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Lessons Learned from the Front Lines: A Trial Court Checklist
for Promoting Order and Sound Policy in Asbestos Litigation

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LESSONS LEARNED FROM THE FRONT LINES: A TRIAL COURT CHECKLIST FOR PROMOTING ORDER AND SOUND POLICY IN ASBESTOS LITIGATION

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THE CHECKLIST

A. CURB IMPROPER FORUM SHOPPING

- **Checklist Item #1:** Determine if the court's jurisdiction is appropriate for the specific case given the jurisdiction's connection to the alleged exposure(s), parties, and witnesses; enforce venue and *forum non conveniens* laws to transfer cases more appropriately heard in other jurisdictions. See page 609.

B. PRIORITIZE CLAIMS OF THE TRULY SICK

- **Checklist Item #2:** Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim. See page 613.
- **Checklist Item #3:** Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings. See page 616.

C. APPLY TRADITIONAL TORT LITIGATION PROCEDURES

- **Checklist Item #4:** Do not consolidate dissimilar claims. See page 620.
- **Checklist Item #5:** Assure discovery rules are appropriate for each claim and defendant; if "form" discovery is used, make sure it is appropriate and not overly burdensome as applied in individual cases. See page 621.
- **Checklist Item #6:** Do not short-circuit trials. See page 622.

D. ONLY ALLOW CLAIMS AGAINST DEFENDANTS WHERE THERE IS A LEGAL BASIS FOR LIABILITY

- **Checklist Item #7:** Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos. See page 624.
- **Checklist Item #8:** Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors' employees. See page 626.
- **Checklist Item #9:** Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture. See page 628.

E. ONLY ALLOW A DEFENDANT TO BE HELD LIABLE IF ITS CONDUCT OR PRODUCT WAS A LEGAL CAUSE OF THE ALLEGED INJURY

- **Checklist Item #10:** Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their claims. See page 631.
- **Checklist Item #11:** Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant's asbestos was a "substantial factor" in causing the alleged harm. See page 633.
- **Checklist Item #12:** Assure specific and adequate product identification by dismissing cases where product identification is not sufficient. See page 636.
- **Checklist Item #13:** Issue disease-specific causation requirements for mesothelioma, lung cancer and other asbestos-related cancers. See page 637.

F. ASSURE JURIES CAN FULLY COMPENSATE DESERVING PLAINTIFFS WHILE PRESERVING ASSETS FOR FUTURE CLAIMANTS

- **Checklist Item #14:** Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims. See page 644.
- **Checklist Item #15:** Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law. See page 647.
- **Checklist Item #16:** Allow collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm. See page 649.
- **Checklist Item #17:** Instruct jurors on the state's joint and several liability rules. See page 650.
- **Checklist Item #18:** Sever or strike punitive damages claims. See page 652.

I. INTRODUCTION

The United States Supreme Court has described the asbestos litigation as a "crisis."¹ A hallmark of the litigation has been the mass filing of lawsuits by plaintiffs with little or no physical impairment and claims made by plaintiffs without reliable proof of causation, both of which have helped force scores of defendant companies into bankruptcy and have threatened payments to the truly sick.² At times, courts have fueled the litigation by taking well-intentioned, but ill-suited, procedural shortcuts in an effort to

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

² See Mark 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); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003).

get out from under the avalanche of claims.³ In pushing for efficiency, however, these courts put aside normal rules of discovery and procedure.⁴ Instead of decreasing dockets, experience has shown that these measures actually created incentives for personal injury lawyers to file more claims.⁵ In recent years, courts and legislatures in key asbestos jurisdictions that have appreciated these unintended consequences have begun restoring fundamental tort law principles to asbestos litigation. By doing so, they have helped root out many of the abusive practices and claims that had plagued the litigation. As a result, the overall asbestos litigation environment has shown signs of improvement.⁶

Whether recent advances in the litigation will be lasting is a question yet to be answered. Asbestos litigation has a way of reinventing itself. As one legal observer explained, "the next asbestos is always asbestos, because the litigation always moves on."⁷ Asbestos personal injury lawyers are creative in finding new tactics to expand liability. In addition, there has been a new migration of claims to jurisdictions where trial judges may not be experienced in managing asbestos dockets. These judges may not be aware of the issues, history and tactics particular to asbestos litigation.

³ See Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001).

⁴ See generally 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).

⁵ See *id.*

⁶ See Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 CONN. INS. L.J. 477 (2006); James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 MEALEY'S TORT REFORM UPDATE 23 (Jan. 18, 2006); Patti Waldmeir, *Asbestos Litigation Declines in Face of US Legal Reforms*, FIN. TIMES, July 24, 2006, at 2; Paul Davies, *Plaintiffs' Lawsuits Against Companies Sharply Decline*, WALL ST. J., Aug. 26, 2006, at A1 [hereinafter Davies, *Plaintiffs' Lawsuits Against Companies Sharply Decline*].

⁷ See Peter Geier, *'Sea Change' In Asbestos Torts Is Here: New Strategies, New Defendants Seen*, NAT'L L.J., Oct. 31, 2005, at 1 (quoting attorney Mark Behrens).

This article collects lessons learned from the past by courts with experience handling asbestos claims and translates them into a checklist of trial action items so that trial judges who may be new to this litigation can avoid some of the more serious problems of the past and better address the next evolution of claims.

II. A PRIMER ON THE ASBESTOS LITIGATION

A. *The Number of Claims Explodes*

The initial asbestos-related lawsuits were filed in the 1970s.⁸ By the 1980s, "what had once been a series of isolated cases turned into a steady flow," which continued to increase over the next decade.⁹ By the early 1990s, courts and commentators recognized that the "elephantine mass" of asbestos cases that were then being filed created extraordinary problems.¹⁰ In 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation called the litigation "a disaster of major proportions."¹¹ The Ad Hoc Committee explained:

The most objectionable aspects of asbestos litigation can be briefly summarized: 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; transaction costs

⁸ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

⁹ See ABA COMM'N ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES 5 (2003), available at http://www.abanet.org/leadership/full_report.pdf [hereinafter ABA COMM'N REP.].

¹⁰ *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); see also *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.").

¹¹ 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 2 (Mar. 1991), reprinted in 6:4 MEALEY'S LITIG. REPS.: ASBESTOS 2 (Mar. 15, 1991) [hereinafter JUD. CONF. REP.].

exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.¹²

Even after this gloomy assessment, the litigation worsened "at a much more rapid pace than even the most pessimistic projections."¹³ During the 1990s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.¹⁴ By 2002, approximately 730,000 claims had been filed,¹⁵ with more than 100,000 claims filed in 2003 alone—"the most in a single year."¹⁶ In August 2005, the Congressional Budget Office estimated that approximately 322,000 asbestos-related claims were pending in state and federal courts.¹⁷

B. Most Plaintiffs Had No Physical Injury from Asbestos Exposure

The primary reason for this explosion in claims was that by the early 2000s, the overwhelming majority of claims—up to 90 percent—were filed on behalf of plaintiffs who were "completely asymptomatic."¹⁸ These claimants may have had some marker of

¹² *Id.* at 2–3.

¹³ GRIFFIN B. BELL, NAT'L LEGAL CTR. FOR THE PUB. INTEREST, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 BRIEFLY, June 2002, at 2.

¹⁴ See *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283, Before the H. Comm. on the Judiciary*, 106th Cong. 62 (1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Edley Testimony].

¹⁵ See STEPHEN J. CARROLL ET AL., RAND, ASBESTOS LITIGATION xxiv (2005), available at <http://www.rand.org/publications/MG/MG162>.

¹⁶ Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16.

¹⁷ AMERICAN ACADEMY OF ACTUARIES' MASS TORTS SUBCOMMITTEE, OVERVIEW OF ASBESTOS CLAIMS AND TRENDS 5 (Aug. 2007), available at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter AM. ACAD. ACTUARIES].

¹⁸ 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, 823 (2002); see also Roger Parloff,

exposure, such as changes in the pleural membrane of their lungs, but “are not now and never will be afflicted by disease.”¹⁹ In contrast, when asbestos litigation first arose in the 1960s, most claimants were “workers suffering from grave and crippling maladies.”²⁰

The key development was the use of mass screenings by plaintiffs’ lawyers and their agents to generate many of the unimpaired claimant filings.²¹ *U.S. News & World Report* described the claimant recruiting process:

Welcome to the New Asbestos Scandal, FORTUNE, Sept. 6, 2004, at 186 (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are ‘unimpaired’—that is, they have slight or no physical symptoms.”); Kathryn Kranhold, *GE To Record \$115 Million Expense for Asbestos Claims*, WALL ST. J., Feb. 17, 2007, at A3 (GE reporting that more than 80% of its pending cases involve claimants “who aren’t sick”); Quenna Sook Kim, *G-I Holdings’ Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (“[A]s many as 80% of [GAF’s] asbestos settlements are paid to unimpaired people.”); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A15.

¹⁹ Edley Testimony, *supra* note 14, at 67.

²⁰ Roger Parloff, *The \$200 Billion Miscarriage of Justice; Asbestos Lawyers Are Pitting Plaintiffs Who Aren’t Sick Against Companies that Never Made the Stuff—and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 158.

²¹ See Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1, 5 (2003). Screenings have frequently been conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. See *Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) (“Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.”); *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002) (asbestos claimants “are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.”); *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.”).

To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: "Find out if YOU have MILLION DOLLAR LUNGS!"²²

Many X-ray interpreters (called "B Readers") hired by plaintiffs' lawyers were "so biased that their readings were simply unreliable."²³ As one physician explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf."²⁴

It is estimated that more than one million workers have undergone attorney-sponsored screenings.²⁵ One worker explained, "[i]t's better than the lottery. If they find anything, I get a few thousand dollars I didn't have. If they don't find anything, I've just

²² Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. NEWS & WORLD REP., Dec. 17, 2001, at 36.

²³ *Owens Corning*, 322 B.R. at 723; see also ABA COMM'N REP., *supra* note 9 (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%); Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843 (2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, *The \$40 Billion Scam*, READER'S DIGEST, Jan. 2007, at 74; Editorial, *Beware the B-Readers*, WALL ST. J., Jan. 23, 2006, at A16. As a result of its findings, the ABA Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA's House of Delegates adopted the Commission's proposal in February 2003. See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Dennis Archer, President-Elect, ABA).

²⁴ David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.).

²⁵ See Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 69 (2003); see also Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 836-37 (2005).

lost an afternoon.”²⁶ If not for the mass filing by the unimpaired, the asbestos litigation crisis may never have arisen.²⁷

C. Most Defendants Had Little, If Any, Connection to the Alleged Exposure

At the same time that tens of thousands of unimpaired claims were being mass produced, many “traditional” asbestos defendants who manufactured, mined, or sold asbestos²⁸ were seeking bankruptcy court protection.²⁹ The pace of bankruptcies accelerated after 2000;³⁰ it is now estimated that at least 85 companies have been forced into bankruptcy as a result of

²⁶ Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 11, 2003, at A1.

²⁷ See Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001); see also *Wilson v. AC&S, Inc.*, 864 N.E.2d 682, 689 (Ohio Ct. App. 2006) (“The extraordinary volume of nonmalignant asbestos cases continues to strain federal and state courts.”), *dismissed*, 864 N.E.2d 645 (Ohio 2007).

²⁸ As Judge Freeman who administers the asbestos docket in New York has explained,

[t]here are noteworthy differences between the bankrupt defendants and those that are still solvent. As a group, the bankrupt corporations can be characterized as ‘traditional’ asbestos defendants; they either mined asbestos, or manufactured, sold, distributed or required asbestos-containing products, including insulation, fire-proofing, construction materials, and boilers. Until recently, these ‘traditional’ defendants were the plaintiffs’ primary targets.

In re New York City Asbestos Litig., 750 N.Y.S.2d 469, 473–74 (N.Y. Sup. Ct. 2002). Traditional asbestos defendants include Johns-Manville, Owens-Corning, Celotex, Pittsburgh Corning, Eagle-Picher, and Raybestos Manhattan.

²⁹ See *In re Combustion Eng'g*, 391 F.3d 190, 201 (3d Cir. 2004) (“[M]ounting asbestos liabilities have pushed otherwise viable companies into bankruptcy.”).

³⁰ See Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) (observing that each time a defendant declares bankruptcy, “mounting and cumulative” financial pressure is placed on the “remaining defendants, whose resources are limited”).

asbestos-related liabilities.³¹

As a direct result of these bankruptcies, the net of liability “spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.”³² One well-known plaintiffs’ attorney has described the litigation as an “endless search for a solvent bystander.”³³ By 2004, more than 8,500 defendants were caught up in the litigation³⁴—up from the 300 defendants in 1983.³⁵ This dramatic increase in claims has been possible because of “the erosion or elimination of standards of recovery, particularly causation and product identification.”³⁶ At least one company in nearly every U.S. industry is involved in the litigation.³⁷ Nontraditional defendants now account for more than half of asbestos litigation expenditures.³⁸

D. Jurisdictions Were Targeted, Causing the Legal Systems to Crack

Another key factor accelerating the asbestos litigation has been the concentration of claims in certain jurisdictions. RAND found that from 1998 to 2000, eleven states saw the brunt of asbestos filings: Texas (19%), Mississippi (18%), New York (12%), Ohio

³¹ See Martha Neil, *Backing Away from the Abyss*, 92 ABA J. 26, 29 (2006).

³² Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14; see also Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1151–52 (2005) (discussing spread of asbestos litigation to “peripheral defendants”).

³³ ‘*Medical Monitoring and Asbestos Litigation*’—A Discussion with Richard Scruggs and Victor Schwartz, 17:3 MEALEY’S LITIG. REP.: ASBESTOS 5 (Mar. 1, 2002) (quoting Richard Scruggs).

³⁴ See Deborah R. Hensler, *California Asbestos Litigation—The Big Picture*, PERSPECTIVES FROM HARRISMARTIN’S COLUMNS—ASBESTOS, Aug. 26, 2004.

³⁵ See JAMES S. KAKALIK ET AL., RAND, COSTS OF ASBESTOS LITIGATION 12 (1983).

³⁶ James Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 236 (2006).

³⁷ AM. ACAD. ACTUARIES, *supra* note 17, at 5.

³⁸ See CARROLL ET AL., *supra* note 15, at 94.

(12%), Maryland (7%), West Virginia (5%), Florida (4%), Pennsylvania (3%), California (2%), Illinois (1%), and New Jersey (1%).³⁹ Sorting through the mass amount of claims against scores of peripheral defendants placed significant pressure on courts where asbestos claims were filed.⁴⁰

Initially, some courts with thousands of lawsuits on their dockets began taking well-intentioned, but ill-fated, procedural shortcuts to usher the claims through the system. One such example was the joining of a significant number of dissimilar claims for trial. The largest single mass consolidation took place in West Virginia in 2002, where the trial court joined more than 8,000 plaintiffs suing more than 250 defendants.⁴¹ The threat of massive liability, including punitive damages, without attention paid to individual claims and defenses, caused nearly every defendant to settle for reportedly huge sums of money.⁴² Other mass consolidations occurred in Virginia and Mississippi.⁴³ These

³⁹ See *id.* at 62.

⁴⁰ Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described the situation facing many judges with heavy asbestos caseloads in testimony before Congress. See *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 6 (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr.). He observed that trial court judges inundated with asbestos claims might feel compelled to shortcut procedural rules:

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

Id.

⁴¹ See *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002).

⁴² See *Mobil Settles, Leaving Carbide as Lone Asbestos Defendant*, ASSOC. PRESS STATE & LOCAL NEWSWIRE, Oct. 10, 2002.

⁴³ See *In re Hopeman Bros., Inc.*, 569 S.E.2d 409 (Va. 2002); *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. 39-40 (1999) (statement of Professor William Eskridge, Yale Law School), available at

consolidations “so depart[ed] from [the] accepted norm as to be presumptively violative of due process.”⁴⁴ They often lumped together people with serious illnesses, such as mesothelioma or lung cancer, with claimants having different alleged harms or no illness at all.⁴⁵ Work histories and exposure levels among plaintiffs varied widely.⁴⁶

In addition to fundamental unfairness and due process concerns, the aggregation of dissimilar claims turned out to be a bit like using a lawn mower to cut down weeds. The practice provided a temporary fix, but created more problems than it solved in the long run. Duke University Law School Professor Francis McGovern has explained,

[j]udges 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.⁴⁷

One West Virginia trial judge involved in asbestos litigation

<http://judiciary.house.gov/judiciary/eskr0701.htm>; John H. Beisner et al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, 7 CIVIL JUSTICE REP. 16 (Apr. 2003), available at http://www.manhattan-institute.org/pdf/cjr_07.pdf.

⁴⁴ TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993).

⁴⁵ See *State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). Justice Elliott Maynard of the West Virginia Supreme Court of Appeals has explained that mass consolidations involve

thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

Id.

⁴⁶ See *id.*

⁴⁷ Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997).

acknowledged this fact:

I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.⁴⁸

This phenomenon is due to the fact that in filing asbestos-related claims, there has been no relationship between the incidence of disease and the number of suits filed.⁴⁹

Consolidations and other procedural shortcuts, along with a few high-profile verdicts and well-developed litigation tactics by lawyers, forced defendants to settle claims, often en mass, rather than sort through them and only pay the meritorious ones. One particularly troubling tactic was the naming of scores, sometimes hundreds, of defendants in a single exposure case⁵⁰ and then settling most of them for a modest amount (often less than \$1,000) that collectively generated tens of thousands of dollars for unimpaired claimants without having to show specific harm or causation against a named defendant.

⁴⁸ Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation versus Inactive Dockets (Pleural Registries) and Case Management Plans That Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271, 284-85 (2003) (quoting *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha County, W. Va. Nov. 8, 2000)); see also Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 TOURO L. REV. 685, 688 (1999) (Judge overseeing New York City asbestos litigation stating, "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

⁴⁹ See *Asbestos Litigation Crisis Continues: It Is Time for Congress to Act: Hearing Before the Sen. Comm. on the Judiciary*, 108th Cong. Mar. 5, 2003 (statement of David Austern, Trustee for the Manville Trust) available at http://judiciary.senate.gov/testimony.cfm?id=617&wit_id=1675.

David Austern, Trustee for the Manville Trust, has described the asbestos claim generation process as the economic model of claims filing as opposed to a medical model. See *id.*

⁵⁰ See Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 272 (2005).

E. Payments to Truly Sick Became Threatened

Over the last few years, it has become clear that mass filings by unimpaired claimants have exhausted scarce resources that should go to “the sick and the dying, their widows and survivors.”⁵¹ The “very small percentage of the cases filed [with] serious asbestos-related afflictions . . . [were] prone to be lost in the shuffle.”⁵² For example, the Manville trustees reported that a “disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever.”⁵³ The Trust is now paying out five cents on the dollar to asbestos claimants.⁵⁴ Other asbestos-related bankruptcy trusts, such as the Celotex and Eagle-Picher Settlement Trusts, also have had to cut payments to claimants.⁵⁵

Some lawyers who represented the sick claimants have since joined with defendants and others in calling for a return of the rule of law in asbestos litigation. Here is what some of these lawyers

⁵¹ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000); see also *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 9 (Mich. 1986) (“We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.”); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) (“Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims.”), *vacated*, 982 F.2d 721 (2d Cir. 1992); *In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 8, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 14, 2002) (“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.”).

⁵² *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996).

⁵³ Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6.

⁵⁴ *Id.*

⁵⁵ See Mark Goodman et al., Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, NAT'L L.J., Apr. 1, 2002, at B14.; Stengel, *supra* note 36, at 262.

have said:

- Matthew Bergman of Seattle: “Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims.”⁵⁶
- Peter Kraus of Dallas: Plaintiffs’ lawyers who file suits on behalf of the non-sick are “sucking the money away from the truly impaired.”⁵⁷
- Terrence Lavin of Chicago (and former Illinois State Bar President): “Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray.”⁵⁸
- Steve Kazan of Oakland: “The current asbestos litigation system is a tragedy for our clients. We see people every day who are very seriously ill. Many have only a few months to live. It used to be that I could tell a man dying of mesothelioma that I could make sure that his family would be taken care of. That statement was worth a lot to my clients, and it was true. Today, I often cannot say that any more. And the reason is that other plaintiffs’ attorneys are filing tens of thousands of claims every year for people who have absolutely nothing wrong with them.”⁵⁹

⁵⁶ Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7.

⁵⁷ Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1.

⁵⁸ Editorial, *ABA Backs Asbestos Reform*, WASH. TIMES, Feb. 16, 2003, at B2.

⁵⁹ See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Steven Kazan), available at http://judiciary.senate.gov/testimony.cfm?id=472&wit_id=1206.

III. THE TRIAL COURT CHECKLIST FOR FAIRLY MANAGING ASBESTOS LITIGATION

Over the last several years, courts and legislatures have begun restoring the rule of law to asbestos litigation, taking measures to rein in the most prevalent abuses in the litigation. These actions, which are set forth in the checklist below, have aided the fair treatment of both seriously injured asbestos claimants and defendants where the litigation has been most prolific. In particular, there is now greater recognition that it is unsound public policy to award damages to plaintiffs who have no current physical impairment from exposure to asbestos.⁶⁰ Rather, it is best to prioritize the claims of those who are truly sick and preserve assets for those injured parties. Courts also have taken measures that allow claims to be determined more accurately, on their merits, and in appropriate jurisdictions. In addition, many courts are taking a much more thorough look at issues such as duty and the science of unsound causation claims by plaintiffs' experts. Trial courts should use this checklist to heed the lessons of the past and produce sound asbestos litigation results in the future.

The categories and checklist items are as follows:

A. CURB IMPROPER FORUM SHOPPING

- **Checklist Item #1:** Determine if the court's jurisdiction is appropriate for the specific case given the jurisdiction's connection to the alleged exposure(s),

⁶⁰ See, e.g., Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 531 (2007) ("[I]t is unreasonable to compensate hundreds of thousands of people exposed to asbestos, who may have physical markers of exposure, but who have no current impairment from a disease caused by asbestos exposure."); Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 WM. & MARY L. REV. 2043, 2061-62 (2007) ("By limiting cases to those claimants suffering from actual, physical impairment, [medical criteria laws requiring plaintiffs to demonstrate asbestos-related physical impairment] reserve judicial resources and corporate money for those claimants that need it most.").

parties, and witnesses; enforce venue and *forum non conveniens* laws to transfer cases more appropriately heard in other jurisdictions.

B. PRIORITIZE CLAIMS OF THE TRULY SICK

- **Checklist Item #2:** Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim.
- **Checklist Item #3:** Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings.

C. APPLY TRADITIONAL TORT LITIGATION PROCEDURES

- **Checklist Item #4:** Do not consolidate dissimilar claims.
- **Checklist Item #5:** Assure discovery rules are appropriate for each claim and defendant; if “form” discovery is used in one’s jurisdiction, make sure it is appropriate and not overly burdensome as applied in individual cases.
- **Checklist Item #6:** Do not short-circuit trials.

D. ONLY ALLOW CLAIMS AGAINST DEFENDANTS WHERE THERE IS A LEGAL BASIS FOR LIABILITY

- **Checklist Item #7:** Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos.
- **Checklist Item #8:** Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors’ employees.
- **Checklist Item #9:** Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture.

E. ONLY ALLOW A DEFENDANT TO BE HELD LIABLE IF ITS CONDUCT OR PRODUCT WAS A LEGAL CAUSE OF THE ALLEGED INJURY

- **Checklist Item #10:** Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their claims.
- **Checklist Item #11:** Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant's asbestos was a "substantial factor" in causing the alleged harm.
- **Checklist Item #12:** Assure specific and adequate product identification by dismissing cases where product identification is not sufficient.
- **Checklist Item #13:** Issue disease-specific causation requirements for mesothelioma, lung cancer and other asbestos-related cancers.

F. ASSURE JURIES CAN FULLY COMPENSATE DESERVING PLAINTIFFS WHILE PRESERVING ASSETS FOR FUTURE CLAIMANTS

- **Checklist Item #14:** Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims.
- **Checklist Item #15:** Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law.
- **Checklist Item #16:** Allow collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm.
- **Checklist Item #17:** Instruct jurors on the state's joint and several liability rules.
- **Checklist Item #18:** Sever or strike punitive damages claims.

The actions included in these checklist items, along with state medical criteria laws and other legislative reforms, have proven to be effective in reducing the number of premature and abusive claims. Jennifer Biggs, who chairs the Mass Torts Subcommittee of the American Academy of Actuaries, has found that “[a] lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level.”⁶¹ Frederick Dunbar, a senior vice president of NERA Economic Consulting, recently studied the Securities and Exchange Commission filings of eighteen large asbestos defendants and found that, “for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years. Ten companies saw claims fall by more than half between 2003 and 2004.”⁶² A prominent Ohio asbestos litigation defense lawyer has said that Ohio’s medical criteria law “dramatically cut the number of new case filings by more than 90%.”⁶³ The CEO of a large mutual insurer further highlighted the effects of recent asbestos reforms at the state level in testimony before Congress:

The beneficial impact of these efforts cannot be overstated. Historically Texas, Ohio and Mississippi have been the leading states to generate claims filed against [our] policyholders, collectively accounting for approximately 80% of the asbestos claims filed against [our] insureds. Since the statutory and judicial reforms in those three key states, the decrease in the volume of claims has been truly remarkable. In Mississippi, the decrease has been 90%, in Texas nearly 65% and, in Ohio, approximately 35%. Across all states, from 2004 to 2005 we have seen over a 50% decrease in the number of new claims filed, a trend that continued in 2006. These numbers are the best evidence that state-driven initiatives are working⁶⁴

⁶¹ Alison Frankel, *Asbestos Removal*, 28:7 AM. LAW., July 2006, at 15.

⁶² *Id.*; see also Mark A. Behrens & Frank Cruz-Alvarez, *State-Based Reforms: Making a Difference in Asbestos and Silica Cases*, 28 No. 22 ANDREWS ASBESTOS LITIG. RPTR. 12 (2006).

⁶³ Peter Geier, *States Taking up Medical Criteria: Move is to Control Asbestos Caseload*, NAT’L L.J., May 22, 2006, at 1.

⁶⁴ *The Fairness in Asbestos Injury Resolution Act of 2006: Legislative Hearing before the Sen. Comm. on the Judiciary*, 109th Cong., at 5 (2006)

A. *Curb Improper Forum Shopping*

1. *Checklist Item #1: Determine if the court's jurisdiction is appropriate for the specific case given the jurisdiction's connection to the alleged exposure(s), parties, and witnesses; enforce venue and forum non conveniens laws to transfer cases more appropriately heard in other jurisdictions.*

Plaintiffs' lawyers often strategically flock to forums where they believe they have a tactical advantage rather than file where there is a logical and factual connection to a claim or claimant.⁶⁵ Indeed, throughout the past thirty years, asbestos claims have shown a remarkable ability to migrate from state-to-state and jurisdiction-to-jurisdiction depending on which courts plaintiffs' lawyers believed would give them the greatest chance of achieving favorable recoveries.⁶⁶ Given the scores of defendants typically

(testimony of Edmund F. Kelly, Chairman, President & CEO, Liberty Mutual Group).

⁶⁵ See Richard Scruggs, *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in *Industry Commentary* (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5; see also Richard Scruggs, *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001). Mississippi plaintiffs' lawyer Richard Scruggs has dubbed these places "magic jurisdictions" because they have reputations for producing large settlements and verdicts:

What I call the "magic jurisdiction," . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant.

Id.

⁶⁶ See CARROLL ET AL., *supra* note 15, at 61–62. RAND found that from 1970 through 1987 California bore 31% of asbestos claims that were filed, but only 5% from 1988 to 1992, 2% from 1993 to 1997, and 2% from 1998 to 2000. Texas trended in the opposite direction, accounting for only 3% of initial

named in asbestos cases, plaintiffs' lawyers often have numerous jurisdictions from which to choose. In addition, some companies are named "simply to try and keep the cases" in certain jurisdictions.⁶⁷

From the mid-1990s through 2003, Madison County, Illinois was a particularly popular destination for asbestos litigation.⁶⁸ Asbestos claims had risen quickly from 65 in 1996 to a peak of 953 in 2003.⁶⁹ During those years, Madison County received significant negative publicity for hearing cases that did not have the proper connections to the County.⁷⁰ In response, the Illinois Supreme Court has removed some of the "pull" from the magnet jurisdictions. In *Dawdy v. Union Pacific Ry. Co.*,⁷¹ the court held that a foreign plaintiff's forum choice deserves less deference if it is not the plaintiff's home.⁷² In *Gridley v. State Farm Mutual Auto Ins. Co.*,⁷³ the court remanded a Louisiana man's case who was not injured in Illinois with directions to dismiss the complaint based on *forum non conveniens*.⁷⁴ In addition, a new judge was appointed to oversee Madison County's asbestos docket.⁷⁵ He began enforcing the state's venue and *forum non conveniens* laws.⁷⁶ In one of his

asbestos claims filed from 1970 to 1987, 15% from 1988 to 1992, an astounding 44% from 1993 to 1997, and 19% from 1998 to 2000. *Id.*

⁶⁷ Steven D. Wasserman et al., *Asbestos Litigation in California: Can it Change for the Better?*, 34 PEPP. L. REV. 883, 886 (2007).

⁶⁸ See Victor E. Schwartz et al., *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 243-44 (2004).

⁶⁹ *See id.*

⁷⁰ *See, e.g.*, Brian Brueggemann, *Forum Participants: Investigate Madison County Court System*, BELLEVILLE NEWS-DEMOCRAT, Apr. 15, 2004; Sanford J. Schmidt, *Lawyers Spar Over Asbestos Filings*, THE TELEGRAPH, Apr. 15, 2004.

⁷¹ 797 N.E.2d 687 (Ill. 2003).

⁷² *Id.* at 694.

⁷³ 840 N.E.2d 269 (Ill. 2005).

⁷⁴ *Id.* at 280-81.

⁷⁵ *See* Paul Hampel, *Dismissal of Asbestos Suits is Change for Madison County*, ST. LOUIS POST-DISPATCH, Jan. 29, 2005, at 6.

⁷⁶ *See, e.g.*, *Palmer v. Riley Stoker Corp.*, No. 04-L-167, 8-9 (Madison County Cir. Ct., Ill. Oct. 4, 2004) (order granting motion to transfer on the

first acts in this new role, the judge ordered the transfer of several out-of-state asbestos cases, noting that they “would place an astronomical burden upon the citizens of Madison County It is one thing to make such efforts to accommodate the citizens of Madison County and others whose cases bear some connection or reason to be here.”⁷⁷ In 2004, asbestos litigation in Madison County dropped 50% to 477 filings; the number fell further to 389 in 2005 and to 325 in 2006.⁷⁸

In the past few years, Delaware and California have attracted considerable attention as places to file asbestos claims.⁷⁹ For example, the *Madison County Record* has observed that the number of new asbestos lawsuits dropped precipitously in Madison County in recent years, but the corresponding “deluge of filings is keeping clerks in a Delaware court working nights and weekends to keep up.”⁸⁰ One Madison County lawyer acknowledged this

basis of *forum non conveniens*).

⁷⁷ *Palmer v. Riley Stoker Corp.*, No. 04-L-167 (Madison County Cir. Ct., Ill. Oct. 4, 2004).

⁷⁸ Steve Gonzalez, *Judges Not Worried About Madison County Asbestos Upsurge*, THE RECORD, July 26, 2007, available at <http://madisonrecord.com/printer/article.asp?c=198493>.

⁷⁹ See Steve Korris, *Asbestos Shift to Delaware is Sign of Distinction for Madison County*, THE RECORD, July 7, 2005, available at <http://madisonrecord.com/news/newsview.asp?c=162805>; Wasserman et al., *supra* note 67, at 885 (“With plaintiff firms from Texas and elsewhere opening offices in California, there is no doubt that even more asbestos cases are on their way to the state.”); Hanlon & Smetak, *supra*, note 60, at 599 (“[P]laintiffs’ firms are steering cases to California, partly to the San Francisco-Oakland area, which is traditionally a tough venue for defendants, but also Los Angeles, which was an important asbestos venue in the 1980s but is only recently seeing an upsurge in asbestos cases.”); Victor E. Schwartz et al., *Litigation Tourism Hurts Californians*, 21:20 MEALEY’S LITIG. REP.: ASB. 20 (Nov. 15, 2006) (reporting that over 30% of pending asbestos claims sampled in California involve plaintiffs with out-of-state addresses); Emily Bryson York, *More Asbestos Cases Heading to Courthouses Across Region*, 28:9 L.A. BUS. J. 8 (Feb. 27, 2006) (“California is positioned to become a front in the ongoing asbestos litigation war.”); Steven Weller et al., *Report on the California Three Track Civil Litigation Study* 28 (Policy Studies Inc. July 31, 2002), available at www.clrc.ca.gov/pub/BKST/BKST-3TrackCivJur.pdf (“The San Francisco Superior Court seems to be a magnet court for the filing of asbestos cases.”).

⁸⁰ Steve Korris, *Delaware Court Seeing Upsurge in Asbestos Filings*, THE

practice, stating, "We're just filing [cases] in different places."⁸¹ This practice of "litigation tourism"⁸² is one of the main reasons the litigation has proved difficult to contain.⁸³

To avoid being a litigation tourist destination, trial courts should, as they do in Mississippi, permit defendants to motion for a more definite statement from the plaintiffs that jurisdiction is proper as to each claim.⁸⁴ As a result of these motions, one Mississippi court "dismissed the claims of 437 non-resident plaintiffs who did not allege either exposure in the State of Mississippi to a defendant's asbestos-containing product or claims against a Mississippi resident defendant."⁸⁵ The same court also dismissed several claims for failure to comply with a court order directing the plaintiffs to perfect transfer of the cases to their respective proper venues in Mississippi.⁸⁶ Similar measures have been undertaken in Ohio.⁸⁷

RECORD (Madison/St. Clair County, Ill.), July 1, 2005, *available at* <http://madisonrecord.com/news/newsview.asp?c=162494>.

⁸¹ Brian Brueggemann, *Asbestos Lawsuits Continue to Decline*, BELLEVILLE NEWS-DEMOCRAT, June 21, 2005, at 3B (quoting Mike Angelides of the SimmonsCooper firm).

⁸² See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2005, at 46 (2005), *available at* <http://www.atra.org/reports/hellholes/2005/Hellholes2005.pdf> ("[P]laintiffs' attorneys become the 'travel agents' for the 'litigation tourist' industry, filing claims in jurisdictions with little or no connection to their clients' claims.").

⁸³ For example, in one case, an Indiana plaintiff with mesothelioma filed a claim against U.S. Steel in Madison County, Illinois, for injuries allegedly sustained from asbestos exposure at a U.S. Steel plant in Indiana. The plaintiff had no significant connection to Illinois, much less to Madison County. Nevertheless, his trial resulted in a \$250 million verdict. See Brian Brueggemann, *Man Awarded \$250 Million in Cancer Case*, BELLEVILLE NEWS-DEMOCRAT, Mar. 29, 2003, at 1A.

⁸⁴ See *Gordon v. Honeywell Int'l, Inc.*, 962 So. 2d 547 (Miss. 2007); *Culbert v. Johnson & Johnson*, 883 So. 2d 550 (Miss. 2004) (transferring in-state cases to the proper county and dismissing out-of-state plaintiffs).

⁸⁵ *Id.* at 549 n.3.

⁸⁶ *Id.* at 550.

⁸⁷ See OHIO CIV. R. 3(B)(11).

B. Prioritize Claims of the Truly Sick

As discussed earlier, mass filings by unimpaired claimants have been a particular problem in asbestos litigation. Courts have found that the best guard against the continued filing of premature, or potentially fraudulent, claims by the unimpaired is to require all plaintiffs to develop the record early in the litigation regarding their alleged level of impairment and the credibility of their diagnoses upon which the claims are based.

- 1. Checklist Item #2: Require plaintiff to show credible evidence of asbestos-related impairment in order to bring or proceed with a claim.*

Asbestos claimants generally have alleged various types of injuries, including mesothelioma, lung cancer and nonmalignant conditions that plaintiffs often refer to as asbestosis or pleural plaques. Mesothelioma is a type of cancer most often associated with asbestos exposure, though it has other causes and can occur idiopathically.⁸⁸ For mesothelioma and lung cancer claims, a plaintiff should be required to present evidence verifying the condition with an exposure history and a credible doctor's report certifying the condition as being asbestos-related.

Allegations of nonmalignant asbestos-related conditions, such as asbestosis, are more challenging for courts because they are subject to misinterpretation and abuse. Many people merely allege radiographic evidence of asbestos exposure, but only people who are physically impaired from exposure to asbestos should be permitted to bring an asbestos claim. A court can determine whether the plaintiff has a legitimate claim by requiring the plaintiff to provide the court with three core pieces of information from a treating physician: (1) a thorough occupational, exposure, and medical history; (2) an x-ray showing markings on the plaintiff's

⁸⁸ See Thomas A. Sporn & Victor L. Roggli, *Mesothelioma in PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES* 104, 108 (Victor Roggli et al., eds., 2d ed., Springer 2004) (1992) (stating evidence that between ten and twenty percent of mesothelioma cases are not asbestos-related, but are idiopathic).

lung that are consistent with asbestos exposure; and (3) a pulmonary function test showing breathing impairment outside of the normal range.⁸⁹

Trial courts have several options for handling claims that fail to meet all three of these base-line tests. First, the actions can be dismissed for failure to state a claim.⁹⁰ Courts in Arizona, Delaware, Maine, Maryland, and Pennsylvania have held that physically unimpaired asbestos claimants do not have legally compensable claims.⁹¹ Federal courts interpreting Hawaii and Massachusetts laws have reached the same conclusion.⁹² As one of the courts explained, “[t]here is generally no cause of action in tort until a plaintiff has suffered an identifiable, compensable injury.”⁹³ The Pennsylvania Supreme Court further specified that in asbestos cases, markings in the pleural linings of the lung without any accompanying impairment does not create a “compensable injury which gives rise to a cause of action.”⁹⁴ Individuals with these conditions, the court concluded, “lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring.”⁹⁵ Thus, they have no claim.

⁸⁹ See generally Dr. John E. Parker, *Understanding Asbestos-Related Medical Criteria*, 18-10 MEALEY'S LITIG. REP.: ASBESTOS 25 (June 18, 2003).

⁹⁰ FED. R. CIV. P. 12(b).

⁹¹ See *Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. App. 1987); *In re Asbestos Litig. Leary Trial Group*, Nos. 87C-09-24, 90C-09-79, 88C-09-78, 1994 WL 721763 (Del. Super. June 14, 1994), *rev'd on other grounds sub nom. Mancari v. A.C. & S., Inc.*, 670 A.2d 1339 (Del. 1995); *Bernier v. Raymark Indus., Inc.*, 516 A.2d 534 (Me. 1986); *Owens-Illinois v. Armstrong*, 591 A.2d 544 (1991), *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md. Ct. Spec. App. 1991); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa.1996).

⁹² See *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *In re Mass. Asbestos Cases*, 639 F. Supp. 1 (D. Mass. 1985).

⁹³ *Bernier*, 516 A.2d at 542.

⁹⁴ See *Simmons*, 674 A.2d at 237.

⁹⁵ *Id.* at 236; see also *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, 1996 WL 539589, at *2 n.8 (E.D. Pa. Sept. 16, 1996) (“Pleural disease is most often an asymptomatic scarring of the pleura—a tissue thin membrane surrounding the lung. Many states, including Pennsylvania, do not allow for a cause of action based upon this condition alone if it is asymptomatic. It can only be discovered through x-ray and, in and of itself, does not pose a health risk or

Second, trial courts may administratively dismiss claims brought by the non-sick. For example, in the federal asbestos multi-district litigation, the late Judge Charles Weiner administratively dismissed all cases where the plaintiff could not provide the court with sufficient medical evidence of a "compensable injury sufficient to sustain a cause of action,"⁹⁶ stating that he would reinstate them if and when the claimant shows evidence of asbestos exposure and an asbestos-related disease.⁹⁷ The order stated simply, "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."⁹⁸ Thousands of cases involving unimpaired claimants were dismissed under this and similar plans issued by this court.

Finally, a trial court can create an inactive docket (also called a pleural registry or deferred docket) to set aside and preserve the claims of the non-sick.⁹⁹ Inactive asbestos dockets were first adopted in the late 1980s and early 1990s in jurisdictions that were experiencing large numbers of filings by the unimpaired—Massachusetts (September 1986), Chicago (March 1991), and Baltimore City (December 1992).¹⁰⁰ Since 2002, the list of

impairment.").

⁹⁶ See *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, Civ. Action No. 2, 1996 WL 239863, at *5 (E.D. Pa. May 2, 1996).

⁹⁷ See *id.*

⁹⁸ See *id.*; *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL 875, Order (E.D. Pa. Oct. 16, 1997).

⁹⁹ See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541 (1992); see also *In re Report of the Advisory Group*, 1993 WL 30497, at *51 (D. Me. Feb. 1, 1993) ("[P]laintiffs need not engage in the expense of trial for what are still minimal damages, but are protected in their right to recover if their symptoms later worsen.").

¹⁰⁰ 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); *In re Asbestos Pers. Injury & Wrongful Death Asbestos Cases*, 1992 WL 12019620 (Baltimore City Cir. Ct., Md. Dec. 9, 1992). The Massachusetts inactive docket has been "really a very good system that has worked out." *Unimpaired Asbestos Dockets: Are They Easing the Flow of Litigation?*, HARRISMARTIN'S COLUMNS: ASBESTOS, Feb. 2002, at 2 (quoting Judge Hiller Zobel). Baltimore City Circuit Court Judge Richard

jurisdictions with inactive asbestos dockets has grown to include Cleveland, Ohio (March 2006); Minnesota (coordinated litigation) (June 2005); St. Clair County, Illinois (February 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002).¹⁰¹ In 2005, RAND referred to the “reemergence” of inactive dockets as one of “the most significant developments” in asbestos litigation.¹⁰²

2. *Checklist Item #3: Establish the credibility of the diagnosis alleging injury by determining whether the claim was generated through a litigation screening or is supported by a report from a physician that has been implicated in fraudulent civil filings.*

A key turning point in the mass generation of asbestos claims was a landmark ruling in June 2005 by the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack of the Southern District of Texas. Judge Jack recommended that all but one of the 10,000 federal court silica claims be dismissed on remand because the diagnoses were fraudulently prepared.¹⁰³ Judge Jack said in her opinion: “[T]hese diagnoses were driven by neither health nor justice [T]hey were manufactured for money.”¹⁰⁴

Rombro has said “the docket is working.” *In re Pers. Injury & Wrongful Death Asbestos Cases*, No. 24-X-92-344501, at 5 (Baltimore City Cir. Ct., Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Unimpaired Docket Medical Removal Criteria).

¹⁰¹ See Mark A. Behrens & Phil Goldberg, *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 MEALEY’S LITIG. REP.: ASBESTOS 33 (Apr. 13, 2005); Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. LITIG. 253 (2005).

¹⁰² CARROLL ET AL., *supra* note 15, at xx.

¹⁰³ See *In re Silica Prods. Liab. Litig.*, MDL 1553, 398 F. Supp. 2d 563, 642 (S.D. Tex. 2005) (“[T]here is only one of the 10,000 Plaintiffs whom the Court can say with confidence is genuinely injured.”).

¹⁰⁴ *Id.* at 635; see also Fred Krutz & Jennifer R. Devery, *In the Wake of Silica MDL 1553*, 4:5 MEALEY’S LITIG. REP. SILICA 1, 2 (2006); Mike

The B readers and screening firms referenced in Judge Jack's opinion have helped generate tens of thousands of asbestos claims. For example, it has been reported that seventy-two percent of the claimants before Judge Jack had filed asbestos-related claims,¹⁰⁵ even though it is "statistically speaking, nearly impossible" to suffer from both asbestosis and silicosis.¹⁰⁶ Dr. Ray Harron reportedly diagnosed disease in 51,048 Manville claims and supplied 88,258 reports in support of other claims.¹⁰⁷ In one day, Dr. Harron reportedly diagnosed 515 people, or the equivalent of more than one a minute in an eight-hour shift.¹⁰⁸ Dr. James Ballard provided 10,700 primary diagnoses and another 30,329 reports in

Tolson, *Attorneys Behind Silicosis Suits Draw U.S. Judge's Wrath/Houston Legal Firm Fined; Order From Bench Says Diagnoses Made for the Money*, HOUSTON CHRON., July 2, 2005, at A1; Mike Tolson, *A Dozen Doctors, 20,000 Silicosis Cases/By Signing Off, X-Ray Readers Put Names on Scandal*, HOUSTON CHRON., May 8, 2006, at A1; Mike Tolson, *Exposing the Truth Behind Silicosis*, HOUSTON CHRON., May 7, 2006, at A1; Editorial, *Silicosis, Inc.*, WALL ST. J., Oct. 27, 2005, at A20.

¹⁰⁵ See Editorial, *Trial Bar Cleanup*, WALL ST. J., Feb. 11, 2006, at A8; see also *Asbestos: Mixed Dust and FELA Issues: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (Feb. 2, 2005) (statement of Professor Lester Brickman, Cardozo Law School), available at http://judiciary.senate.gov/testimony.cfm?id=1362&wit_id=3963 (reporting that 60% of the federal court silica claimants had filed asbestos claims with the Manville Trust).

¹⁰⁶ Carlyn Kolker, *Spreading the Blame: The So-Called Phantom Epidemic of Silicosis Has Become a Hot Potato for the Plaintiffs' Bar*, 27:10 AM. LAW., Oct. 2005, at 24.

¹⁰⁷ See Editorial, *Silicosis Clam-up*, WALL ST. J., Mar. 13, 2006, at A18.

¹⁰⁸ See *id.* Recently, Dr. Harron reached an agreement with the Texas Medical Board that he will never again practice medicine in Texas. According to the medical board's website:

On April 13, 2007, the Board and Dr. Harron entered into an Agreed Order pursuant to which Dr. Harron agreed not to practice medicine in the period before his medical license expires, not to renew his medical license after it expires and not to petition the Board for reinstatement or re-issuance of his license.

News Release, Tex. Med. Bd., Medical Board Disciplines 34 Doctors (Apr. 18, 2007), available at <http://www.tmb.state.tx.us/news/press/2007/041807a.php>. The Board acted "based on allegations related to silica/silicosis litigation and Dr. Harron's determination and signature on x-ray findings of silicosis for numerous silicosis plaintiffs." *Id.*

support of asbestos claims.¹⁰⁹ According to Manville Trust records, Dr. Jay Segarra “participated in almost 40,000 positive diagnoses for asbestos-related illnesses over the last 13 years, or about eight per day, every day, including weekends and holidays. There were about 200 days on which Dr. Segarra rendered positive diagnoses for more than 20 people, and 14 days with more than 50.”¹¹⁰

Judge Jack’s findings have impacted, and will continue to impact, asbestos litigation.¹¹¹ For example, the Court of Common Pleas of Cuyahoga County (Cleveland), Ohio recently dismissed approximately 3,755 asbestos cases after the screening doctors, some of whom had been involved in the silicosis litigation, refused to testify, asserting their Fifth Amendment right against self-incrimination.¹¹² The court also put aside another 35,000 asbestos cases where plaintiffs were diagnosed by the same doctors until those plaintiffs receive diagnoses from other doctors.¹¹³ Similarly, Claims Resolution Management Corporation, which manages the Manville Personal Injury Settlement Trust, has stated that it will no longer accept medical reports prepared by the doctors and screening companies that were the subject of Judge Jack’s opinion.¹¹⁴

Several other trusts have followed Manville’s lead, including the Eagle-Picher, Celotex, Halliburton (DII Industries), and Keene Creditors Trusts.¹¹⁵ Most recently, the current manager of the

¹⁰⁹ See Editorial, *Silicosis Clam-up*, *supra* note 107.

¹¹⁰ Adam Liptak, *Defendants See a Case of Diagnosing for Dollars*, N.Y. TIMES, Oct. 1, 2007, at A14.

¹¹¹ See Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 289 (2006).

¹¹² See *In re Cuyahoga County Asbestos Cases*, Special Docket 73958 (Ct. Com. Pl. Cuyahoga County, Ohio Mar. 22, 2006); Peter Geier, *Thousands of Asbestos Cases Dismissed*, NAT’L L.J., Apr. 10, 2006, at 13.

¹¹³ Davies, *Plaintiffs’ Lawsuits Against Companies Sharply Decline*, *supra* note 6, at A9.

¹¹⁴ Memorandum from David Austern, President, Claims Resolution Management Corporation, *Suspension of Acceptance of Medical Reports* (Sept. 12, 2005), available at <http://www.claimsres.com/documents/9%2005%20Suspension%20Memo.pdf>.

¹¹⁵ Letter from William B. Nurre, Executive Director, Eagle-Picher Personal

federal asbestos multi-district litigation docket, United States District Judge James Giles of the Eastern District of Pennsylvania, stated that, because “[c]urrent litigation efforts in this court and in the silica litigation have revealed that many mass screenings lack reliability and accountability and have been conducted in a manner which failed to adhere to certain necessary medical standards and regulations,” the court will “entertain motions and conduct such hearings as may be necessary to resolve questions of evidentiary sufficiency in non-malignant cases supported only by the results of mass screenings which allegedly fail to comport with acceptable screening standards.”¹¹⁶

Given the claim generation history, the credibility of claims must be properly scrutinized. Also, trial courts should join the recent movement to reject claims generated by the screening firms and physicians that were the subject of Judge Jack’s opinion.

C. Apply Traditional Tort Litigation Procedures

There is now a better understanding that creating separate, fast-track procedures for asbestos cases fueled the claim-generation engine for unimpaired claimants by encouraging the settlement of claims without regard to their merits.¹¹⁷ In the last few years,

Injury Settlement Trust, to Claimants’ Counsel (Oct. 19, 2005), *available at* <http://www.cpf-inc.com/includes/content/PhysicianNotice.pdf>; Notice of Trust Policy Regarding Acceptance of Medical Reports from John L. Mekus, Executive Director, Celotex Asbestos Settlement Trust (Oct. 20, 2005), *available at* http://www.celotextrust.com/news_details.asp?nid=22.

¹¹⁶ *In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8, 2007 WL 2372400, *2 (E.D. Pa. May 31, 2007).

¹¹⁷ Former Michigan Supreme Court Chief Justice Conrad L. Mallet, Jr. described in testimony to Congress the pressure that trial court judges inundated with asbestos claims might feel to shortcut procedural rules:

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

courts have restored order to asbestos cases and effectively reduced incentives for new filings by unimpaired claimants.

1. *Checklist Item #4: Do not consolidate dissimilar claims.*

The use of joinder to consolidate dissimilar claims has been discredited and should not be allowed. In 2004, the Mississippi Supreme Court began severing multi-plaintiff asbestos-related cases.¹¹⁸ In 2006, the Michigan Supreme Court adopted an administrative order to preclude the “bundling” of asbestos-related cases for trial, stating that “each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery.”¹¹⁹ Similarly, the Ohio Supreme Court amended the Ohio Rules of Civil Procedure to preclude the joinder of pending asbestos-related actions for trial purposes.¹²⁰ In addition, Georgia, Kansas, and Texas have enacted laws to prevent

The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 320 (1999) (statement of Former Michigan Supreme Court Chief Justice Conrad L. Mallet, Jr.).

¹¹⁸ See, e.g., *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004); *Albert v. Allied Grove Corp.*, 944 So. 2d 1 (Miss. 2006); *Amchem Prods., Inc. v. Rogers*, 912 So. 2d 853 (Miss. 2005); *Illinois Cent. R.R. Co. v. Gregory*, 912 So. 2d 829 (Miss. 2005); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Alexander v. ACandS, Inc.*, 947 So. 2d 891 (Miss. 2007); see also Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393 (2005); David Maron & Walker W. (Bill) Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and The Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253 (2007).

¹¹⁹ Administrative Prohibition on “Bundling” Cases, MICH. L. WKLY., Aug. 9, 2006; see also Editorial, *Unbundling Asbestos*, WALL ST. J., Aug. 21, 2006, at A10.

¹²⁰ See OHIO R. CIV. P. 42(A)(2) (“In tort actions involving an asbestos claim, . . . the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person’s household.”).

the joinder of asbestos cases at trial unless all parties consent.¹²¹ These decisions are sound and should be followed. Apples and bananas may mix in a fruit salad, but not in asbestos litigation.

2. *Checklist Item #5: Assure discovery is proper for each claim and defendant; if "form" discovery is used in one's jurisdiction, make sure it is appropriate and not overly burdensome as applied in individual cases.*

Some jurisdictions, such as San Francisco, use a standard form for discovery in asbestos cases that requires each defendant to respond to a sweeping set of interrogatories and production requests within 90 or 120 days of being served.¹²² In the past, these forms may have provided an effective and fair way to inject efficiency into asbestos litigation. The traditional asbestos defendants that were regularly named in asbestos litigation often had this information readily available, as they likely produced much of it in prior cases.

Broad-based discovery tools, however, can be inefficient, unfair, and out-of-date when applied to newer defendants. For companies that may only be peripherally connected, if at all, to the alleged injury, responding to "one size fits all" standing discovery orders can be unduly costly and burdensome. For example, in one California case, Watts Regulator Company—a valve manufacturer—was named in a lawsuit where the plaintiff alleged contact with one type of the company's valves used on one day at one location.¹²³ Despite the narrow scope of the plaintiff's claim, the standing order required Watts to provide information on the identity and composition of all asbestos-containing products made or sold in a twelve year period, which reportedly amounted to

¹²¹ See KAN. ST. ANN. § 60-4902 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (Vernon 2005); GA. CODE ANN. § 51-14-11 (2007).

¹²² *In re Complex Asbestos Litig.*, No. 828684 (Cal. App. Dep't. Super. Ct. Jan. 1, 1997) (general order re: New Filings), available at http://www.sfgov.org/site/courts_page.asp?id=10754 [hereinafter Gen. Order No. 129 Re: New Filings].

¹²³ See Petition for Review, *In re Complex Asbestos Litig.* (Watts Regulator Co.), No. 828864 (Cal. App. Dep't Super. Ct. Apr. 2, 2007).

almost 2,000 unique products with more than a million different permutations.¹²⁴

As this example illustrates, orders to compel the production of substantial information that has no relevance to a case and will not result in the discovery of admissible evidence can be highly inappropriate. Assuming it is even possible to collect the information in the time period allowed, as a practical matter, companies would likely be coerced into settling claims regardless of their merits just to avoid spending the considerable time, money and resources it would take to comply with the standing order.

Trial courts should follow traditional litigation procedures and only require defendants to produce information that is reasonably related to a plaintiff's specific allegations and is reasonably calculated to lead to the discovery of admissible evidence in the action.¹²⁵ To the extent "form" discovery can still be a useful litigation tool, it should be updated regularly to reflect the many types of companies that are named in asbestos litigation and the many types of cases that are being brought today. Trial courts considering a form discovery order should seek input from the plaintiff and defense communities before issuing such an order. Courts also should allow objections by defendants to assure that a form's discovery provisions are not overly burdensome as applied in individual cases.¹²⁶

3. Checklist Item #6: Do Not Short-Circuit Trials.

Another trial management technique that should be avoided is arbitrary time limits for defendants' to present their cases. For example, a San Francisco court recently limited the 124 defendants

¹²⁴ See Petition for Review at 15, *In re Complex Asbestos Litig.* (Watts Regulator Co.), No. 828864 (Cal. App. Dep't Super. Ct. Apr. 2, 2007).

¹²⁵ See, e.g., FED. R. CIV. P. 26(b)(1).

¹²⁶ Under San Francisco Superior Court Order No. 129, a defendant may not object that the information is not reasonably calculated to lead to the discovery of admissible evidence in the action and may not object that the discovery is unduly burdensome, except that a defendant may assert a "one-time" burden objection in the first ninety days of the first suit against it. Gen. Order No. 129 Re: New Filings, *supra* note 122.

named in an asbestos action to 45 total hours, which amounted to thirty-six minutes per defendant to cross-examine plaintiffs and present their own cases. Such a limitation denies defendants basic procedural due process because their ability to mount a defense “will be hampered or even eliminated through actions of others over which these defendants have no control or lawful ability to control.”¹²⁷

D. Only Allow Claims Against Defendants Where There Is a Legal Basis for Liability

Now in its fourth decade, the litigation has been sustained by the plaintiffs’ bar search for new defendants coupled with new theories of liability. As the litigation evolves, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched.

The issue of whether a legal duty exists between an asbestos plaintiff and a peripheral defendant who may have little or no connection to the alleged injury is increasingly becoming a central issue in the litigation. Unlike with most litigation, plaintiffs’ lawyers in asbestos cases are not selective in naming as defendants only those companies that could have caused the harm. They typically name scores of defendants regardless of their actual connection to the plaintiff’s alleged injury. Nevertheless, as in other tort cases, the plaintiff must still meet his or her burden of proving that the defendant owed a legal duty before liability can be imposed.¹²⁸

¹²⁷ See Written Opposition to Certain Trial Procedures in Violation of Due Process at 2, *Arts v. Asbestos Defendants*, No. 417505 (Cal. Super. Ct. filed July 17, 2007).

¹²⁸ *Pulka v. Edelman*, 358 N.E.2d 1019, 1022 (N.Y. 1976), *reargument denied*, 362 N.E.2d 640 (N.Y. 1977).

1. *Checklist Item #7: Premises owners generally should owe no duty to plaintiffs alleging harm from off-site, secondhand exposure to asbestos.*

A newer duty issue is whether a premises owner may be held liable for injuries to workers' family members who have been exposed to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.¹²⁹ In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products. Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners, for alleged harms to independent contractors exposed to asbestos. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs."

Since the beginning of 2005, a growing number of courts have decided whether premises owners owe a duty to "take home" exposure claimants. The duty has been rejected by the highest courts in Georgia,¹³⁰ New York,¹³¹ and Michigan;¹³² Texas¹³³ and

¹²⁹ See Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 MEALEY'S LITIG. REP.: ASBESTOS 32 (July 5, 2006).

¹³⁰ See *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005).

¹³¹ See *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115 (N.Y. 2005); see also *In re Eighth Judicial Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.)*, 12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006).

¹³² See *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206 (Mich. 2007).

¹³³ See *Alcoa, Inc. v. Behringer*, 2007 WL 2949524 (Tex. App. Oct. 11, 2007) (no duty owed because harm from non-occupational exposure to asbestos was not reasonably foreseeable at time of plaintiff's exposure); see also *Exxon Mobil Corp. v. Altimore*, 2007 WL 1174447 (Tex. App. Apr. 19, 2007) (withdrawn Aug. 9, 2007) (premises owner owed no duty to an employee's wife injured by pre-1972 exposure to asbestos brought home on her husband's work clothing).

Iowa¹³⁴ appellate courts; a Delaware trial court,¹³⁵ and a Kentucky federal court.¹³⁶ Earlier, a Maryland appellate court reached the same conclusion.¹³⁷ The New Jersey Supreme Court is the only court of last resort to go the other way.¹³⁸ A few appellate courts have found a duty to exist in some circumstances.¹³⁹

A broad new duty requirement for landowners would allow plaintiffs' lawyers to begin to name countless premises owners directly in asbestos and other suits. As one commentator has explained,

If the law becomes clear that premises-owners or employers owe a duty to the family members of their employees, the stage will be set for a major expansion in premises liability. The workers' compensation bar does not apply to the spouses or children of employees, and so allowing those family members to maintain an action against the employer would greatly increase the number of potential claimants. Moreover, people who claim to be injured from take-home exposure, especially children, have very appealing facts and tend to be much younger than other claimants. These factors all flow together in support

¹³⁴ See *Fossen v. MidAmerican Energy Co.*, 2008 WL 141194 (Iowa Ct. App. Jan. 16, 2008).

¹³⁵ See *In re Asbestos Litig. (Riedel v. ICI Americas, Inc.)*, 2007 WL 4571196 (Del. Super. Ct. Dec. 21, 2007) (unpublished).

¹³⁶ See *Martin v. General Elec. Co.*, 2007 WL 2682064 (E.D. Ky. Sep. 5, 2007) (unpublished). As this article went to press, plaintiffs were appealing the *Martin* ruling in the Sixth Circuit Court of Appeals.

¹³⁷ See *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58 (Md. Ct. Spec. App. 1998).

¹³⁸ See *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006).

¹³⁹ See *Satterfield v. Breeding Insulation, Inc.*, 2007 WL 1159416 (Tenn. App. Apr. 19, 2007), *appeal granted* (Tenn. Sept. 17, 2007); *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. App. 2006); *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006); *Rochon v. Saberhagen Holdings, Inc.*, 2007 WL 2325214 (Wash. App. Aug. 13, 2007) (unpublished); *Honer v. Ford Motor Co.*, 2007 WL 2985271 (Cal. App. Oct. 15, 2007); *Condon v. Union Oil Co. of Cal.*, 2004 WL 1932847 (Cal. App. Aug. 31, 2004).

of high values for these claims.¹⁴⁰

The courts that have rejected a new duty rule for premises owners have recognized that tort law must draw a line between the competing policy considerations of providing a remedy to everyone who is injured and of extending tort liability almost without limit. As the Michigan Supreme Court explained, "imposing a duty on a landowner to anybody who comes into contact with somebody who has been on the landowner's property" would create "a potentially limitless pool of plaintiffs."¹⁴¹ Potential plaintiffs might include anyone who came into contact with an exposed worker or his or her clothes, such as co-workers, children living in the house, extended family members, renters, house guests, baby-sitters, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he was dirty, as well as local laundry workers or others that handled the worker's clothes.

Trial courts would be wise to heed the concerns raised by the high courts of Georgia, New York, and Michigan, and dismiss premises owners from cases brought by persons exposed off-site.

2. *Checklist Item #8: Maintain traditional tort law distinctions for when premises owners can be liable for injuries to contractors' employees.*

In asbestos litigation, the issue of landowner liability for harms caused to contractors' employees arises in two types of situations. First, some personal injury lawyers have asserted liability against landowners when the contractor was specifically hired to perform

¹⁴⁰ Patrick M. Hanlon, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law in 2005*, SL041 ALI-ABA 665, 694 (2005).

¹⁴¹ *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas*, 740 N.W.2d at 200; *see also Adams*, 705 A.2d at 66 ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came into close contact with [decedent's husband], including other family members, automobile passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees.").

the work that caused the injury—in this case, working with products that contained asbestos.¹⁴² The Nevada Supreme Court, however, ruled in *Knutson v. Battle Mountain Gold Co.*¹⁴³ that a premises owner does not owe such a duty of care to contractors' employees¹⁴⁴ because the independent contractor is in a better position than the premises owner to take special precautions to protect against any peculiar damages associated with working on the premises.¹⁴⁵ The Delaware Supreme Court echoed that sentiment: "If the independent contractor, through its work, causes the condition that might otherwise give rise to landowner liability . . . employees of that independent contractor have no basis to claim that the landowner is liable for injuries resulting from that condition."¹⁴⁶

Second, a contractor's employee may sue a landowner for asbestos related exposures resulting from work of another independent contractor on the same premises. The Delaware Supreme Court, however, ruled that landowners cannot be liable "solely because they knew of the existence of a latent hazard on their premises."¹⁴⁷ Rather, two additional elements must be shown: "ignorance of the latent hazard on the part of the contractor and its employees and the failure to warn of the latent condition or to take other appropriate action."¹⁴⁸ The California Supreme Court has

¹⁴² See, e.g., *Knutson v. Battle Mountain, Gold Co.*, No. 46504 (Nev. July 20, 2007) (Order of Affirmance).

¹⁴³ *Id.*

¹⁴⁴ See also *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007); *Entergy Gulf States, Inc. v. Summers*, 2007 WL 2458027 (Tex. Aug. 31, 2007), *petition for reh'g filed* (Nov. 19, 2007).

¹⁴⁵ See *Knutson*, No. 46504, at 4 (internal citations omitted).

¹⁴⁶ *In re Asbestos Litig.*, 897 A.2d 767 (table), 2006 WL 1214980 (Del. Apr 12, 2006) (unpublished); see also *In re Asbestos Litig.*, 2007 WL 1651964 (Del. Super. May 31, 2007) (unpublished), *aff'd sub nom. Wenke v. E.I. Du Pont de Nemours and Co.*, 2008 WL 187940 (Del. Super. Jan. 17, 2008); *In re Asbestos Litig.*, 2007 WL 1651968 (Del. Super. June 25, 2007) (unpublished).

¹⁴⁷ *In re Asbestos Litig.*, 2006 WL 1214980, at *2.

¹⁴⁸ *Id.* The Restatement (Second) of Torts § 343 states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and

supported these principles, remanding a case for a new trial so that jury instructions could reflect that “the hirer/landowner who has not retained control over the work, and who was not itself actually on notice of a concealed hazardous condition that causes injury, should not be derivatively or vicariously liable for injuries contemporaneously inflicted by an independent contractor on another contractor’s employee.”¹⁴⁹ That court found it persuasive “that reasonable safety precautions against the hazard of asbestos were readily available, such as wearing an inexpensive respirator.”¹⁵⁰ Trial courts should follow these well-reasoned decisions.

3. *Checklist Item #9: Component part manufacturers should not be held liable for alleged asbestos-related hazards in external or replacement parts made, supplied, or installed by others and affixed post-manufacture.*

Plaintiffs’ lawyers have also begun naming manufacturers of non-asbestos components (typically pumps and valves) in product liability actions alleging that the component part maker had a duty to warn of hazards in asbestos-containing components or finished products made by others.¹⁵¹ These claims should be dismissed; it is well established “[a]s a general rule, [that] component sellers should not be liable when the component itself is not defective.”¹⁵² This rule was embodied in the Restatement, Third, Products Liability and has been found to apply even where the supplier

should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (1965).

¹⁴⁹ *Kinsman v. Unocal Corp.*, 123 P.3d 931, 945 (Cal. 2005).

¹⁵⁰ *Id.* at 939.

¹⁵¹ *See Braaten v. Saberhagen Holdings*, 151 P.3d 1010 (Wash. Ct. App. 2007), *review granted*, No. 80251-3 (Wash. Jan. 8, 2008); *Simonetta v. Viad Corp.*, 151 P.3d 1019 (Wash. Ct. App. 2007), *review granted*, No. 80076-6 (Wash. Jan. 8, 2008).

¹⁵² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §5 (1997); *see also Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992).

knew its product may be integrated into a finished product that may cause harm.¹⁵³ The reporters of the Restatement chose their rules based on public policy rather than numbers of cases or bias toward any party.

To place a duty to warn on a defendant for harms caused by others' products, or the use of others' products, is contrary to two long-standing tort law principles: (1) that economic loss should ultimately be borne by the one who caused it, and (2) that the manufacturer of a particular product is in the best position to warn about risks associated with it. As the Restatement (Third) Products Liability explains, "[i]f the component is not itself defective, it would be unjust and inefficient to impose liability solely on the ground that the manufacturer of the integrated product utilizes the component in a manner that renders the integrated product defective."¹⁵⁴

Furthermore, expanding liability for failure to warn under these circumstances would be "untenable and unmanageable."¹⁵⁵ Such a duty rule would lead to "legal and business chaos—every product supplier would be required to warn of the foreseeable dangers of numerous other manufacturers' products. . . ."¹⁵⁶ "For example, a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject, and the manufacturer of bread would be required to warn of peanut allergies, as a peanut butter and jelly sandwich is a foreseeable use of bread."¹⁵⁷ Packaging companies might be held liable for hazards regarding contents made by others. There are many other examples that

¹⁵³ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §5 cmt. a illus. 1 (1997); see also *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510 (Mich. Ct. App. 1995), *appeal denied*, 562 N.W.2d 198 (Mich. 1997).

¹⁵⁴ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §5 cmt. a (1997).

¹⁵⁵ Thomas W. Tardy III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HARRISMARTIN COLUMNS: ASBESTOS, May 2007, at 6.

¹⁵⁶ John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, TOXIC TORTS & ENV'TL L. 7 (Defense Research Inst. Toxic Torts & Env'tl L. Comm. Winter 2005).

¹⁵⁷ Tardy & Frase, *supra* note 155, at 6.

could be provided.

Consumer safety also could be undermined by the potential for over-warning (the “Boy Who Cried Wolf” problem) and through conflicting information on different components and finished products.¹⁵⁸

E. Only Allow a Defendant To Be Held Liable If Its Conduct or Product Was a Legal Cause of the Alleged Injury

For issues relating to both general and specific causation, courts should require that plaintiffs provide precise and credible allegations against each defendant early in the litigation and exercise their judicial responsibility to require the application of well-grounded science in causation arguments.¹⁵⁹ General causation exists when a substance can cause an injury or condition in the general population; specific causation exists when the substance is the cause of a specific person’s injury.¹⁶⁰ Unlike some environmental contamination cases, there is no defined incident of exposure, and the latency period can take several decades.¹⁶¹ This

¹⁵⁸ See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §5 cmt. a. (1997); Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 43 (1983) (“The extension of workplace warnings liability unguided by practical considerations has the unreasonable potential to impose absolute liability. . . .”).

¹⁵⁹ See, e.g., *Merrell Dow Pharm. Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) (in toxic tort cases, a plaintiff has a burden of showing both general causation—that the substance the plaintiff was allegedly exposed to can generally cause the condition claimed—and specific causation—that the specific exposure was a substantial cause of the specific harm).

¹⁶⁰ *Id.* at 714; see also *Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265, 270 (Tex. App. 2006) (“Proving one type of causation does not necessarily prove the other, and both are needed in situations where direct, reliable medical testing for specific causation has not taken place.”).

¹⁶¹ DEPARTMENT OF HEALTH AND HUMAN SERVICES, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, ASBESTOS TOXICITY: WHAT RESPIRATORY CONDITIONS ARE ASSOCIATED WITH ASBESTOS?, available at http://www.atsdr.cdc.gov/csem/asbestos/respiratory_changes2.html (observing latency periods of ten to fifty years).

circumstance is partly why “most plaintiffs sue every known manufacturer of asbestos products,”¹⁶² notwithstanding the plaintiff’s marginal contact, if any, with a particular defendant’s product. It is incumbent on trial courts, therefore, to dismiss defendants where causation cannot be established and instruct jurors on how to make appropriate causation decisions.¹⁶³

1. Checklist Item #10: Make gatekeeper decisions on expert testimony and assure that materials experts rely on actually support their opinions.

Trial courts should hold preliminary hearings to scrutinize the reliability of expert opinions and to determine whether there is a risk of disease associated with a particular asbestos exposure. There are different types, length and concentrations of asbestos fibers,¹⁶⁴ and plaintiffs’ lawyers are increasing the number of

¹⁶² Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162 (4th Cir. 1986).

¹⁶³ In some cases, especially where the plaintiffs are sympathetic, courts have relaxed specific causation requirements to allow a case to go to trial or to encourage settlement. The ability to recover absent proof of causation is considered by many legal observers to be a key cause of the rapid expansion in recent years of claims alleging asbestos-related injuries. See Steven Hantler, *Toward Greater Judicial Leadership on Asbestos Litigation*, CIVIL JUSTICE FORUM, MANHATTAN INST. FOR POLICY RESEARCH, Apr. 2003, at 6–8 (“[D]uring the course of discovery some of the defendants are dismissed on motions for summary judgment because there has been no evidence of any contact with any of such defendants’ asbestos-containing products. Other defendants may be required to go to trial but succeed at the verdict stage.”); but see Pearson v. Garlock Sealing Tech., No. 2001-297 (Tex. Dist. Ct. order Jan. 25, 2005) (granting defendant’s summary judgment motion because plaintiff’s expert testimony attempting to link Garlock’s gaskets to plaintiff’s peritoneal mesothelioma failed to satisfy admissibility standards). HarrisMartin reported that Pearson’s settlements with other defendants totaled an estimated \$20 million. See *Texas Judge Awards Garlock Summary Judgment in Mesothelioma*, HARRISMARTIN’S COLUMNS: ASBESTOS, Feb. 2005, at 12.

¹⁶⁴ See, e.g., Becker v. Baron Bros., Coliseum Auto Parts, Inc., 649 A.2d 613, 620 (N.J. 1994) (trial court erred in instructing jury that all asbestos-containing friction products without warnings are defective as a matter of law: “Our courts have acknowledged that asbestos-containing products are not uniformly dangerous and thus that courts should not treat them all alike.”);

diseases they claim are asbestos-related.¹⁶⁵

One particularly helpful tool is the epidemiological study. For example, as discussed later in this section, some experts claim that it may only take one fiber to cause certain asbestos-related ailments, including mesothelioma.¹⁶⁶ In comparing this claim to epidemiological studies, an Ohio federal judge in *Bartel v. John Crane, Inc.*¹⁶⁷ ruled that testimony alleging “that every breath [plaintiff] took which contained asbestos could have been a substantial factor in causing his disease, is not supported by the medical literature.”¹⁶⁸ The court said that it would accord “less weight” to that testimony.¹⁶⁹

Where consistent, significant, and clear epidemiology exists, as in *Bartel*, courts have begun scrutinizing and, when appropriate, rejecting expert opinions that contradict those studies.¹⁷⁰ Carefully

Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1145 (5th Cir. 1985) (Tex. law) (“[A]ll asbestos-containing products cannot be lumped together in determining their dangerousness.”); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985) (“Asbestos products . . . have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others.”).

¹⁶⁵ See Jonathan M. Samet, *Asbestos and Causation of Non-Respiratory Cancers: Evaluation by the Institute of Medicine*, 15 J.L. & POL’Y 1117 (2007).

¹⁶⁶ See *infra* notes 192–94 and accompanying text.

¹⁶⁷ 316 F. Supp. 2d 603 (N.D. Ohio 2004), *aff’d sub nom.* *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

¹⁶⁸ *Id.* at 611.

¹⁶⁹ *Id.*

¹⁷⁰ See, e.g., *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885–86 (10th Cir. 2005) (“This is not a case where there is no epidemiology. It is a case where the body of epidemiology largely finds no association between silicone breast implants and immune system diseases. . . . We are unable to find a single case in which a differential diagnosis that is flatly contrary to all of the available epidemiological evidence is both admissible and sufficient to defeat a defendant’s motion for summary judgment.”); *Allen v. Pa. Eng’g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (numerous reputable epidemiology studies contradicted plaintiffs’ theory); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316 (11th Cir. 1999) (plaintiffs’ “proffered conclusions . . . were out of sync with the conclusions in the overwhelming majority of the epidemiological studies presented to the court.”); *Chambers v. Exxon Corp.*, 81 F. Supp. 2d 661, 665 (M.D. La. 2000) (causation claim contradicted by “a number of

conducted pre-trial judicial “gatekeeper” hearings can bring these and other important causation issues to light and reduce the likelihood that liability can be based on speculative or discredited testimony.

2. *Checklist Item #11: Adhere to traditional elements of substantial factor causation at summary judgment and provide clear jury instructions as to whether a particular defendant’s asbestos was a “substantial factor” in causing the alleged harm.*

In cases where a plaintiff alleges multiple sources of exposures, which occurs regularly in asbestos litigation, courts must compare exposures to determine whether a particular source was a “substantial factor” in causing the alleged injury.¹⁷¹ When a defendant’s product could not have been a substantial factor in causing the claimed injury, the defendant must be dismissed—even when the defendant’s conduct could have been a “negligible” or “insubstantial” cause of the injury.¹⁷² For example, if there is clear evidence of long-term, substantial exposure to asbestos from one or more sources, incidental exposures cannot be deemed to be substantial causes of the alleged disease.¹⁷³

scientifically performed studies which demonstrate no association” between benzene and CML), *aff’d*, 247 F.3d 240 (5th Cir. 2001).

¹⁷¹ See RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965). The term “substantial cause” is sometimes referred to as a “substantial contributing cause” or a “substantial factor in.”

¹⁷² *Id.* at § 431 cmt. d (“While it is necessary to the existence of liability for negligence that the defendant’s negligent conduct be a substantial factor in bringing about harm to another, this of itself is not necessarily conclusive. There are certain rules which operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about. These rules are stated in §§ 435–453.”).

¹⁷³ See *id.* at cmt. a (“The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . rather than in the so-called ‘philosophical sense’ which includes every one of the great number of events without which any happening would not have occurred.”).

“The most frequently used test for causation in asbestos cases is the ‘frequency-regularity-proximity test’ announced in *Lohrmann*.”¹⁷⁴ In *Lohrmann v. Pittsburgh Corning Corp.*,¹⁷⁵ the Fourth Circuit formulated this test in determining whether a specific asbestos product contributed to, or was a substantial cause of, the plaintiff’s injuries.¹⁷⁶ The plaintiff, having gone to trial against seven asbestos product manufacturers, had argued that if he could “present any evidence that a company’s asbestos-containing product was at the workplace while the plaintiff was at the workplace, a jury question has been established as to whether that product contributed as a proximate cause to the plaintiff’s disease.”¹⁷⁷ The Fourth Circuit rejected the argument, and adopted the rule employed by the district court judge, providing that whether a plaintiff could get to the jury (or defeat a motion for summary judgment) “would depend upon the frequency of the use of the product and the regularity or extent of the plaintiff’s employment in proximity thereto.”¹⁷⁸ Many courts have applied the *Lohrmann* (or a *Lohrmann*-like) causation standard.¹⁷⁹

¹⁷⁴ *Slaughter v. Southern Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991) (applying *Lohrmann* to an asbestos claim governed by Texas law).

¹⁷⁵ 782 F.2d 1156 (4th Cir. 1986).

¹⁷⁶ *See id.* at 1163.

¹⁷⁷ *Id.* at 1162.

¹⁷⁸ *Id.*

¹⁷⁹ *See, e.g.*, *Gregg v. V.J. Auto Parts, Inc.*, 2007 WL 4557811, *9 (Pa. Dec. 28, 2007); *Borg-Warner Corp. v. Flores*, 323 S.W.3d 765 (Tex. 2007), *reh’g denied* (Oct. 12, 2007); *Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724 (S.C. 2007); *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749 (Miss. 2005); *Monsanto Co. v. Hall*, 912 So. 2d 134 (Miss. 2005); *Chavers v. General Motors Corp.*, 79 S.W.3d 361 (Ark. 2002); *Jackson v. Anchor Packing Co.*, 994 F.2d 1295 (8th Cir. 1993) (applying Ark. law); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445 (Md. 1992); *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449 (Ill. 1992); *Vaughn v. Ford Motor Co.*, 91 S.W.3d 387 (Tex. App. 2002) (applying Ill. law); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994); *Eckenrod v. GAF Corp.*, 544 A.2d 50 (Pa. Super. Ct. 1988), *appeal denied*, 553 A.2d 968 and 553 A.2d 969 (Pa. 1988); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990) (applying Pa. law); *James v. Bessemer Processing Co.*, 714 A.2d 898 (N.J. 1998); *Sholtis v. American Cyanamid Co.*, 568 A.2d 1196, 1207 (N.J. Super. Ct. App. Div. 1989) *Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712 (4th Cir. 1995) (applying N.C.

Accordingly, a trial court should carefully evaluate the potential culpability of named defendants and dismiss those defendants where the plaintiff has not put forth sufficient facts to support a "frequency, regularity, proximity test" at summary judgment.¹⁸⁰ For claims that go to trial, courts should instruct the jury that in order to find against a specific defendant, a plaintiff alleging multiple exposure sources must present evidence (1) of exposure to a "specific product" attributable to the defendant, (2) "on a regular basis over some extended period of time," (3) "in proximity to where the plaintiff actually worked," (4) such that it is probable that the exposure to the defendant's product caused plaintiff's injuries.¹⁸¹

Importantly, courts should avoid suggestions that substantial cause should be characterized in terms of risk. Some personal injury lawyers and their experts have suggested that it should be sufficient that a defendant's exposure is a substantial factor in the *risk* of asbestos disease.¹⁸² This mistaken notion arose from a California Supreme Court opinion adopting the substantial cause test because the court, perhaps unintentionally, equated risk with cause.¹⁸³ California courts that have followed this path have

law); *Chism v. W.R. Grace & Co.*, 158 F.3d 988 (8th Cir. 1998) (applying Mo. law); *Kraus v. Celotex Corp.*, 925 F. Supp. 646 (E.D. Mo. 1996) (applying Mo. law); *Lyons v. Garlock, Inc.*, 12 F. Supp. 2d 1226 (D. Kan. 1998) (applying Kan. law); *Dillon v. Fibreboard Corp.*, 919 F.2d 1488 (10th Cir. 1990) (applying Okla. law); *Blackston v. Shook and Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985) (applying Ga. law).

The *Lohrmann* causation standard also is the law in a number of states that have enacted medical criteria requirements for asbestos cases. See OHIO REV. CODE ANN. § 2307.96(B), FLA. STAT. ANN. §§ 774.203(30)-204 (applying to certain claims); GA. CODE ANN. § 51-14-3(23).

¹⁸⁰ See *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005) (applying the frequency, regularity, and proximity test and finding that the plaintiff did not establish that most of the named defendants had any exposure to the products).

¹⁸¹ *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986).

¹⁸² See Wasserman et al., *supra* note 67, at 897.

¹⁸³ See *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1223 (Cal. 1997) ("[T]he plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that

reduced California's causation standard to a minimal threshold; essentially allowing a claim to be based on any exposure that "is not negligible, theoretical, or infinitesimal."¹⁸⁴ Being a substantial risk is not the same as being a substantial factor in the *cause* of asbestos disease and, therefore, is contrary to the doctrines set forth in the Restatement (Second) and in *Lohrmann*, as well as sound science.¹⁸⁵ Trial courts in California and elsewhere should avoid weakening this fundamental concept in tort law that a defendant, in order to be deemed liable, must have had some part—and in these cases a substantial one—in actually causing the plaintiff's harm.

3. *Checklist Item #12: Assure specific and adequate product identification by dismissing cases where product identification is not sufficient.*

Because of the practice of naming scores, sometimes hundreds, of defendants, product identification can be particularly weak, such as the vague recollection by a co-worker that a particular defendant's product was at a workplace.¹⁸⁶ Trial courts, consequently, should and do regularly dismiss defendants at summary judgment for lack of proper product identification.¹⁸⁷ Discovery requests and subsequent summary judgment motions from individual defendants should be permitted early in the process

in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.") (emphasis added).

¹⁸⁴ See Wasserman et al., *supra* note 67, at 897.

¹⁸⁵ See *Nat'l Bank of Commerce v. Assoc. Milk Producers, Inc.*, 22 F. Supp. 2d 942, 961 (E.D. Ark. 1998) ("Establishing that the risk of causation 'is not zero' falls woefully short of the degree of proof required by *Daubert* and its progeny.").

¹⁸⁶ See, e.g., *Campbell ex rel. Estate of Campbell v. Flintkote Co.*, No. 1298 May. Term 1997, 93 Oct. Term 1998, 2000 WL 33711047, at *4 (Pa. Com. Pl. Nov. 7, 2000) ("[V]ague and oftentimes uncertain assertions . . . [are] not enough for the Plaintiff to sustain her burden.").

¹⁸⁷ See, e.g., *id.*; *Smith v. A-Best Prods. Co.*, No. 94-CA-2309, 1996 WL 80533, at *4 (Ohio App. 4 Dist. Feb. 20, 1996) (holding that plaintiff must prove exposure to each defendant's product and that the product was a substantial factor in causing plaintiff's injury).

so that defendants, especially peripheral defendants, are not pressured to engage in “nuisance” settlements to avoid the costs of defending the litigation.

Trial courts should adhere to the traditional tort law principle that a plaintiff must be able to identify a particular manufacturer as a cause of the alleged injuries.¹⁸⁸ It is insufficient to establish the mere presence of asbestos in the workplace. At minimum, a plaintiff must show a specific defendant’s asbestos product was used near where the plaintiff worked. As a Philadelphia trial court wrote: “[A plaintiff] must prove that he worked in the vicinity of the product’s use. . . . Product identity can be established where the record shows that plaintiff inhaled asbestos fibers shed by that manufacturer’s specific product.”¹⁸⁹

Some states consider product identification as part of the *Lohrmann* substantial factor analysis.¹⁹⁰ For example, the Mississippi Supreme Court held, “the proper test to be used is the frequency, regularity, and proximity standard to show product identification of the defendants’ actual products, exposure of the plaintiffs to those products, and proximate causation as to the injuries suffered by the plaintiffs.”¹⁹¹

4. *Checklist Item #13: Issue disease-specific causation requirements for mesothelioma, lung cancer and other asbestos-related cancers.*

a. *Mesothelioma*

Mesothelioma cases can be the most challenging for trial courts and juries because the plaintiffs can be particularly sympathetic. Notwithstanding the desire to assist those with this deadly form of

¹⁸⁸ See *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52 (Pa. Super. Ct. 1988) (“The mere fact that [defendant’s] asbestos products came into the facility does not show that the decedent ever breathed these specific asbestos products or that he worked where these asbestos products were delivered.”).

¹⁸⁹ *Campbell*, 2000 WL 33711047, at *2 (internal citations omitted).

¹⁹⁰ See, e.g., *Monsanto Co. v. Hall*, 912 So. 2d 134 (Miss. 2005).

¹⁹¹ *Id.* at 137.

cancer, it is important that plaintiffs' lawyers only seek recovery from those whose products may have caused the disease. One theory that plaintiffs' lawyers and their experts have used to expand the pool of potential defendants, as alluded to above, is the so-called "any fiber" theory.¹⁹² The single fiber theory suggests that any exposure to asbestos, regardless of quantity, duration or frequency, contributes to the development of asbestos disease.¹⁹³ This theory has been increasingly scrutinized by the courts because, according to epidemiological studies and leading scientific experts, the theory violates the fundamental toxicology tenet that dose makes the poison.¹⁹⁴

For example, in *Borg-Warner Corp. v. Flores*,¹⁹⁵ the Texas Supreme Court rejected the "single fiber" theory, holding that in order to prove causation, a plaintiff must show "[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease."¹⁹⁶ The trial judge responsible for administering the Texas asbestos docket agreed, stating that the single fiber theory "confuses the difference between a potential cause and a substantial cause, and encourages speculation on how little exposure, and how infrequently the exposure must take place, before causation can be said to have been proven."¹⁹⁷

Likewise, the Pennsylvania Supreme Court recently rejected

¹⁹² See Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, SW. U. L. REV. (forthcoming 2008).

¹⁹³ *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

¹⁹⁴ See generally, David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL'Y 5, 15 (2003) ("The relationship between dose and effect (dose-response relationship) is the hallmark of basic toxicology.").

¹⁹⁵ 232 S.W.3d 765 (Tex. 2007), *reh'g denied* (Oct. 12, 2007).

¹⁹⁶ *Id.* at 773.

¹⁹⁷ Letter from Judge Mark Davidson, 11th District Court, Texas, to Counsel, *In re Asbestos*, No. 2004-3, 964, at *3 (July 18, 2007) (on file with the Brooklyn Law School Journal of Law & Policy).

the *any exposure* theory in *Gregg v. V.J. Auto Parts, Inc.*¹⁹⁸ *Gregg* involved allegations that personal car repair work on brakes and gaskets caused plaintiff's mesothelioma, resulting in a lawsuit against the auto parts store that sold Mr. Gregg the parts he used. The primary holding in the case dealt with the application of the "frequency, proximity, and regularity" test, but in the course of the discussion the Court majority expressed a clear rejection of the *any exposure* approach:

We recognize that it is common for plaintiffs to submit expert affidavits attesting that any exposure to asbestos, no matter how minimal, is a substantial contributing factor in asbestos disease. However, we share Judge Klein's perspective, as expressed in the *Summers [v. Certaineed Corp., 886 A.2d 240 (Pa. Super. 2005)]* decision, that such generalized opinions do not suffice to create a jury question in a case where exposure to the defendant's product is *de minimis*, particularly in the absence of evidence excluding other possible sources of exposure (or in the face of evidence of substantial exposure from other sources). As Judge Klein explained, one of the difficulties courts face in the mass tort cases arises on account of a willingness on the part of some experts to offer opinions that are not fairly grounded in a reasonable belief concerning the underlying facts and/or opinions that are not couched within accepted scientific methodology.¹⁹⁹

While recognizing the occasional difficulty of proving which of plaintiff's exposures contributed to the disease, Pennsylvania's highest court nevertheless rejected the easy way out of simply stating that all exposures are responsible:

[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every "direct-evidence" case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and

¹⁹⁸ No. 38 EAP 2005, 2007 WL 4557811 (Pa. Dec. 28, 2007).

¹⁹⁹ *Id.* at **8 (internal citations omitted).

fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.²⁰⁰

In the last three years, a growing number of other courts in multiple jurisdictions have excluded or criticized *any exposure* causation testimony, either as unscientific under a *Daubert*²⁰¹/*Frye*²⁰² analysis or as insufficient to support causation. This pattern of decisions includes:

- a Texas appellate court in a mesothelioma case rejecting testimony that any dry wall exposures above 0.1 fibers/cc year would be a substantial contributing factor;²⁰³
- an Ohio federal district court and the Sixth Circuit Court of Appeals in a gasket and packings case;²⁰⁴
- two Pennsylvania state trial judges rejecting the *any exposure* testimony in mechanic cases and another criticizing the theory's application in a pleural disease case;²⁰⁵
- a federal bankruptcy court in litigation involving

²⁰⁰ *Id.* at **9.

²⁰¹ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

²⁰² See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

²⁰³ See *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. 2007).

²⁰⁴ See *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd sub nom.* *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

²⁰⁵ See *In re Toxic Substance Cases (Vogelsberger v. Owens-Illinois, Inc.)*, 2006 WL 2404008, *7-8 (Pa. Com. Pl., Allegheny County, Aug. 17, 2006) (holding expert's "any fiber" opinion inadmissible under *Frye* standard), *on appeal sub nom.* *Betz v. Pneumo-Abex, LLC*, No. 1058 WDA 2006 (Pa. Super. Ct. Jan. 16, 2007); *Basile v. American Honda Motor Co., Inc.*, No. 11484 CD 2005, slip op. at 8-12 (Pa. Com. Pl. Feb. 22, 2007) (precluding expert from testifying that "all asbestos exposures substantially contributed to and caused the Plaintiff Decedent's mesothelioma"); *Summers v. Certainteed Corp.*, 886 A.2d 240, 244 (Pa. Super. 2005), *appeal granted*, 897 A.2d 460 (Pa. 2006).

- asbestos in vermiculite insulation;²⁰⁶
- a Mississippi appellate court that rejected a medical monitoring class for persons allegedly exposed in a school building;²⁰⁷ and
- a Washington trial court decision rejecting an *any exposure* opinion in a heavy equipment mechanic case.²⁰⁸

These decisions are sound, as a matter of law and science, and should be adopted elsewhere.

One complicating factor in mesothelioma cases is that, while mesothelioma is generally associated with asbestos exposure, it has been estimated that between ten and twenty percent of all mesothelioma patients contract their disease from non-asbestos sources.²⁰⁹ At this point the cause of these illnesses is unknown.²¹⁰ Nevertheless, it clearly would be inappropriate for courts to allow plaintiff's lawyers to pursue litigation under the theory that asbestos exposure must have caused a plaintiff's mesothelioma. Courts must require causation standards to be met.

b. Lung Cancer

The key issue for courts with lung cancer cases is to distinguish between lung cancers caused by asbestos exposure and those from other causes. The plaintiff must "offer competent evidence that asbestos exposure, more likely than not, caused [plaintiff's] lung cancer, and also to negate with reasonable certainty [plaintiff's] heavy smoking history as the other plausible cause of his lung cancer."²¹¹

In cases involving heavy smokers, plaintiffs' lawyers have tried to get around this task by suggesting that there is a synergistic

²⁰⁶ See *In re W.R. Grace & Co.*, 355 B.R. 462, 474, 478 (Bankr. D. Del. 2006), *leave to appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007).

²⁰⁷ See *Brooks v. Stone Arch., P.A.*, 934 So. 2d 350 (Miss. App. 2006).

²⁰⁸ *Anderson v. Asbestos Corp., Ltd.*, No. 05-2-04551-5SEA (Wash. Super. Oct. 31, 2006) (Transcript of bench ruling at 144-45).

²⁰⁹ See *Sporn & Roggli*, *supra* note 88, at 108.

²¹⁰ See *id.*

²¹¹ *Mobil Oil Corp. v. Bailey*, 187 S.W.3d 265, 271 (Tex. App. 2006).

effect between smoking and asbestos exposure in causing lung cancer.²¹² Under such a theory, asbestos can cause lung cancer even where the plaintiff does not have asbestosis.²¹³ As a Texas appellate court held in *Mobil Oil Corp. v. Bailey*,²¹⁴ trial courts should not admit expert testimony asserting these theories because they have not been shown to be relevant and reliable.²¹⁵ With such novel scientific theories of causation, “[c]areful exploration and explication of what is reliable scientific methodology in a given context is necessary.”²¹⁶ Smoking and other potential causes for lung cancer, therefore, must be accounted for in cases alleging lung cancer from asbestos-related exposures.

c. Other Forms of Cancer

Personal injury lawyers also have filed asbestos-related claims for more general types of cancer, such as cancers of the colon, kidney, rectum, larynx, stomach, pharynx and esophagus.²¹⁷ Courts adhering to *Daubert*, *Frye* or other such sound scientific screening standards should reject these claims because the science does not support a causal link between asbestos and these other cancers.²¹⁸

With regard to colon cancer, for example, some cases have been filed where asbestos bodies and fibers have been found in the plaintiff's colon.²¹⁹ Presence of asbestos fibers, however, does not

²¹² *See id.*

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See id.* at 271–72.

²¹⁶ *Id.* at 274 (citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 719 (Tex. 1997)).

²¹⁷ *See* Jonathan M. Samet, *Asbestos and Causation of Non-Respiratory Cancers: Evaluation by the Institute of Medicine*, 15 J.L. & POL'Y 1117 (2007).

²¹⁸ *See* Letter from Dr. James D. Crapo to U.S. Sen. Jon Kyl (July 23, 2003), in S. Rep. No. 108-118, at 148 (“Compensation by the FAIR Act for forms of cancer other than lung cancer and mesothelioma is not justified by current medical science.”).

²¹⁹ *See* Alani Golanski, *General Causation at a Crossroads in Toxic Tort Cases*, 108 PENN ST. L. REV. 479, 491–96 (2003).

create a causal relationship between those fibers and any cancer.²²⁰ The Institute of Medicine of the National Academies, which has published the broadest look into theories of causal relationships between selected cancers, including colon cancer, and asbestos, found that there is “not sufficient [evidence] to infer a causal relationship between asbestos exposure and colorectal cancer.”²²¹ Accordingly, courts applying sound scientific principles have rejected these claims.²²²

As discussed above, epidemiological studies can be an important tool for courts in assessing such new theories of causation. Again, in the context of colon cancer, a number of epidemiologists and medical organizations have expressly determined that asbestos exposure does not cause colon cancer.²²³ For example, one study in the Los Angeles area concluded “occupational exposure to asbestos is not a risk factor for colon cancer.”²²⁴ Similarly, a 2004 study found that “[c]urrent epidemiology does not support the link between asbestos exposure and adenocarcinoma of the colon.”²²⁵ Yet, some personal injury

²²⁰ *Id.*

²²¹ INST. OF MED. COMM. ON ASBESTOS: SELECTED HEALTH EFFECTS, ASBESTOS: SELECTED CANCERS (NATIONAL ACADEMIES PRESS 2006) (“The overall lack of consistency or of the suggestion of an association among the case-controlled studies (even those of the highest quality) and the absence of convincing dose-response relationships in either type of study design, however weigh against causality.”).

²²² See, e.g., *In re Joint E. & S. Dist. Asbestos Litig.*, 827 F. Supp. 1014, 1037–50 (S.D.N.Y. 1993) (granting judgment as a matter of law on the ground that epidemiological studies failed to demonstrate a sufficiently strong and consistent association between asbestos and colon cancer); *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121 (5th Cir. 1988) (holding that expert testimony that plaintiff’s colon cancer “could have been due to asbestos exposure lacked probative value because it was pure speculation based on negative inferences”); *but see Grassis v. Johns-Manville Corp.* 591 A.2d 671, 675–77 (N.J. Ct. App. 1991) (reversing grant of summary judgment on these grounds).

²²³ See, e.g., David H. Garabrant et al., *Asbestos and Colon Cancer: Lack of Association in a Large Case-Control Study*, 135(8) AM. J. OF EPIDEMIOLOGY 843–53 (1992).

²²⁴ *Id.*

²²⁵ Sporn & Roggli, *supra* note 88, at 108.

lawyers continue to file these cases.²²⁶ When such novel theories of causation are proffered, courts should perform their gatekeeper function to reject them unless and until credible science can establish such a link.

F. Assure That Juries Can Fully Compensate Deserving Plaintiffs While Preserving Assets For Future Claimants

- 1. Checklist Item #14: Permit discovery of settlement trust claims, as well as any pre-trial settlements, and declare intentions to file any future claims.*

Ohio trial court Judge Harry Hanna showed the importance of allowing defendants to seek discovery of claim forms that a plaintiff's lawyers had previously submitted to settlement trusts.²²⁷ In *Kananian v. Lorillard Tobacco Co.*,²²⁸ he "exposed one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to settlement trusts or other funds set up by bankrupt companies to pay asbestos-related claims.²²⁹

As the *Cleveland Plain Dealer* reported, "[Judge] Hanna's order effectively opened a Pandora's box of deceit . . . Documents from the six other compensation claims revealed that [plaintiff's lawyers] presented conflicting versions of how Kananian acquired his cancer."²³⁰ In addition, emails and other documents from the

²²⁶ See, e.g., Plaintiff's Answer to Motion for Summary Judgment of Defendant, Honeywell Int'l (Allied Signal/Bendix), *Larson v. Honeywell Int'l Corp.*, No. 3627 (Pa. Com. Pl. filed Mar. 30, 2007).

²²⁷ See *Kananian v. Lorillard Tobacco Co.*, No. CV 412750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 18, 2007) (order and opinion).

²²⁸ *Id.*

²²⁹ Editorial, *Cuyahoga Comeuppance*, WALL ST. J., Jan. 22, 2007, at A14; see also Paul Davies, *Plaintiffs' Team Takes Hit on Asbestos*, WALL ST. J., Jan. 20, 2007, at A4; Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, CIN. POST, Feb. 20, 2007, at A3; Editorial, *Going Too Far*, COLUMBUS DISPATCH, Feb. 7, 2007, at 8A.

²³⁰ James F. McCarty, *Judge Becomes National Legal Star; Bars Firm Form Court Over Deceit*, CLEVELAND PLAIN DEALER, Jan. 25, 2007, at B1

plaintiff's attorneys showed that "the client has accepted monies from entities to which he was not exposed," and one settlement trust form was "completely fabricated."²³¹ In all, Mr. Kananian reportedly collected \$700,000 from trusts and settlements.²³² The *Wall Street Journal* has editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."²³³

Other courts have recognized the discoverability of claim forms submitted by plaintiffs to asbestos-related bankruptcy trusts.²³⁴ In *Volkswagen of America, Inc. v. Superior Court*, for example, a California appellate court issued a writ of mandamus, stating that it would be an unjustifiable denial of discovery for the trial court to not allow defendants to discover documents submitted to bankruptcy trusts by the plaintiff's attorney in support of the plaintiff's claims to those trusts for compensation for the alleged asbestos-related injuries.²³⁵ Likewise, Texas trial courts are granting

("In one claim, the lawyers said Kananian had been exposed to asbestos while working as a welder around insulated pipes. In another claim they said he welded for only two weeks while on a ship in the Philippines. In a third claim, the lawyers said the victim had been exposed to asbestos at the San Francisco Naval Shipyard at a time when Kananian testified he was a rifleman who merely had passed through the port on board a troopship.").

²³¹ Lorillard Tobacco Co.'s Motion to Dismiss or, in the Alternative, to Disqualify Chris Andreas and the Brayton Purcell Firm, *Kananian v. Lorillard Tobacco Co.*, No. 442750, 2 (Ohio Ct. Com. Pl. Cuyahoga County Nov. 13, 2006).

²³² See Kimberley A. Strassel, *Trusts Busted*, WALL ST. J., Dec. 5, 2006, at A18.

²³³ Editorial, *Cuyahoga Comeuppance*, WALL ST. J., Jan. 22, 2007, at A14; see also Daniel Fisher, *Double-Dippers*, 178:4 FORBES 136 (Sept. 4, 2006).

²³⁴ See Strassel, *supra* note 232, at A18; see also *Skonberg v. Owens-Corning Fiberglas Corp.*, 576 N.E.2d 28 (Ill. Ct. App.), *appeal denied*, 580 N.E.2d 135 (Ill. 1991); *In re New York City Asbestos Litig.* (Negrepon v. A.C. & S, Inc.), No. 120894/01 (N.Y. Sup. Ct., N.Y. City Dec. 11, 2003) (hearing transcript); *Drabczyk v. Amchem Prods., Inc.*, No. 2005-1535 (N.Y. Sup. Ct. Erie County Jan. 18, 2008).

²³⁵ 139 Cal. App. 4th 1481 (2006); see also *Seariver Maritime, Inc. v. Superior Court*, 2006 WL 2105431, at *5 (Cal. App. 1 Dist. July 28, 2006)

motions to compel responses to interrogatories directed to asbestos claimants regarding claims and settlements made or expected to be made with any bankruptcy trust.²³⁶ In New Jersey, a discovery master for the court overseeing that state's consolidated asbestos docket recommended that production of claim forms be directed, explaining that, whether or not ultimately admissible in evidence, such documents reveal discoverable factual information regarding plaintiffs' alleged exposure to asbestos-containing products.²³⁷ Most recently, a New York trial court acted to head off gamesmanship in filing practices by requiring plaintiff's counsel to file all claim forms that they intend to file within ninety days before the start of trial, and produce such forms to defendants.²³⁸ The court cautioned that if plaintiff's counsel ignored the order and filed claim forms with bankruptcy trusts at a later date, the court would "vacate any verdict if it is against the Defendant."²³⁹

By allowing such discovery, and preventing gamesmanship, courts can better prevent an unscrupulous claimant from trying to tell one story to a bankruptcy trust and a different story to the jury in a civil action. Transparency with respect to claim forms also creates proper pressure on plaintiffs' lawyers to file more consistent and accurate bankruptcy trust claims.

(unpublished).

²³⁶ *Duncan v. A.W. Chesterton*, No. 2004-07671 (Tex. Harris County Dist. Ct. Dec. 14, 2006) ("[T]he information as documents related to plaintiff's bankruptcy claims are discoverable."); *Brassfield v. Alcoa*, No. 2006-08035 (Tex. Harris County Dist. Ct. Nov. 9, 2006) ("The Defendants are entitled to production of the applications from the trusts in order to introduce them into evidence at the trial of the case.").

²³⁷ *Szostak v. A-B Elec. Supply Co.*, No. L-12453-97 (Mass. Middlesex County Super. Ct. Nov. 15, 2006).

²³⁸ *See Cannella v. Abex*, Nos. 1037729/07, 105609/03, 105136/07, 107449/07, 104144/07, 106808/07, 117395/06, 116617/06 (N.Y. Sup. Ct., N.Y. County Jan. 24, 2007) (hearing transcript).

²³⁹ *Id.* at 46.

2. *Checklist Item #15: Assure proper settlement credits and offsets at trial with monies paid by any entity to satisfy a legal claim directed at the injury alleged in accordance with state law.*

An important way to assure that litigation resources are preserved for future claimants, while allowing current claimants to be fully compensated, is to properly offset judgments with settlement credits and trust receipts. Given the mass numbers of defendants typically named in the litigation, the final sum of all settlements is often substantial. In addition, as discussed in the previous section, most plaintiffs also collect funds from bankruptcy trusts in satisfaction of a claim outside of the litigation process. With several large trusts coming online with assets totaling \$30 billion in 2007 and 2008,²⁴⁰ “[f]or the first time ever, trust recoveries may fully compensate asbestos victims.”²⁴¹

Trial courts should expect that plaintiffs’ lawyers will try to affect the off-set calculation. One tactic plaintiff’s lawyers have used is to include in the settlements they reach with most defendants that only a small portion, if any, of those settlements will be used to off-set any judgment against the remaining defendants; they will then argue that these side agreements should “control the allocation of set-offs.”²⁴² As can be expected, courts have rejected these efforts because they “subvert the findings of the trier of fact” in assessing liability.²⁴³ Courts also have recognized that plaintiffs and their lawyers have an undisputed “interest in allocating as little as possible” of settlements to final judgments.²⁴⁴

In addition, some plaintiffs’ lawyers have argued, as in New

²⁴⁰ See Strassel, *supra* note 232, at A18.

²⁴¹ Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 MEALEY’S ASBESTOS BANKR. REP. 1 (Nov. 2006).

²⁴² See Wasserman et al., *supra* note 67, at 920 (discussing several ways that plaintiffs’ attorneys in California have attempted to influence off-sets).

²⁴³ Jones v. John Crane, Inc., 35 Cal. Rptr. 3d 144, 158 (Cal. Ct. App. 2005).

²⁴⁴ Wilson v. John Crane, Inc., 97 Cal. Rptr. 2d 240, 254 (Cal. Ct. App. 2000).

York asbestos cases, that because of the automatic stay of litigation against bankruptcy trusts, a plaintiff cannot obtain effective jurisdiction over the trust and, consequently, monies received from those trusts should not be included in the off-set calculations.²⁴⁵ Judge Freedman, who oversees New York City's asbestos docket, has wisely rejected this argument, holding that the culpability of tortfeasors who are bankrupt and, therefore, not a party to the case, will be included when calculating a defendants' liability under New York law.²⁴⁶ The impact of this issue in asbestos litigation, she recognized, "is especially pronounced, because of the large number of potentially culpable parties that have filed for bankruptcy."²⁴⁷

In the face of these and similar efforts, trial courts must assure that the controlling allocation formula is applied in ways that are reasonable and fair.²⁴⁸

²⁴⁵ See *In re New York City Asbestos Litig.*, 750 N.Y.S.2d 469, 472-73 (N.Y. Civ. Ct. 2002).

²⁴⁶ *Id.* at 479.

²⁴⁷ *Id.* at 473.

²⁴⁸ See RESTATEMENT (SECOND) OF TORTS § 920A (1979) ("A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability."); see also *Burns v. Stouffer*, 100 N.E. 2d 507 (Ill. Ct. App. 1951) (holding that it is reversible error not to credit an amount received from a joint tortfeasor); see generally Jean Macchiaroli Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEX. L. REV. 1701, 1702 (1995) (discussing various approaches to state contribution laws); Brittany L. Wills, *To Settle or Not to Settle?: The Calculation of Judgments Among Nonsettling Defendants in Texas*, 31 ST. MARY'S L.J. 529, 536 (2000) (focusing on Texas contribution laws).

3. *Checklist Item #16: Allow certain collateral sources to be admissible so that jurors can consider and account for all collateral sources that provided compensation to the plaintiff for the alleged harm.*

To further preserve resources for future claimants, trial courts should dedicate “any amount paid by anybody, whether they be joint tort-feasors or otherwise,” that have compensated a plaintiff for the asbestos-related harm at issue.²⁴⁹ This calculation should include collateral sources when a plaintiff’s initiative did not generate the source of the funds.²⁵⁰ Generally, the collateral source rules provide that damages awarded by a jury are not reduced by the amount of compensation or benefits that the plaintiff received from sources other than the defendant, even when the plaintiff did not use his or her own assets to help create those sources of funding.²⁵¹ A North Carolina appellate court in *Schenk v. HNA Holdings, Inc.*²⁵² reviewed the impact of the collateral source rule on modern asbestos litigation and affirmed a trial court’s decision to offset plaintiffs’ verdict awards by amounts collected through workers’ compensation benefits.²⁵³ Given the mature state of

²⁴⁹ *Schenk v. HNA Holdings, Inc.*, 613 S.E.2d 503, 509 (N.C. Ct. App. 2005) (internal citations omitted); see also Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL’Y 57, 59 (2005)); RESTATEMENT (SECOND) OF TORTS § 920A(2).

²⁵⁰ Where a plaintiff’s initiative generated the source of the funds, such as by purchasing life insurance, it may not be appropriate for the court to allow such evidence before a jury.

²⁵¹ The collateral source rule “ordains that, in computing damages against a tortfeasor, no reduction be allowed on account of benefits received by the plaintiff from other sources, even though they have partially or wholly mitigated his loss.” John Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1478 (1966).

²⁵² 613 S.E.2d 503 (N.C. Ct. App. 2005). For a more developed discussion as to why collateral sources should be admitted in strict products liability cases, see Victor Schwartz, *Strict Liability and the Collateral Source Rule Do Not Mix*, 39 VAND. L. REV. 569 (1986).

²⁵³ *Id.* at 510.

asbestos litigation today, the *Schenk* Court provides an appropriate method for preserving litigation resources.

Taking this step can be particularly important where joint and several liability still applies, as jurors may want to spare defendants from providing windfall benefits for harm they did not cause. Such a system also allows juries to assist in rationing the remaining litigation resources while still preventing those plaintiffs from bearing the costs for their own bills.²⁵⁴

4. *Checklist Item #17: Instruct jurors on the state's joint and several liability rules.*

In asbestos litigation, dozens, even hundreds, of companies may be named as potentially responsible parties, but most settle and "usually only one or, at most, a couple of defendants remain" at trial.²⁵⁵ These defendants likely are only peripherally related to the alleged injury and named mostly for their "deep pockets." To help jurors accurately assess liability, courts should include in jury instructions an explanation of the state's joint and several liability laws.²⁵⁶

When juries are not informed of the effect of joint and several liability, they can be led to believe that a peripheral asbestos

²⁵⁴ Informing the jury in this manner recognizes the jurors' fundamental role as "the judge of the facts." Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 OR. L. REV. 523, 523 (1991); see also *Whiteley v. OKKC Corp.*, 719 F.2d 1051, 1058 (10th Cir. 1983) ("The determination of damages is traditionally a jury function. . . . The jury must have much discretion to fix the damages deemed proper to fairly compensate the plaintiff.").

²⁵⁵ Wasserman et al., *supra* note 67, at 917.

²⁵⁶ Joint and several liability holds a defendant responsible for an entire harm, even though a jury has determined that it was only partially responsible. "The clear trend over the past several decades has been a move away from joint and several liability." RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000). As of this writing, about forty states have either abolished or modified their joint liability rules. See Hantler et al., *supra* note 32, at 1147-51. Another approach to the one discussed in this section would be for courts to abolish joint liability in asbestos cases altogether. See Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203 (2004).

defendant “will only be liable for a small contribution to the total damage award and the main defendant will be liable for the remainder.”²⁵⁷ Such “blindfold rules,”²⁵⁸ no matter how well-intended, may result in setting a “trap for the uninformed jury.”²⁵⁹ The jury will not know that the “deep pocket defendant may be liable for the entire award, with little hope of contribution from the party that is mainly at fault.”²⁶⁰ Concern about this issue in general litigation has caused several state supreme courts to implement “sunshine rules,” requiring trial courts to inform juries of joint and several liability rules.²⁶¹ These courts have found that it is “better to equip jurors with knowledge of the effect of their findings than to let them speculate in ignorance and thus subvert the whole judicial process.”²⁶² This concern about the ability of the judicial system to competently adjudicate such claims is particularly pressing in asbestos litigation, where the dynamics of the peripheral defendant tend to dominate most cases.

For this reason, San Francisco Superior Court Judge Stephen Allen Dombink, provided such a jury instruction in response to a defense motion.²⁶³ He instructed the jury that, under California

²⁵⁷ Julie K. Weaver, *Jury Instructions on Joint and Several Liability in Washington State*, 67 WASH. L. REV. 457, 471 (1992).

²⁵⁸ See generally Jordan H. Leibman et al., *The Effects of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L.J. 349 (1998).

²⁵⁹ *Luna v. Shockey Sheet Metal & Welding Co.*, 743 P.2d 61, 64 (Idaho 1987) (citing *Seppi v. Betty*, 579 P.2d 683 (Idaho 1978)).

²⁶⁰ *Id.*

²⁶¹ See, e.g., *Reese v. Werts Corp.*, 397 N.W.2d 1 (Iowa 1985) (holding that the trial court should have instructed the jury on the effects of its verdict on the plaintiff's recovery); *Decelles v. State*, 795 P.2d 419, 419–21 (Mont. 1990) (“We think Montana juries can and should be trusted with the information about the consequences of their verdict.”); *Coryell v. Town of Pinedale*, 745 P.2d 883, 884, 886 (Wyo. 1987) (holding that statute provided that the court must “inform the jury of the consequences of its verdict”).

²⁶² *Id.*

²⁶³ See *Horr v. Allied Packing*, No. RG-03-104401, slip op. at *2 (Cal. Super. Ct. App. Dep’t Feb. 13, 2006). The proposed order stated:

“If you find [Defendant] liable for any percentage of fault, [Defendant] will be responsible to pay for its proportionate share of any non-

law, any finding of a proportionate share of liability for economic damages would result in the defendant being responsible for the full amount of economic damages.²⁶⁴ Judge Dombink had faith that juries are responsible enough to handle this knowledge.²⁶⁵ A similar instruction has recently been issued in Los Angeles County Superior Court.²⁶⁶

5. *Checklist Item #18: Sever or strike punitive damages claims.*

Finally, courts should sever or strike punitive damages claims in asbestos cases because it is unsound public policy to allow such awards in modern asbestos cases.²⁶⁷ The purpose of punitive damages generally is to punish specific wrongdoers, deter them from committing wrongful acts again, and deter others in similar situations from committing wrongful behavior.²⁶⁸ The message of

economic damages you may award. With respect to economic damages, [Defendant] will be responsible for the full amount of those damages less a proportionate share of any settlements that may have been made by other defendants." *Id.*

²⁶⁴ *Id.* (approving the following jury instruction: "If you find Dentsply liable for any percentage of fault, Dentsply will be responsible to pay for its proportionate share of non-economic damages you may award. With respect to economic damages, Dentsply will [be] responsible for the full amount of those damages less a proportionate share of any settlements that may have been made by other defendants.").

²⁶⁵ *See id.* ("The proposed instruction will aid the jury in determining the proper amount of damages and making the proper allocation of the ratio of settlement percentages as between the economic and noneconomic damages.").

²⁶⁶ *See* Reporter's Daily Transcript of Proceedings, at 41, *Mikul v. Bondex Int'l*, No. BC332247 (Los Angeles County Super. Ct. Nov. 22, 2006) ("If you find a Defendant liable for any percentage of fault, that defendant will be responsible to pay for its proportionate share of any noneconomic damages you may award. With respect to economic damages, that defendant will be responsible for the full amount of those damages, less a proportionate share of any settlements that may have been made by other Defendants.").

²⁶⁷ *See, e.g.,* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137 (2001).

²⁶⁸ *See* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416

deterrence, both specific and general, has been heard loud and clear in asbestos cases. At this phase in litigation, punitive damages have an unintended and unfortunate effect—they “threaten fair compensation to [pending and future] claimants” who await their recovery, and “threaten . . . the economic viability of [peripheral] defendants.”²⁶⁹ The problem is exacerbated when punitive damages are repeatedly assessed against a company in different trials for the same or similar underlying conduct.²⁷⁰

The United States Court of Appeals for the Third Circuit approved a decision by Judge Weiner, who oversaw the federal multi-district litigation for asbestos cases, to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial.²⁷¹ The Third Circuit, quoting liberally from a 1991 Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, said that its decision was based on “compelling” public policy:

Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not [sic] permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages.²⁷²

At the conclusion of its opinion, the Third Circuit strongly urged state courts to sever or stay punitive damages claims in asbestos

(2003).

²⁶⁹ JUD. CONF. REP., *supra* note 11, at 3, 5.

²⁷⁰ See William W. Schwarzer, *Punishment Ad Absurdum*, 11 CAL. LAW 116 (1991) (“Barring successive punitive damage awards against a defendant for the same conduct would remove the major obstacle to settlement of mass tort litigation and open the way for the prompt resolution” of legitimate claims.”).

²⁷¹ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000).

²⁷² *Id.*

cases to preserve assets for sick claimants.²⁷³ Several state courts have done so, including trial courts in Baltimore City,²⁷⁴ Northampton County (Bethlehem and Easton), Pennsylvania; Philadelphia,²⁷⁵ and New York City.²⁷⁶ Florida has enacted a law banning punitive damages "in any civil action alleging an asbestos or silica claim."²⁷⁷

Trial courts should follow these examples and sever punitive damages in order to preserve funds to compensate the truly sick. This step should be taken in the early stages of litigation because of the leveraging effect punitive damages have at the settlement table.²⁷⁸

CONCLUSION

The foregoing checklist items were born in jurisdictions where the asbestos litigation crisis is most prolific and best understood. The common theme is that they facilitate the resolution of claims on their merits. Specifically, they focus scarce litigation resources on the claims of those truly impaired from asbestos exposure, allow defendants to exculpate themselves when they or their

²⁷³ See *id.* ("It is discouraging that . . . some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.").

²⁷⁴ See *Keene Corp. v. Levin*, 623 A.2d 662, 663 (Md. 1993) (noting that trial court deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages are paid").

²⁷⁵ See *Third Circuit Rehears Dunn Arguments en banc*, 8:1 MEALEY'S LITIG. REP.: ASBESTOS 20 (Feb. 5, 1993) ("[The] Philadelphia Court of Common Pleas has a basic 'standing order' that all punitives are to be stayed . . .").

²⁷⁶ See *\$64.65 Million Awarded in Four Asbestos Cases*, 4:18 MEALEY'S LITIG. REP.: TOXIC TORTS 16 (Dec. 15, 1995) (reporting on a New York case in which the trial court severed and deferred punitive damages indefinitely).

²⁷⁷ FLA. STAT. ANN. § 774.207(1) (West 2005).

²⁷⁸ See *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting) ("[T]he potential for punitive awards is a weighty factor in settlement negotiations, . . . [and] assets that could be available for satisfaction of future compensatory claims are dissipated"), *modified in part*, 13 F.3d 58 (3d Cir. 1993), *cert. denied*, 510 U.S. 1031 (1993).

products could not have caused the harm alleged, cut down on the gaming of the legal system, and preserve assets for future claimants. To employ these checklist items most effectively, courts should require plaintiffs early in their lawsuits to provide facts relating to the nature of their damages and to each defendant. By separating out the colorable claims as soon as practicable, the nation's judges can maintain the current momentum towards restoring order and sound public policy to asbestos cases.