

# The Growing Asbestos Litigation Crisis In Texas: Immediate Action Is Needed

by  
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The judicial system is suffering from an explosion of asbestos-related lawsuits that shows no sign of decline. In the six years between 1993 and 1999, the number of pending cases nationwide doubled from 100,000 cases to more than 200,000 cases.<sup>1</sup> Analysts predict that up to 700,000 more cases will be filed by 2050.<sup>2</sup> The number of future claimants could be as high as two million.<sup>3</sup>

The large increase in new asbestos claims is fueled by filings by unimpaired claimants, aggressive client drives by personal injury lawyers, the tendency of many courts to promote efficiency over fairness in asbestos cases, and the willingness of most courts to permit multiple punitive damages awards for conduct that may have ended decades ago. These practices are rapidly depleting scarce resources that should go to “the sick and dying, their widows and survivors.”<sup>4</sup>

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

<sup>2</sup> See *Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 MEALEY’S LITIG. REP.: ASBESTOS 22, June 18, 1999.

<sup>3</sup> See *id.*

<sup>4</sup> *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*,

At least 43 companies have been driven into bankruptcy,<sup>5</sup> and “the process is accelerating.”<sup>6</sup> In 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. declared bankruptcy. In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-I Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. So far in 2002, RHI, the world’s leading producer of refractory materials for the steel industry, was forced to seek bankruptcy protection for one of its U.S. subsidiaries (North American Refractories Co., “NARCO”) as a result of asbestos claims NARCO inherited from businesses it acquired.<sup>7</sup> More companies are likely to follow.<sup>8</sup>

121 S. Ct. 2216 (2001) (quoting *In re Patenaude*, 210 F.3d 135, 139 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 565 (2000)).

<sup>5</sup> See Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 10 (Rand Inst. For Civil Justice Aug. 2001) (preliminary report) (stating that “[a]t least 41 asbestos defendant companies have entered bankruptcy.” Federal – Mogul Corp. and North American Refractories Co. filed bankruptcy after the Rand preliminary report was issued).

<sup>6</sup> *Collins*, 233 F.3d at 812.

<sup>7</sup> William Hall, *RHI forced to seek protection for US business*, FIN. TIMES.- FT.COM, Jan. 7, 2002.

<sup>8</sup> See Mark D. Plevin & Paul W. Kalish, *What’s Behind the Recent Wave of Asbestos Bankruptcies?*,

The large number of asbestos-related bankruptcies is putting pressure on so-called “peripheral defendants” – companies that are being dragged into the litigation to make up for the “traditional defendants” that have sought the protection of the bankruptcy courts.

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The combination of these various forces has resulted in a domino effect – payments to the unimpaired have encouraged more claims to be filed, depleting the assets of “traditional defendants” and driving many into bankruptcy; each new bankruptcy filing puts “mounting and cumulative” financial pressure on the remaining solvent defendants and accelerates the bankruptcy process;<sup>9</sup> newer peripheral defendants are pulled into the litigation to make up for the shares of the bankrupt defendants; the peripheral defendants themselves begin to collapse under the great weight of new claims, and the process goes on and on.

This system is bad for almost everyone involved, particularly sick claimants. Absent some changes in the way asbestos claims are resolved, claimants who become truly sick in the future may not receive adequate

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MEALEY’S LITIG. REP.: ASBESTOS, Vol. 16, No. 6., Apr. 20, 2001.

<sup>9</sup> Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 392 (1993) [hereinafter Edley & Weiler].

compensation. Changing the current asbestos compensation system would be pro-claimant.

### THE EXPLOSION OF ASBESTOS-RELATED LAWSUITS

When asbestos product liability lawsuits emerged in the early 1970’s,<sup>10</sup> no one could have predicted that courts thirty years later would be dealing with a worsening “litigation crisis.”<sup>11</sup> Production and use of new asbestos products largely ceased in the United States in the early 1970’s due to increased awareness of dangers and new governmental regulations. The 15 to 40-year time gap between exposure and manifestation of asbestos-related diseases led many to believe that the litigation would be a serious, but declining problem.<sup>12</sup> Unfortunately, this is not the case.

### UNIMPAIRED CLAIMANTS FUEL THE EXPLOSION

Most new asbestos claimants – as much as 90 percent, according to some reports – are only mildly impaired or are not sick at all.<sup>13</sup> They are “people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not

<sup>10</sup> See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

<sup>11</sup> *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>12</sup> See James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 30 (Rand Inst. for Civil Justice 1984).

<sup>13</sup> See *Transcript of Dec. 10 Tel. Conf.* (Dec. 10, 2001), available at <http://www.halliburton.com> (stating that 90 percent of asbestos claims against Halliburton are by unimpaired claimants); Quenna Sook Kim, *G-I Holdings’ Bankruptcy Filing Cites Exposure in Asbestos Cases*, WALL ST. J., Jan. 8, 2001, at B12 (reporting that “as many as 80% of [GAF’s] asbestos settlements are paid to unimpaired people.”).

impaired by an asbestos-related disease and likely never will be.”<sup>14</sup>

**M**any of these claimants feel compelled to file claims out of concern that they will be time-barred if they do not file soon after the first markers of exposure become detectable.<sup>15</sup> While this is understandable, “their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now.”<sup>16</sup>

Claims brought by plaintiffs with no serious physical impairment are at the heart of the asbestos litigation problem. Senior United States District Court Judge Charles R. Weiner, who oversees the federal asbestos multidistrict proceedings, has explained 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.”<sup>17</sup> “Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured.”<sup>18</sup>

**T**exas is no stranger to this problem. For example, in November 2001, a Texas jury awarded \$3 million to three

<sup>14</sup> Prof. Edley Testimony, *supra* note 1, at 5.

<sup>15</sup> See *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106<sup>th</sup> Cong., at 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary of the Department of Health and Human Services).

<sup>16</sup> Edley & Weiler, *supra* note 9, at 393.

<sup>17</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), No. Civ. A MDL 875, 1996 WL 539589, at \*1 (E.D. Pa. Sept. 16, 1996).

<sup>18</sup> Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, *Report on Mass Tort Litigation 2* (Feb. 15, 1999) (comments of John Aldock, Esq., participant in Dec. 8, 1998 Mass Torts Working Group Conference).

plaintiffs who were exposed to asbestos at an aluminum plant.<sup>19</sup> “Their attorney said the verdict was reached even though the plaintiffs who do not have cancer were forbidden from testifying on their fear of developing the disease from past

asbestos exposure.”<sup>20</sup> Only months earlier, another Texas jury awarded 22 plaintiffs \$35 million for “future physical impairment” and “future medical costs” although it is likely that these claimants will never become seriously ill.<sup>21</sup>

Claims by the unimpaired clog the court system, causing unwelcome

delays for older asbestos claimants and those with fatal diseases, such as mesothelioma. Such claims also cause delays for others in the civil justice system. Perhaps most troubling, “[t]he continued hemorrhaging of available funds deprives current and future victims of rightful compensation” for real injuries.<sup>22</sup>

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<sup>19</sup> See *Texas Jury Awards \$3 Million in Asbestos Exposure Case*, 23 No. 24 ANDREWS ASBESTOS LITIG. REP. 4 (Dec. 6, 2001).

<sup>20</sup> *Id.*

<sup>21</sup> *Two Asbestos Defendants Hit With \$35 Million Verdict*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

<sup>22</sup> *Collins*, 233 F.3d at 812.

## COURTS PARTLY TO BLAME

Unfortunately, the courts themselves are partly to blame for the current situation. Faced with what the United States Supreme Court has characterized as an “elephantine mass of asbestos cases,”<sup>23</sup> the focus of many well-intentioned and hard-working trial judges has been on promoting efficiency in asbestos cases. Trial courts have adopted substantive or procedural mechanisms designed to streamline court dockets and move these cases through the system.

It was hoped that this process would put money in the hands of the sick as fast as possible, reduce transaction costs, and ultimately make the cases disappear. Instead, these practices have greatly exacerbated the problem.<sup>24</sup> As one distinguished law professor has written: “Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. 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.”<sup>25</sup>

## HOW SHOULD TEXAS RESPOND?

Texas should take immediate action to preserve scarce and depleting assets for sick

<sup>23</sup> Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).

<sup>24</sup> See Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

<sup>25</sup> Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997). See also Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) (“The more successful judges become at dealing ‘fairly and efficiently’ with mass torts, the more and larger mass tort filings become.”).

asbestos claimants. By doing so, the state also can reduce the pressure on the remaining solvent “traditional defendants,” and slow the spread of the litigation to newer “peripheral defendants.” These goals can be achieved in a sound and fair manner. Several key reforms that would help in Texas include: (1) the establishment of inactive docket plans, also known as a pleural registries or deferral registries; (2) abolition of multiple punitive damages in asbestos cases; and (3) additional fair share liability reform. These reforms should be considered by the courts as well as the legislature.

### 1. INACTIVE DOCKET PLANS

Inactive docket programs are judge-manned docketing systems that allow claims of impaired claimants to be heard more promptly by “deferring” the claims of unimpaired claimants to an “inactive docket” until the individual develops an actual impairment.<sup>26</sup> Under these plans, individuals who cannot meet certain objective medical criteria are placed on an inactive docket with statute of limitations being tolled, and all discovery stayed. Claimants are moved to the active civil docket when they present credible medical evidence of impairment.

Impaired claimants are thus able to move “to the front of the line” and are not forced to wait until earlier-filed claims by unimpaired individuals are resolved. Removing long delays that are characteristic of many asbestos cases can be important for impaired litigants, particularly for older claimants and those with a fatal disease. At the same time, the program benefits unimpaired individuals by protecting their claims from being time-barred should they later develop an asbestos-related disease. This would address a primary engine driving the filing of claims by many unimpaired

<sup>26</sup> See Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J. L. & PUB. POL’Y 541, 553 (1992).

individuals. Transaction costs would be substantially reduced because no discovery is conducted with respect to unimpaired claimants.

Inactive docket programs have existed for many years in Massachusetts,<sup>27</sup> Cook County (Chicago), Illinois,<sup>28</sup> and Baltimore, Maryland.<sup>29</sup> They have proven to be fair and workable. Similar programs should be adopted in Texas.

## 2. END PUNITIVE DAMAGES OVERKILL

Punitive damages are not normal civil damages. They are awarded over and above compensatory damages as “a windfall and not a matter of right.”<sup>30</sup> Punitive damages serve to punish a defendant for wrongdoing and to deter others that might engage in similar conduct. In the asbestos context, however, punitive damages no longer serve either a retributive or deterrent purpose.

Moreover, those who may feel the biggest impact of such windfall awards are future claimants. As a special Ad Hoc Committee of the United States Judicial Conference explained in its report to the Chief Justice of

<sup>27</sup> See Commonwealth of Massachusetts, Middlesex Superior Court, “Massachusetts State Court Asbestos Personal Injury Order,” Sept. 1986.

<sup>28</sup> See *In re Asbestos Cases*, Order to Establish Registry for Certain Asbestos Matters (Cir. Ct., Cook Cty., Ill. Mar. 16, 1991).

<sup>29</sup> See *In re Asbestos Personal Injury and Wrongful Death Asbestos Cases*, Order Establishing an Inactive Docket for Asbestos Personal Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

<sup>30</sup> *Seminole Pipeline Co, MAPCO, Inc. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. App. 1998). The United States Supreme Court recently reinforced this view in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1683 (2001). The Court in *Cooper* held that, because punitive damages are “quasi-criminal” awards that operate as “private fines,” they are subject to de novo review on appeal.

the United States Supreme Court: punitive damages recoveries by earlier-filing claimants “threaten fair compensation to pending and future claimants and threaten the economic viability of defendants.”<sup>31</sup>

This is true even in cases that are settled out of court, because of the leveraging effect punitive damages have at the settlement table.<sup>32</sup> As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has explained: “[T]he potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated.”<sup>33</sup>

Texas has been the site of frequent punitive damages verdicts in asbestos cases.<sup>34</sup> Here are some examples from 2001:

<sup>31</sup> Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 32 (Mar. 1991).

<sup>32</sup> Yale law professor George Priest has observed: “[T]he availability of unlimited punitive damages affects the 95% to 98% of cases that settle out of court prior to trial. It is obvious and indisputable that a punitive damages claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation.” George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 829 (1996).

<sup>33</sup> *Dunn v. Hovic*, 1 F.3d 1371, 1398 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied*, 510 U.S. 1031 (1993).

<sup>34</sup> These jury awards do not necessarily reflect final judgments. In Texas, punitive damages are capped at the greater of \$200,000 or two times economic damages plus amount equal to noneconomic damages up to \$750,000. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (2001).

- ★ One jury awarded five plaintiffs \$130 million, including \$70 million in compensatory damages and \$60 million in punitive damages an asbestos case.<sup>35</sup>
- ★ Another jury awarded \$55 million to a man with mesothelioma. The award included \$12 million in compensatory damages to the plaintiff, \$5.5 million for his wife, and \$14 million for the couple's children, plus an additional \$15 million in punitive damages (later reduced to \$2.75 million).<sup>36</sup>
- ★ An insulation maker was hit with an \$18 million damage award, including \$15 million in punitive damages, in the case of a single plaintiff diagnosed with asbestosis.<sup>37</sup>
- ★ A jury awarded \$11.1 million, including \$3 million in punitive damages, against two asbestos defendants.<sup>38</sup>

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

Some courts are taking aggressive steps to protect assets for asbestos claimants who are or may become sick. Recently, for example, the Third Circuit Court of Appeals approved a decision by United States District Judge Charles R. Weiner of the Eastern

<sup>35</sup> See *Texas Jury Awards \$130 Million to Five Plaintiffs in Asbestos Suit*, 23 No. 19 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 27, 2001).

<sup>36</sup> See *Meso Victim and Family Awarded \$55 Million by Texas Jury*, 16 No. 22 ANDREWS ASBESTOS LITIG. REP. 8 (Sept. 21, 2001).

<sup>37</sup> See *Texas Jury Finds Insulation Maker Liable for \$18 Million*, 23 No. 4 ANDREWS ASBESTOS LITIG. REP. 3 (Mar. 1, 2001).

<sup>38</sup> See *Texas Jury Hits Two Asbestos Defendants With \$11 Million Verdict*, 23 No. 18 ANDREWS ASBESTOS LITIG. REP. 4 (Sept. 13, 2001).

District of Pennsylvania (the federal "MDL Panel") to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial.<sup>39</sup> The appellate court concluded: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls."<sup>40</sup>

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State trial courts in Baltimore, Maryland,<sup>41</sup> Northampton County (Bethlehem and Easton), Pennsylvania,<sup>42</sup> and Philadelphia, Pennsylvania<sup>43</sup> have severed, deferred, or stayed indefinitely punitive damage claims in asbestos cases. In New York, at least some judges have severed and indefinitely deferred punitive damage claims in asbestos cases.<sup>44</sup>

<sup>39</sup> See *Collins*, 233 F.3d at 812.

<sup>40</sup> *Id.*

<sup>41</sup> See *Abate v. A.C. & S., Inc.*, No. 89236704, slip op. at 26 (Md. Cir. Ct. Baltimore City Dec. 9, 1992); see also *Keene Corp. v. Levin*, 623 A.2d 662, 663 (Md. App. 1993) (noting that Judge Levin deferred payments of punitive damages "until all Baltimore City plaintiffs' compensatory damages are paid.").

<sup>42</sup> See *In re Asbestos Litig.*, No. C0048AB200100003, slip Order at 6 (Jan. 11, 2001).

<sup>43</sup> See *Yancey v. Raymark Indus., Inc.*, No. 1186 (832), Asbestos Order No. 0001 (Pa. Com. Pl. Phila., Oct. 1986); see also *Third Circuit Rehears Dunn Arguments en Banc*, 8:1 MEALEY'S LITIG. REP.: ASBESTOS 20 (Feb. 5, 1993) (reporting that the "Philadelphia Court of Common Pleas has a basic 'standing order' that all punitives are to be stayed.").

<sup>44</sup> See *\$64.65 Million Awarded in Four Asbestos Cases*, 4:3 MEALEY'S LITIG. REP.: TOXIC TORTS 16 (Dec. 15, 1995) (reporting on the New York case of

Texas should follow the lead of these pioneering jurisdictions.

### **3. FAIR SHARE LIABILITY REFORM**

The rule of joint liability, commonly called joint and several liability, provides that when two or more persons engage in conduct that might subject them to individual liability and their conduct produces a single, indivisible injury, each defendant will be liable for the total amount of damages. Joint liability is unfair, because it puts full responsibility on those who may have been only marginally at fault. Joint liability contributes to the spread of asbestos litigation to newer “peripheral defendants.”

Most states have abolished or modified the principle of joint liability, either by judicial decision or legislation. In 1995, the Texas legislature abolished joint liability, except for defendants found to be “greater than 50 percent” at fault.<sup>45</sup> In environmental and toxic tort cases, joint liability continues to apply to any defendant whose fault is determined to be “equal to or greater than 15 percent.”<sup>46</sup> For example, AC&S Inc. was recently ordered to pay a former Navy machinist and his wife \$3.1 million in damages in an asbestos case, even though AC&S was found only 20 percent at fault.<sup>47</sup>

At a minimum, Texas should consider an across-the board application of the general rule abolishing joint liability for any defendant found to be 50 percent or less at fault. The

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*Falloon v. Westinghouse* in which the trial court severed and deferred punitive damages indefinitely).

<sup>45</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(B) (2001).

<sup>46</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(C) (2001).

<sup>47</sup> See *AC&S Hit With \$3.1 Million Verdict in Meso Suit*, 23 No. 19 ANDREWS ASBESTOS LITIG. REP. 3 (Sept. 27, 2001).

state may even consider moving to a pure “fair share” proportionate liability system in all tort cases, as other states have done.

## CONCLUSION

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

It is time – perhaps past due – to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.<sup>48</sup>

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<sup>48</sup> *Dunn*, 1 F.3d at 1399 (Weis, J., dissenting).