2001

What Courts Can Do in the Face of the Never-Ending Asbestos Crisis

Paul F. Rothstein
Georgetown University Law Center, rothstei@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/183

71 Miss. L.J. 1-34 (2001)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Litigation Commons, and the Torts Commons
What Courts Can Do in the Face of the Never-Ending Asbestos Crisis

71 Miss. L.J. 1-34 (2001)

Paul Rothstein
Professor of Law
Georgetown University Law Center
rothstei@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/183/

Posted with permission of the author
WHAT COURTS CAN DO IN THE FACE OF THE NEVER-ENDING ASBESTOS CRISIS

Paul F. Rothstein*

For more than twenty-five years, state and federal courts across the country have struggled to respond to an ever-expanding asbestos litigation crisis. Over $20 billion and thirty bankruptcies later, more asbestos claims are filed now than ever before. Many predict that the number of claims (and the number of bankruptcies) will only keep increasing and that tens of billions of additional dollars will be spent.

* Professor of Law, Georgetown University Law Center. Professor Rothstein is author of Evidence: Cases, Materials and Problems, Evidence in a Nutshell: State and Federal Rules of Evidence and several other books as well as over 100 articles. The preparation of this article was made possible by funding from the Coalition for Asbestos Justice, Inc.

1 One of the first major asbestos-liability cases was Borel v. Fibreboard Corp., 493 F.2d 1076 (5th Cir. 1973), where the court of appeals affirmed a verdict against an asbestos defendant on a strict liability theory.

2 See Harold Brubaker, Three Major Firms Have Filed for Bankruptcy Protection from Asbestos Claims, PHILA. INQUIRER, Jan. 13, 2001 (describing the history of Crown Cork & Seal which, for three months in the early 1960s, owned a company that made one product that allegedly contained asbestos and still spent $90 million on asbestos claims in 2000 alone); John Rooney, Evolution, Not End, Seen for Asbestos Litigation, CHI. DAILY L. BULL., Apr. 21, 2001; A Trail of Toxic Torts: Fresh Asbestos Trouble for Insurers, THE ECONOMIST, Jan. 27, 2001, available at 2001 WL 7317425.

Despite the lengthy history of asbestos litigation, our courts have not been able to develop a coordinated, comprehensive and fair method to resolve the asbestos problem. Judges, in an effort to clear their dockets, have often adopted case management techniques that have actually encouraged more and more asbestos claims, particularly by claimants who are, at best, mildly impaired or more recently, not sick at all. As a result, plaintiffs with no physical impairment receive windfall settlements that reduce the amount of funds available to pay the claims of those who are truly sick or who may become truly sick. At the same time, many of these case management techniques have limited the procedural protections typically available to tort defendants.

Without a fair and rational method of resolving asbestos claims in the tort system, and with federal legislation remaining highly speculative, defendants have increasingly been forced into bankruptcy courts. That outcome benefits no one. Plaintiffs suffer because the limited pool of funds available to pay asbestos claims is "steadily being depleted," making it more likely that claimants who develop a serious asbestos-related illness will not receive adequate or timely compensation in the future. Bankrupt companies may have to lay off employees, close plants and cut back on core business practices—matters which can be significant to the

---

Tillinghast-Towers Perrin estimates that the ultimate cost will reach $200 billion, of which 39% will be borne by defendants and 61% by U.S. or foreign insurers. Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion, BUS. WIRE, June 12, 2001 [hereinafter Tillinghast-Towers].


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

* See Queena Sook Kim, Firms Hit by Asbestos Litigation Take Bankruptcy Route, WALL ST. J., Dec. 21, 2000, at B4, available at 2000 WL-WSJ 26620724; Mark D. Plevin et al., Don't Bankrupt Asbestos, LEGAL TIMES, Mar. 19, 2001, at 68.
local or national economy. And, in consequence, some other good, safe, even beneficial, non-asbestos products may no longer become available, either because of the financial problems of the company or because the company or other companies, perhaps unreasonably, fear liability. Bankruptcies are also bad news for remaining defendants that have only a remote connection to asbestos such as oil companies, hospitals, colleges and many local “mom and pop” small businesses. Plaintiffs seek compensation from these peripheral defendants to make up for the loss of funds from larger, more culpable companies that have gone into bankruptcy. This has a domino effect that results in additional defendants filing for bankruptcy.

---

8 Financial problems are of course faced by companies that have not filed for bankruptcy protection. "Every company that is a defendant in asbestos litigation" sees these lawsuits "sop up cash flow, diverting money that could be used to develop new products, hire new employees, and build new plants." Brubaker, supra note 2. The stock values of these companies plummet because "Wall Street loathes the uncertainty of a liability that seems to have no end." Id.; see also The People v. America Inc.: American Companies in Court, THE ECONOMIST, Mar. 24, 2001 (discussing the financial scrutiny being faced by companies with even the most remote connection to asbestos claims), available at 2001 WL 7318244.


10 U.S. Gypsum filed for bankruptcy in June 2001 citing political changes in the U.S. Senate which it believed made asbestos legislation less likely. USG Says It May Seek Bankruptcy Protection, WALL ST. J., June 5, 2001, at A-12, available at 2001 WL-WSJ 2865545. U.S. Gypsum had been lobbying Congress for a legislative solution but pointed to slower progress than expected combined with increasing settlement demands that are “completely out of proportion to our . . . liability.” Id. Crown, Cork and Seal spent $100 million on asbestos litigation in 1999 and $160 million in 2000 and had estimated that its 2001 costs would be $275 million. MEALEY'S LITIG. REP.: ASBESTOS, May 18, 2001, at 13.

11 Bankruptcies have caused some plaintiffs' lawyers to file new claims at a "dizzying pace." Bill Geroux, Asbestos Lawsuits Multiply: Bankruptcies Chief Reason, RICH. TIMES-DISPATCH, Apr. 28, 2001, at B-2, available at 2001 WL 5321831. As one publication that tracks asbestos litigation noted, “The cumulative effect of bankruptcy reorganization by many large asbestos defendants has left many of the remaining companies reeling as new claims remain on the rise with no end in sight.” MEALEY'S LITIG. REP.: ASBESTOS, May 18, 2001, at 13. That article reported the claim data for the following non-bankrupt defendants: (1)
The purpose of this article is not to argue that claimants suffering from serious asbestos-related diseases should not be compensated. To the contrary, one of the points of this article is that absent some change in the way asbestos claims are resolved,\footnote{12} claimants who become truly sick in the future may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant.

Also, the purpose of this article is not to ascribe blame. Rather, it is to fix a problem. The judges cannot be blamed for their good intentions. Neither can the plaintiffs' attorneys be blamed for zealously representing their clients—which is what they are doing here.\footnote{13} This normally produces great social good. However, in the case of asbestos, a seriously flawed system has resulted.

I. THE CURRENT ASBESTOS CRISIS

No one could have predicted that more than twenty-five years after asbestos product liability litigation emerged, courts would still be facing tens of thousands of new claims each year. Certainly no one would have predicted that by the year 2000, over 200,000 asbestos cases would be clogging the courts with new claims increasing at a staggering rate. In fact, new claims against the largest asbestos defendants have averaged approximately 40,000 per year over the past several years.\footnote{14}

Two examples are noteworthy. In the year 2000 alone, 60,000 claims were filed against the Manville Trust—a Trust established to handle asbestos claims against Johns-Manville Corp., which filed for bankruptcy in 1982. The year 2000 ava-

\footnote{12} For a discussion concerning recent efforts to pass asbestos legislation, see James Reed, Federal Asbestos Legislation: The Search for a Strategy, HARRIS MARTIN COLUMNS: ASBESTOS, Apr. 2001.

\footnote{13} They also get paid but so do the lawyers and businessmen on the other side. A system that pays people to look out for the interests of others is not a bad system.

\footnote{14} See Hearings, supra note 3.
lanche represented the greatest number of claims filed against Manville since 1989, the Trust's first full year of operation.\textsuperscript{15} The Trust also estimates that there will be 50% more claims in 2001 than the previous high-water mark set a year earlier.\textsuperscript{16} Because of the flood of new claims, the Trust imposed a sixty-day moratorium to determine if it could continue to pay claims as it has in the past.\textsuperscript{17}

Similarly, in a recent filing in the United States Bankruptcy Court for the District of Delaware, W.R. Grace & Co. stated that in 2000 asbestos claims had increased 81% over the prior year, reaching a total of 49,000 claims.\textsuperscript{18} Moreover, in January of 2001, claims against W.R. Grace had increased 374% over those in January of 2000, and February of 2001 claims were 207% higher than February of 2000.\textsuperscript{19}

Defendants have settled well over 300,000 claims, but these efforts to resolve the claims have failed to reduce the caseload. One defendant, Owens Corning, devised a National Settlement Program to settle as many claims as possible. That Settlement Program was cited by opponents of legislative reform as an example of why asbestos legislation was not necessary.\textsuperscript{20} But even after settling hundreds of thousands of claims, Owens Corning was forced to file for bankruptcy because claimants continued to bring more and more claims seeking larger and larger settlements.\textsuperscript{21}

\textsuperscript{15} See Letter from David Austern, President, Claims Resolution Management Corporation, to Attorneys Who File Manville Trust Claims (Mar. 26, 2001) (on file with author).
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Id. at 38-39. As a historical marker, prior to 1980, there were approximately 950 cases pending in the federal courts. See Terrence Dungworth, Product Liability and the Business Sector: Litigation Trends in Federal Courts 36 (1988). By 1985, that number increased four-fold to over 37,000 cases. Id.; see also Deborah R. Hensler, Asbestos Litigation in the United States: A Brief Overview 3 (1992).
\textsuperscript{21} Owens Corning Files Voluntary Chapter 11 Petition to Resolve Asbestos Liability, PR NEWSWIRE, Oct. 5, 2000; Joseph B. White & Jim VandeHei, Owens
While the initial focus of asbestos litigation was the asbestos producers and the manufacturers of asbestos products, over time the pool of defendants has grown. More than 2000 companies or individuals have been named as asbestos defendants in courts across the country, and the number of defendants is growing.\(^2\) As the primary asbestos defendants have declared bankruptcy, the list of defendants has been expanded to include companies with little more than a remote connection to asbestos.\(^3\) The new defendants are diverse, ranging from oil companies, to automobile manufacturers, to hospitals and colleges. They generally have an attenuated connection to asbestos.\(^4\) Some of these peripheral defendants have already sought bankruptcy protection.\(^2\)\(5\)

Perhaps these developments in asbestos litigation—a substantial increase in both the number of claims and the number of peripheral defendants—would be understandable if the number of sick claimants were also increasing. But that is not the case. The bulk of the new cases are being filed by people who are not sick in a meaningful sense. As many as 80% of new cases are brought by plaintiffs who suffer from no physical impairment,\(^6\) and it is likely that most of these
plaintiffs will never become ill from their exposure to asbestos. If they had little or no costs, particularly to those who are or will become more compellingly ill, suits by such claimants might be considered just. Yet the lawsuits by these relatively unimpaired claimants are allowed to proceed and reduce the limited pool of resources available for those individuals who are much sicker or dying or will become sick with serious asbestos-related diseases in the future.

That funds may not be available for these latter individuals has been apparent since the early 1990s. In 1990, Chief Justice Rehnquist convened a Judicial Conference Committee to examine the growing asbestos litigation problem. After extensive study, the Committee reported in 1991 that the “situation has reached critical dimensions and is getting worse.” Characterizing the state of asbestos litigation as “a disaster of major proportions to both the victims and the producers of asbestos products,” the Committee concluded that the courts were “ill-equipped” to address the mass of claims in an effective manner. The increasing caseload made long pre-trial delays increasingly “routine,” while the continuing exhaustion of defendants’ assets has raised a real prospect that “future claimants may lose altogether.”

Recent awards to unimpaired or mildly impaired claimants have only pleural plaques. “[Pleural] plaques are areas of (the pleura membrane covering the lung and chest wall) in which cell tissue is replaced by tougher tissue. Pleural plaques result from asbestos exposure but do not affect lung functions and do not necessarily lead to asbestosis or increase the risk of cancer.”

See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 746-47, 750-51, 812 (E.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), on reh’g, 993 F.2d 7 (2d Cir. 1993) (discussing the mass, assembly-line medical screening programs employed by some attorneys for claimants); see also Tillinghast-Towers, supra note 3 (indicating a significant majority of new claims are for non-malignant diseases).

27 See In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. 710, 746-47, 750-51, 812 (E.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), on reh'g, 993 F.2d 7 (2d Cir. 1993) (discussing the mass, assembly-line medical screening programs employed by some attorneys for claimants); see also Tillinghast-Towers, supra note 3 (indicating a significant majority of new claims are for non-malignant diseases).


29 Id. at 2.

30 Id.

31 Id. at 3; see In re Joint E. & S. Dist. Asbestos Litig., 129 B.R. at 746-47, 750-51, 812 (describing the backlog of asbestos personal injury cases).
nants illustrate the Committee's concern that truly sick claimants may face a depleted pool of assets in the future. In October of 2001, a Mississippi jury awarded six asbestos plaintiffs $150 million—$25 million each—even though none of the plaintiffs are sick from asbestos and may never become so.\textsuperscript{32} The plaintiffs claimed that in the future they may suffer asbestos-related diseases because their work, often decades ago, brought them into contact with asbestos-containing products. In March of 2001 a Texas jury awarded twenty-two plaintiffs, who were not seriously ill, $35 million for "future physical impairment" and "future medical costs although it is likely that these claimants will never become seriously ill."\textsuperscript{33} There are many similar examples. In February of 1998, a Texas jury awarded $115.6 million in damages\textsuperscript{34} to twenty-one plaintiffs whose illnesses ranged from "mild" to "asymptomatic" asbestosis, and even to "unconfirmed" illnesses.\textsuperscript{35} Also in 1998, a Mississippi state jury awarded between $2 million and $3.5 million to two plaintiffs whose alleged asbestosis could not be detected by x-ray examinations.\textsuperscript{36}

How did we get here? Unfortunately, the courts themselves must share some of the responsibility. Many courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system, without regard to the merits of the claims. While these judges undoubtedly had good intentions, they have actually made things worse by encouraging the filing and settlement of questionable claims.\textsuperscript{37} As one commentator noted


\textsuperscript{33} Two Asbestos Defendants Hit with $35 Million Verdict, 23 No. 4, ANDREWS ASBESTOS LITIG. REP., Mar. 1, 2001, at 3.

\textsuperscript{34} This $115.6 million included $15.6 million in compensatory damages and $100 million in punitive damages. McLeod, supra note 22.

\textsuperscript{35} Id.


\textsuperscript{37} For example, the court administrator in Cuyahoga County, Ohio, noted that "We are victims of our own success." Cuyahoga Asbestos Cases Abound, DAYTON
nearly four years ago,

Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.38

In the federal courts, all asbestos claims have been consolidated for pre-trial purposes before Senior United States District Judge Charles R. Weiner of the Eastern District of Pennsylvania (the federal MDL Panel). Thus, the same procedural rules implemented by the court, such as the severing of all punitive damages claims,39 have been used in connection with tens of thousands of claims. But state courts have adopted different and, often, contradictory rules. For example, some courts place suits brought by unimpaired claimants on an inactive docket so that the seriously ill can be compensated first. Other courts however, such as courts in Mississippi,40 consolidate thousands of claims of relatively unimpaired people with the claims of those who are quite sick or dying. This practice tends to overcompensate the relatively unimpaired at the expense of the very sick. This lack of coordination can best be demonstrated with some concrete examples.

---

DAILY NEWS, May 14, 2001, at 2-B, available at 2001 WL 21258316. That court’s cases have grown from 4000 to 27,000 in just four years and the court “has become so experienced at handling asbestos cases that even people who never lived or worked in Ohio file their lawsuits in the court.” Id.


40 See, e.g., John Porretto, Rural County Known for Huge Verdicts, BILoxi SUN HERALD, July 2, 2001 (discussing the negative impact on jobs, the cost of healthcare and availability of insurance); see also supra note 36.
II. THE LACK OF COORDINATION AMONG THE COURTS

Early rulings in favor of asbestos claimants often resulted from the willingness of courts to stretch accepted legal principles or develop new theories that permitted claims where traditional theories would have denied recovery. While clearly the result of good intentions—compensating people harmed by asbestos—such rulings only tended to encourage unmeritorious lawsuits. Faced with the addition of thousands of asbestos cases to their dockets, courts began to use a wide variety of substantive and procedural methods to try to manage the ever-increasing caseload. Some of these mechanisms sought to take into account the problems posed by asbestos litigation such as limited resources and suits by unimpaired claimants. But most of the procedures adopted by the courts were designed to move cases along as if efficiency and expediency were the only important factors; they ignored the prospect that claimants who actually become seriously ill in the future may not be adequately compensated, ignored important rights of defendants and ignored the impact of increasing numbers of defendant bankruptcies.

The different ways that courts have addressed the asbestos problem, can be seen by (1) the response by courts to the filings by unimpaired claimants, (2) the use by courts of mass joinders or mass trials in certain states, (3) the willingness of courts to permit the award of medical monitoring costs and (4) the failure of courts to account for the impact of punitive damages, including their in terrorem effect at the settlement table.

A. Addressing the Dilemma of the Unimpaired Claimant

At the heart of the current asbestos problem are claims brought by individuals who are not seriously ill or who may never become sick at all. As noted above, a large number of cases filed against asbestos defendants are filed by plaintiffs with no serious physical impairments. When these weak cases are consolidated with other cases, or when courts force settlements of these weak cases by allowing the claims of the truly sick to be leveraged, the plaintiffs who are not ill use the plain-
tiffs who are seriously ill to "inflate the value of those claims."\footnote{Hearings, supra note 3; see also Patricia Waldmeir, A Legal System Insulated from Logic: A New Surge of Asbestos Lawsuits is Bankrupting U.S. Business and Exposing the Failings of the Law, FIN. TIMES, June 7, 2001, at 12.} Plaintiffs who are not seriously ill and suffer no physical impairment receive recoveries to the detriment of those plaintiffs who are seriously ill and dying.

Only a relatively small portion of the current nationwide burden of asbestos lawsuits involves serious injuries.\footnote{As Judge Weinstein has pointed out, large numbers of claims by plaintiffs without serious injury are often generated as a result of mass, "assembly-line" medical screening programs: [Some attorneys] have filed all of their cases without regard to the extent of injury. In conjunction with unions they have arranged through the use of medical trailers and the like to have x-rays taken of thousands of workers without manifestations of disease and then filed complaints for those that had any hint of pleural plaque. \textit{In re Joint E. \\& S. Dist. Asbestos Litig.}, 129 B.R. 710, 748 (E.D.N.Y. 1991), vacat-ed, 982 F.2d 721 (2d Cir. 1992), on reh’g, 993 F.2d 7 (2d Cir. 1993).} Only a small fraction of the cases present claims of severe asbestosis or asbestos-related malignancies such as lung cancer or mesothelioma. Far greater numbers involve conditions which, if present at all, are associated with little or no actual impairment.\footnote{See In re Haw. Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring.").} This has led Judge Weiner, who oversees the federal asbestos multidistrict proceedings, to note that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases."\footnote{In re Asbestos Prods. Liab. Litig. (No. VI), 1996 WL 539589, at *1 (E.D. Pa. Sept. 12, 1996).} The influx of large numbers of claims by the relatively unimpaired defeats the purpose of the tort system: "that the sick and dying, their widows and survivors should have their claims addressed first."\footnote{In re Patenaude, 210 F.3d 135, 139 (3d Cir. 1999), cert. denied, 531 U.S. 1011 (2000). See generally 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); Peter H. Schuck, The Worst Should Go First:
that if they don't file claims for their relatively unimpaired clients, the statute of limitations may have run if and when the clients do become seriously ill. It is a valid concern and drives some of the problem.

To date, only a handful of courts, such as the Supreme Court of Pennsylvania, have been willing to take steps to address this problem. That court has ruled that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action.\(^4^6\) Further, the court held that the discovery of pleural plaques or a non-malignant, asbestos-related lung pathology "does not trigger the statute of limitations with respect to an action for later, separately diagnosed disease of lung cancer."\(^4^7\) The court added "because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable."\(^4^8\)

The Pennsylvania Supreme Court's decision is an important step in the right direction. First, the court's ruling ensures that those who are not seriously ill will not threaten the right to compensation of those who are.\(^4^9\) Second, the court affirmed that individuals need not file claims simply to avoid any statute of limitations issues; absent physical impairment the clock does not run.\(^5^0\)

Cognizant of both the statute of limitations issue and the problems posed by unimpaired claimants, a few other courts have created pleural registries or inactive dockets pursuant to which the claims of those who cannot meet certain objective medical criteria are placed on an inactive docket where statute of limitations and similar defenses are tolled. For example, the Massachusetts inactive asbestos docket was created in Septem-


\(^{4^7}\) Simmons, 674 A.2d at 237.

\(^{4^8}\) Id. at 238.


\(^{5^0}\) Id.
ber of 1986 through an amendment to an order creating a statewide consolidated asbestos docket. The docket provides a mechanism by which plaintiffs who have been diagnosed with asbestos-related pleural diseases can toll all applicable statutes of limitations regarding their claims or the related claims of their families or estates, until their pleural conditions developed into either asbestosis or some type of malignancy. While on the inactive docket, cases are exempt from discovery.

Similarly, the Circuit Court for Cook County, Illinois, created a pleural registry system in March of 1991. In creating that system, the court recognized that asbestos litigation posed problems for parties: plaintiffs exhibiting no impairment filed claims out of fear that the statute of limitations would expire before their disease progressed to a stage that was medically recognized as impaired, while defendants expended substantial sums in appearing in and defending against such inchoate claims.

Under the Cook County plan, claimants must file an Asbestos Personal Injury Information Sheet. Cases in which an asbestos-related cancer or mesothelioma is alleged may immediately go on the active docket. Claimants who have a history of asbestos exposure and demonstrate objective asbestos-

---

52 Id.  
53 Id. Similarly, pleural cases originally filed in the consolidated docket may be transferred to the inactive docket on plaintiff's motion, and thereafter become subject to all of the same provisions and requirements as cases originally filed on the inactive docket. Id.  
54 See Order to Establish Registry for Certain Asbestos Matters, In re Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 26, 1991) [hereinafter Registry Order]. The pleural registry in Cook County was created by Judge Dean Trafalet who handled the asbestos cases for a fourteen-year period that ended in 1998. When Judge Trafalet took over the asbestos cases there were 8000 cases pending, but today there are about 875 pending cases with another 1200 cases on the pleural registry. See Rooney, supra note 2.  
55 Registry Order, supra note 54.  
56 Id. All claims must be filed individually, as the Order prohibits claims on behalf of groups or classes of claimants. Id.  
57 Id.
related physical findings (such as pleural plaques) but who either do not meet the minimum criteria for impairment, as defined in the Order, or who have not manifested a cancer certified as asbestos-related, as defined in the Order, place their claims on the registry.\(^5\) While on the registry, claims are exempt from discovery and “shall not ‘age’ for any purpose.”\(^6\)

Other courts have also begun to acknowledge the unimpaired claimant problem. Recently, the Texas Supreme Court addressed a statute of limitations question arising out of an asbestos claim and, in that context, noted the problems raised by compensating unimpaired claimants. In *Pustejovsky v. Rapid American Corp.*,\(^6\) the issue before the court was whether a plaintiff could bring separate actions for separate latent asbestos diseases.\(^6\) The court found that a claim for malignant asbestos disease would not be barred by the statute of limitations even where a previous claim for asbestos exposure or minimal impairment had been filed. The court concluded that it was better to allow the second action because otherwise, claimants would feel compelled to bring premature and vague claims (such as fear of cancer) to avoid statute of limitations issues. The court specifically identified its concern that giving damages to claimants who are not sick in a meaningful sense would result in the overcompensation of those who do not get a disease and a “systematic under-compensation” for those who do.\(^6\)

### B. Mass Joinders and Mass Trials

Perhaps the most troubling procedural mechanism used by courts to resolve large numbers of asbestos claims has been the mass joinder or mass trial of thousands of individual claims

\[^5\] Id.
\[^6\] Id.
\[^7\] Id.
\[^8\] 35 S.W.3d 643 (Tex. 2000).
\[^9\] The court noted that it had previously held that a claimant who had been exposed to asbestos but had not developed a serious asbestos-related disease could not bring a claim for fear of developing such disease. *Pustejovsky*, 35 S.W.3d at 648-50.
\[^10\] Id. at 650.
which include claims by both those who are demonstrably sick and those who are unimpaired. The use of this procedural conglomeration threatens both the right of the seriously ill plaintiffs to be fully compensated and the right of defendants to fair process.

1. Mississippi

Although Mississippi does not have court procedures that allow for class actions, Mississippi joinder rules do allow for the joinder of hundreds or thousands of claimants from across the country in one case. Under Mississippi rules, it does not matter how many plaintiffs are from out-of-state so long as one of the plaintiffs is a Mississippi resident who is suing one out-of-state defendant. This “one and all” rule is procedurally similar to class actions but without the same level of protection. Mass joinder of asbestos claims in Mississippi courts, in conjunction with Mississippi rules that provide limited time for discovery, can be used to limit the procedural protections to which defendants are generally entitled.

A Mississippi case that highlights the problem is Cosey v. E.D. Bullard Co., a consolidated case where a trial involving twelve of the 1738 plaintiffs resulted in a jury verdict of $48.5 million. The judge advised the defendants to settle with the

---

64 See, e.g., MISS. UNIF. R. OF CIR. & COUNTY CT. PRAC. § 4.04A (requiring that discovery be completed within ninety days of filing of answer).
65 According to one former Chief Justice of the Mississippi Supreme Court, the joinder rules were never intended to authorize the type of “quasi-class litigation” that takes place. Jerry Mitchell, Out-of-State Cases, In-State Headaches, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1-A. If this multi-claimant litigation had been intended, a class action rule would have been proposed, according to another former Mississippi Supreme Court Chief Justice, who added that “[w]e did not favor class-action suits for reasons that it was burdensome, and our courts weren’t equipped to handle them.” Id. Other procedural mechanisms in Mississippi attract asbestos claimants. Labatton, supra note 63. For example, in Mississippi defendants have no right to perform medical exams. See id.
66 Civ. No. 95-0069 (Cir. Ct., Jefferson County, Miss. 1995).
67 Motion for Disqualification and Recusal of Judge at 5, Cosey, Civ. No. 95-
remaining plaintiffs, or he would try them immediately in front of the same jury, with an instruction to find the defendants liable.\textsuperscript{68} When counsel for the defendants said the plan sounded "like this side of hell," the judge corrected him saying, "No counsel, this is hell."\textsuperscript{69} As one defendant's general counsel remarked, "It's no secret that there are state courtrooms in Mississippi which have become notorious for awarding outlandish verdicts to asbestos claimants who are not sick and as a result, asbestos cases from all over the country tend to migrate there.\textsuperscript{70}

Not surprisingly, Mississippi's rules have resulted in forum-shopping.\textsuperscript{71} Over the past few years the number of plaintiffs filing suit in Jefferson County has exceeded the number of Jefferson County residents.\textsuperscript{72} In early 2001, two new asbestos suits were filed in Mississippi, one including over 2000 claimants\textsuperscript{73} and a second involving over 7000 claimants,\textsuperscript{74} a majority of whom did not reside in Mississippi. Unfortunately, it appears this trend will continue. The Mississippi Supreme Court recently rejected a request to correct the problem in American Bankers Insurance Co. \textit{v. Alexander}.\textsuperscript{75} There the court affirmed the joinder of 1371 plaintiffs in a case in Jefferson County, and made no attempt to change Mississippi's joinder rules.\textsuperscript{76}

\textsuperscript{68} \textit{Id.} at 5-6; see also \textit{Hearings}, supra note 3 (noting that the plaintiffs in \textit{Cosey}, whose disease could not be detected by x-ray, were awarded between $2 million and $3.5 million each).

\textsuperscript{69} Motion to Recuse, supra note 67, at 6.

\textsuperscript{70} Labatron, \textit{supra} note 63 (quoting Richard A. Weinberg, General Counsel for GAF Corp.).

\textsuperscript{71} \textit{See The Cloud Grows Darker over Our Judiciary System}, \textit{THE TIMES} (Lamar County, Miss.), June 28, 2001 (describing efforts to sign up plaintiffs to bring suit in certain Mississippi counties).

\textsuperscript{72} Jerry Mitchell, \textit{Jefferson County Ground Zero for Cases}, \textit{CLARION-LEDGER} (Jackson, Miss.), June 17, 2001, at 1-A. Since 1999, the number of plaintiffs that have filed suit in Jefferson County, Mississippi (more than 10,000), has outnumbered the total number of people in the county (9740). \textit{Id.}

\textsuperscript{73} Third Amended Complaint 1, Ex. A at 1-31, Bankston \textit{v. Westinghouse Elec. Corp.}, No. 2000-17-CVI (Cir. Ct., Jones County, Miss. Mar. 20, 2001).

\textsuperscript{74} Amended Complaint 1, Ex. A at 1-146, Williams \textit{v. A.P. Green Indus., Inc.}, No. 2001-6-CV3 (Cir. Ct., Jones County, Miss. May 29, 2001).

\textsuperscript{75} No. 98-IA-0046-SCT, 2001 WL 83952 (Miss. Feb. 1, 2001).

\textsuperscript{76} \textit{Am. Bankers Ins. Co.}, 2001 WL 83952, at *1. Nevertheless, one current Su-
2. West Virginia

The West Virginia courts have used mass trials for tens of thousands of asbestos claims. Beginning with the first consolidated trial in 1989, over 20,000 asbestos claims have been included in mass trial groups. These trials did not address all liability issues. Instead, there were no named plaintiffs presented to the jury, and the issue to be resolved was whether any of the numerous defendants had either manufactured a defective product or maintained a workplace which was not reasonably safe. The mass trials also determined whether some of the defendants had acted in a manner that would warrant an award of punitive damages and asked the jury to develop a "multiplier" for calculating such damages. A second phase was contemplated which would only then focus on the defendant's liability and the amount of the compensatory damages. Although the ostensible purpose of this procedure was to avoid repetitive litigation, the goal was to "provide the opportunity for the parties to settle massive numbers of cases at one sitting."

In 1996, the West Virginia Supreme Court had the opportunity to address the viability of these mass trials in a situation where there were no common issues among the defendants who each allegedly had maintained an unreasonably safe workplace. The plaintiffs had allegedly worked in various facilities owned by different defendants all of which were in West Virginia. These "premises"-related defendants chal-

---

preme Court Justice has expressed support for a rule addressing who can access Mississippi courtrooms. See Toni Terrett, Supreme Court Justice Books Tort Reform, CLARION-LEDGER (Jackson, Miss.), June 18, 2001.

77 See Preliminary Reply of the Respondent, A. Andrew MacQueen, with Objections and Motions at 5, Mobile Oil Corp. v. MacQueen, No. 29768 (W. Va. May 25, 2001) [hereinafter Preliminary Reply of Judge MacQueen].

78 Id.

79 Id.

80 Id.

81 West Virginia ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300 (W. Va. 1996).

82 MacQueen, 479 S.E.2d at 302.
lenged the trial court's consolidation of a number of separate civil actions filed on behalf of individuals who claimed physical injuries stemming from asbestos exposure which occurred while the plaintiffs were "constructing, repairing, and/or maintaining various facilities" owned by the defendants. The Supreme Court of West Virginia ruled that the consolidation plan was appropriate and provided the trial court with "broad authority" for resolving as many claims as quickly as possible.

Until recently, however, it appeared that some change might be forthcoming. The West Virginia Supreme Court elected to consolidate virtually all West Virginia asbestos claims before one judge under West Virginia's mass litigation procedures. As part of the Mass Litigation Panel proceedings, the judge in charge held a series of meetings with counsel for plaintiffs and defendants to formulate a plan for proceeding with the asbestos cases. Plaintiffs sought to continue the trial practices that made West Virginia an attractive jurisdiction. Plaintiffs requested "a consolidated, common issues trial for all pending asbestos cases," arguing that past consolidations "created important, substantive rights" and therefore, a denial of those procedures in the future "raise[d] issues of a denial of substantive due process and equal protection to the . . . members of the . . . class under both the Constitution of West Virginia and the United States Constitution." The motion was denied, and the court instead scheduled "a series of small-group, all-issues trials" (although Judge MacQueen argued that an inactive docket may violate the West Virginia

---

83 Id.
84 Id. at 305.
87 Id. at 2.
88 W. Va. Mandamus Ruling, supra note 85, at 5.
Unfortunately, the West Virginia Supreme Court reversed course and, while allowing at least some of the small-group, all-issues trials to proceed, made clear that it expected to see larger consolidated trials. The court appointed a new "supervising judge" to schedule a new series of meetings with counsel for plaintiffs and defendants to consider the types of larger trial groups that should be scheduled. The court said that those trial groups might include, among other things, "cases involving the premises liability theory," "cases with issues susceptible to mass trial of all or most parties" and "cases involving common product exposure." Thus, mass trials will probably be back in West Virginia in the future.

3. Maryland

Trial courts in Baltimore, Maryland, have also consolidated thousands of asbestos claims. The first mass trial, held in 1992, was broken into phases and, as in West Virginia, focused on general issues of liability and punitive damages. Following the mass trial, the court scheduled a series of smaller trial groups or mini-trials to resolve the remaining issues specific to individual claimant issues. Rather than resolving claims quickly and efficiently, ten years later these mini-trials have yet to be concluded. In February of this year, a judge in Baltimore Circuit Court approved a settlement of over 6800 asbestos-injury cases, which had been pending in the system for years.
Mass trials and mass consolidations are perhaps the most obvious examples of case management techniques designed to resolve cases quickly but which actually end up encouraging the filing of more asbestos claims. Such procedures take the focus away from the merits of individual claims (while often ignoring the due process rights of defendants) and allow non-meritorious claims to flourish. More importantly, mass trials and mass consolidations provide a mechanism which increases the value of unimpaired claims at the expense of truly sick plaintiffs, further reducing the limited pools of resources and increasing the likelihood that future deserving claimants will not be fully compensated.

C. Medical Monitoring

Plaintiffs in medical monitoring cases seek post-exposure, pre-symptom recovery for the expense of periodic medical examinations to detect the onset of physical harm (which may or may not occur). Some courts have permitted recovery for medical monitoring, but many have rejected it. Medical monitoring, like recovery for expected future impairment or fear thereof, may have its place in tort law, but in the asbestos litigation, this device has become a caricature.

Recognition of medical monitoring absent physical injury could have enormous consequences for asbestos litigation given the massive number of individuals who were exposed to asbestos at some level. If even a small fraction of these individuals were to seek recovery for medical monitoring, the effects on future claimants, the court system and the remaining solvent defendants could be far-reaching. As one court explained:

There is little doubt that millions of people have suffered exposure to hazardous substances. Obviously, allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants.... Allowing today's generation of

---

exposed but uninjured plaintiffs to recover may lead to tomorrow's generation of exposed and injured plaintiff's [sic] being remediless.\textsuperscript{95}

These serious practical concerns led the United States Supreme Court in \textit{Metro-North Commuter Railroad Co. v. Buckley}\textsuperscript{96} to reject medical monitoring in Federal Employers' Liability Act (FELA)\textsuperscript{97} cases.\textsuperscript{98} One of the Court's primary concerns in \textit{Buckley} was that medical monitoring would permit literally "tens of millions of individuals" to justify "some form of substance-exposure-related medical monitoring."\textsuperscript{99} As a result, defendants would be exposed to unlimited liability, and a "flood' of less important cases" would drain the pool of resources available for meritorious claims by plaintiffs with serious, present injury.\textsuperscript{100} The Court concluded:

\begin{quote}
[W]e are more troubled than is [the dissent] by the potential systemic effects of creating a new, full-blown, tort law cause of action—for example, the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other.\textsuperscript{101}
\end{quote}

Equally instructive on this point is the Texas Supreme Court's more recent decision in \textit{Temple-Inland Forest Products Corp. v. Carter}.\textsuperscript{102} In rejecting a "fear of disease" claim

\begin{footnotes}
\item 521 U.S. 424 (1997).
\item 45 U.S.C. §§ 51-60 (1994). FELA is a federal statute that defines rights and duties in personal injury cases brought by railroad workers against their employer railroads. FELA is something like a tort equivalent of workers' compensation for the railroad field.
\item \textit{Buckley}, 521 U.S. at 442-43.
\item \textit{Id.} at 442.
\item \textit{Id.}
\item 993 S.W.2d 88 (Tex. 1999).
\end{footnotes}
brought by a person who was exposed to asbestos, but had no physical injury, the court explained:

The difficulty in predicting whether exposure will cause any disease and if so, what disease, and the long latency period characteristic of asbestos-related diseases, make it very difficult for judges and juries to evaluate which exposure claims are serious and which are not. This difficulty in turn makes liability unpredictable, with some claims resulting in significant recovery while virtually indistinguishable claims are denied altogether. Some claimants would inevitably be overcompensated when, in the course of time, it happens that they never develop the disease they feared, and others would be undercompensated when it turns out that they developed a disease more serious even than they feared. Also, claims for exposure could proliferate because in our society, as the Supreme Court observed, “contacts, even extensive contacts, with serious carcinogens are common.”

For this reason, the Texas Supreme Court was reluctant to stray from the bedrock rule, taken from the Restatement (Second) of Torts, that a showing of actual injury is an indispensable element of a tort cause of action. The court stated: “If recovery were allowed in the absence of present disease, individuals might feel obliged to bring suit for such recovery prophylactically, against the possibility of future consequences from what is now an inchoate risk,” which would “exacerbate not only the multiplicity of suits but the unpredictability of results.”

Sound public policy dictates that courts maintain the 200-year-old principle that causes of action generally require proof of a present physical injury. The traditional physical injury

---

103 Temple-Inland, 993 S.W.2d at 93 (emphasis added).
104 See Restatement (Second) of Torts § 436A (1965) (stating that defendant should not be held liable for emotional disturbance absent physical injury); see also Purjet v. Hess Oil V.I. Corp., 1986 WL 1200, *4 (D.V.I. Jan. 8, 1986) (applying Virgin Islands law) (“We are bound, however, to follow the Restatement's rule that actual injury is an indispensable element of a tort cause of action," including medical monitoring claims.)
105 Temple-Inland, 993 S.W.2d at 93.
106 See, e.g., W. Page Keeton et al., Prosser and Keeton on the Law of
rule serves a number of important functions with respect to medical monitoring claims. First, it prevents courts from being flooded with thousands of new claims. As one set of commentators has pointed out, with an estimated thirty-eight percent of all cancers attributable to occupational exposure to toxic chemicals and 50,000 hazardous waste sites in the United States, "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify that the exposure significantly increased our risk of disease." It was precisely this concern that persuaded the United States Supreme Court to refuse to allow medical monitoring claims in the *Buckley* decision.

Furthermore, medical monitoring awards are often totally unnecessary. Most workers today already receive access to medical check-ups through a health plan. A tort award would simply provide a windfall recovery. As the Supreme Court noted in *Buckley*, "where state and federal regulations already provide the relief that a [medical monitoring] plaintiff seeks, creating a full-blown tort remedy could entail systemic costs without corresponding benefits" because recovery would be allowed "irrespective of the presence of a ‘collateral source.’"

In addition, medical monitoring awards are subject to serious abuse. If awarded in a lump-sum, there is no guarantee that any recovery will actually be spent on medical monitor-

---

107 Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 COLUM. J. ENVTL. L. 121, 130 (1995); see also Andrew R. Klein, *Rethinking Medical Monitoring*, 64 BROOK. L. REV. 1, 13 (1998) ("According to the United States Environmental Protection Agency ("EPA"), billions of pounds of hazardous chemicals are emitted into the air each year, and nearly twenty percent of the U.S. population (approximately 40 million people) live within four miles of a hazardous waste site that the EPA has placed on its National Priority List.") (footnotes omitted).


109 Approximately eighty percent of all standard medical testing is paid for by third-party insurance. 2 ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY—REPORTERS' STUDY 379 (1991).

110 *Buckley*, 521 U.S. at 443.
In fact, evidence suggests that lump-sum awards are more likely to be spent in the short-term than to be saved for future medical monitoring.\textsuperscript{112} This will almost certainly be true in the vast majority of cases where monitoring is already provided by a "collateral source."

Moreover, the social risk associated with making medical monitoring too readily available to the millions of persons in our society who can claim exposure to toxic substances, including asbestos, will have the effect of compensating those who are unimpaired or slightly impaired at the expense of those who are seriously injured. When courts permit large damage awards for medical monitoring, less money is available to compensate those who have serious injuries or will develop serious injuries in the future.

These serious problems will only be exacerbated if claimants seeking medical monitoring are permitted to pursue recovery through the vehicle of class action litigation. People who suffer actual asbestos-related injuries may be unable to obtain compensation for their injuries if funds are further depleted for monitoring classes of individuals who have no present physical injury, and may never become sick.

Despite these facts, some state courts still permit plaintiffs to recover damages for medical monitoring even in the absence of injury. In 1998, the Supreme Court of Louisiana, in a suit brought on behalf of a class of plaintiffs that had not filed suit for asbestos disease or injury, ruled that for an asymptomatic claimant exposed to asbestos, "the reasonable cost of medical monitoring is a compensable item of damage . . . provided that a plaintiff satisfies [certain] criteria."\textsuperscript{113} As a result of this

\textsuperscript{111} As one commentator has noted, "[t]he incentive for healthy plaintiffs to carefully hoard their award, and faithfully spend it on periodic medical examinations to detect an illness they will in all likelihood never contract, seems negligible." Arvin Maskin et al., \textit{Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?}, 27 WM. MITCHELL L. REV. 521, 540-41 (2000).


\textsuperscript{113} Bourgeois v. A.P. Green Indus., Inc., 97-3188, pp. 8-9 (La. 7/8/98), 716 So. 2d 355, 360. The court identified seven criteria that needed to be established:
ruling, the Louisiana Legislature amended its law to eliminate medical monitoring as a compensable item. Specifically, the amendment stated, “Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease.”

But in April of 2001, the Louisiana Supreme Court spoke again on the issue, this time holding that the Legislature’s decision to eliminate medical monitoring was unconstitutional to the extent that the law was applied retroactively (i.e., to the extent the plaintiff already had a “vested property right” in a cause of action it could not be divested by a subsequent statute). The upshot of the ruling was to permit large numbers of claimants who acknowledged they were unimpaired to seek

(1) Significant exposure to a proven hazardous substance.

(2) As a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.

(3) Plaintiff’s risk of contracting such a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease.

(4) A monitoring procedure exists that makes the early detection of the disease possible.

(5) The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles.

(6) The prescribed monitoring regime is different from that normally recommended in the absence of exposure.

(7) There is some demonstrated clinical value in the early detection and diagnosis of the disease.

_Bourgeois_, pp. 9-11, 716 So. 2d at 360-61. To this list, the court added that the “costs must be both reasonable and limited in duration to the maximum latency period (if known) of the diseases for which there is an increased risk.” _Id._ at p. 11, 716 So. 2d at 361.


medical monitoring costs in the courts, depleting funds available to compensate those claimants who are or may become sick.\textsuperscript{116}

\textbf{D. Managing Punitive Damages Claims}

Continuing to award punitive damages in asbestos cases no longer makes sense. The purpose of punitive damages in product liability cases is to punish manufacturers for the injuries their products caused and to deter others from doing the same.\textsuperscript{117} It would be difficult to argue that punitive damages awards in asbestos cases over the past twenty years have not adequately punished asbestos manufacturers. Moreover, individuals responsible for decisions relating to asbestos products no longer work at these corporations and in most cases are dead. Punishing corporations for decisions made years before the present management was in power does not serve the purpose of punitive damages.

When the threat of large punitive damage awards is used to increase settlement amounts, punitive damages become a means of extortion rather than the corrective and deterrent they are intended to be. Thus, continued use of punitive damages not only violates a defendant’s rights,\textsuperscript{118} it threatens fu-

\textsuperscript{116} The court held that because the plaintiffs, before passage of the statute, had filed an amended petition alleging the seven criteria, they could pursue their medical monitoring claims. \textit{Bourgeois II}, p. 12, 783 So. 2d at 1260-61; see \textit{Crooks v. Metro. Life Ins. Co.}, 2001-0466, pp. 3-4 (La. 5/25/01), 785 So. 2d 810, 812 (stating that the court should determine whether the seven criteria from \textit{Bourgeois I} occurred before Act 989 went into effect).

\textsuperscript{117} See, e.g., \textit{RESTATEMENT OF TORTS} § 908 cmt. a (1939) (noting that the functions of punitive damages are punishment and deterrence); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ’S CASES AND MATERIALS ON TORTS 549 (10th ed. 2000) (describing the origin and purpose of punitive damages).

\textsuperscript{118} See King v. Armstrong World Indus., Inc., 906 F.2d 1022, 1031 (5th Cir. 1990) (“It must be said that a strong arguable basis exists for applying the due process clause . . . to a jury’s award of punitive damages in a mass tort context.”); Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989) (“We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle.”); McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1570 (M.D. Ga. 1990) (“[D]ue process may place a limit on the number of times and the extent to which a defendant may be subjected to punishment for a single course of conduct.”); Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J. 1989) (“[T]he
ture plaintiffs by driving defendant corporations into bankruptcy, thereby depleting the pool available for compensatory damages.119

The United States Court of Appeals for the Third Circuit recently recognized many of these same concerns. In In re Col­lins,120 the Third Circuit had the opportunity to consider the Judicial Panel on Multidistrict Litigation's decision not to re­mand punitive damages claims for trial together with the re­mainder of personal injury claims arising from asbestos expo­sure.121 The court was convinced that there was a “compel­ling” public policy rationale for severing the claimants' punitive damage claims:

The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage wind­falls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on re­mand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.122

119 See Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) (“If no change occurs in our tort or constitutional law, the time will arrive when [a defendant's] liability for punitive damages imperils its ability to pay compensatory claims”); Bishop v. Gen. Motors Corp., 925 F. Supp. 294, 298 (D.N.J. 1996) (“Indeed, one of the many cogent criticisms of punitive damages is that multiple punitive [damage] liability can both bankrupt a defendant and preclude recovery for tardy plaintiffs.”).


121 Collins, 233 F.3d at 810.

122 Id. at 812. Other courts have also severed punitive damages claims. For example, in Northampton County, Pennsylvania, Judge Panella severed all punitive damages claims from discovery, pre-trial motions and trial, ruling that any
Yet many courts have not been willing to take similar steps to curb the impact of punitive damages claims. For instance, the Supreme Court of Montana had to decide whether W.R. Grace & Co. could present evidence of the scope of asbestos litigation it faced as well as hypothetical average amounts for each pending claim during a mini-trial on punitive damages.\textsuperscript{123} The purpose of that evidence was to show that an award of punitive damages could threaten the ability of sick claimants to obtain compensation.\textsuperscript{124} The trial court permitted W.R. Grace to introduce an economic expert who performed a series of calculations in order to approximate the potential damages facing the company in comparison to the company's net worth.\textsuperscript{125}

However, the Montana Supreme Court ruled that the trial court abused its discretion in admitting this evidence – finding that such evidence is irrelevant to the issue of punitive damages, as well as "highly speculative."\textsuperscript{126} On remand, W.R. Grace would have been unable to introduce such expert testimony and thus, the jury would have been unaware of the impact of a large punitive damages award on seriously ill claimants. W.R. Grace has since sought bankruptcy protection following a flood of new asbestos claims.

III. A GLOBAL VIEW IS NEEDED

In mass tort litigation, such as the asbestos litigation, when a judge in one state acts, he or she not only affects the plaintiffs and defendants in that state, but also current and future plaintiffs and defendants in all other states. Imagine the frustration of one judge, coping with the impact of depleted funds and mounting bankruptcies by setting for trial only the

\textsuperscript{123} Finstad v. W.R. Grace & Co., 2000 MT 228, ¶ 7, 8 P.3d 778, 781.
\textsuperscript{124} Finstad, ¶ 46, 8 P.3d at 787.
\textsuperscript{125} Id. ¶ 40, 8 P.3d at 785.
\textsuperscript{126} Id. ¶¶ 48-49, 8 P.3d at 787.
cases of those who are sick or have died from an asbestos disease, watching a judge in another state allow unimpaired claimants to achieve compensation as part of a mass consolidated trial. With no end in sight to the asbestos litigation crisis, courts must reexamine the procedural mechanisms and substantive rules they have adopted to determine whether they are actually making the problem worse.

Unfortunately, courts are often hesitant to take a global view of the problem at the expense of the citizens of their state. For example, a state judge may be unwilling to prevent plaintiffs in his or her state from receiving punitive damages if a similarly situated plaintiff in another state will not be precluded from receiving them. 127 This state-centric view of the litigation is not just a theory. For example, in West Virginia, the plaintiff's submission to the West Virginia Mass Litigation Panel actually argued that a mass consolidated trial of all asbestos claims was necessary because of the supposed "risk of bankruptcy filings on the part of the remaining asbestos manufacturing defendants" as well as "the drain of defendant dollars to other litigation in other states where litigation plans are in effect." 128 More specifically, the plaintiffs argued that "if the dollars are not being demanded in West Virginia, they will be spent elsewhere until they are all gone." 129

127 See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967) (noting that "a state otherwise willing to impose such self-denying limits might be disinclined to do so until assured that others would follow suit").

128 Plaintiffs' Motion for Mass Trial, supra note 86, at 7.

129 Id. at 7 n.3. In two separate opinions, the West Virginia Supreme Court of Appeals has reflected on this potential transfer of wealth in general. In Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991), the court stated:

"State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable of correcting regardless of surpassing integrity and boundless goodwill. State courts cannot weigh the appropriate trade-offs in cases concerning the national economy and national welfare when these trade-offs involve benefits that accrue outside the jurisdiction of the forum and detriments that accrue inside the jurisdiction of the forum."

Garnes, 413 S.E.2d at 905. Earlier in Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991), the court opined:
The lack of a coordinated approach results in compensation based on forum rather than merit. A recent settlement illustrates this problem. In November of 1999, eighteen of the nation's leading asbestos makers agreed to settle two of the largest asbestos personal injury cases for $160 million. However, the money was not allocated to plaintiffs based on the severity of injury, but apparently on where they lived. For example, $263,000 went to each of 246 plaintiffs who lived in four counties in Mississippi and who suffered injuries. Seven Texas plaintiffs only received $43,500 each. But 2645 residents of Ohio, Indiana and Pennsylvania who had similar injuries only received $14,000 each.

In the absence of federal legislation, judges must look outside their own "asbestos fiefdoms" and make decisions that will help resolve the problem at a national level. They must cooperate and work toward a global approach to these cases. "Through [such] cooperation, judges can promote efficiency and

Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.

Blankenship, 406 S.E.2d. at 786.

130 See Labaton, supra note 63 (noting that these Mississippi cases involved almost 4000 plaintiffs from five states).
131 See id.
132 See id.
133 See id.
134 See id.

135 Francis E. McGovern, Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation, 148 U. Pa. L. Rev. 1867, 1880 (2000). Professor McGovern stated that the "ubiquity and massness of the tort should lead to cooperation among judges." Id. at 1867. He proposed a cooperative strategy that judges can use to deal with the many problems associated with mass torts. Specifically, Professor McGovern offered four proposals: "(1) revise the MDL rule or approach to make the strategy explicit; (2) revise Rule 23 to allow for more comprehensive settlements; (3) provide institutional support for state judges and for cooperative efforts; and (4) revise the Manual for Complex Litigation to educate judges concerning cooperative institutional strategy." Id. at 1892.
horizontal equity in the adjudication." Cooperation on a global level will serve two immediate goals—"eliminating redundancy and promoting consistency." Additionally, cooperation today would assure the long-term goal of compensating claimants who become truly sick in the future.

A. Take Steps to Control Claims by the Unimpaired

Courts must be willing to distinguish between the claims of those who are truly sick and those who are not. The adoption of inactive dockets by courts in Illinois, Massachusetts and Maryland is a good example of a method of controlling claims by the unimpaired. The unwillingness of the Pennsylvania Supreme Court to recognize a cause of action by claimants who are asymptomatic is another. Until courts take steps to control claims by the unimpaired, court dockets will continue to be clogged by such claims, and the limited resources available to those who are truly sick will continue to be depleted.

B. Strictly Enforce Joinder and Venue Rules to Prevent Forum Shopping

Courts need to be more assertive in requiring that claimants have had some substantive contact with the state in which they have filed suit. Thousands of cases are filed in states like Mississippi even though the claimants have no connection to the state because Mississippi's joinder rules are so liberal. Similarly, the streamlining of judicial procedures encourages out-of-state residents to file suit in Ohio. One solution would be for courts to require that plaintiffs either have been exposed to asbestos in the state or live or work in the state in which they file suit. Doing so would decrease forum shopping while also unclogging state courts faced with lawsuits by thousands of individuals who literally have no relationship to that state. In-state plaintiffs who pay taxes to keep the state courthouses open would benefit by having their claims heard faster.

136 Id. at 1867.
137 Id. at 1872.
C. Bring More Cases Before Fewer Judges

Many states have procedures which allow for the consolidation of cases from across that state to be transferred to a single judge. These types of procedures have been used by states in other mass tort contexts such as Fen/Phen and silicone breast implants. A more consistent approach to the handling of the asbestos litigation can be achieved if the number of judges responsible for managing asbestos cases is reduced.

D. Provide Institutional Support

More formal mechanisms should be adopted to provide opportunities for judges from across the country to share their views and experiences concerning the asbestos litigation. Organizations such as the National Judicial College and ad hoc state court committees have provided forums for improved communication in the past, but additional steps should be taken. An organization that maintained claimant statistics, compiled case management orders and opinions and provided a forum for increased communication would provide judges with an important resource to draw upon as they try to balance their need to move cases along with the need to protect both the availability of funds to compensate the truly sick and the rights of defendants. Making this information available to litigants may also streamline the parties’ ability to work out

---

138 Id. at 1886-87.

139 One solution of course would be to revise the multi-district litigation (MDL) rules to allow both state and federal claims to be transferred to a single judge. As Professor McGovern explains, “[i]f the MDL statute were amended to allow the transferee judge to oversee pretrial discovery for both federal and state cases, it would be possible to reduce much of the redundant discovery.” Id. at 1892. Additionally, if the MDL judge had greater powers, such as the ability to defer aggregation or settlement until the marketplace has spoken, or to eliminate incentives to file claims prematurely (e.g., toll the statute of limitations), “then the premature massness that preempts a liability determination could be lessened.” Id.

140 Professor McGovern conceptualizes a National Center for State Courts, funded by the State Justice Institute, which would establish an “institutional mechanism . . . to share information and provide limited support” so that there would be “a permanent method of insuring a more effective state marketplace of litigation.” Id. at 1894.
case management and discovery matters with less court involvement.

E. Use the Tools that Already Exist

While some common-sense innovations, such as inactive dockets, are available to the courts, many judges do not have to look past their own court rules to improve the asbestos problem. One of the reasons that more and more asbestos claims are being filed is that courts have been unwilling to treat asbestos claims like they would other tort claims. Judges need to require plaintiffs to meet their burden of proof and be willing to dismiss cases on summary judgment if that burden is not met. Furthermore, judges need to enforce the procedural rights of defendants and, in particular, the rights of defendants to full discovery. The time required to enforce the rule of law now will actually save time in the future because the incentive to file frivolous or marginal claims will have been eliminated.

IV. THE COURTS ARE THE ONLY PRACTICAL SOLUTION

In *Ortiz v. Fibreboard Corp.*, United States Supreme Court Justice David Souter stated that "the elephantine mass of asbestos cases . . . defies customary judicial administration." As one Third Circuit Judge commented:

Unquestionably, a national solution is needed. Despite the deteriorating situation, Congress has declined to act and class actions are inadequate remedy. . . .

. . . Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.

---

142 *Ortiz*, 527 U.S. at 821; see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.") (footnote omitted).
143 *Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting) (footnote
Even more recently, in discussing the need for a legislative solution, one Maryland District Court Judge recognized:

the need for developing less complex and more responsive and responsible ways of sorting out the blame and cost for industrial-age ills such as asbestosis than a system of litigation meant to sort out competing claims to straying cattle. Yet, the system lumbers on because no one has the incentive or initiative to change it, perhaps because everyone is so invested in the status quo.144

The need for a national solution has never been stronger than it is today, where over thirty companies have been forced into bankruptcy as a result of asbestos-related litigation, where the number of cases on court dockets continues to grow at epidemic proportions and where claimants who get sick in the future run the risk of undercompensation or no compensation at all. However, without federal legislation, which remains speculative, only the courts can take steps to improve the asbestos litigation environment. Mechanisms designed to move cases along have failed. Courts must be willing to try new techniques, such as inactive dockets, and at the same time enforce those rules—tort standards and forum limitations—that already exist. Whichever path they choose, the courts must do something now before the problem gets even worse.