▶ 16

To Dave Weaver,	From Sheila Jeffers
Dept./Agency CHN, OP MCR	Phone # 215 597 3997
Fax # 216 522 4495	Fax # 6390

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ENTERED: 5/2/96

CLERK OF COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)

CIVIL ACTION NO. MDL 87[illegible]
(Including MARDOC, PELA[illegible]
and [illegible])

This Document Relates to:
ALL ACTIONS

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ADMINISTRATIVE ORDER NO. 3

It is the intention of the Court that the cases be resolved through negotiation wherever possible. The Court and all parties agree that, as that process proceeds, it is often necessary to give special attention to certain cases. Although all settlements represent steps toward the Court's ultimate goal, special efforts to resolve these cases are not a substitute for broad-based negotiations designed to reduce the docket backlog.

In accordance with ADMINISTRATIVE ORDER NO. 2 Plaintiffs' counsel has previously submitted information to the Court relating to their malignancy and asbestosis cases. The Court has determined to give a priority to malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury. The following procedures are hereby established for review, settlement and/or further action in these cases:

I SELECTED CASES

Selected cases are identified by disease category. In each case, plaintiff's counsel must have a written medical opinion by a board certified specialist setting forth that exposure to asbestos or asbestos-containing products is a substantial contributing cause to the condition or death of plaintiff (plaintiff's decedent). The disease categories are:

A. Mesothelioma, living and deceased.
B. Lung Cancer, living and deceased.
C. Other malignancies, living and deceased.
D. Asbestosis, total disability deceased or total disability living.

II PROCEDURE FOR PLAINTIFFS' COUNSEL

The Court will process all cases previously identified by Plaintiffs' counsel pursuant to ADMINISTRATIVE ORDER NO. 2 as mesothelioma and lung cancer in accordance herewith UNLESS the

IV SETTLEMENT NEGOTIATIONS

Following the initial procedures, all counsel shall make themselves readily available for personal and telephone settlement conferences. AT THIS TIME, NEGOTIATION IS TO BE ONGOING AND IN GOOD FAITH. All counsel are to report no less than once a week by telephone to the Court as to their progress. The Court will be available on a regular basis for participation in a settlement conference, either by telephone or in person. If, after thirty (30) days, any party feels that his/her opponent is not negotiating in good faith, they may request the Court to forward the matter to the Mediation Committee for a recommendation. If a request is made to refer the matter to the Mediation Committee, such request shall be honored by the Court. When the Court determines that further settlement discussions are unlikely to be productive, the Court will hold a termination conference to discover the status of all remaining parties to the action(s) in negotiation and to determine whether the case is to be forwarded to the Mediation Committee. A referral may be of one or a number of cases. If no request for referral is made, and the parties have been unable to resolve their differences, the Court shall determine whether the matter is appropriate for immediate remand.

V MEDIATOR

The Court shall appoint a neutral mediator for each case who is familiar with the jurisdiction. Once the Mediator is selected, he/she shall hear all referrals for that jurisdiction subject to resignation or Court reassignment. Upon receipt of a referral from the Court, the Mediator shall take the following action:

A. Provide notice to each party of the time and place of a mediation hearing , which hearing shall take place no sooner than ten (10) days after such notice, but as soon thereafter as possible.

B. Each party may provide a short position statement to his/her opponent and to the Mediator no less than five (5) days prior to the hearing.

C. The Mediator shall set forth his/her own rules for proceeding on the referral and shall advise the participants.

D. At the hearing the Mediator shall attempt to mediate settlement as to all parties. As to any case in the group that is not so resolved, the Mediator shall determine whether the participants have negotiated in good faith. This determination shall be made on a case by-case-basis.

Because different viewpoints of the same case are equally understandable, a finding of bad faith is not necessary in all instances where the parties are unable to reconcile their differences and settle.

BY THE COURT:

Date: 9/2/92

Charles R Weiner

CHARLES R. WEINER, J.

ENTERED: 9/8/92

CLERK OF COURT

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
	:	
USG CORPORATION,	:	**Jointly Administered**
a Delaware Corporation,	:	**Case No. 01-2094 (RJN)**
et al.[1]	:	
	:	
Debtors.	:	
	:	**MEMORANDUM OPINION**
	:	**and ORDER**
	:	

This document constitutes the Memorandum Opinion and Order of the Court. On November 27, 2001, pursuant to the provisions of 28 U.S.C. §292(b), the Honorable Alfred M. Wolin was designated and assigned to hold court in the District of Delaware to complete unfinished business in a number of bankruptcy cases. These cases carry with them an enormous volume of known and unknown asbestos claims. In one of these cases, the above-captioned In re USG Corp., Case No. 01-2094, the debtor (hereinafter "USG") has applied for certain case management initiatives in the form of a case management order directed towards estimation hearings of the approximately 190,000 asbestos personal injury claims pending against it pursuant to 11 U.S.C. §

[1] The Debtors are the following 11 entities: USG Corporation, United States Gypsum Company, USG Interiors Inc., USG Interiors International, Inc., L&W Supply Corporation, Beadex Manufacturing, LLC, B-R Pipeline Company, La Mirada Products Co., Inc., USG Industries, Inc., USG Pipeline Company and Stocking Specialists, Inc.

502(c). The salient point of the debtors' proposal is that they would be permitted to challenge the validity of the claims against them in the context of the estimation hearing.

USG contends that it possesses substantive defenses to many of the asbestos claims against it and to many of the asbestos claims anticipated to be made in the future. The Court is sensitive to the concerns behind the debtors' position. Much has been written about the so-called "unimpaired" claimants, those who have been exposed to asbestos and may bear clinically verifiable signs of that exposure, but who currently exhibit no outward symptoms interfering with the quality of their lives. With a finite amount of money available to pay claims, competition for payment is more than an academic question. That shareholders' equity may be extinguished to compensate those whom they believe suffered no tangible harm is a bitter corporate pill to swallow.

The Asbestos Claimants' Committee ("ACC"), and the Future Claimants' Representative ("FCR") view this type of merits-based estimation hearing as unnecessary and unduly burdensome. They proffer that an estimation of USG's present and future asbestos liability can be made on the basis of USG's pre-petition settlements and litigation history of asbestos-related personal injury claims and lawsuits. It is similarly distasteful medicine to tort claimants to hear that claims identical to those which

were either litigated to judgment or settled in the state tort system over the course of many years could be eliminated by an imaginative application of federal procedural rules.

A third fact looms over this controversy, however. It has been represented to the Court, and financial analyses dehors the record make it appear at least plausible, that USG is insolvent even if one only counts the claims of the very sick or deceased victims of asbestos exposure. As to these claimants, still according to the ACC and FCR, the debtors have no legitimate defense. Debtors, of course, insist that even these claimants should not recover. This much is clear, however -- if this subset of very sick or deceased claimants represents valid claims in excess of the net worth of the debtor, small benefit will be gained for immense cost of litigating the entire universe of claims, including the so-called "unimpaireds."

The Court is aware that the tension between the positions articulated by the parties concerning the proper mode of valuing the debtors' asbestos liability reveals a fundamental, perhaps the fundamental divide between them. Indeed, the issue may lie at the heart of all asbestos bankruptcies. It is important, therefore, that all understand with perfect clarity the Court's role in relation to this dispute.

The Court exists to assist the parties in resolving their differences. It does so by providing a framework within which

the parties can litigate those differences to a Court-imposed result or compromise them based upon the parties' expectation of a predictable outcome. In bankruptcy, where liabilities exceed the assets of the estate, the Court will assist the parties in apportioning the remaining assets among the legitimate claimants. But, if the debtor maintains that its creditors are not legitimate and that, properly analyzed, claims against it do not exceed its assets, the Court must assist as well.[2] The statements in counsels' briefs compel the Court to state the obvious. In an asbestos bankruptcy, the Court will, within the constraints of the law, reject unsubstantiated claims, bogus medical evidence and fanciful theories of causation. The Court will protect those who have been truly harmed.

As stated, this Court can do so only within the context of the law binding upon it and upon the claims before it. It is basic that federal bankruptcy jurisdiction does not oust state law governing claims on a debtor's estate. Raleigh v. Illinois Dep't of Revenue, 530 U.S. 15, 20 (2000) ('basic federal rule' in bankruptcy is that state law governs the substance of claims").

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[2] Thus the mode selected is ultimately determined by parties. For example, the matter of In re Armstrong World Indus., also pending before this Court, a consensual solution is already well-advanced. In that and other cases, the value of asbestos liability is based upon the private parties' own assessment of that liability, as adjusted by mutual, self-interested compromise. The ultimate result is no less legitimate, however, than one imposed by the Court.

The Bankruptcy Code only creates a forum for dividing inadequate assets among competing claims; it says nothing about the law under which those claims arise. An unbroken line of authority holds that state law claims remain governed by state law, even after the debtor invokes federal bankruptcy protection.

This principle defines the extent of the Court's discretion. Matters concerning claims administration, including such issues as proof of claim forms and claims bar dates are governed by the federal Bankruptcy Code and Rules. In these areas the Court has some limited discretion. As to the application of federal or state substantive law to the merits of the claims themselves, the Court has no discretion. With these structural truths in hand, the Court now turns to the application at bar.

In In re USG Corporation, one sees these general truths played out in detail. The debtors argues that "[t]he vast majority of asbestos personal injury suits filed today are meritless nonmalignant claims of minor pleural plaques diagnosed by dubious methods." USG Brf. at 16. USG contends that its due process rights require that the Court examine the merits of these claims. The debtors contend that the so-called "unimpaired" claimants have no valid claims, that claimants cannot identify an USG product to which they were exposed, that lung cancer claimants have no diagnosis of asbestosis and thus cannot prove that their cancer is caused by asbestos, and that mesothelioma is

not caused by chrysotile asbestos, the type of asbestos used in USG products. The debtors believe that success on these defenses would eliminate sufficient claims so that the remaining asbestos claimants could be paid in full, USG Brf. at 36, and, presumably, leave value in the debtors' estates for existing equity holders.

The ACC responds with weighty arguments. The debtors propose to litigate their defenses in relation to a sample of one percent of claimants, and extrapolate the results over the entire claimant pool to arrive at an estimated total allowed claim. The ACC disputes that one percent of the claimant pool would produce a statistically reliable base for extrapolation, and contends that, in any event, this approach was expressly rejected by the Fifth Circuit as an unconstitutional impairment of the right to a jury. Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998). On the logistical front, the ACC points out that one percent of the debtors' 190,000 claimants is still an unmanageable 1,900 individual litigants, each of whom presumably would insist on exercising the full panoply of discovery and trial rights.

The ACC maintains that the debtors' proposal to use Daubert hearings and expert panels to attack the medical merits of the tort claims would pervert these devices from their legitimate use. What the debtors are really attempting, the ACC contends, is to re-litigate over a decade's worth of asbestos personal

injury litigation in the state courts, litigation which USG consistently either lost suffering heavy damage awards, or paid substantial sums to settle. The ACC suggests that the fact that USG has been paying such large amounts over so a long period of time to resolve its asbestos liability undermines its position that the claims against it now are without merit. At a minimum, they contend, this raises the possibility that, even if Daubert and expert panels properly could be used as debtors suggest, the debtors would lose anyway.

It has been represented to the Court, however, that USG may well be insolvent even if only those claimants with mesothelioma, lung cancer and other cancers are counted. If this is true, the implications for this application are grave. No one has denied that, were the Court to adopt the debtors' proposed course of substantive estimation, the cost in time and money from the debtors' estates would be substantial. The supermajority requirement of 11 U.S.C. § 524(g) grants the tort claimants undeniable power, power that would translate into long, hard fought and expensive litigation over every step of the debtors' plan were it to be put in place by the Court. The Court must be satisfied that there is a real benefit to be gained before it embarks on this course.

Thus, even assuming the legal merits of the debtors' position, the chance that the legitimate cancer claimants alone

may represent a liability in excess of the debtors' assets means that any benefit to be gained by adopting the debtors' case management proposal may be illusory. If USG is made insolvent by the cancer claimants alone, existing equity will get nothing under any plan of reorganization. The debtors-in-possession will have no stake, and presumably no interest, in pressing for the elimination of the majority of the claims they now argue are invalid. Any continued objection to a plan of reorganization by them, existing equity or even general unsecured creditors would be subject to cram down under 11 U.S.C. § 1129.

Moreover, it is far more practical to estimate the universe of cancer claimants by themselves than to undergo a merit-based estimation of all of the tort claimants.[3] Unlike for many of the so-called "unimpaireds," pathology reports or autopsy reports will exist to substantiate the harm suffered by the cancer claimants. Doctors' reports will usually be from treating physicians, not from persons engaged in mass screenings, a practice found so objectionable by the debtors. By focusing on those claimants who have indisputably been damaged, the Court need not, at this juncture of the case, delve into the troubled

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[3] The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in various jurisdictions. See Schuck, The Worst Should Go First: Deferral Registries In Asbestos Litigation, 15 Harv. J.L. & Pub. Pol. 541 (1992). Moreover, legislation has been proposed that embraces this principle.

and occasionally metaphysical controversy of the so-called "unimpaired" class of claimants.

The burden on the claimants may be minimized as well. Claim forms submitted pursuant to this Memorandum and Order may serve also as the claim against the 524(g) trust most assume will be established upon confirmation of a plan of reorganization. This will avoid onerous duplication of effort. Many cancer claimants have already filed claim forms in other bankruptcy cases. Potentially, these will serve as a ready source of information for the preparation of claim forms for this case. Upon a finding by the Court that these claims forms are adequate for its purposes, claim forms from other cases may be directly submitted here in lieu of a new form.

Upon the passing of a cancer-only bar date and processing of the claims submitted, the Court will hold an estimation hearing under 11 U.S.C. § 502(c). At this time, debtors will be permitted to present their defenses. The Court will not decide now the precise procedural device with which these defenses will be brought before the Court. Debtors may wish to attack certain medical evidence under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). They may wish to move for summary judgment on certain issues on a claims-wide consolidated basis pursuant to Federal Rule of Civil Procedure 42. The parties may be assured that the Court will

entertain such applications only to the extent they do not interfere with the claimants' constitutional and legal rights as prescribed by law and as set forth at length in their written and oral submissions to the Court.

To accomplish this end, the Court will make the following provisions. The debtors will, within thirty days of the date of this Memorandum Opinion and Order, submit to the Court a proposed Order creating a claims bar date for all persons with a claim against USG and its affiliates for personal injury arising out of asbestos exposure who can certify as follows:

> A diagnosis of cancer, which is demonstrated by a medical report of a board-certified internist, pulmonary specialist, oncologist or pathologist showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure.

The proposed order shall provide that those claimants who can certify that they possess a claim based upon the above-listed criteria shall be required to submit a claim form containing the following information:

1. Identifying Information (Injured Party)

   Name of injured party
   Social Security Number (SSN)
   Gender
   Date of birth
   Mortality status (living,deceased)
   If deceased, Was death asbestos related
   If deceased, date of death
   If living, mailing address
   If claimant has personal representative, state that person's

-name
-social security number
-Mailing address
-Relation to injured party

2. Counsel Information (Lead counsel only)

Law firm name
Attorney name
Telephone number
Mailing address

3. Dependents and/or Beneficiaries Information

Dependent/Beneficiary name
Dependent/Beneficiary date of birth
Dependent/Beneficiary relationship to injured party
Whether dependent is financially dependent

4. Alleged Asbestos-Related Injuries & Date of Diagnosis

Mesothelioma
Lung Cancer
Other Cancer
Required Supporting Documentation
Death Certificate (if deceased) with cause of death

5. Required Supporting Documentation

Certificate of Official Capacity (if claimant has a personal representative)
Medical Record Supporting the Alleged Diagnosis including:
physical exam results,
pathology reports
diagnostic reports
Statement of diagnosing physician regarding whether
whether he/she conducted a physical examination.
whether he/she treated the claimant
what factors the diagnosing physician relied upon in the diagnosis.

6. Smoking History

has the claimant ever smoked cigarettes, cigars, or pipes
has claimant ever used chewing tobacco or snuff
What was the frequency and duration of use

7. Occupational Exposure to USG Products

Date exposure began
Date exposure ended
Occupation during exposure
Description of job duties
Industry in which exposure occurred
Description of how USG product was used at the site
Employer or site owner
Site of exposure
Nature of exposure
USG product exposed to

8. Exposure to another person who was occupationally exposed

Date exposure began
Date exposure ended
Relationship to source individual
Nature of exposure
USG product exposed to

9. Asbestos Litigation

Has a lawsuit been filed on behalf of the claimant
Court where suit originally flied
Date originally filed
Verdicts against USG or any co-defendant
Has the claimant received settlement money from USG; if so, in what amounts
Has injured party received settlement money or verdict payments from other defendants (and amounts)

10. Employment Information

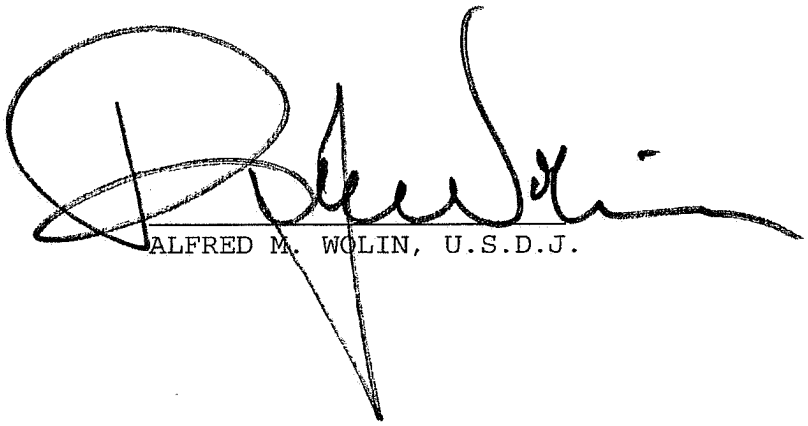
Current employment status
Amount of last annual wage
Date of last annual wage

Upon the bar date, the forms contemplated by this Order shall be submitted to a claims analysis and administration facility. The facility shall be selected by the Court following input from the parties. The facility shall process and analyze the claims to produce workable information to the parties that cannot be impeached for bias and will be in aid of further case

management initiatives.

Upon receipt of the debtors' proposed Order, the Court will afford all parties the opportunity to comment upon it. All discovery is stayed until further order of the court.

IT IS so Ordered this 19th day of February 2003.



ALFRED M. WOLIN, U.S.D.J.