

Asbestos

Asbestos Reform — Past And Future

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Commentary

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Four years ago, the United States were in the midst of an asbestos litigation crisis. Filing rates approached 100,000 cases per year. Over 90% of those cases involved non-malignant conditions, mostly brought by people who had no physical impairments and who had been recruited through asbestos screenings run by (or for) the entrepreneurial trial bar. Much of the money paid in settlement went to people who weren't sick. Asbestos litigation had led to a total of more than 70 bankruptcies, of which two-thirds had been filed since the beginning of 2000. More bankruptcies loomed, as financial markets largely shut down for companies tainted with possible asbestos liabilities. As a result of all this, there was a serious danger that the sickest asbestos claimants would not be fully compensated, because of the massive diversion of resources to the worried (or sometimes not particularly worried) well.

There was not much hope for the future. Although over 700,000 claims had been filed as of 2002, it was estimated that over 2 million additional claims could be filed before the litigation ran its course.¹ Estimates of the total amount of future asbestos costs — added to the \$70 billion that had already been spent — were as high as \$195 billion² — and some outlying estimates were even larger. Congress's effort to establish a trust fund for impaired asbestos victims was stalled.

Today, even if the asbestos litigation system cannot be described as healthy, the sense of crisis is gone.³ What happened? Can it last? And what's next?

I. The Dialectical Materialism Of Asbestos Litigation

During much of the 1990s, asbestos litigation seemed under control. Case filings, while growing, were still considered manageable. The litigation focused on a limited number of major defendants, and many of those were members of the Center for Claims Resolution (CCR), which settled (or, more rarely, litigated) claims on behalf of all its members and allocated the financial responsibility according to a sharing formula. Trials were rare, and most defendants had established settlement matrices with the major plaintiffs' law firms that allowed claims to be processed rather than litigated. To be sure, claims on behalf of the so-called unimpaired were a problem. However, a number of important courts had adopted "pleural registries" that allowed pleural plaque and other unimpaired cases to be deferred while judicial resources were focused on sicker claimants.⁴

The managerial approach to asbestos litigation culminated in the *Amchem* class action settlement between CCR and most major plaintiffs' law firms.⁵ The *Amchem* settlement deferred the claims of the unimpaired and established a matrix for the payment of other claims — in a sense institutionalizing the administrative settlement patterns that had come to characterize the litigation. What was new about *Amchem* was the use of the class action device to achieve finality for the participating defendants by binding future claimants to the matrix. *Amchem* also promised to reduce the high transaction costs of the tort system and expressly limited attorneys' fees. Had the settlement survived, it was expected that other defendants would enter into similar agreements, essentially transforming asbestos litigation into a nationwide administrative compensation system.

Although most of the plaintiffs' trial bar adhered to *Amchem*, objectors led by Baron & Budd, a Texas firm with many unimpaired clients, successfully appealed the District Court's approval of the settlement to the Third Circuit. The Supreme Court granted certiorari and affirmed the Court of Appeals, putting an end to this "arguably brilliant" experiment in judicial management and ushering in a period of crisis.⁶ In 1998, the year after the Supreme Court's decision in *Amchem*, asbestos litigation took off. New claims were being filed at unprecedented levels, especially in then-new venues like Jefferson County, Mississippi, and huge verdicts pushed settlement values to unprecedented levels. By 2000, the system began to crumble. Babcock & Wilcox and Pittsburgh Corning filed for bankruptcy protection early in the year. By Christmas, those companies had been joined by such major defendants as Owens Corning, GAF, and Armstrong. The vast majority of major defendants followed them into bankruptcy by the following summer.

Bankruptcy filings automatically stayed asbestos claims against the bankrupts, and thus sucked vast resources out of the tort system. Plaintiffs' lawyers, seeking to maintain whole-case values, escalated their demands upon previously unimportant defendants and began to develop cases against new classes of defendants. The plaintiffs' bar had, moreover, seemed to perfect the techniques of recruiting claimants nationwide and channeling them into so-called "magic jurisdictions" where the defense hardly had a chance. There was no room for optimism when juries in Mississippi could render verdicts of \$150 million to 6 quite healthy men.⁷

A. The Reform Analysis

In response to this crisis, insurers and defendants, sometimes together, and sometimes separately, formulated a program for change. At least initially, the reform program was developed in collaboration with plaintiffs' lawyers who specialized in mesothelioma cases and who feared that their clients would be hurt by a diversion of resources to the worried well. Since late 2003, that program has largely succeeded in reversing the currents that led to the debacle of 2000. If the initial post-*Amchem* explosion was the "thesis," then the reform program was the "antithesis." Whether we have reached a stable "synthesis" is a question to which we will return below.

Underlying this "antithesis" was what we will call the "Reform Analysis," which had had 3 main elements:

Problem #1: The Unimpaired. The tort system compensated hundreds of thousands of "unimpaired" claimants, for the most part generated by "screening" programs that systematically culled exposed populations looking for anyone with spots on his lungs. As a result, resources that should have gone to cancer victims and other seriously ill claimants were being misallocated to people who exhibited some physical indicia of exposure but were not sick.

Solution: Adopt medical criteria that would shunt the claims of the unimpaired to the side and concentrate the resources of the system on cancer cases — above all mesotheliomas.

Problem #2: Interstate Forum Shopping. Unlike most tort lawsuits, which are local, asbestos litigation involved the nationwide mobilization of cases which were then channeled into certain "magic jurisdictions" where alleged bias of judges and juries made a reasonable defense impossible. Initially, the "magic jurisdictions" reformers had in mind were certain counties in West Virginia and rural Mississippi — havens for unimpaired non-malignant claims. But the rise of Madison County, Illinois — the venue of choice for mesothelioma claims — underscored the fact nationwide mobility of claims was a separate problem.

Solution: Limiting venue to the state where the plaintiff lived or where exposure occurred.

Problem #3: Aggregations. The “elephantine mass” of asbestos cases had traditionally been managed by large scale consolidations designed to force settlement of all cases, the good with the bad. Some consolidations in the 1990s had involved thousands of claims. These massive consolidations continued into the 21st century in West Virginia, Virginia, and Mississippi.⁸ Moreover, evidence indicated that even relatively small consolidations substantially increased jury awards, possibly through confusion.⁹ Defense-oriented reformers saw consolidations of any size as distorting, and they saw the jumbo consolidations in states like West Virginia as a flagrant violation of due process.¹⁰ Moreover, a consensus emerged that consolidations designed to force settlements merely encouraged the filing of more and more claims that could not be litigated but could be settled within a larger mass.

Solution: Limit consolidations to situations where plaintiffs and defendants agreed to them.

By the fall of 2002 the Reform Analysis had become very widely accepted. The problems addressed by the Reform Analysis were not, of course, the only flaws in the U.S. asbestos litigation system. Asbestos litigation is expensive: of every \$2.38 spent by defendants or their insurers, only \$1.00 actually reaches claimants.¹¹ Moreover, many defendants are convinced that they are paying far more than their “fair share” of the harm done by asbestos-containing products. The underlying problem is that companies like Johns Manville did much more damage than they could pay for, and the operation of joint and several liability has caused their share to be shifted to defendants whose responsibility is at best attenuated. This effect is amplified by rampant fraud and misrepresentation in exposure and product identification testimony. With the relative success of the initial reform program, increasing attention is likely to be paid to second-wave issues, including joint and several liability.

1. Medical Criteria

Almost from the beginning most asbestos claimants were “unimpaired” — i.e., they did not have cancer and their breathing was (still) in the normal range.¹² It was generally thought that if asbestos caused a physical harm — i.e., any detrimental physical change in the body — there would be a legal injury that could be redressed under tort law, however minor the detriment might be.

As noted above, in the early 1990s, some courts began to use what were then called “pleural registries,” or, more generally, “deferral dockets.” Claimants who failed to meet impairment criteria established by the courts would be placed on a deferral docket until they got sick. This deferral tolled the statute of limitations (and kept a place in line) for unimpaired claimants, but reserved trial time for people who met the applicable medical criteria. Deferral dockets lost momentum in the mid-1990s, in part because of great hopes that their primary objective — deferring the claims of the unimpaired — would be met by the *Amchem* settlement.¹³ Nevertheless, with the emergence of the Reform Analysis, deferral dockets were an established mechanism for addressing the problem of the unimpaired claimant, and, not surprisingly, they became a key part of the reform program.

In 2001-2002, defendants and insurers, allied with plaintiffs’ lawyers who specialized in cancer cases, pressed both for a Federal medical criteria bill and for renewed use of deferral dockets by courts with substantial asbestos case loads. In September 2002, plaintiffs’ lawyer Steven Kazan made a powerful case for a medical criteria bill in hearings before the Senate Judiciary Committee.¹⁴ Shortly thereafter, Justice Helen Freedman ordered the creation of a deferral docket for unimpaired cases in New York City.¹⁵

In February 2003, the American Bar Association’s House of Delegates adopted a resolution recommending enactment of a Federal medical criteria bill and setting forth its views on what medical criteria would be appropriate.¹⁶ Although the focus of Federal legislative efforts shifted in March 2003 from medical criteria to the creation of a Federal administrative compensation scheme, the ABA resolution became the model for the adoption of a number of deferral dockets over the next several years.¹⁷ The ABA Resolution has also served as a model for state legislative efforts that began in earnest in 2004.¹⁸ Ohio adopted a medical criteria statute in 2004, and five other states — Texas, Florida, Georgia, Kansas, and South Carolina — have followed suit since then.¹⁹ Ohio, Texas, and Florida have been major asbestos venues, accounting for 35% of all filings in the 1998-2000 period.²⁰

(a) Non-Malignant Claims

State medical criteria statutes focus primarily on unimpaired non-malignant claims. They have four

main elements: (a) procedures for addressing medical issues at the outset of the case, (b) standards for diagnosis and impairment, (c) provisions to ensure the integrity of medical evidence, and (d) tolling of the statute of limitations.

At the outset, all of the medical criteria statutes have similar procedures for early resolution of the question whether a claim should be deferred. The first step is submission of a report by the plaintiffs that makes the required showing of a physical impairment caused by asbestos exposure. (The time limit for filing such reports is usually short for new cases; the procedures for filing such reports in pending cases vary). A defendant may challenge the sufficiency of the plaintiff's showing through a motion to dismiss.²¹ If the court finds that the plaintiff has failed to present adequate evidence of impairment (or in Texas that the motion to dismiss is "meritorious"), the claims will be dismissed without prejudice.²²

The medical criteria relating to diagnosis and impairment are complex, and a detailed summary exceeds the scope of this paper.²³ Assuming adequate evidence of exposure, the statutes all rely primarily on chest x-rays for the diagnosis of asbestos-related disease. Usually, a finding of asbestosis must be based on a chest x-ray read as ILO 1/1, and pleural conditions can only be compensated if a chest x-ray shows diffuse pleural thickening (rather than just pleural plaques).²⁴ Moreover, diagnosis of an asbestos-related condition must be accompanied by a showing of breathing impairment, which cannot be based on subjective testimony, but must be supported by pulmonary function tests.²⁵ Impairment must also be "restrictive" — the hallmark of asbestos-related diseases — rather than obstructive, which is caused by diseases like chronic bronchitis or emphysema.²⁶

A prime target of medical criteria legislation is the litigation screening programs that have produced much-criticized "diagnoses for dollars." Accordingly, the various statutes contain a number of provisions to prevent fraud and abuse.²⁷ First, and probably most important, these laws require pulmonary function tests to comply with technical standards established by the American Thoracic Society.²⁸ Second, several statutes prohibit the use of reports of any doctor or laboratory who required a claimant to retain a law firm to receive an examination.²⁹ Third, the statutes prohibit

relying on diagnoses involving procedures that violate any "law, regulation, licensing requirement or medical code of practice."³⁰ Litigation screeners often violate licensing and other technical requirements. Fourth, most statutes include provisions to ensure that the diagnosing doctor has a doctor-patient relationship with the claimant.³¹ Similarly, some statutes limit the income that a diagnosing doctor may earn in litigation, and the amount of professional time that the doctor may spend as a consultant or expert.³² Fifth, all of the statutes require that the diagnosing doctor (or someone under her supervision) take an occupational and exposure history of each claimant.³³

Finally, all of the statutes include provisions to toll the statute of limitations for unimpaired claimants.³⁴ Thus, people with non-impairing asbestos related conditions are not prejudiced if later their condition becomes impairing.

(b) Cancer Claims

Although state medical criteria legislation primarily focuses upon the unimpaired non-malignant claim, several statutes try to address cancer claims as well. This is a significant conceptual shift. Cancer criteria do not raise a timing issue as to when, in the course of a disease process, it is appropriate to allow a claim. Nor do they raise an issue as to whether a claimed injury is serious enough to be the basis for a lawsuit — there can be no doubt that cancer meets any conceivable threshold. Cancer criteria try to address the question of what evidentiary showing should be required to prove causation, especially for cancers like lung cancer that are caused by factors other than asbestos.

In two states (Texas and Kansas), the cancer criteria may not significantly change existing law.³⁵ Georgia goes further than those states and requires all cancer claimants to provide medical reports that exclude other more probable causes of the cancer — an invitation to defendants to challenge medical reports, especially in lung cancer cases, on the ground the cancer was "more probably" caused by smoking than by asbestos exposure.³⁶

Some statutes take more direct aim at cancer cases filed by smokers. In Ohio, for instance, smokers who file lung cancer claims must show that asbestos exposure is the predominant cause of the cancer and that

a medical authority has determined that without the exposure the cancer would not have occurred.³⁷ If this but-for test is applied stringently, it could prove to be a significant hurdle.

Finally, two states, South Carolina and Florida, require that at least some cancer claimants provide evidence of an underlying nonmalignant asbestos-related condition. In South Carolina, cancer claimants must provide a diagnosis of cancer, a doctor's opinion that the cancer was not more probably the result of causes other than asbestos exposure, and, for non-mesothelioma claimants, both proof of a fifteen-year latency period and an underlying nonmalignant condition.³⁸ In Florida, smokers who file a claim for cancer of the lung, larynx, pharynx, or esophagus, need to provide (a) a doctor's diagnosis and opinion that the cancer is not more probably the result of a cause other than asbestos exposure, (b) evidence of substantial occupational exposure to asbestos, and (c) evidence of underlying asbestosis or diffuse pleural thickening (not pleural plaques).³⁹ These requirements could be difficult to meet in the cancer cases where they apply.

(c) Constitutional Challenges

Medical criteria laws will cause lasting changes only if courts uphold them against constitutional challenges. Previous waves of state tort reform have been invalidated by state supreme courts, typically relying on state constitutional grounds that cannot be appealed to the United States Supreme Court. Predictably, several challenges to state medical criteria bills are working their way through the courts.

In the main, these challenges involve the question of whether the deferral procedure may apply to asbestos claims pending before enactment. In many states, the legislature may not retroactively restrict the substantive rights of people whose claims have already accrued, although it may change the procedures applicable to such claims. Thus, a key issue is whether medical criteria statutes are "substantive" or "procedural" for purposes of state constitutional analysis.

In November 2006, the Georgia Supreme Court held that state's medical criteria law is unconstitutional as applied to cases pending as of its effective date.⁴⁰ Although the Georgia court is the only state supreme court to address the issue, lower courts in both Florida and Ohio have held that the new medical criteria pro-

cedures cannot be applied to pending cases, while the appellate courts in both states have reached varying results. The state supreme courts will ultimately have to decide whether the statutes can be constitutionally applied to pending cases.⁴¹

Of course, it is important whether the new medical criteria procedures apply to pending cases or not. It is even more important, however, to bar the return of mass recruitment of the claims of the unimpaired through screening programs. Thus, even if these laws are ultimately determined to be prospective only, they will still make a major change in the landscape of asbestos litigation. While broader constitutional challenges have been made, it is striking that the primary effort of the plaintiffs' trial bar has been to prevent the new rules from affecting their current cases.

2. Forum Shopping

There is increasing acceptance of the principle that plaintiffs in asbestos cases should be required (in most circumstances) to sue where they live or where they were exposed. That principle would go a long way toward eliminating most forum shopping abuses.⁴²

Several states have adopted venue statutes that reflect this principle. The leader was West Virginia.⁴³ The problem facing that state was epic. Since the 1990s, plaintiffs' attorneys had flooded the West Virginia courts with out-of-state cases. As those cases accumulated, the West Virginia courts resorted to massive consolidations that a justice of the West Virginia Supreme Court of Appeals called a violation of due process.⁴⁴ This process placed a heavy burden on the West Virginia court system, and the expedients that the courts considered necessary to meet the challenge called into question the quality of justice in West Virginia. To address this crisis, the legislature enacted a venue statute barring the claims of out-of-state plaintiffs unless a substantial part of the conduct giving rise to the claim took place in West Virginia or the plaintiff proves he cannot get jurisdiction over the defendant outside West Virginia.⁴⁵

The West Virginia model has been followed in other states. Florida and Georgia permit asbestos claims to be filed if the plaintiff is a domiciliary (Florida) or resident (Georgia) of the state or if the asbestos exposure occurred in the state.⁴⁶ Moreover, Ohio's Supreme Court recently revised the state's rules of

civil procedure to limit venue for asbestos cases to the location where all the plaintiffs reside or were exposed to asbestos or where the defendant has its principal place of business.⁴⁷

Although these statutes have been remarkably successful, there is a cloud on the horizon. In June of 2006, the West Virginia Supreme Court of Appeals struck down the West Virginia forum shopping law to the extent it bars suits by nonresidents against West Virginia defendants, holding that discrimination against non-residents in this situation violated the Privileges and Immunities Clause of the U.S. Constitution.⁴⁸ The court then held that as a matter of judicial policy, if venue is proper with regard to any West Virginia defendant, the case can proceed against out-of-state defendants as well.⁴⁹ In December 2006 the U.S. Supreme Court declined to hear the case. As a result, West Virginia could well find itself helpless against a renewed influx of out-of-state asbestos claimants unless the legislature is able to draft a narrower statute that meets the concerns of the state's highest court.⁵⁰ A return to the cycle of mass consolidations is certainly possible. Beyond that, however, *Morris* will inevitably create doubt about the validity of other anti-forum shopping laws and discourage other states from protecting their courts from an onslaught of cases that have no real connection to the forum.

In addition to statutory venue reform, two jurisdictions important in the asbestos litigation have addressed the problem of forum shopping through stricter interpretation of venue rules and partly through strengthening of the principle of *forum non conveniens*.

In Mississippi, judicial and legislative action went hand in hand. Before 2004, plaintiffs could join together massive numbers of "similar" claims, so long as one of the plaintiffs could satisfy the venue provisions.⁵¹ This resulted in "mass joinders" — large numbers of plaintiffs would join in a suit against out-of-state defendants. Early in 2004, the Mississippi Supreme Court began to interpret joinder rules strictly.⁵² Moreover, in June the same year the legislature passed the Mississippi Tort Reform Act of 2004.⁵³ Under the Act, venue is proper where the defendant resides, or "where a substantial alleged" act, omission, or event "that caused the injury occurred."⁵⁴ Alternatively, if the suit is against a nonresident defendant, venue may

lie where the plaintiff resides.⁵⁵ Each plaintiff must independently satisfy the venue provisions — no longer can thousands of plaintiffs join together to file suit in a plaintiff-friendly jurisdiction where only one plaintiff resides.⁵⁶ In addition, the act allowed Mississippi judges to transfer or dismiss claims under the doctrine of *forum non conveniens* if "the interest of justice" and the "convenience of the parties and witnesses" would be better served by the case being heard elsewhere.⁵⁷ Since 2004, Mississippi judges have severed and dismissed thousands of out-of-state asbestos claims, and Mississippi is no longer considered a hospitable venue for asbestos plaintiffs.⁵⁸

Illinois has also tightened up its interpretation of the doctrine of *forum non conveniens*.⁵⁹ In early 2004, Judge Nicholas Byron in Madison County, Illinois, gave up his position as asbestos judge. He was replaced by Judge Daniel Stack, who, at least initially, enforced the principle of *forum non conveniens* much more stringently.⁶⁰ In addition, the Illinois Supreme Court issued a non-asbestos ruling in November of 2005 which also takes a relatively strict view of the state's *forum non conveniens* doctrine, especially where out-of-state plaintiffs are concerned.⁶¹ While these changes were a promising sign in a jurisdiction long-plagued with a horde of claims by out-of-state plaintiffs, the past few months (since the last election) have indicated a troublesome backslide.⁶² It remains to be seen whether Madison County will remain an improved (although still difficult) jurisdiction for defendants, or whether it will revert to a haven for mesothelioma claims from all over the country.

3. Consolidations

The third element of the Reform Analysis was its challenge to consolidations. The massive consolidations that were such a striking feature of asbestos litigation in the 1990s have faded from the scene. The last "jumbo" consolidations of this kind occurred in West Virginia and Virginia, respectively, in 2002. The current West Virginia procedure for managing asbestos cases no longer relies on massive consolidations, although the West Virginia Supreme Court's invalidation of the West Virginia anti-forum shopping statute could turn the clock back.

While massive consolidations have diminished in importance, small scale consolidations continue to flourish, especially in key jurisdictions such as New

York City.⁶³ Even these small scale consolidations significantly improve outcomes for plaintiffs.⁶⁴ Here, too, however, the winds of change can be felt. The recent asbestos statutes adopted in Texas and Georgia prohibit consolidation of multiple-plaintiff cases for trial without the consent of all parties.⁶⁵ The Texas law is especially important because that state has for many years relied upon modest-sized consolidations in trying asbestos cases. Some defense lawyers expect the abolition of trial consolidations to contribute as much to improving the asbestos litigation environment in Texas as the adoption of medical criteria.

Other states have also taken aim at consolidations in asbestos cases. Ohio recently modified its rules of civil procedure allowing consolidation of asbestos claims “for case management purposes,” but absent consent of all parties, they may consolidate for trial “only those pending actions relating to the same exposed person and members of the exposed person’s household.”⁶⁶ Similarly, on August 9, 2006, the Michigan Supreme Court adopted Administrative Order No. 2006-6 forbidding the “bundling” of asbestos personal disease cases for settlement or trial. In his concurrence, Justice Markham stated that the unbundling order would (among other things) “help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as ‘leverage’ for the resolution of other cases.”⁶⁷

B. Beyond The Reform Analysis — Joint And Several Liability

Legislative and judicial reforms based on the Reform Analysis have, at least for the time being, transformed asbestos litigation. Although “unimpaired” claims still exist in considerable numbers and represent a significant public policy problem, they no longer are the driving force. While forum shopping still exists, the worst jurisdictions (or best, depending on one’s point of view) — Mississippi, West Virginia and Madison County, Illinois — have for the moment rejoined the mainstream, although there are recent trouble signals in Madison County. And while consolidations (especially smaller consolidations) continue to occur in such important jurisdictions as New York, massive consolidations have for the time being disappeared and even small-scale consolidations are increasingly disfavored. Certainly any asbestos defendant that

compares the state of the litigation today with 2001 or 2002 must be astonished at the sea change that has taken place.

That does not, however, mean that defendants or their insurers are resting on their laurels. There are new worlds to conquer. The most broadly relevant has to do with the widespread perception that still-solvent defendants are paying for much more harm than they did, in large part because of the operation of joint and several liability.

In the United States, the principle of joint and several liability — that every wrongdoer is liable for the plaintiff’s entire injury no matter how small its proportional responsibility — is somewhat tattered. Only a few states continue to observe it without qualification, although the majority still observe it in some form.⁶⁸ This is critically important in asbestos litigation, because an effective regime of proportionate responsibility for loss would make it uneconomical to seek out the marginal defendant who is responsible only in trivial part for the plaintiff’s injury. Eventually, the search for the solvent bystander would run out of fuel, and asbestos litigation would stall.

Several significant jurisdictions have tightened up the rules of joint and several liability in recent years. To some extent, this was the continuation of a general trend that went beyond the context of asbestos. In New York, however, the impetus was specific to asbestos cases, and in both Texas and Ohio, the legislature eliminated previous adverse treatment of defendants in toxic tort cases, which include asbestos.

States use three main patterns in addressing the problem of apportioning liability among joint tortfeasors. Some adopt the traditional principle of joint and several liability, leaving it up to the wrongdoers to allocate responsibility among themselves through actions for contribution or indemnity. If any of the wrongdoers cannot pay its share, the risk of loss is on the remaining wrongdoers. Other states go to the opposite pole, adopting a rule of pure proportional liability. In such states, defendants never pay more than their proportionate share, and the risk that a defendant will be insolvent falls on the injured party. Most states now take a middle ground, in which defendants are jointly and severally liable only if they reach a certain threshold of comparative responsibility. Typically, the threshold is

50% for most kinds of claims, but many states have adopted a special rule in “toxic tort” (including asbestos) cases establishing a lower threshold of responsibility for joint and several liability.⁶⁹

If there are any limits to joint and several liability, it becomes critical which defendants are on the jury form. In the last several years, the most important issue in this regard has been whether companies that are in bankruptcy are considered in the apportionment of comparative responsibility. As companies emerge from bankruptcy, it will become increasingly important whether their successor trusts are considered.

Two important jurisdictions for asbestos cases — Florida and Mississippi — have recently adopted a rule of pure proportional liability for all kinds of cases, and in both states all potentially responsible tortfeasors go on the verdict form.⁷⁰ There is, however, in both states an exception to the rule of proportional liability if the plaintiff can show intentional wrongdoing.

A third key jurisdiction, New York, has for a number of years had a hybrid system. New York curtailed joint and several liability in 1986 by enacting C.P.L.R. § 1601, which provides that a defendant who bears 50% or less of the culpability for plaintiff's claims may be jointly liable for *economic damages*, but only severally liable for *non-economic damages*.⁷¹ Section 1601 provides, however, that “the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein *if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action...*”⁷² Some courts, including the Second Circuit, interpreted this provision to mean that bankrupt companies responsible for part of the plaintiff's damages in an asbestos case could not appear on verdict forms because the automatic stay in bankruptcy put them beyond the court's jurisdiction.⁷³ As a result, the court thought that the liability share of bankrupt companies had to be reallocated among the other defendants. Because of the large number of asbestos defendants in bankruptcy, this reading of the statute often led to the imposition of joint liability on defendants with less than 50% of actual responsibility for the plaintiff's damages.⁷⁴

In 2002, Justice Helen Freedman, the managing judge for New York City asbestos cases, ruled that New York

juries must consider the proportionate responsibility of bankrupt tortfeasors when allocating fault so long as those tortfeasors are subject to the personal jurisdiction of the court.⁷⁵ The New York Appellate Division upheld Justice Freedman's ruling, saying: “[n]otwithstanding the automatic stay resulting from bankruptcy, [a] tortfeasor is not exempt from consideration of damages” and the bankrupt entity's culpability “can still be calculated in apportioning liability.”⁷⁶ New York's highest court, the state Court of Appeals, did not review the Appellate Division's order for procedural reasons.⁷⁷ Thus, for now at least, the bankrupt share will be taken into account in allocating liability in New York.

Two major venues for asbestos litigation — Texas and Ohio — moved toward proportional liability by eliminating the special treatment that had been accorded to “toxic tort” cases. In 2003, Texas addressed joint and several liability in two ways. First, the legislature brought the rules applicable in toxic tort cases into line with those applicable in other kinds of cases. Previously, a toxic tort defendant would be jointly and severally liable if the jury found that its proportionate responsibility for the plaintiff's injury was 15% or more, while in every other kind of case, the threshold for joint and several liability was 50%.⁷⁸ The 2003 legislation provided that all tortfeasors are liable to a plaintiff only for their proportionate share of responsibility, unless “the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent” or the defendant has acted in concert with “specific intent to do harm to others” actionable under selected provisions of the Texas penal code.⁷⁹ Leaving to one side the criminal acts exception, the new rule in Texas is basically that a defendant will only be jointly and severally liable if its conduct was the predominate cause of the plaintiff's harm.

Second, the 2003 legislation made a series of changes that, together, ensure that the jury considers the proportionate responsibility of all relevant actors — including bankrupts and employers shielded from tort liability by workers' compensation exclusivity. Thus, a defendant may designate a “responsible third party” for purposes of allocating responsibility *even if the third party cannot be joined in the suit*.⁸⁰ At the same time, the statute repealed previous provisions exempting bankrupt tortfeasors and employers covered by workers' compensation from the allocation

of responsibility.⁸¹ These provisions make it more difficult to expand the litigation in Texas to engulf new defendants because it is hard to show that the marginal defendant is responsible for more than 50% of the liability if the bankrupt share and the share of employers is taken into account.

In 2003, Ohio enacted Senate Bill 120, which implements reforms of joint and several liability similar to those in the Texas bill.⁸² For all Ohio causes of action accruing after April 9, 2003, defendants are liable only for their proportionate share of the plaintiff's damages unless their share of responsibility exceeds 50% or they committed an intentional tort.⁸³

Joint and several liability reform is, of course, part of the traditional tort reform agenda of American business. While it has a special importance in asbestos litigation, the principle of proportionality is increasingly a part of American law, and the arguments for reform of joint and several liability are not really driven by the special circumstances of asbestos litigation. However, it would not be surprising if the future witnessed continued efforts at removing the special treatment for "toxic tort" cases in hybrid states like Texas, nor would it be surprising to see efforts to address joint and several liability in special legislation focused on asbestos cases (based on the very attenuated responsibility many remaining defendants have for the harms caused by asbestos exposure).

II. A New 'Synthesis'?

There has been enormous progress toward achieving the main objectives of the Reform Analysis program. This is most evident with respect to claims by the unimpaired. Although only a few states have adopted medical criteria legislation, many courts have been influenced by the underlying policy of reserving limited funds for the sick, and so it is often difficult for claimants with non-impairing diseases to obtain trial dates and substantial settlements. At the same time, the rules of the bankruptcy trusts that are emerging from the wave of bankruptcy filings that began in 2000 no longer contain the strong incentives for filing unimpaired non-malignant claims that existed in some of the older trusts, although the cumulative impact of new resources from the bankruptcy trusts could encourage non-malignant filings in the next few years. Unimpaired cases are still filed in large numbers, but they no longer dominate financially.

The decline of unimpaired cases is not due only to changes in legal rules. The litigation screenings that produced masses of unimpaired claimants have been much abashed by the excoriating opinion of Judge Janice Graham Jack in the consolidated silica litigation.⁸⁴ Screenings began to decline well before Judge Jack's opinion — possibly due in part to fears that Federal legislation might eliminate the profits to be made from the investment in acquiring new claims. But the current sense of scandal, combined with statutes and formal and informal judicial rules discouraging the filing of unimpaired claims, has made it questionable whether the serious abuses that were routine a few years ago will make a comeback. The demise of screening affects not only unimpaired cases, but impaired non-malignant cases and possibly asbestos-related cancers (other than mesothelioma) as well. Many such claims were found more or less as a byproduct of the screenings that generated tens of thousands of unimpaired claims, and as screenings decline, the number of non-mesothelioma filings of all kinds can be expected to decline as well.

Similarly, the interstate forum shopping that led to massive filings in Mississippi and Madison County, Illinois, has somewhat diminished. Many new cancer claims are being filed in Delaware, and the asbestos judge in Delaware has refused at this point to dismiss out-of-state claims on the basis of *forum non conveniens*. But Delaware is not overwhelmed with filings the way Madison County was and is very committed to providing a fair hearing for all cases. It is certainly not a "magic jurisdiction." Other claims are migrating to plaintiff friendly jurisdictions such as San Francisco and Los Angeles, various counties in Illinois, New York City, Philadelphia, and Middlesex County, New Jersey. So far, however, none of these jurisdictions threaten to repeat the abuses that led to the take-off in filings that occurred after *Amchem*. While the West Virginia Supreme Court of Appeals's decision in the *Morris* case could reopen the doors to out-of-state filings in West Virginia, the current situation at least is encouraging to defendants and insurers.

Finally, massive consolidations for trial have not been seen for some time, and even small consolidations have become rarer.

Notwithstanding the overall success of the Reform Analysis, however, the asbestos litigation system has

not reached a stable synthesis. Defendants and insurers are pushing beyond the Reform Analysis to obtain further advantages, and plaintiffs' lawyers are developing strategies for revitalizing the litigation from their own perspective.

A. The Defense Side

On the defense side, there are currently four principal issues: (a) the new role of bankruptcy trusts in the compensation system, (b) claims based on second-hand exposure, (c) potential liability for exposure to asbestos in friction products, and (d) the duty of manufacturers of products that do not contain, but will be used with, asbestos to warn of asbestos dangers.

1. Bankruptcy Trusts

By far the most important single issue on the defense side is integrating bankruptcy trusts with vast resources into the asbestos compensation structure. In 2000-2003, asbestos bankruptcies withdrew massive funds from the asbestos litigation system. Now many of those bankruptcy proceedings are resulting in the approval of reorganizations that will inevitably reinsert many billions of dollars into the system through trusts for the payment of asbestos claims.⁸⁵ The aggregate resources of these trusts could reach \$30-40 billion in 2007. Asbestos defendants know that they were forced to pay dearly when those resources left the system — and they want to receive credits when those resources return.

Currently, there are two major problems. The first is the absence of transparency regarding plaintiffs' actual or potential bankruptcy trust claims. Plaintiffs have generally taken the position that claims against the trusts are settlement discussions and inadmissible — and even non-discoverable — in actions against other defendants.⁸⁶ This issue is beginning to be seriously litigated. A California Court of Appeals held in May that claims filed with bankruptcy trusts are discoverable — and its opinion strongly suggests, without deciding, that they would be admissible as well.⁸⁷ Moreover, in the *Kananian* case in Ohio, there are strong indications that the plaintiff (or his lawyers) obtained compensation from the trusts on the basis of one set of facts and then sought compensation from the defendant on the basis of an utterly inconsistent story.⁸⁸

The second major problem is the prospect of “double-dipping.” In many states, defendants who go to trial

are entitled to settlement credits where others have already settled. The availability of these credits after trial affects settlement values, since both plaintiffs and defendants know that a verdict at trial will be net of previous settlements. Thus, ordinarily each defendant's share of liability is influenced by other settlements, even in those cases that settle completely and there is no trial. This mechanism only works, however, for pre-trial settlements. Plaintiffs' counsel are already delaying settlements with the bankruptcy trusts until after they have settled with other claimants. Under the trusts' TDPs, there is no offset for prior settlements with solvent defendants. Thus, by adopting a strategy of settling with defendants first and then obtaining awards from the trusts, the plaintiffs' trial bar hopes to *settle with defendants for the entire value of the case and then to obtain additional compensation from the trusts.*⁸⁹

As more and more money flows into the bankruptcy trusts, these issues become much more important. It is a good guess that some efforts will be made in Congress, state legislatures, and the courts to require transparency in plaintiffs' claims on the bankruptcy trusts and to combat double-dipping. This would not only help defendants obtain whatever set-offs or contribution rights they have, but also would address the fraud that too often occurs in attributing exposure to different defendants.

2. Second-Hand Exposures

A second set of issues involves premises or employer liability for second-hand occupational exposures. In the United States, unlike most countries, asbestos litigation has primarily involved product liability. The workers' compensation system bars most claims against employers. While some actions may be brought by the employees of independent contractors against premises owners, premises liability has been a relatively minor theme in American asbestos litigation.

With the demise of many key products defendants, plaintiffs' lawyers took a new interest in premises defendants after 2000. Particularly important was the development of second-hand exposure, or “take-home” cases, brought by an employee's spouse or children typically (though not always) for mesothelioma allegedly caused by asbestos that the employee brought home from work.⁹⁰ These cases are a power-

ful threat for two reasons. First, since the workers' compensation bar does not apply to workers' family members, take-home cases may be brought against employers who otherwise are not subject to asbestos lawsuits. Second, the plaintiffs in take-home cases involving a worker's children are much younger than the usual asbestos plaintiff, and the potential damages are therefore much greater.

Premises owners have reacted to increased pressure in part by obtaining legislation. The most comprehensive provisions in their favor are in the Ohio asbestos statute. This statute defines a premises owner's standard of care in asbestos cases in a way that is highly favorable to the defendant.⁹¹ And with regard to take-home exposure, it exonerates premises defendants from liability to plaintiffs exposed to asbestos other than in the vicinity of the premises, effectively preempting asbestos claims resulting from take-home exposure.⁹² The Kansas asbestos reform bill adopts the same "proximity" rule.⁹³

Premises owners have also pursued a litigation strategy designed to establish the principle that premises owners/employers do not have a duty to third parties — including the family members of employees — who were exposed to asbestos from employees' clothing. So far, defendants and insurers have succeeded in New York and Georgia, failed in New Jersey and Louisiana, and achieved at least partial success in Texas.⁹⁴ It is too early to tell how successful the defense strategy will be, but it is a fair bet that success in establishing that premises owners/employers have no duty to people injured through second-hand exposures will lead to efforts to apply a similar rule to the sellers of asbestos products to those same employers. Over the long term, therefore, defendants' success in framing the rules on second-hand exposures may set important boundaries to asbestos claims.

3. Causation In Friction Product Cases

A third major battleground is an effort by automobile manufacturers to establish *as a matter of law* that asbestos in certain friction products (e.g., brakes) cannot cause asbestos-related diseases in general and mesothelioma in particular. Since the automobile industry is vulnerable to claims based on home repair of vehicles where the plaintiff's testimony is practically impossible to refute, the plaintiffs' trial bar has concentrated its attention on friction products litigation

in recent years. Industry success in excluding the testimony of plaintiffs' experts in these kinds of cases would have a major impact on the litigation.⁹⁵ Moreover, even if the industry does not succeed in barring the plaintiffs' experts as a matter of law, it will be important to see how juries react to the conflict among experts.⁹⁶

4. Product Liability For Non-Manufacturers

Finally, an issue percolating in some courts is whether a product seller has a duty to warn when its product did not contain asbestos, but the manufacturer knew the product would be combined with an asbestos product — such as asbestos gaskets or insulation — to work properly.⁹⁷ Extension of liability to the makers of such ancillary products could open up a whole new generation of defendants to asbestos liabilities.

B. The Plaintiffs' Side

While defendants and insurers work to consolidate and extend their gains, plaintiffs' attorneys are adapting to the new litigation environment. The business model has certainly changed for them. The emphasis is no longer on recruitment of tens of thousands of claims, many of little merit, which are settled *en masse* for relatively modest average amounts. Instead, the plaintiffs' trial bar is concentrating on recruiting mesothelioma claims and obtaining high returns on those claims.⁹⁸ This emphasis affects plaintiffs' lawyers' choices of venue. Los Angeles, for example, is not an especially attractive place for processing thousands of claims, but is very attractive to plaintiffs' attorneys trying cases one by one.

For the plaintiffs' bar, it is imperative to recruit as many mesothelioma claims as possible. While the propensity to sue for people with mesothelioma is high, it is by no means 100% of the incidence of the disease. In part that is due to the fact that in many instances there is no identifiable exposure to asbestos (other than the sort of background exposures to which everyone is subject). The task of the plaintiffs' lawyer is to find the exposure — which helps explain why the controversies over take-home exposures, friction products, and non-asbestos product manufacturers whose products required asbestos for insulation or other purposes are so important. It is generally expected that with the present propensity to sue there will be 1000-2000 new mesothelioma cases a year

through at least 2020. The financial impacts would greatly increase if more effective recruitment and ingenuity in establishing exposure led even to modest increases in those numbers.

The qualities that make for a successful plaintiffs' lawyer (and a successful defense lawyer) are changing. The most dangerous plaintiffs firms will probably be "boutique" firms that handle cases nationally, focus on high-value cases, and have an excellent trial capability. (Some of these firms will be spin-offs from traditional plaintiffs' firms.) The new breed of asbestos trial lawyers will be aggressive in discovery against target defendants, will be indefatigable in making the case against new "peripheral" defendants, and will have the ability to take a case to trial and win a large verdict. Moreover, because of the relatively certain resources from bankruptcy trusts, especially in mesothelioma claims, plaintiffs' lawyers will often be well funded in their efforts against solvent defendants. An aggressive plaintiffs' bar that emphasizes trial over management of masses of cases will call for new qualities in defense firms — above all, an ability to investigate and try cases (both on the facts and on the science) as well as an understanding of where to fight and where to settle.

Over the longer term, there may be increased attention to asbestos-related lung cancers. To the extent that current lung cancer filings arise out of screening programs, we would expect something of a lull for the next few years as plaintiffs' lawyers more intensively litigate mesothelioma claims. The key with respect to lung cancers is to find an effective way of recruiting substantially exposed individuals in the absence of traditional litigation screening. While the threatened cost to the defense is not as daunting as the cost of mesothelioma claims, it could become significant.

III. Conclusion

The American asbestos litigation system is in transition. The correlation of forces is certainly much more favorable to the defense side than it was five years ago. But the system has not stabilized. It is possible that the defense side will be able to go beyond the program based on the Reform Analysis — obtaining further restrictions on joint and several liability, more transparency to ensure that the resources of asbestos trusts are counted within the system, favorable rules on second-hand liability or causation, and the like. It is also possible that a new emphasis on high value claims and

an energized and talented plaintiffs' trial bar will succeed in obtaining far more from mesothelioma and possibly lung cancers than has been the case in the past. It will be a number of years before these forces work themselves out, and a new, and stable, synthesis is reached. In the meantime, it is likely that the litigation will grow more intense as each side attempts to demonstrate its strength and reestablish a stable set of expectations — "maturity" in Duke Law School Professor Francis McGovern's happy expression⁹⁹ — that will enable all sides to return to managing cases rather than fighting them. To some extent, however, this new era of more intense conflict will be moderated for claimants by the amount of resources distributed through asbestos trusts, which will generally not involve either high costs or intense litigation.

Endnotes

1. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 70, 105-06 (RAND Institute for Civil Justice 2005).
2. *Id.* at 106.
3. Deborah Hensler, Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System, 12 Conn. Ins. L.J. 255, 278-80 (2006).
4. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 & n.3 (1992).
5. For a comprehensive account of the *Amchem* decision and its aftermath see Patrick M. Hanlon & Anne M. Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 526, 547-57 (2007). The Federal district court's opinion approving the *Amchem* settlement is reported as *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 334 (E.D. Pa. 1994).
6. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'g* *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). The description of the *Amchem* settlement as "arguably brilliant" comes from the Court of Appeals's opinion, *supra*, at 83 F. 3d at 617.
7. Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, May 4, 2002, at 155.

8. Technically, claim aggregation in Mississippi was through joinder rather than consolidation, but the effect was essentially the same. *Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 93 (1999) (statement of William N. Eskridge, Jr., Professor, Yale Law School).
9. See Michelle J. White, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 9362, 2002), available at <http://www.nber.org/papers/w9362>
10. See *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (testimony of Walter E. Dellinger, Professor, Duke Law School).
11. STEPHEN J. CARROLL, ET AL., *supra* note 1, at 105 ("42 percent of the funds expended on asbestos litigation have ended up in claimants' pockets").
12. In the early 1980s RAND researchers took note of the compensation of claimants with "no manifest asbestos-related injury." JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 28–31 (1984). The first screening fraud scandal occurred shortly thereafter. *Raymark Indus., Inc. v. Stemple*, No. 88-1014-K, 1990 U.S. Dist. LEXIS 6710, at *53 (D. Kan. May 30, 1990); Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 97–103 (2004).
13. Other factors also affected the popularity of deferral dockets. For example, several of the courts that led the way in establishing such dockets (e.g., the District of Massachusetts and the Northern District of Illinois) were Federal courts, and their procedure was overtaken by events when all Federal cases were consolidated by the Federal Panel on Multidistrict Litigation. Moreover, doubts were raised about the authority of courts to adopt a procedure that would in effect prevent certain cases from ever being heard. These issues are considered in Mark A. Behrens & Manuel Lopez, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 REV. OF LITIG. 253, 266-286 (2005).
14. *Asbestos Litigation: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) (written statement of Steven Kazan, Esq.).
15. *In re New York City Asbestos Litig.* (N.Y. Sup. Ct. Dec. 19, 2002) (Order Amending Prior Case Management Orders) (on file with authors).
16. Resolution Adopted by the House of Delegates of the American Bar Association (Feb. 2003) (on file with authors).
17. *In re Cuyahoga County Asbestos Cases*, No. 73958 (Ct. Com. Pl. Cuyahoga County, Ohio Mar. 22, 2006) (Order of the Court Regarding Prioritization of Non-Malignant Cases for Trial); *In re All Asbestos Litig.* Filed in Madison County (Madison County Cir. Ct., Ill. Jan. 23, 2004) (Order Establishing Asbestos Deferred Registry); *In re All Asbestos Cases* (Portsmouth, Cir. Ct., Va. Aug. 4, 2004) (Order Establishing an Inactive Docket for Cases Filed By the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims); *In re All Asbestos Litig.*, No. 04 MR 293 (Cir. Ct. St. Clair County, Ill., Feb. 25, 2005) (Order Establishing Asbestos Deferred Registry); *In re Minnesota Asbestos Cases* (Ramsey Co. 2nd Dist. Ct. July 5, 2005); see also Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties 1 (Dec. 3, 2002) (on file with authors).
18. The ABA Resolution of February 2003 was the point of departure for the American Legislative Exchange Council's model state medical criteria bill, which has been used as a template in subsequent reform battles. See Mark A. Behrens & Phil S. Goldberg, *The Asbestos Litigation Crisis in a Nutshell*, THE STATE FACTOR 2–8 (July 2004); American Legislative Exchange Council, *Asbestos & Silica Claims Priorities Act*, THE STATE FACTOR 9–16 (July 2004).
19. See Act effective Sept. 2, 2004, H.B. 292, 125th Gen. Assembly (Ohio 2004) (codified at OHIO REV. CODE ANN. §§ 2307.91 to 2307.98 & 2502.02); Act effective Sept 2, 2005, S.B. 15, 79th Reg. Leg. (Tex. 2005) (codified at TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.0031 & 90.001 to 90.012); Asbestos and Silica Compensation Fairness Act, effective July 4, 2006, H.B. 1019, 2005 Leg. (Fla. 2005) (codified at FLA. STAT. ch. 774.201 to 774.209); Act effective April 13, 2005, H.B. 416, 2005-2006 Sess. (Ga. 2005) (codified at GA. CODE ANN. §§ 51-14-1 to 51-14-10); Silica and Asbestos Claims Act, KAN. STAT. ANN., 2006 Kan. Sess. Laws Ch. 196; Asbestos and Silica Claims Procedure Act of 2006, S. 1038, 116th Sess.

- (S.C. 2006) (to be codified at S.C. CODE ANN. §§ 44-135-10 to 44-135-110); *see also* Richard D. Schuster & Nina I. Webb-Lawton, *Ohio's Groundbreaking Asbestos Legislation*, 19-14 MEALEY'S LITIG. REP.: ASBESTOS 40 (August 18, 2004). The medical criteria laws are thoughtfully analyzed in David M. Setter & Jeanette S. Eirich, *Medical Criteria Legislation: A Response to Screening Scandals*, 21-7 MEALEY'S LITIG. REP.: ASBESTOS 43 (May 3, 2006).
20. STEPHEN J. CARROLL ET AL., *supra* note 1, at 62 (Table 3.3).
 21. TEX. CIV. PRAC. & REM. CODE ANN. § 90.007. Some states simply provide that defendants have an opportunity to challenge the showing. GA. CODE ANN. § 51-14-5; FLA. STAT. § 774.205(2); OHIO REV. CODE ANN. § 2307.93(A)(1); KAN. STAT. ANN. § 60-4903(a). In South Carolina, a defendant may file a notice of appearance if the plaintiff fails to make the proper showing. The plaintiff then has an additional ninety days to provide the evidence, after which the defendant must be "afforded a reasonable opportunity to challenge the adequacy of the proffered prima facie evidence." S.C. CODE ANN., § 44-135-80(A).
 22. TEX. CIV. PRAC. & REM. CODE ANN. § 90.007(c); GA. CODE ANN. § 51-14-5; FLA. STAT. § 774.205(2); OHIO REV. CODE ANN. § 2307.93(C). In South Carolina, if a plaintiff fails to make the necessary showing, the "claimant's action shall not be placed on any trial docket nor be the subject of any discovery." S.C. CODE ANN. § 44-135-80(A).
 23. For a more detailed summary, see Patrick M. Hanlon & Anne M. Smetak, *Changing the Tort System: Asbestos Reform in the States*, materials prepared for ALI-ABA Conference, Asbestos Litigation in the 21st Century, Appendix A (New Orleans, Nov. 30-Dec. 1, 2006).
 24. *See* OHIO REV. CODE ANN. §§ 2307.91(AA)-(BB) & 2307.92(B)(3)(b)(i); TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(2)(C)(i); GA. CODE ANN. §§ 51-14-2(15)(B)(iii)(I) & 51-14-3(a); FLA. STAT. §§ 774.203(24)-(25) & 774.204(2)(e); KAN. STAT. ANN. § 60-4901(cc) & (dd), § 60-4902(b)(4); S.C. CODE ANN. § 44-135-50(A)(2)(f). The standard formula requires bilateral diffuse pleural thickening rated B2 in the ILO system and blunting of at least one costophrenic angle. *E.g.*, OHIO REV. CODE ANN. § 2307.91(BB). Blunting of the costophrenic angle is the hallmark of diffuse pleural thickening and would rarely occur in cases involving pleural plaques alone. Since diffuse pleural thickening is unusual, these laws significantly cut back on compensation for people who have pleural changes but not asbestosis.
 25. *See* OHIO REV. CODE ANN. §§ 2307.92(B)(3)(a) & 2307.92(B)(3)(b)(i); TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(2)(D); GA. CODE ANN. §§ 51-14-2(15)(B)(iv) & 51-14-3(b); FLA. STAT. ch. 774.204(2)(d) & 774.204(2)(f); KAN. STAT. ANN. §§ 4902(b)(3) & (b)(5); S.C. CODE ANN., § 44-135-50(A)(2)(g).
 26. In Georgia, this standard analysis is the end of the story. The other reform states, however, provide alternative ways of meeting the diagnosis and impairment criteria. For example, Florida plaintiffs with 1/0 chest x-rays can also meet the diagnostic threshold so long as they can confirm those x-ray readings with CT scans. FLA. STAT. § 774.204(2)(g). In practice the medical criteria in some states may be somewhat more flexible than they appear at first glance. There is no substitute for a careful reading, and rereading, of each statute.
 27. David M. Setter & Jeanette S. Eirich, *supra* n. 19, at 43-64 (discussing the Florida, Georgia, Ohio, and Texas reforms).
 28. *Id.* at 48-50; KAN. STAT. ANN. § 60-4902(h); S.C. CODE ANN. § 44-135-30(23)(b).
 29. Setter & Eirich, *supra* note 19, at 50-51; KAN. STAT. ANN. § 60-4901(o); S.C. CODE ANN. § 44-135-50(C)(3). Georgia goes a step further and prohibits reports or diagnoses by any doctor not paid by the claimant or his insurer. GA. CODE ANN. § 51-14-2(17)(B); Setter & Eirich, *supra* note 19, at 52.
 30. Setter & Eirich, *supra* note 19, at 51 (citation omitted); KAN. STAT. ANN. § 60-4901(o) (3); S.C. CODE ANN. § 44-135-50(C)(2). Frequently litigation screeners are in violation of state licensing laws, and often diagnostic equipment such as x-ray machines do not comply with required safety procedures.
 31. Setter & Eirich, *supra* note 19, at 51-52; KAN. STAT. ANN. § 60-4901(o)(2); S.C. CODE ANN. § 44-135-50(A)(2)(b). Florida and South Carolina require that

- the diagnosing doctor be a treating physician or a doctor who has examined the claimant at the request of a treating physician. *Setter & Eirich, supra* note 19, at 52; S.C. CODE ANN. § 44-135-50(A)(2)(b).
32. *Setter & Eirich, supra* note 19, at 52; KAN. STAT. ANN. § 60-4901(o)(4).
 33. *Setter & Eirich, supra* note 19, at 52; KAN. STAT. ANN. §§ 60-4902(b)(1) & (c)(3); S.C. CODE ANN. § 44-135-50(A)(2)(b).
 34. FLA. STAT. ch. 774.206(1); GA. CODE ANN. § 51-14-4; OHIO REV. CODE ANN. § 2307.94(A); S.C. CODE ANN. § 44-135-110(A); KAN. STAT. ANN. § 60-4904(a). Texas tolls the statute of limitations until the earlier of the date of the claimant's death or the filing of a complying medical report. TEX. CIV. PRAC. & REM. CODE ANN. § 16.0031(a).
 35. TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(1). Kansas differs from Texas by exempting mesothelioma claimants from making such a showing, and requiring all non-mesothelioma cancer malignant claimants to establish a ten-year latency period. KAN. STAT. ANN. §§ 60-4901(jj), 4902(c) &(d).
 36. GA. CODE ANN. § 51-14-2(15)(A).
 37. OHIO REV. CODE ANN. §§ 2307.92(C)(1), 2307.91(FF).
 38. S.C. CODE ANN. § 44-135-50(A)(1).
 39. FLA. STAT. § 774.204(3). A smoker for purposes of the bill is one "who has smoked cigarettes or used other tobacco products on a consistent and frequent basis within the last 15 years." *Id.* § 774.203(29). Non-smokers who file asbestos-related claims for cancers of the lung, trachea, larynx, pharynx, or esophagus are not required to make any prima facie medical showing. *Id.* § 774.204(4). There are similarly strict standards (applicable to both smokers and non-smokers) for cancers of the colon, rectum, or stomach. To assert a claim for colon, rectal, or stomach cancer, a smoker must make a prima facie showing that includes a diagnosis of primary cancer and an opinion that exposure to asbestos is a substantially contributing factor to the disease, latency, and *both* evidence of underlying asbestosis or pleural thickening *and* substantial occupational exposure to asbestos. *Id.* § 774.204(5). A non-smoker must show *either* underlying asbestosis or pleural thickening *or* substantial occupational exposure to asbestos. *Id.*
 40. *Daimler-Chrysler Corp. v. Ferrante*, 637 S.E. 2d 659 (Ga. 2006). Legislation to address the constitutional defects that the Georgia Supreme Court found in *Ferrante* was introduced on February 20, 2007. See S.B. 182, http://www.legis.ga.gov/legis/2007_08/search/sb182.htm.
 41. Initially, a county judge ruled that the Florida statute was not intended to apply to cases set for trial as of its effective date, but that ruling was overturned by an intermediate appellate court in June of 2006. *In re Asbestos Litig., Mobil Corp. v. Mallia*, 933 So. 2d 613, 616-21 (Fla. Dist. Ct. App. 2006). The Florida Third District Court of Appeal recently rejected a constitutional challenge to retroactive application of the act. See *DaimlerChrysler Corp. v. Hurst*, 2007 Fla. App. LEXIS 1434 (Fla. Ct. App., 3d Dist. Feb. 7, 2007). The same issue is pending before other panels of the Florida Court of Appeal, and will likely ultimately be resolved by the Florida Supreme Court.
- An Ohio trial court held in early 2006 that the reforms are unconstitutional as applied to pending claims because they changed plaintiffs' substantive rights. The court also said that that it would "adjudicate substantive issues" in cases filed before the September 2004 effective date of the statute "according to the law as it existed prior to the bill's enactment." *In re Special Docket No. 73958* (Ct. Com. Pl., Cuyahoga County, Ohio Jan. 6, 2006); see OHIO CONST. art. II, § 28. Different districts of the intermediate Ohio appellate court have returned conflicting opinions on whether the Ohio statute may be applied retroactively. *Compare Wilson v. AC&S, Inc.*, 2006 App. LEXIS 6580 (Ohio Ct. App. 12th Appellate Dist. Dec. 18, 2006) (retroactive application does not violate Ohio constitution), with *Wagner v. Anchor Packing Co.*, 2006 Ohio App. LEXIS 7050 (Ohio Ct. App. 4th Appellate dist. Dec. 20, 2006) (retroactive application of Ohio statute is unconstitutional). As in Florida, the issue will ultimately have to be resolved by the state supreme court.
- Plaintiffs in a silicosis case (*Olivas v. Oglebay Norton Indus. Sands, Inc.*, No 2000-06200 (Harris County,

- Texas) have recently filed a motion challenging the retroactive application of the Texas medical criteria law (which affects both silica and asbestos cases). The grounds for the motion would generally apply to asbestos as well as silica cases.
42. Of course, forum shopping is normal in the American legal system. In asbestos cases, however, it presents special policy problems. Asbestos is a nationwide tort, and plaintiffs have their choice of a huge number of county courts. A few of those courts may be subject to the patterns of bias (political and otherwise) and procedural abuse that earn them the label "magic jurisdictions." Because the plaintiffs' bar is well organized on a national level, plaintiffs' lawyers will find those courts. In addition, when a court begins to attract asbestos cases, it can attract a *lot* of asbestos cases. Deluging a court with a large number of cases can force the court to take short cuts that favor efficiency over justice, and those very shortcuts can then attract thousands more cases. Victor E. Schwartz & Leah Lorber, Commentary, *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, 250-67 (2000). There are good reasons to be concerned about forum shopping in the asbestos context that might not apply in many other contexts.
 43. Texas enacted a jurisdictional law in 1997 that required trial courts to dismiss the claims of asbestos plaintiffs whose claims arose outside of Texas and who were not residents of Texas when their claims arose (as long as defendant stipulated that the alternative jurisdiction would allow a new claim to relate back to the initial filing in Texas for limitations purposes). See S.B. 220, 75th Leg. Reg. Sess. (Tex. 1997) (codified at TEX. CIV. PRAC. & REM. CODE § 71.052). The 1997 law applied solely to asbestos personal injury and wrongful death claims. *Id.* Although that law was repealed in 2003, H.B. 4, 78th Leg. Reg. Sess. (Tex. 2003), out-of-state asbestos claims continue to be discouraged by the state's general *forum non conveniens* statute. See TEX. CIV. PRAC. & REM. CODE § 71.051.
 44. State *ex rel.* Mobil Corp. v. Gaughan, 565 S.E.2d 793, 795 (W. Va. 2002) (Maynard, J., concurring).
 45. S.B. 213, Reg. Sess. (W. Va. 2003) (codified at W. VA. CODE § 56-1-1). While the West Virginia statute was a response to the deluge of asbestos cases, it applies generally to all tort actions.
 46. GA. CODE ANN. § 51-14-8(a); FLA. STAT. ch. 774.205.
 47. OHIO R. CIV. P. 3(B)(11) (as amended in July 2005). In the event no such forum is available, the suit may be brought where the defendant has property or debts subject to attachment or where the defendant has an agent to receive service. *Id.* 3(B)(13).
 48. Morris v. Crown Equipment Corp., 633 S.E.2d 292, 300 (W. Va.), *cert. denied*, 127 S. Ct. 833 & 835 (2006).
 49. *Id.* at 301-02.
 50. West Virginia's procedures for consolidations have typically involved a phase I trial on liability and a punitive damages multiplier followed by mini-trials on individual damages. Thus, for example, a single jury could find that hundreds of defendants were liable for punitive as well as compensatory damages at that a multiplier of, say, 3, or 5, or 9, should be applied to actual damages in each case to arrive a punitive damages. The possibility of a punitive damages multiplier is a strong incentive to defendants to settle, because a loss at the liability stage could have tremendous consequences. In 2005, the West Virginia Supreme Court of Appeals held that a bifurcated trial in which a punitive damages multiplier was determined in the first phase did not violate due process. In re: Tobacco Litig. (Personal Injury Cases), 624 S.E. 2d 738 (W. Va. 2005). This ruling seems inconsistent with the U.S. Supreme Court's repeated insistence that punitive damages be assessed on the basis of the defendant's conduct toward each plaintiff. E.g., Philip Morris USA v. Williams, No. 05-1256 (February 20, 2007), slip op. 5-7; State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003). The essence of the West Virginia Supreme Court procedure is a determination of punitive damages on the basis of the defendant's conduct toward a large and heterogeneous group of plaintiffs — without any consideration at all of the defendant's conduct with respect to each plaintiff — which is then applied to each individual case using the multiplier. While this procedure results in different awards to different plaintiffs based on their damages, the multiplier itself

does not reflect any consideration of the defendant's conduct with respect to specific plaintiffs. Nevertheless, if *Morris* opens the gates for a mass of out-of-state claims, the possibility is strong that plaintiffs' lawyers will take advantage of the ruling to overwhelm the state courts with out of state filings, force a return to mass consolidations, and take advantage of the possibility of a punitive damages multiplier to force mass settlements with little regard to the merits of each case.

51. *See American Bankers Ins. Co. v. Alexander*, 818 So. 2d 1073 (Miss. 2001) (joinder permissible as long as one claimant asserts proper venue with respect to one defendant).
52. *See Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1097 (Miss. 2004)(cases may be joined only if each plaintiff demonstrates to the court that all of the cases "relat[e] to or aris[e] out of the same transaction or occurrence" and have a common "question of law or fact"); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So. 2d 493 (Miss. 2004)(applying *Janssen* to asbestos cases).
53. H.B. 13, 1st Extraordinary Sess. (Miss. 2004).
54. H.B. 13 § 1 (codified at MISS. CODE ANN. § 11-11-3).
55. *Id.*
56. *Id.*
57. *Id.* Interestingly, the Mississippi Supreme Court had revised the Mississippi Rules of Civil Procedures earlier that year to permit interstate *forum non conveniens*, despite its recognition that "venue is essentially a legislative matter." *See* MISS. R. CIV. P. 82(e) cmt. But whether the source of the Mississippi courts' power to dismiss claims on the basis of *forum non conveniens* is legislative or judicial, the Mississippi Supreme Court has made it very clear that the choice of forum of out of state claimants deserves only slight deference and that Mississippi courts no longer welcome asbestos claims with no connection to Mississippi. *3M Co. v. Johnson*, 926 So. 2d 860, ¶¶ 18–19 (Miss. 2006) ("The courts of Mississippi will not become the default forum for plaintiffs seeking to consolidate mass-tort actions.").
58. Mississippi Judges Order Plaintiffs To Prove that Their Claims Belong in State 19-23 MEALEY'S LITIG. REP.: ASBESTOS 4 (Jan. 5, 2005); Mississippi Judges Dismiss Claims; Order Plaintiffs To Prove Cases Belong, 20-1 MEALEY'S LITIG. REP.: ASBESTOS 10 (Feb. 2, 2005); Mississippi Court Severs 76 Claims, Orders Transfer to Proper Venues, 20-5 MEALEY'S LITIG. REP.: ASBESTOS 26-27 (April 1, 2005). Late in 2005 the Mississippi Supreme Court applied the Mangialardi and Jansen cases to remand and sever consolidated silica claims with express orders that the plaintiffs provide "sufficient information to defendants and the trial court for a determination of transfer, where possible, to a court of appropriate venue." *3M Co. v. Glass*, 917 So. 2d 90, ¶ 14 (Miss. 2005). On January 18, 2007, the Mississippi Supreme Court upheld the lower court's dismissal of 159 claims with no connection to the state, even though there was no showing that the claims could be brought in another state. *Alexander v. ACandS, Inc.*, No. 2005-CA-01031-SCT, Miss. Sup.: 2007 Miss LEXIS 17. In so holding, the court ruled that its amendment to the state's joinder rule (which prevented piggy-backing on properly filed claims) was retroactive and, in contrast to the doctrine of *forum non conveniens*, the state's venue rules required dismissal whether or not the case could be maintained elsewhere.
59. Illinois venue reform legislation was introduced, but not passed, in 2005. *See* S.B. 1724, 94th Gen. Assembly (Ill. 2005).
60. *See* Paul Hampel, *Asbestos Judge Tosses Out 3 Lawsuits*, STLTODAY.COM, Oct. 7, 2004 (discussing Judge Stack's dismissal of cases on *forum non conveniens* grounds, in which he noted that one plaintiff's home was "15 miles from the courthouse in Baton Rouge, Louisiana, and is approximately 700 miles from this court").
61. *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269, 277 (Ill. 2005).
62. *See* Plaintiffs Attorneys Emboldened Post Election, *Madison Record* (Jan. 25, 2007).
63. *See, e.g., In re New York City Asbestos Litig.*, No. 102034/05 (N.Y. Sup. Ct. Jan. 19, 2006) (order permitting the consolidation of suits even though plaintiffs did not share a common worksite or occupation).

64. See White, *supra* note 9, at 11.
65. Tex. Civ. Prac. & Rem. Code Ann. § 90.009; Ga. Code Ann. § 51-14-10.
66. OHIO R. CIV. P. 42(A)(2) (as amended July 2005).
67. See Administrative Order No. 2006-6: Prohibition on “Bundling” Cases, available at <http://www.courts.mi.gov/supremecourt/resources/administrative/2003-47-080906.pdf>. The asbestos judge in Michigan appears to have adopted a practice of trying a series of exemplar cases together and then extrapolating the results to other arguably similar cases. *Id.* at 5 (Kelly, J., dissenting).
68. RESTATEMENT (THIRD) OF TORTS § 17, rep. note to cmt. a, tbl. at 151–55; Richard L. Cupp Jr., *Asbestos Litigation & Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 PEPP. L. REV. 203, 209, 214–15 (2004).
69. This summary account is not intended to do justice to the range of variations on joint and several liability in the U.S. For example, some states, including California, have joint and several liability for “economic damages” (e.g., lost earnings or earning capacity, medical expenses) but proportional liability for non-economic damages (e.g., pain and suffering). For a dated but comprehensive survey, see Jean Macchiaroli Eggen, *Understanding State Contribution Laws and Their Effect on the Settlement of Mass Tort Actions*, 73 TEX. L. REV. 1701, 1751-77 (1995).
70. For Mississippi: H.B. 13 § 6, 1st Extraordinary Sess. (Miss. 2004) (codified at MISS. CODE ANN. § 85-5-7). For Florida: H.B. 145, Reg. Sess. (Fla. 2006) (to be codified at FLA. STAT. § 768.81(3)). Other states restricting or eliminating joint and several liability since 2002 include Minnesota, South Carolina, Arkansas, West Virginia, Georgia, and Missouri.
71. N.Y. C.P.L.R. § 1601.
72. *Id.* (emphasis supplied).
73. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 844-46 (2d Cir. 1992).
74. See, e.g., *In re Joint E. & S. Dists. Asbestos Litig.*, 798 F. Supp. 940, 954–59 (E. & S.D.N.Y. 1992).
75. *In re New York City Asbestos Litig.*, 750 N.Y.S.2d 469 (Sup. Ct. 2002).
76. *In re New York City Asbestos Litig.*, 775 N.Y.S.2d 520, 520 (App. Div. 2004); see also *Bifaro v. Rockwell Automation*, 269 F. Supp. 2d 143, 149 (W.D.N.Y. 2003) (“[T]he prevailing rule of law in New York would allow the jury to consider the relative culpability of [the bankrupt entity] in apportioning non-economic damages....”).
77. *In re New York City Asbestos Litig.*, 840 N.E. 2d 137 (N.Y. 2005).
78. Tex. Civ. Prac. & Rem. Code Ann. § 33.013(c) (2002).
79. H.B. 4, 78th Regular Leg. § 4.07 (Tex. 2003) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 33.013).
80. *Id.* § 4.02 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 33.003).
81. *Id.* §§ 4.05, 4.10.
82. S.B. 120 § 1, 124th Gen. Assem., Reg. Sess. (Ohio 2003).
83. *Id.* (codified at OHIO REV. CODE ANN. § 2307.22).
84. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). Although Judge Jack’s scorn was directed at silica claimants’ lawyers and the screening companies that produced diagnoses for dollars, many of the same lawyers and screening companies were active in asbestos litigation as well. In fact, one of the criticized B-readers, Ray Harron of West Virginia, reportedly generated around 10% of all asbestos claims submitted to the Manville Trust before he was disqualified by the Trust in 2004. See Hanlon & Smetak, *supra* note 5, at 530-31.
85. A few years ago, bankruptcy trusts — even large ones like Manville — were thought of as contributing only negligible amounts to the overall burden of asbestos compensation. But with billions of dollars coming back into the system as a result of the confirmation of numerous bankruptcy reorganizations, it has become clear that the asbestos trusts are not negligible after all. Some (and perhaps many) mesothelioma claim-

- ants, for example, could collect over \$1 million from the bankruptcy trusts alone. See Charles Bates & Charles Mullen, *Having Your Tort and Eating It Too?* 6-4 MEALEY'S ASBESTOS BANKRUPTCY REPORT 1 (Nov. 2006), available at http://www.bateswhite.com/news/pdf/Having_Your_Tort.pdf.
86. The position that claim forms filed with bankruptcy trusts are part of settlement discussions and are inadmissible, and not even discoverable, is beginning to find its way into some bankruptcy plans. For example, Section 6.5 of the Babcock & Wilcox Trust Distribution Procedures (TDP) provides as follows: "All submissions to the PI Trust by a holder of a PI Trust Claim . . . shall be treated as made in the course of settlement discussions between the holder and the PI Trust, and intended by the parties to be confidential and to be protected by all applicable state and federal privileges, including but not limited to those directly applicable to settlement discussions. The PI Trust will preserve the confidentiality of such claimant submissions, and shall disclose the contents thereof only in response to a valid subpoena of such materials issued by the Bankruptcy Court." See <http://www.bwasbestos.com/files/BWTrustDistributionProcedures.pdf>. Probably TDP provisions cannot impair the discovery rights of third parties with respect to the trusts or deprive state courts of jurisdiction to issue subpoenas. Still, there is a reason why the plaintiffs' lawyers who drafted the B&W TDP sought to conceal from solvent defendants (and other trusts) what is being said to the B&W trust on their clients' behalf. The absence of sunshine invites fraud and abuse.
87. *Volkswagen of America, Inc. v. Superior Court*, 139 Cal. App. 4th 1481, 1492-94 (2006).
88. Daniel Fisher, *Double-Dippers*, FORBES, Sept. 4, 2006, at 136-38. The misconduct of the plaintiffs' lawyer in the Ohio trial court ultimately led that court to revoke the plaintiffs' attorneys pro hac status. See *Kananian v. Lorrillard Tobacco Co.*, Case No. CV 442750 (Cuyahoga County Ct. Com. Pleas Jan. 18, 2007).
89. The strategy of delaying applications to bankruptcy trusts until after settlements with solvent defendants has long been available. But with the vast resources of the new bankruptcy trusts it has become much more important. Some plaintiffs may be entitled to up to a million dollars or more from the trusts that can be expected to exist by the end of 2007. There is no very good reason in policy or justice why those settlements should be added on to a full tort-system recovery.
90. 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 15 (July 5, 2006).
91. For a more complete discussion, see Patrick M. Hanlon & Julie S. Lehrman, *Developments in Premises Liability Law* 9-12, ALI-ABA, Asbestos Litigation in the 21st Century (2004).
92. OHIO REV. CODE ANN. § 2307.941(A)(1) (no liability unless the exposure occurred "while the individual was at the premises owner's property").
93. KAN. STAT. ANN. § 60-4905(a) (no liability unless the exposure was "at or near" the property).
94. *Compare* *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) (employer has no duty to family members of employee) and *Holdampf v. A.C.&S.*, 840 N.E.2d 115, 116 (N.Y. 2005) (employer Port Authority of New York owed no duty to an employee's wife who contracted mesothelioma from take-home exposure) *with* *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006) (employer "owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing"); *Chaisson v. Avondale Indus., Inc.*, 2006 La. App. LEXIS 3020, at *22-24 (Dec. 20, 2006)(same). In *Exxon Mobil Corp. v. Altmore*, 2006 Tex. App. LEXIS 10437 (Dec. 7, 2006) the court held that the defendant did not owe a duty to an employee's wife injured by take-home exposure because the risk of asbestos exposure in such cases was not foreseeable before 1972. That holding at least technically leaves open the possibility that on a better factual record plaintiffs may succeed in take-home exposure cases in Texas. In *Chaisson*, the Louisiana Court of Appeals cited the New Jersey opinion in *Olivo* and the Texas decision in *Altmore* to find a duty to a household member when the premises exposure took place from 1976-1982. The court emphasized that it was finding a duty "based upon the facts and circumstances of this case," leaving open the possibility that, as in *Altmore*, the Louisiana courts would find no duty to

- household members for premises exposure prior to 1972. 2006 La. App. LEXIS 3020, at *23.
95. The automakers recently lost this battle in an intermediate appellate court in Michigan. See *Chapin v. A & L Parts, Inc.*, 2007 Mich. App. LEXIS 156 (Mich. Ct. App. Jan. 30, 2007) and have recently sought review from the Michigan Supreme Court, see MEALEY'S LITIGATION REPORTS: ASBESTOS 12 (January 21, 2007). See also *In re Asbestos Litigation*, 900 A. 2d 120, 151 (Del. Super. 2006)(causation testimony of plaintiffs' experts admissible in friction products case). In Texas, defendants other than automobile manufacturers have argued that chrysotile asbestos does not cause mesothelioma and that expert testimony to the contrary is inadmissible. These defendants lost before the Texas MDL Court, but the Texas Supreme Court, in response to a mandamus petition filed by several defendants, has recently directed the parties to brief the issue on the merits. *In re Garlock Sealing Technologies LLC & Georgia Pacific Corp.*, No. 06-0881 (Tex.). The Texas Court of Appeals denied mandamus relief in September 2006.
96. We note in passing that there is also some pressure from the defense side to establish that lung cancer cannot be attributed to asbestos in the absence of underlying asbestosis. They have achieved some success with this argument in Texas. See *Bailey v. Mobil Oil Corp.*, 187 S.W.3d 265 (Tex. App. — Beaumont 2006, pet. denied); *Manzie v. A.W. Chesterton*, MDL Cause No. 2004-55604, Order of Nov. 20, 2006 (11th Dist. Court, Harris County, Texas)(excluding expert opinion and granting summary judgment against plaintiff where again plaintiff offered no reliable evidence linking a lung cancer in a long-time smoker without asbestosis to asbestos exposure). So far, however, the U.S. has not seen a nationwide campaign to establish this principle, and it is generally left up to juries to decide the causation question where there is no underlying asbestosis.
97. *E.g.*, *Simonetta v. Viad Corp.*, 2007 Wash. App. LEXIS 127 (Jan. 29, 2007)(finding duty to warn by evaporator manufacturer where product must be insulated with asbestos).
98. A fascinating example of the plaintiffs' bar's shift of business plan is the downsizing of Baron & Budd of Dallas, once a national leader in settling unimpaired claims. The firm's managing partner, Russell Budd, attributes the layoffs to "a changed business model." While previously the firm had a docket of 15,000 lawsuits, tort reform (especially in Texas) reduced that to only 1,000. According to Mr. Budd, "Today we have significantly less volume, but more complex, more serious injury cases. That requires a different staffing model and a different business model." Brenda Sapino Jeffries, *Baron & Budd lays off 19 lawyers, 100 staffers*, TEXAS LAWYER (March 5, 2007) at <http://www.texaslawyer.com>.
99. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688-94 (1989). ■

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