Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts

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COURTS

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“The life of the law has not been logic: it has been experience.”

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I. PREFACE

After the Berlin wall fell in 1990, it appeared that the term “Cold War” had outlived its usefulness. But thirteen years later, another Cold War is being fought—not between apprehensive armies in Berlin, but in our Nation’s courts as they struggle to resolve hundreds of thousands of asbestos claims filed against American industry. Like the first Cold War, the present one involves a great deal of action that takes place below the radar screen. Thousands of cases are filed annually and lawyers line up on both sides spending billions prosecuting and defending the suits. Then for various reasons, including unacceptable risks to company coffers and shareholder value, and the risk of large scale damage inflicted by appellate review, all but a few cases are settled—often for far less than the parties spent developing them for trial.

This voluntary process of case disposition occurs with minimal judicial intervention and resembles the first Cold War because it is also an economic struggle, not merely a struggle between competing ideas. Unlike the economic struggle that characterized the first Cold War, however, where one side ultimately triumphed, both sides in the asbestos conflict are losing. The resources available to compensate the injured are not unlimited. To date, over sixty companies have defended and/or settled themselves into bankruptcy, often without a single reported appellate decision dealing with critical legal issues underlying their controversies and more similar decisions can be expected. Unless Congress, state legislatures, or courts take action to elevate the interests of justice over judicial economy and economics, both plaintiffs and defendants in asbestos litigation face a bleak future.

Certainly, everyone involved in the process—litigants, lawyers, judges, and legislators—must share responsibility for creating the current morass. Of these groups, courts have the greatest opportunity to change the controversy’s stagnant paradigm. Like other torts, asbestos claims are creatures of common law principles that are designed to resolve problems on the basis of experience. Despite decades of experience, courts have generally failed to adapt procedures and common law principles to address asbestos litigation effectively. Instead, they have regularly declared themselves incapable of solving the crisis their own ingenuity has created. Hence, when

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2. The United States Supreme Court has repeatedly refused to “reconfigure established liability rules” to deal with the “‘elephantine mass of asbestos cases’ lodged in
judges have the opportunity to make a difference, they often defer to outdated traditions, or worse, defer to their legislatures as though the common law precluded change rather than enabled adaptation and flexibility.

This article frankly suggests that we dispel the myths of asbestos litigation that have caused the asbestos litigation crisis and that they are replaced with a fresh look at jurisprudential and scientific reality. It examines the depressing current state of affairs and suggests judicial solutions that can be used to restore fairness to asbestos litigation by enabling and encouraging trial and appellate courts to consider the merits of cases. Adapting the common law system to restore fairness will encourage litigants to seek summary and trial dispositions that promise meaningful appellate review. Once that review takes place, the asbestos litigation controversy may truly mature into a process based on a struggle of modern ideas, modern resources, and modern rationales, as opposed to the system currently in effect. As will be discussed below, Texas courts are in a unique position to make these adaptations assuming that the litigants are willing to bring these opportunities to their attention.

II. TODAY’S ASBESTOS LITIGATION LANDSCAPE

A. The Crisis is Worsening

When asbestos lawsuits emerged in the 1970’s, no one predicted that courts thirty years later would face a worsening crisis. Production and use of new asbestos products largely ceased in the United States in the early 1970’s, and the large latency period between exposure and manifestation of asbestos-related diseases led many to believe that the litigation would be a declining problem. Unfortunately, this has not proven true.3

Courts are experiencing an explosion of asbestos litigation, and resources are being depleted that should go to “the sick and dying, their widows and survivors.”

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The “elephantine mass”\textsuperscript{5} of asbestos cases in this country is a well-known fact of life to practically everyone involved in the legislative and judicial processes.\textsuperscript{6} Six years ago, the United States Supreme Court expressly recognized that asbestos litigation presented a “crisis.”\textsuperscript{7} Since then, the situation has worsened substantially,\textsuperscript{8} to the point where it has deteriorated “at a much more rapid pace than even the most pessimistic projections.”\textsuperscript{9} Nationally, asbestos cases doubled during the 1990s.\textsuperscript{10} In 2001, over 90,000 new cases were filed.\textsuperscript{11} Authorities forecast between one million and three million asbestos claims will be made in the future.\textsuperscript{12} This ever-expanding universe of claims finds no analogy short of the mystical musings of theoretical physicists.\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{5} Ortiz, 527 U.S. at 821. See also Ayers, 123 S. Ct. at 1228.
\item \textsuperscript{7} Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 597 (1997).
\item \textsuperscript{10} See Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 62 (1999) (statement of Christopher F. Edley, Jr., Esq., Co-Director, The Civil Rights Project, Harvard Law School), available at http://commdocs.house.gov/committees/judiciary/hju62442.000/hju62442_0.htm (In the 1990's the number of cases doubled from 100,000 to 200,000) [hereinafter Edley Testimony].
\item \textsuperscript{11} See Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, N.Y. TIMES, Apr. 10, 2002, at A1, available at 2002 WL 18538000.
\item \textsuperscript{13} See generally Stephen Hawking, A Brief History of Time 14-15 (2d ed. 1996) (explaining how theoretical physicists are currently debating whether the Big Bang created a universe that will continue expanding forever, or whether the universe will ultimately collapse inward upon itself). Although the answer to this question may be in doubt insofar as physics is concerned, the dwindling resources available to fuel the expansion of asbestos litigation suggests that the question is not whether the system will collapse from its own weight, but when it will do so.
\end{itemize}
B. Unimpaired Claimants Fuel the Flame

Most new cases are filed by plaintiffs who are not currently ill. As many as eighty percent of the new claimants are only mildly impaired or not sick at all. These plaintiffs are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be."

Many of these claimants sue to avoid being time-barred if they do not file after the first markers of exposure are detected. But "their presence on court dockets and in settlement negotiations inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."

Judge Weiner, who oversees the federal asbestos proceedings, explains that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases." Today, given the volume of claims and the disappearance of any effective injury requirement, defendants are paying those who are not really injured. In a recent article, the distinguished reporters for the Restatement (Third) of Torts observed that "[b]y all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who have been exposed to asbestos but who, with rare exceptions, are completely asymptomatic." The unimpaired claimants clog the court system and cause delays for the sick claimants.


15. See Qucena Sook Kim, G-I Holdings' Bankruptcy Filing Cites Exposure in Asbestos Cases, WAll St. J., Jan. 8, 2001, at B12 ("[A]s many as [eighty percent] of its asbestos settlements are paid to unimpaired people.").

16. Edley Testimony, supra note 10, at 68.


and others in the justice system. Perhaps the most troubling is that "[t]he continued hemorrhaging of available funds deprives current and future victims of rightful compensation" for real injuries.\textsuperscript{21}

C. The Economy Is Seriously Impacted

At least sixty-seven companies have been driven into bankruptcy by asbestos.\textsuperscript{22} Over thirty of these bankruptcies occurred within the past two years.\textsuperscript{23} In 2001, Federal-Mogul Corp., USG Corp., W.R. Grace & Co. and G-1 Holdings, Inc. (formerly known as GAF Corp.) sought Chapter 11 protection. In 2000, Babcock & Wilcox Co., Pittsburgh Corning Corp., Owens Corning, and Armstrong World Industries, Inc. all declared bankruptcy. More filings are likely.\textsuperscript{24}

These bankruptcies are squeezing so-called peripheral defendants—companies sued to make up for insolvent traditional defendants. More and more companies from an expanding variety of industries have been pulled into litigation to provide claimants with new sources for compensation.\textsuperscript{25} Twenty years ago, only 300 defendants were involved in asbestos litigation.\textsuperscript{26} Current lawsuits name more than 8,000 defendants.\textsuperscript{27} Many of these defendants had no role in the manufacturing of asbestos products or their distribution into the stream of commerce. Instead, they are users or consumers of asbestos-containing products who either (i) incorporated the products into their manufacturing processes, such as steel manufacturers or petroleum refiners, (ii) used asbestos as a component of other products sold in the marketplace, such as furnaces and water heaters, (iii) merely owned premises where asbestos was present, such as school districts and office buildings, or (iv) acquired companies that manufactured such products or owned such premises.\textsuperscript{28} Although the

\textsuperscript{21} In re Collins, 233 F.3d 809, 812 (3d Cir. 2000).
\textsuperscript{23} See Mark A. Behrens & Rochelle M. Tedesco, Two Forks in the Road of Asbestos Litigation, 18 MEALEY'S LITIG. REP. 3, 1 (2003).
\textsuperscript{26} See Behrens & Tedesco, supra note 23, at 1.
creativity of plaintiffs' counsel appears unlimited, the resources necessary to compensate their clients are dwindling rapidly as asbestos litigation takes its toll on the American economy.

Asbestos-related bankruptcies severely impact employees, shareholders, pensioners, and retirees. "Almost one-half of these bankruptcies occurred within the past two years." While some companies in bankruptcy have quietly and steadfastly moved out of that situation and back into profitability, most have done so with severe costs, layoffs and adverse economic consequences. The total cost is estimated in the billions, and employee pension plan losses average $8,307 per worker. Researchers estimate additional costs of two billion dollars resulting from the failures of other businesses. Others project future lawsuit costs exceeding $200 billion. To say the least, these numbers dwarf the costs of every other disaster, whether acute or chronic, experienced in the history of the Republic.

These combined forces have resulted in a domino effect. Settlements to the unimpaired encourage more claims, depleting the litigation as plaintiffs' lawyers seek to expand the number of defendants who have assets available to pay for asbestos injuries—even though "[t]he extent of liability, possible defenses and value of the claims against these new defendants is unknown."

29. See generally Richard B. Schmitt, Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos into a Court Perennial, WALL ST. J., Mar. 5, 2001, at A1 ("Lawyers have trolled for clients at shipyards, chemicals plants, union halls and churches, where they post medical technicians to screen people for evidence of asbestos exposure.").

30. See CARROLL, supra note 12, at 50 (noting that asbestos litigation "has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy"); see also Hearing on The State of the Economy, Before the Sen. Comm. on the Budget, 108th Cong. (2003) (statement of Michael E. Baroody, Executive Vice President of the Nat’l Assoc. of Mfrs.) (Asbestos litigation is "one of a number of factors hurting the U.S. economy").

31. See Behrens & Tedesco, supra note 23, at 1.

32. Id.

33. See JOSEPH E. STIGLITZ ET AL., THE AM. INS. ASSOC., THE IMPACT OF ASBESTOS LIABILITIES ON WORKERS IN BANKRUPT Firms 2 (2002) (stating that approximately 60,000 Americans have lost their jobs between 1997 and 2000 as a result of asbestos related bankruptcies).

34. See id. at 3.

35. See id. at 12.


37. See CARROLL, supra note 12, at vi; BIGGS, supra note 14, at 4.

38. See BELL, supra note 9, at 8 (explaining that asbestos costs exceed current estimates of the cost of "all Superfund cleanup sites combined, Hurricane Andrew, or the September 11 terrorist attacks").
assets of traditional defendants. Each new bankruptcy puts "mounting and cumulative financial pressure" on the remaining solvent defendants and accelerates the bankruptcy process;" new defendants are sued to make up for the shares of bankrupt defendants; new defendants themselves begin to collapse under the weight of new claims, and the process goes on. This system is bad for almost everyone, particularly sick claimants. Without changes, claimants who become truly ill may not receive adequate compensation. Changing the current asbestos compensation system would be pro-claimant and pro-defendant.

III. THE ROLE OF THE COURTS

Courts are partly to blame for the current crisis. Faced with an "elephantine mass of asbestos cases," many judges have focused on promoting efficiency and encouraging expedited resolutions. It was hoped that this process would put money in the hands of the sick promptly, reduce transaction costs, and ultimately clear the docket. Instead, the situation is worse. As one professor has written,

[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam. As the traffic slowed to a crawl, many courts found no other solution than to build more lanes on the freeway. As congestion predictably increased, the rights of individual defendants, particularly premises liability defendants, began to suffer.

In West Virginia, for example, the State's Supreme Court remarked in 1996 that the burden of asbestos litigation "has effectively forced the courts to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active dockets." By 2002, these innovative techniques resulted in scheduling a single mass trial to decide the liability of a multitude of defendants to

42. State ex rel. Appalachian Power Co. v. MacQueen, 479 S.E.2d 300, 304 (W. Va. 1996).
approximately 8,000 plaintiffs. The case involved hundreds of different premises in numerous states; myriad occupations and exposures; many different products, formulations, applications and warnings; a variety of diseases in various stages of development; and a timetable for evaluating liability that spanned over sixty years.43

The coercive effect of this non-traditional approach is obvious. Irrespective of whether the trial judge intended it, the West Virginia plan was completely unworkable as a trial plan. It necessarily assumed that the trial would be simplified, and perhaps most importantly, that appellate review would be precluded, by coercing most defendants to settle rather than risk the massive liability of a gigantic trial. Although the plan presented the same "judicial blackmail" problems raised by class action abuses,44 the appellate courts, including the United States Supreme Court, refused to intervene to stop the process before final judgment.45 Thereafter, consistent with the plan's coercive import, all but one of the original 259 defendants settled.46 The situation repeated itself shortly thereafter in Virginia.47 Although such a mass


44. See, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (The appellate courts use the term "blackmail settlements" to describe pre-trial procedures that place defendants under intolerable settlement pressures); see generally Richard O. Faulk and Kevin L. Colbert, Reforming an Abusive System: Curtailing Class Certification in Toxic Tort and Environmental Litigation, 11 TOXICS L. REP. 241, 249 (1997), reprinted in R. FAULK, STOPPING THE SPEEDING LOCOMOTIVE: PERSPECTIVES ON TOXIC TORT AND ENVIRONMENTAL LITIGATION (Gardere 2000).

45. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

Id. (citations omitted)(emphasis added). See also In re Rhone-Poulenc Rorer, Inc., 51 F.3d at 1300.

With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11 [bankruptcy proceedings].

Id.

46. See Mobil Settles, Leaving Carbide As Lone Asbestos Defendant, ASSOC. PRESS NEWSWIRES, Oct. 10, 2002.

47. In Virginia, 1,300 asbestos claims were consolidated for trial, even though "consolidation of all the cases would adversely affect the rights of the parties to a fair
consolidated trial may be impermissible under current Texas law,\textsuperscript{48} consolidations of even a few claims, combined with other problems that preclude adequate case development and enhance trial risks, may create equally coercive circumstances—especially when thousands of later claims remain pending.\textsuperscript{49}

There is a stark reality underlying results like those described above: \textit{nothing was truly decided regarding the merits of the controversies}. Instead, the dispositions merely proved that masses of claims coupled with judicial determination to enhance the economic risk of litigation will temporarily clear crowded dockets by forcing defendants to settle. When plaintiffs learn that a particular forum will coerce settlement procedurally irrespective of the merits of their claims, one doubts whether that forum’s dockets will remain unclogged for long.

From a public policy perspective, the economic resolution of masses of claims with inadequate attention to individual facts and controlling legal principles encourages further filings and perpetuates an abusive system.\textsuperscript{50} It is well known that the aggregation of claims can have a major impact on substantive law by dignifying claims that, if handled individually, would be subject to stricter scrutiny.\textsuperscript{51} When

\textsuperscript{48} See In re Ethyl Corp., 975 S.W.2d 606, 611 (Tex. 1998) (refusing to issue writ of mandamus to vacate consolidated trial order in asbestos case and setting forth standards for proper consolidations). The Ethyl court only addressed consolidations, not other case administration practices that exacerbated the coercive effect. Moreover, the court did not conduct a true maturity analysis, but merely assumed, in dicta, that all asbestos cases were suitable for treatment as mature torts, irrespective of the cause of action involved. Given the holding in recent cases, it is reasonable to assume that a more expansive record would produce a different result. See S.W. Ref. Co., Inc. v. Bernal, 22 S.W.3d 425, 439 (Tex. 2000).


\textsuperscript{50} \textit{See generally} Faulk & Colbert, supra note 44, at 242–44 (identifying the problems in class action lawsuits that make it an abusive system causing defendants to settle fast because it becomes an economic problem versus a legal battle).

\textsuperscript{51} \textit{See generally} Bernal, 22 S.W.3d at 438. The court held: Aggregating claims can dramatically alter substantive tort jurisprudence. Under the traditional tort model, recovery is conditioned on defendant responsibility. The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. By removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, “[c]lass certification magnifies and strengthens the number of unmeritorious claims.”
masses of claims are settled without adequate development to assure their vitality, the process sends a misleading message to all citizens—a message that, because of the scope of the disposition, announces vindication without victory. Even worse, other courts, legislatures, and the public are encouraged to make further decisions based upon the efficacy of results that are merely coercive transfers of wealth, as opposed to informed resolutions consistent with established jurisprudence.

The present asbestos litigation system used to resolve premises liability cases shares the rush to judgment paradigm that characterized former class action practices in Texas. Consolidated trials, abbreviated master discovery, and comparatively short periods allowed for case development before trial, seem to emphasize the judicial economy approach that prompted the "certify first, ask questions later" approach that resulted in class action abuses. Unfortunately, asbestos case administration is largely a pre-trial matter conducted by individual trial courts, and the parties generally have no rights to interlocutory appeals as they do when class actions are certified under

Id. (internal citation omitted); see also John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. REV. 990, 1010–11 (1995); Francis E. McGovern, Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano, 80 CORNELL L. REV. 1022, 1023–24 (1995) (observing that mass tort cases have a tendency to attract many unmeritorious claims). In short, "if claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." Bernal, 22 S.W.3d at 438.

52. Prior to the Texas Supreme Court's decision in Bernal, Texas appellate courts made a number of overreaching decisions in furtherance of this policy in class actions. See e.g., St. Louis S.W. Ry. Co. v. Voluntary Purchasing Groups, Inc., 929 S.W.2d 25, 29 (Tex. App.—Texarkana 1996, writ dism'd) (Class certification should be resolved "as soon as practicable" after the action is filed and the determination may be made solely on the basis of the pleadings.); Microsoft Corp. v. Manning, 914 S.W.2d 602, 607 (Tex. App.—Texarkana 1995, writ dism'd) (When considering class certification at such an early stage, before supporting facts are fully developed, the court should favor maintaining the suit as a class action because the court may always modify or decertify the class later.); Life Ins. Co. of S.W. v. Briste, 722 S.W.2d 764, 772 (Tex. App.—Fort Worth 1986, no writ) (Plaintiffs are not required to prove a prima facie case of liability to secure class certification and the probability of their success on the merits is not relevant to the class certification issue.); Microsoft, 914 S.W.2d at 615 (To the extent the court hears evidence at the class certification hearing, the rules of evidence do not apply. In particular, the court may base its conclusions on evidence which may be inadmissible at trial, even if the supporting proof fails to satisfy admissibility standards for scientific evidence.); Id. at 613 (The scope of a class may, under appropriate circumstances, be national in scope and variations in state law across the nation do not necessarily preclude certification of national classes, especially if the party opposing the class fails to establish that the variations will render the case unmanageable.). The Texas Supreme Court has now rejected such reasoning in both the commercial and personal injury class action context. See Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 697–99 (Tex. 2002); Bernal, 22 S.W.2d at 434–36.
Texas law.\textsuperscript{53} Because final judgments are necessary to correct errors, and because the system motivates settlements and discourages trials, the problem perpetuates itself, thereby precluding appellate review that might restore the fairness already achieved in Texas class action practice.

There are legions of legal issues that are unexplored, underdeveloped, or which should be reconsidered in light of emerging doctrines and ideas. The lack of appellate authority on these issues creates difficulties in case evaluation. These difficulties are compounded by the complex factual issues presented when plaintiffs sue hosts of new defendants whose products and premises have no experience with asbestos litigation. To date, most Texas trial courts have not accommodated these new developments into case administration rules. With a few exceptions, local rules fail to recognize meaningful distinctions between particular defendants or causes of action.\textsuperscript{54} As will be seen below, such generic approaches perpetuate a system that fosters settlements, which in turn, preclude appellate courts from correcting the process.

\section*{A. Erroneous Classification of Asbestos Premises Liability as a Mature Tort}

Although some may believe that asbestos litigation generally is a mature tort that justifies special shorthand treatment to promote judicial efficiency, there is nothing mature about asbestos premises liability litigation in Texas. Maturity requires a demonstrated and consistent history of trials and appeals sufficient to show claims have a predictive vitality.\textsuperscript{55} To reach that stage "different judicial strategies

\begin{itemize}
  \item \textsuperscript{53} See \textsc{Tex. Civ. Prac. \\ & Rem. Code} \S 51.014(3) (Vernon 1997).
  \item \textsuperscript{54} Although most Texas counties where concentrations of asbestos cases are pending have standing orders in place to govern the litigation, no county makes a distinction between product liability and premises liability claims in its orders. See generally Texas Local Rules, at http://www.texaslocalrules.com (providing links to the various counties' local rules).
\end{itemize}

The paradigm cases for these alternative views are "mature mass torts" or mass tort litigation, where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' intentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.

\textit{Id.}.

This definition of maturity has been criticized, however, because "[s]ocial science's
should be used at different stages of the life cycle." Specifically, in
the early stages of an alleged mass tort controversy judges should
employ a traditional approach, which is to "view each case discretely,
thus ignoring the effects of cases on one another." At the later
stages, "once the full dimensions of the tort are recognized, a more
activist model is appropriate." The activist model envisions: (i)
consolidation; (ii) resolving all common issues within the consolidated
proceeding; (iii) collecting information regarding the injuries; and (iv)
developing a systematic process for resolving all remaining issues. In
other words, in order to promote judicial efficiency over litigants'
traditional rights to their day in court, the cause of action alleged by
particular injured parties against particular defendants must
experience a substantial number of trials, a substantial number of
similar verdicts and a substantial number of similar results on appeal.
Only then does maturity arise, and only then can the judicial system
adopt a more generic approach.

The maturity of asbestos litigation, irrespective of the causes of
action involved, is almost a cliché. Like many clichés, however, it is
riddled with assumptions and unsubstantiated conclusions. Although
Professor McGovern’s “leading example of mature mass tort litigation
involves asbestos [claims],” none of his articles address circumstances
where claims are asserted against varying defendants on varying
causes of action and dissimilar facts. Instead, his references to
asbestos litigation seem directed almost exclusively to asbestos
products liability cases, which, by the date of his publications, had
been through almost two decades of litigation and, according to some,
had “crossed a kind of developmental threshold in the early 1990s,”
where “cases could be resolved more readily in a more systematic,
inexpensive, predictable—and therefore equitable—fashion.”

No such history existed for asbestos premises liability litigation at
the time of Professor McGovern’s seminal articles. Indeed, no such

study of the effects of aggregation remains quite young and active. Whether a single
maturation cycle applies to all mass torts has not been determined.” Thomas E.
Willging, Beyond Maturity: Mass Tort Case Management in the Manual for Complex
57. Id. at 1840.
58. Id. at 1842.
60. Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80
61. Id. at 949–50.
history exists now. Trials of asbestos premises liability cases are rare and appeals are even less common. The predictive vitality of such claims has not been established in general, much less regarding any specific defendant or premises. As will be shown below, a multitude of factual, expert, and legal issues regarding premises liability claims remain unresolved to this date. Accordingly, if any developmental threshold has been crossed in asbestos premises liability cases, it was not crossed because the controversy was mature, but rather because litigants, lawyers, and courts assumed products and premises cases were substantially the same. Based on this assumption, they justified a system that promised expedited settlements without repeating the lengthy struggle fought in product liability cases.

Moreover, some of the scientific evidence that drove product liability claims in the 1970’s and 1980’s is suspect under federal and some state evidentiary rules, such as those applied by Texas state courts. For example, many courts and lawyers assume that there is legally sufficient evidence to support causation of asbestos-related diseases in industrial premises commonly found in Texas, such as petroleum refineries. In fact, although the epidemiology of workers employed by such facilities has been extensively evaluated, it is questionable that excesses of asbestos-related diseases have been found that satisfy the Havner standards.

Moreover, attempts to extrapolate conclusions from other industries such as mining and textile manufacturing to support causation by asbestos exposures in petroleum facilities also face major obstacles under Texas law. Under Merrell Dow Pharm., Inc. v. Havner, and its progeny, plaintiffs must not only produce multiple studies demonstrating a doubling of the relative risk that is statistically significant, but they must also show that they are similar to the persons examined in the studies. This requires proof that the injured person was exposed to the same substance, that the exposure or dose level was similar to those in the study, that the exposure occurred before the onset of the injury, and that the timing of the onset of the injury was comparable with the experiences reflected in the study.

62. This problem is not limited to premise cases. The asbestos literature has not yet received a critical review under the modern Texas rules and such a review may reveal plaintiffs’ inability to prove causation in diseases and circumstances once routinely accepted under more archaic principles. Hence, product liability defendants might also benefit from reconsideration.
63. 953 S.W.2d 706 (Tex. 1997).
64. See id. at 720.
65. Id.; see generally Hon. Harvey Brown, Eight Gates for Expert Witnesses, 36 HOUS. L. REV. 743, 804–10 (1999) (discussing “connective reliability” theory as a component of
The connective reliability requirement compels a showing of a reliable connection between the scientific evidence and the specific case before the court. Without such a connection, the “analytical gap” between the studies and the decedent’s personal situation may be too great to bridge.\(^{66}\)

It is one thing to use the epidemiology of asbestos-related diseases among shipyard, textile, and mining workers to show that exposures in those industries are causally associated with the use of asbestos-containing products. It is quite another thing to offer those studies to prove that exposures in entirely different industries, such as petroleum refining, were capable of producing the same results. \textit{Havner} does not permit such comparisons and analogies to be made without an adequate predicate to show connective reliability.\(^{67}\) In the absence of such a predicate, there is no basis for extrapolating the exposures sustained by workers in vastly disparate industries to plaintiffs involved in current asbestos premises litigation, especially when those exposures occurred in entirely different contexts and levels and when the exposures occurred at different (and often regulated) time periods.

Surely, such claims cannot be mature when the underlying literature that allegedly supports them has never been reviewed under modern evidentiary rules. Texas law requires plaintiffs to produce objective and reliable evidence showing the level of toxic exposures necessary to cause their illnesses, and that they actually sustained such exposures attributable to the specific defendant’s product or premises.\(^{68}\) Moreover, plaintiffs must also support their experts’ opinions with legally sufficient medical and scientific evidence to support causation. No matter how highly qualified expert witnesses may appear to be, their testimony that “it is so” is inadmissible and legally insufficient to support verdicts and judgments.\(^{69}\) Finally and most importantly, Texas law requires trial and appellate courts to examine the specific studies upon which expert opinions are based to

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\(^{66}\) Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139, 144 (1997) (upholding exclusion of expert testimony based on studies that were too dissimilar from facts of underlying case).

\(^{67}\) See also Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 727 (Tex. 1998) (quoting \textit{Joiner} to exclude expert’s testimony that suffered from a fatal “analytical gap”).

\(^{68}\) See \textit{Havner}, 953 S.W.2d at 720.

determine whether the literature actually supports the opinions. Accordingly, it is improper and potentially fatal for experts to refuse to identify and produce the literature upon which they rely, and it is equally erroneous for trial and appellate courts to approve expert opinions without reviewing that literature critically.

There are no asbestos exceptions to these rules. Indeed, since Texas courts (and many other jurisdictions) have never undertaken such a review regarding certain asbestos-related diseases and claims, a critical assessment of asbestos literature and its use in premises liability cases is long overdue. Nevertheless, because it has always been so and because it suits judicial economy to treat such claims as mature, courts and litigants treat these premature allegations with extraordinary deference. Recently published investigations confirm the urgency of such a review. Incredibly, the qualifications of one of the most celebrated asbestos experts, Irving J. Selikoff, have been called into serious question. According to a recent study, Selikoff, who “was the dominant figure in the field of asbestos and health,” never obtained the M.D. degree he repeatedly claimed he possessed. If this hallowed expert’s lack of qualifications and evasions had been discovered earlier, “the history of the asbestos question would have been very different.”

Similar problems with a defense expert witness proved devastating to Johns-Manville. The reliability of extrapolating Selikoff’s conclusions regarding the industries he surveyed to new defendants regarding products and industries he never examined has always been questionable, but this new revelation compromises such tactics severely. Although the investigator assigns some blame for failing to discover Selikoff’s lapses to defense lawyers, pressures on those lawyers raised by courts concerned with judicial economy also may have contributed. Hence, judicial shortcuts

70. Id.
71. Indeed, the Texas Supreme Court fell into this trap. See In re Ethyl Corp., 975 S.W.2d 606, 610–12, 17 (Tex. 1998) The Court held, in dicta, that asbestos litigation was a mature tort with which Texas courts have a vast amount of experience. After this statement, the Court approved the consolidation for trial of several asbestos premises liability claims, even though no reported Texas appellate decision has evaluated the merits of any asbestos premises claim and even though, by their very nature, such claims involve separate inquiries regarding a wide variety of non-generic concerns. Surely, Professor McGovern never intended claims with no prior appellate history and which involve a myriad of disparate premises, as opposed to a single product, to be deemed mature.
73. Id. at 32.
74. See id. at 29–31.
75. See id. at 33.
created to deal with the original asbestos litigation crisis may have compromised the interests of justice. Using those same shortcuts to resolve the current crisis will risk further and perhaps more severe injustices.

Erroneously classifying claims as mature torts has enormous consequences—and the effect of those consequences has played a large role in producing the current asbestos litigation crisis. As Professor McGovern envisioned, once a set of claims is classified as mature, they may justifiably be aggregated and handled in a shorthand manner to reach predictable conclusions.\textsuperscript{76} Since aggregation assumes that trial victories for plaintiffs are predictable, aggregation necessarily amplifies the strength of the claims and exerts a coercive effect on defendants.\textsuperscript{77} Inevitably, defendants are forced to settle claims to avoid massive economic risks and those settlements preclude appellate review of cases that, if handled individually, would more likely be tried and appealed.

Thus, by improperly characterizing Texas asbestos litigation as mature in all respects, the courts deprive themselves of opportunities to review undeveloped issues. In turn, this lack of review perpetuates a vicious cycle of settlements that have little, if anything, to do with the merits of individual cases. When this process is unregulated by appellate review, it risks gigantic transfers of wealth without regard to anything other than naked bargaining power—a practice that raises the specter of judicial blackmail.\textsuperscript{78} Although such a process produces economic results, it does not provide the safeguards necessary to ensure the rendition of justice. In any mass tort context, we must remember that the goal of promoting increased access to justice is not achieved by promoting access alone. Any system of collective litigation must not only enhance accessibility, but also must ensure the reliable and efficient dispensation of justice to all participating parties.\textsuperscript{79} Systems that administer mass torts based upon mere assumptions of maturity, such as those presently governing Texas asbestos premises liability cases, should be re-examined and adapted to guarantee that fundamental fairness is not compromised by procedures designed to expedite case resolution.

\textsuperscript{76} McGovern, \textit{An Analysis of Mass Torts for Judges}, supra note 56, at 1842.
\textsuperscript{77} \textit{See id.; supra text accompanying note 51.}
\textsuperscript{78} \textit{See supra text accompanying notes 43-44.}
\textsuperscript{79} \textit{See Richard O. Faulk, Armageddon Through Aggregation: The Use and Abuse of Class Actions in International Dispute Resolution, 10 MICH. S.U.–DCL J. INT'L L. 205, 238 (2001).}
B. Improper Use of "State of the Art" Evidence to Infer Knowledge in Premises Cases

Premises liability cases are negligence cases in which the duty of ordinary care is applied. Conversely, products liability claims against manufacturers of asbestos containing products are based upon strict liability and invoke the unreasonably dangerous standard of care where knowledge of product dangers is imputed to defendants as a matter of law. Although manufacturers of asbestos-containing products may be held to the standard of an expert and charged with the knowledge of dangers revealed by the scientific literature, such a standard is irrelevant in premises liability cases. Yet, litigants often seek to apply this standard to premises liability cases.

In premises liability cases involving independent contractors, Texas law requires that owners have "actual knowledge" of the dangerous condition on their premises. Attempts to infer such knowledge circumstantially must be based upon a foundation that shows that the owner was, at the very least, in a position to know and appreciate the dangers. Despite this requirement, plaintiffs often offer irrelevant expert testimony and documents regarding the state of the art of asbestos knowledge, without any prior showing that the premises owners had any reason or opportunity to know and appreciate the dangers revealed by the abstract state of the art knowledge. Because of the lack of trials and appeals, this critical legal error has gone unnoticed.


81. TEX. CIV. PRAC. & REM. CODE ANN. § 95.003(2) (Vernon 1997).

82. Evidence only qualifies as "circumstantial" and is only arguably probative if it is "inferred from other facts proved in the case." Russell v. Russell, 865 S.W.2d 929, 933 (Tex. 1993). Hence, state of the art evidence is only admissible as circumstantial evidence if "other facts proved in the case" corroborates the owners' actual subjective knowledge of the information plaintiffs seek to infer. Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 817 (Tex. 2002) (explaining that an employer's actual knowledge of a hazard is circumstantially inferred by an employee's mere proximity to it, or a policy requiring employees to keep areas free from hazards or one which required employees to intervene to protect invitees from known hazards).

83. In premises liability cases, "[k]nowledge" means more than simply knowing that a condition is recognized as dangerous; the person must also appreciate the "chance of harm and the gravity of the threatened harm." Miller v. Wal-Mart Stores, Inc., 54 S.W.3d 481, 484 (Tex. App.—Corpus Christi 2001, rev'd on other grounds), 102 S.W.3d 706 (Tex. 2003). See also RESTAQUEMENT (SECOND) OF TORTS, § 342 cmt. a (1965).
C. Inability to Prove "Cause in Fact"

As a claim grounded in common law negligence, premises liability requires proof that the negligence of the defendant was a proximate cause of the plaintiff's injuries. To prove proximate cause, Texas law requires that the defendant's negligence do more than merely contribute to the plaintiff's injury. Instead, it must be a cause in fact—a cause without which the injury would not have occurred. Stated another way, plaintiffs must prove that but for the defendant's negligence, their injury would not have occurred. This definition is contained in the standard jury charges promulgated by the Texas Supreme Court, and has been reiterated in case law by the Texas Supreme Court.

The "but for" rule should have a major impact on asbestos premises liability litigation. In such cases, multiple plaintiffs typically sue the owner of every premises upon which they were allegedly exposed to asbestos, sometimes joining hundreds of defendants. Individual plaintiffs in such cases (typically contractor's employees) assert claims against a variety of premises owners, claiming that each premises owner is liable for injuries caused by asbestos exposures on its premises. Exposure periods may vary from several years to a few weeks (or even less), but no matter how short the exposure period may be, and no matter how vaguely documented the actual exposures may be, plaintiffs insist that each contributing exposure was a proximate cause of their illnesses. Typically, plaintiffs' industrial hygiene experts support these claims by testifying that all exposures are "cumulative" and that each exposure "contributed" to cause the illness. The witnesses are often unable (or unwilling) to state,

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84. See Texas Pattern Jury Charge - General Negligence & Intentional Personal Torts § 2.4 (2000) ("Proximate cause' means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred.").

85. Marathon Corp. v. Pitzner, 106 S.W.3d 724, 727 (Tex. 2003) ("The test for cause in fact is whether the negligent 'act or omission was a substantial factor in bringing about injury,' without which the harm would not have occurred."); see Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 477 (Tex. 1995).

86. See John Dement, Ph.D., Deposition testimony in Alcorn, et al. v. Amoco Chemical Co., No. 93-042492 (55th Dist. Ct., Harris County, Tex. July 10, 1997) and Bently, et al. v. Shell Oil Co., et al., No. 94-059230 (55th Dist. Ct., Harris County, Tex. July 10, 1997) taken in Durham, North Carolina 56 (transcript available at CRS Court Reporting Services) ("What happens with asbestos-related disease, again, they're all cumulative. And these workers, most of them—I think all of them worked at many work sites and had exposures at many work sites. All you can say is that, at each work site, they had at least some asbestos exposure to contribute to the cumulative exposure which
however, that the exposure on any particular premises was so substantial that, without it, the plaintiffs' injuries would not have occurred.87

In a case that involves multiple worksites, Texas law requires that the exposures on each worksite be sufficient to cause illness independently. To the extent that plaintiffs cannot make such a showing against particular defendants, it is the duty of trial judges to remove them from the case—not to deny their motions and force them to risk a verdict. When plaintiffs are permitted not only to maintain these speculative claims but also to aggregate them into controversies that enhance the risk of trial, the resulting economic settlements fan the flames of litigation.

In almost twenty years of asbestos premises liability litigation, this obvious issue has not been addressed in a single reported Texas appellate decision. The reason for the lack of appellate decisions on this point is obvious—there have been very few, if any, trials of such cases. Instead, thousands of eligible cases have been filed and settled for amounts of money that are cumulatively enormous. The explanations for this phenomenon are elusive, but whether they are based upon the propensity of many defendants to settle for costs of defense or, conversely, the coercive pressure of aggregated mass tort claims generally, the ultimate result is a massive transfer of wealth that is entirely unjustified by liability principles—a transfer that the appellate courts are powerless to correct unless the litigants and the trial courts are willing to challenge it.

D. Improper Use of Inadmissible Scientific Evidence to Infer Knowledge

Similarly, plaintiffs may offer state of the art evidence regarding asbestos dangers that are described in legally irrelevant and inadmissible scientific articles, including epidemiology studies of industries and exposures that are not sufficiently similar to the premises in question to justify any comparisons. In order for any epidemiology study to be admitted under Texas law, it must satisfy the strict standards set forth in Merrell Dow Pharm., Inc. v. Havner.88 At a

increased their risk. But I can't say, among those, which one actually was the cause of disease. They actually all are, because they're all related to the cumulative dose.”).

87. See id. at 56 & 58 (“Well, as I've said, the cause of the disease is their lifetime asbestos exposure . . . . I can't say, of those, which one caused it. In fact, they all contributed to this cumulative dose, which contributed to the disease.”)

88. 953 S.W.2d 706 (Tex. 1997).
minimum, the study must reflect a doubling of relative risk and be statistically significant. Equally important, the study must demonstrate connective reliability sufficiently comparable to the personal situation encountered by the particular plaintiff on the particular premises.99 Juries would be irremediably prejudiced by the impression that the dangers of asbestos were known in all industries under every circumstance, when, in fact, up to at least 1972, the dangers regarding asbestos were known and appreciated in only a few operations, such as mining.90

In reality, only literature based upon studies of truly comparable exposures in truly comparable industries is relevant to premises liability, and even then, the studies must satisfy the rigorous Havner criteria before they can be admitted into evidence. It is erroneous, therefore, to admit evidence establishing an epidemiological association between occupational asbestos exposures in the shipbuilding industry to show causation in workers exposed to asbestos in the petroleum refining industry. Unless a predicate is laid to establish that the exposures and the conditions in the two industries are sufficiently similar to justify a comparison, there is no connective reliability and there is too great an analytical gap between the studies. As a result, the studies are not only objectionable under Havner, but also irrelevant to the controversy.

This rule also holds true in certain types of asbestos product liability cases. For example, the presence of a particular asbestos-containing product as a component of another product, such as a valve or a gasket, does not justify admission of epidemiology studies regarding the harmful effects of asbestos generally. Instead, the studies must be sufficiently similar to the application in question (such as persons working with valves and gaskets with similar exposure opportunities). To bridge the analytical gap successfully, studies must

89. The person who is the subject of this suit must be shown to be similar to the persons in the epidemiology study in that he
[1] was exposed to the same substance, [2] that the exposure or dose levels were comparable to or greater than those in the studies, [3] that the exposure occurred before the onset of injury, [4] . . . that the timing of the onset of injury was consistent with that experienced by those in the study, . . . [and] [5] if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.

Id. at 720 (citation omitted).

90. See, e.g., RICHARD DOLL & JULIAN PETO, ASBESTOS: EFFECTS ON HEALTH OF EXPOSURE TO ASBESTOS 2–5 (1985); Irving J. Selikoff et al., Carcinogenicity of Asbestos, 25 ARCHIVES OF ENVTL. HEALTH 183, 183–84 (1972).
reasonably quantify exposures and examine circumstances demonstrably similar to those allegedly experienced by the plaintiff before the court, not studies that remotely examine demonstrably dissimilar applications.

E. Improper Use of Evidence and Claims Regarding Other Diseases

1. The Specificity Requirement

Another critical legal issue concerns the improper introduction of evidence and submission of jury questions regarding diseases other than those from which the plaintiff actually suffers. Plaintiffs' expert witnesses typically support their causation opinions with hosts of articles that deal with a wide range of asbestos-related diseases. In asbestosis cases, for example, experts may base their opinions on articles that deal with cancers, and even in cases involving a specific form of cancer, literature regarding a variety of other allegedly asbestos-related cancers may be offered. For example, in a case where a plaintiff seeks damages for colon cancer, it is not uncommon for experts to identify articles that deal with mesothelioma and lung cancer to support their opinions. The impact of such blurred presentations can be highly prejudicial. Moreover, their use violates one of the most basic principles underlying the Havner decision: the specificity requirement.

Even if a plaintiff produces multiple studies that show risk-doubling, courts must still consider whether the studies satisfy other scientific criteria necessary for legal sufficiency.\(^91\) Proof of multiple statistically significant epidemiology studies is merely one component of the legal sufficiency analysis. Even if multiple studies rise to the level of statistical significance, each study must still be evaluated under standard scientific criteria to determine their reliability to prove causation under the circumstances of the particular case.\(^92\) If they do not survive that inquiry, numerous statistically significant studies may still be held legally insufficient to support causation.

This article has already examined one of those criteria, namely,

\(^91\) See Havner, 953 S.W.2d at 718 ("We do not hold, however, that a relative risk of more than 2.0 is a litmus test or that a single epidemiological test is legally sufficient evidence of causation. \textit{Other factors must be considered.}\)\(^92\)\) (emphasis added). See also, Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 286 (Tex.App.—Texarkana 2000, no pet.).

\(^92\) See Havner, 953 S.W.2d at 718.
similarity.93 Thus, plaintiffs must show that they or their decedent was similar to the persons examined in the studies,94 and one of the most essential similarities is that the plaintiffs suffer from the same disease examined in the literature. Following this reasoning, Havner and its progeny also require that the studies relied upon by plaintiffs' experts be sufficiently specific so that they relate to the same illness from which they suffer or their decedent died.95 Hence, asbestos plaintiffs are required to produce evidence of a reliable association between asbestos and their specific disease. If the disease is colon cancer, the experts must base their opinions on studies that examine that disease, rather than generalized categories that arbitrarily include the disease.96 In the same manner, plaintiffs with specific lung cancers, such as bronchoalveolar carcinoma, cannot admit evidence regarding the general category of lung cancer without laying a reliable predicate that asbestos causes all forms of lung cancer.97

2. "Fear of Cancer" Damages

The Texas Supreme Court has recognized separate causes of action for asbestosis and for asbestos-related cancers,98 and it has also suggested that persons who sue for asbestosis may not have a legitimate claim for future mental anguish based on "fear" of future

93. See supra Part III.A.
94. See Havner, 953 S.W.2d at 720.
95. See id. at 718 n.2 (recognizing the "specificity" factor listed in "Bradford Hill criteria" is widely used by epidemiologists). See also Austin, 25 S.W.3d at 291–93 (affirming summary judgment for defendants where plaintiffs failed to produce evidence showing an epidemiological association between benzene and the specific type of leukemia involved in the case).
96. The alleged causal connection between asbestos at certain exposure levels and asbestosis must be evaluated independently from the literature concerning other diseases, such as cancer. Similarly, different cancer types must also be evaluated separately. See Austin, 25 S.W.3d at 291 (holding evidence regarding causation of acute myelogenous leukemia (AML) by benzene as legally insufficient to support causation of chronic myelogenous leukemia (CML)). See also Allen v. Pa. Eng'g Corp., 102 F.3d 194, 197 (5th Cir. 1996) (holding that evidence suggesting a connection between ethylene oxide and hematopoetic cancers is not probative on causation of brain cancer); Mitchell v. Gencorp Inc., 165 F.3d 778, 782–83 (10th Cir. 1999) (holding evidence that benzene exposure caused AML is not probative to show causation of chronic myelogenous leukemia CML in the absence of adequate data directly related to CML).
97. The court in Austin recognized the possibility that evidence might be legally sufficient regarding a general disease category such as leukemia if the record contained reliable evidence "that all types of leukemia are related or interchangeable so that if exposure to benzene causes all types of leukemia generally, such exposure causes CML specifically." Austin, 25 S.W.3d at 290. Unfortunately for the Austin plaintiffs, they failed to provide legally sufficient evidence to support that conclusion. Id. at 292.
cancers. Nevertheless, despite these clear signals, some trial courts continue to submit fear claims in the context of asbestosis litigation. To date, no such case has put the question squarely before the appellate courts. As a result, settlements of unimpaired asbestosis claims are inflated, and because of the high verdict risk posed by fear claims, trials are rare. The lack of trial and appellate court attention to this problem perpetuates the cycle of mass asbestos filings and compounds the crisis.

Although some might argue that the recoverability of fear-of-cancer damages in asbestosis cases was resolved by the United States Supreme Court’s decision in *Norfolk & W. Ry. Co. v. Ayers*.

The *Ayers* decision is neither controlling nor persuasive authority when Texas common law is concerned. In *Ayers*, the Supreme Court held that railroad employees suing for asbestosis damages under the Federal Employers Liability Act (FELA) could recover “mental anguish damages resulting from the [employees’] fear of developing [an asbestos-related] cancer.” As a federal statute, however, FELA differs from Texas common law negligence standards in many important respects—differences that not only explain why the Supreme Court reached its decision under FELA, but also explain why Texas Courts must conclude that such damages are not available under Texas law.

The controlling and most profound difference between FELA and the Texas common law of negligence is FELA’s avowed bias toward promoting compensation of injured workers. To that end, FELA has been “liberally construed . . . to further Congress’[s] remedial goal” of holding railroads responsible for the physical dangers to which their employees are exposed.

Accordingly, the decision in *Ayers* to permit recovery for fear of damages was not the first time the Supreme Court relaxed traditional common law principles to achieve FELA’s compensatory goals. In addition to the examples set forth above, prior decisions abandoned the traditional

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100. 123 S. Ct. 1210 (2003).
101. 123 S. Ct. 1215.
102. See Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994) (citing previous FELA cases that relaxed the standard of causation required at common law and expanded the doctrine of negligence per se beyond that which is covered by the common law rule); Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987) (“FELA is a broad remedial statute, and [courts] have adopted a ‘standard of liberal construction in order to accomplish [Congress’] objects.’”). *Id.* (citing *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).
concept of proximate cause and replaced it with a featherweight causation rule, under which any negligence of an employer, even the slightest and most remote, justified a finding of causation. Similarly, in the spirit of broad construction, FELA has been construed to cover some intentional torts even though its text only mentions negligence.

Viewed from this perspective, the Court's decision to permit recovery for fear of cancer as a component of mental anguish damages is a predictable result, most notably because FELA itself requires common law standards to yield when they conflict with FELA's mandate to promote employee recoveries. Since FELA is "a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety," the Ayers majority, itself, explained that "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier."

The Texas common law of negligence, however, does not recognize any bias in favor of compensation in its liability or damage principles. Unlike a court presiding over a FELA claim, which is charged with promoting recoveries by injured parties, a Texas court presiding over a negligence claim under the Texas common law must apply a test of "ordinary care" to determine: whether a duty exists; whether a duty was breached; and whether the breach of duty proximately caused damages. Within this rule of reason, damages which are too remote or which are speculative or conjectural cannot be recovered. There is no statutory mandate in Texas that requires

104. See, e.g., Jamison v. Encarnacion, 281 U.S. 635, 641 (1929) (finding that the unprovoked assault on worker by a foreman was held to be negligence under FELA).
106. The only Texas appellate case that discussed the propriety of fear-of-cancer damages did so in a FELA case, and even then, did so in dicta. See Norfolk S. Ry. Co. v. Bailey, 92 S.W.3d 577, 582 (Tex.App.—Austin 2002, pet. filed).
107. See TEXAS PATTERN JURY CHARGES—MALPRACTICE, PREMISES & PRODUCTS § 2.1 (2002) ("'Ordinary Care' means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.").
108. See generally Frias v. Atl. Richfield Co., 104 S.W.3d 925, 927-28 (Tex.App.—Houston [14th Dist.] 2003, pet. denied) (emphasizing expert testimony must be grounded in science and not merely the speculation of the expert and that there cannot be too big of a gap in reasoning between the evidence and the conclusion). See also Daniels v. Lyondell-
courts to depart from time-honored rules to foster recovery of damages beyond those traditionally allowed at common law.

Indeed, even if ensuring compensation is a goal of the common law, denying expanded recoveries furthers that goal. If defendants' assets are consumed by awards that compensate plaintiffs for fear of diseases they will probably never develop, there is a serious risk that persons who ultimately develop malignant diseases will be inadequately compensated. As the dissent in Ayers compellingly reasoned, courts cannot ignore the long-term impact of allowing enhanced damage awards to present claimants.\(^{109}\) Perhaps in a perfect world, where resources were unlimited and compensation was perpetually assured to those who are presently injured, courts could freely allow recoveries without regard to future problems. But the world of asbestos litigation is far from perfect. Multiple companies have been forced into bankruptcy since this crisis began over forty years ago, and there is no end in sight. Legislative relief has proved elusive.

Now, when there is literally nowhere else for plaintiffs and defendants to turn for an equitable solution, it is time for the courts to finally find the solutions within the common law itself. If, as Justice Holmes so eloquently wrote, "[t]he life of the law has not been logic: it has been experience,"\(^{110}\) then over forty years of experience shows that judges must act to protect both plaintiffs and defendants from the injustice of ever-expanding damage awards. Although this experience should influence conservative approaches in all areas of asbestos litigation, it should certainly mandate denial of new categories of damages, such as fear of cancer, that are not only unnecessary to fully compensate presently injured parties, but threaten to deny such compensation to those who develop malignant diseases in the future.

F. Improper Use of Governmental Standards to Prove Causation

Plaintiffs also try to use governmental exposure standards, such as OSHA PELs, as direct evidence of a threshold that when exceeded proves causation. However, governmental standards are not scientific evidence, and even when they are exceeded, they do not prove the plaintiff has been exposed to levels of asbestos sufficient to cause any


\(^{110}\) Holmes, supra note 1, at 1.
particular disease. 111 Instead, causation can only be determined by the use of admissible scientific evidence, and the burden remains on plaintiffs to show (i) the level and duration of exposure necessary to cause the disease from which they suffer, and (ii) that they were actually exposed to such levels on the premises owned by the defendant. 112 Under Texas law, there is no basis for a "one-hit" exposure theory based upon an assumption that there is no safe level of exposure. 113 Although such an assumption may be appropriate in regulatory processes, use of such assumptions in litigation improperly shifts the burden of proof to the defendant to prove a safe level. 114 Although this issue arises regularly in Texas asbestos litigation, it has not been reviewed in any reported appellate case involving asbestos exposure.

As this brief discussion shows, asbestos premises liability litigation in Texas lacks a sufficient history of trials and appeals to demonstrate its predictive vitality and its treatment as a mature tort. Indeed, any declaration to the contrary would be premature given the paucity of appellate review of these, and many other important legal questions. To be blunt, the Texas Supreme Court’s dicta, which it used to justify consolidation of groups of claimants in asbestos cases (a shorthand approach arguably appropriate in mature tort cases) is wrong insofar as it applies to asbestos premises liability cases. 115 Therefore, it is time to slow the wheels of justice in premises liability asbestos cases until these and other important concerns are resolved.

111. See, e.g., Allen v. Pa. Eng'g Corp., 102 F.3d 194, 198 (5th Cir. 1996) (holding that OSHA, IARC and the EPA's recognition of a substance as a carcinogen is legally inadequate to support a finding of causation because "[t]he agencies' threshold of proof is reasonably lower than that appropriate in tort law"); Mitchell v. Gencorp Inc., 165 F.3d 778, 783 n.3 (10th Cir. 1999) (explaining that California's listing of substance as a carcinogen is entitled to no weight in a causation analysis since governmental standards, even if exceeded, are not legally sufficient evidence to support a finding of causation).

112. Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 292 (Tex. App.—Texarkana 2000, no pet.) ("It is fundamental that a plaintiff in a toxic tort case must prove the levels of exposure that are dangerous to humans generally, and must also prove the actual level of exposure of the injured party to the defendant's toxic substances.").


114. See Mitchell, 165 F.3d at 783 n.3 (It is the plaintiff who must "prove that it is more likely than not that another individual has caused him or her harm."); see also Faulk, Strategic and Scientific Considerations in Toxic Tort Defense, supra note 113, at 535.

115. See In re Ethyl Corp., 975 S.W.2d 606, 617 (Tex. 1998) (upholding the trial court's decision in consolidation and trial management of premises liability asbestos cases without conducting maturity analysis for such cases separately from products cases).
by multiple trials and multiple appellate decisions. Failure to do so perpetuates an economic rather than a jurisprudential process.

G. Applying Statutory Limits to Premises Owner Liability

Most asbestos premises liability lawsuits involve claims by employees of independent contractors who seek damages for injuries caused by exposure to asbestos while working on the defendants’ premises. Generally, an owner or occupier of land does not owe any duty to insure that an independent contractor performs his work in a safe manner.116 In Texas, however, duties generally arise only “when the employer retains some control over the manner in which the independent contractor’s work is performed.”117 Since 1996, the obligation of a property owner to the employee of an independent contractor doing construction work has been governed by statute, namely, Section 95 of the Texas Civil Practice and Remedies Code.118

“Chapter 95 of the Texas Civil Practices and Remedies Code was enacted in 1996 as part of a sweeping tort-reform package.”119 It limits the ability of an independent contractor to recover damages from property owners in cases where the “property owners who do not exercise control over construction projects beyond simply hiring someone to do it, and you do not have any knowledge of any defect on the property.”120 Chapter 95 applies in part to personal injury “that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.”121 Moreover, it provides that in such cases “a property owner is not liable for . . . injury . . . arising from the failure to provide a safe workplace . . . .”122

Chapter 95 governs the liability of a property owner for the acts of an independent contractor when the latter commits acts on the former’s property and it pertains to claims “for damages caused by negligence” against a property owner.123 A “property owner” is

118. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 95.002–003 (Vernon 1997).
120. Fisher, 16 S.W.3d at 201 (summarizing the statement of Rep. Combs during the debate on Texas Senate Bill 28 on the floor of the House of Representatives during the 74th Legislature).
121. TEX. CIV. PRAC. & REM. CODE ANN. § 95.002(2) (Vernon 1997).
122. Fisher, 16 S.W.3d at 201.
123. TEX. CIV. PRAC. & REM. CODE ANN. § 95.001(1) (Vernon 1997).
defined as “a person or entity that owns real property primarily used for commercial or business purposes.”

Section 95.003 provides the critical language of the statute:

A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:

(1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and

(2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Section 95.002 clarifies the scope of section 95.003, by stating that:

This chapter applies only to a claim:

(1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and

(2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

By its terms, Chapter 95 applies broadly to all types of asbestos-related injuries sustained by any contractor employee “who constructs, repairs, renovates, or modifies an improvement to real property.” Both conditions of Section 95.003 “must be met before liability will be imposed upon the property owner.” “[T]he failure to provide a safe workplace” means that the injuries must relate to work being done by the injured party, but the injury-producing defect need not be the object of the injured party’s work.

124. Id. § 95.001(3).
125. Id. § 95.003.
126. Id. § 95.002.
127. Id. § 95.003.
Since its enactment, courts have addressed challenges to Chapter 95's constitutionality, and whether it is an additional form of negligence or an independent contractor's exclusive remedy for negligence claims. In Francis v. Coastal Oil & Gas Corp., the Texas's First District Court of Appeals rejected the argument that Chapter 95 violates the Texas Constitution's "open courts" provision. The appellants argued that Chapter 95 is unconstitutional because it "forecloses, 'redefines,' or 'abolishes'" a plaintiff's right to seek redress for injuries caused by a property owners negligence. The Francis court held that Chapter 95 does not abolish negligence claims against property owners; instead, it merely delineates the evidentiary showing a plaintiff must meet in order to prevail. According to the Francis Court, if Chapter 95 abolished any claims, it merely eliminated those where plaintiffs sought to hold property owners not strictly liable for injuries to contractor's employees. "[A]bolishing strict liability unreasonably or arbitrarily restricts claims for negligence."

Some plaintiffs argue that even when Chapter 95 is applicable it does not preempt all other common law negligence claims against property owners. Specifically, they assert that Chapter 95 does not extend to property owners who are themselves negligent, and that common law negligence claims remain available to redress those situations. This contention has also been rejected. Thus, if Chapter 95 applies, it is the sole remedy available to a contractor's employee engaged in construction, repair, renovation or modification of improvements on real property, such as refineries, and property owners are only liable for negligence if the statute's specific criteria are met.

defective ladder that a contractor used to access air-conditioning, and where the contractor was hired to repair the unit, was injury within scope of Section 95.003).
131. See id. at *13.
132. Id.
133. See id. at *9.
134. Id. at *13.
135. See id. at *9.
136. See Fisher v. Lee & Chang P'ship, 16 S.W.3d 198, 201–02 (Tex.App.—Houston
In an effort to take a case out of the ambit of Chapter 95, some plaintiffs also argue that (1) the contract did not involve an improvement on real property, (2) they were injured by an object other than the one they were to repair, or (3) they were not engaged in construction, repair, renovation or modification of the improvement. Courts, however, have held that Chapter 95 broadly applies as long as the contractor's injuries are related to the contractor's work. In determining whether or not a contractor was engaged in construction, repair, renovation or modification of the improvement, courts look to the contract controlling the work, instead of the activity the contractor was engaged in at the time of the injury. Courts have also construed the term "improvement" broadly.

Accordingly, when plaintiffs allege injuries caused by exposure to asbestos during the course of their work on the premises, they must prove that the premises owner retained or exercised control over the performance of the work. They must also prove that the premises owner had actual knowledge that the plaintiffs faced dangerous exposures to asbestos in the course of employment, and that the owner failed to provide adequate warnings of those dangers. The requirement of actual knowledge places the erroneous use of state of the art evidence at the forefront of Chapter 95 cases. As discussed earlier in this article, plaintiffs may not constructively infer knowledge in premises liability cases in the same way that is permitted in product liability cases. Instead, they must prove, either directly or

[1st Dist.] 2000, pet. denied) (holding Chapter 95 to be the exclusive remedy against an allegedly negligent premises owner when contractor's employees are injured doing work within its ambit).


138. See Admire, No. 01-02-00060-CV, 2003 WL 203514 at *2 (contractor fell while descending a ladder after finishing his repair); Bohall, 2003 WL 21361772 (contractor died while inspecting storage bins); Fisher, 16 S.W.3d at 201 (contractor fell on his way to repair an air conditioning unit).

139. See Fisher, 16 S.W.3d at 201. Improvements include any addition or betterment is attached to the property. There are three factors to consider in determining whether an item is an attachment: (1) the mode and sufficiency of annexation; (2) the adaptation of the item to the use or purpose of the property; and (3) the intention of the party who annexed the item. Id.


141. See supra Part III.B & D.
circumstentially, that the owner not only knew the dangers of asbestos generally, but also that the owner knew that the contractor's employee was in danger of exposure from which a disease could be contracted while working on the premises. Knowledge of the sufficiency of exposures cannot be shown by conjecture or speculation, nor can such findings be based upon unsubstantiated expert opinions. 142

In short, since Chapter 95's actual knowledge element requires proof of the owner's knowledge, it necessarily encompasses a showing of what reliable scientific evidence was available regarding exposures similar to those in the plaintiff's workplace. Essentially, the knowledge element requires expert testimony, and that expert testimony must satisfy all the criteria required for proof of causation under Havner and its progeny. To date, there are no reports that any Texas trial or appellate court has considered this issue in a premises liability asbestos case. Accordingly, insofar as maturity is concerned, such cases are in their legal infancy.

H. Procedural Tools Within the Trial Court's Discretion

Beyond resolving these important legal issues, trial courts have the inherent authority to promulgate procedural processes that can substantially and fairly clear their clogged dockets. By establishing inactive docket plans, also known as plural or deferral registries, the judiciary can reduce pressures on remaining defendants and slow the spread of the litigation.

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

142. See Austin v. Kerr-McGee Ref. Corp., 25 S.W.3d 280, 292 (Tex. App.—Texarkana 2000, no pet.) ("It is fundamental that a plaintiff in a toxic tort case must prove the levels of exposure that are dangerous to humans generally, and must also prove the actual level of exposure of the injured party to the defendant's toxic substances.") (emphasis added). Scientific knowledge of the harmful level of exposure to a chemical and knowledge that a plaintiff was exposed to such quantities are minimal facts necessary to sustain a plaintiff's burden in a toxic tort case. See Allen v. Pa. Eng'g Corp., 102 F.3d 194, 195 (5th Cir. 1996) (construing Texas law). See also Mitchell v. Genecorp Inc., 165 F.3d 778, 781 (10th Cir. 1999) ("It is well established that a plaintiff in a toxic tort case must prove that he or she was exposed to and injured by a harmful substance manufactured by the defendant.").
evidence of impairment. Impaired claimants thus move to the front of the line. Removing long delays is important, particularly for older claimants and those with fatal diseases. The program also benefits unimpaired individuals by protecting claims from being time-barred. This reform defuses limitations concerns underlying claims by many unimpaired individuals. Transaction costs would be substantially reduced because no discovery is conducted of unimpaired claimants.

A large amount of articles have been written on this subject, some by this author. Others appear elsewhere in this volume or were published in other forums. To avoid duplication, the details of inactive docket creation and practice are not repeated here. It suffices to say that inactive docket programs have existed for many years in Massachusetts, Illinois, Maryland and in the federal district courts. Recently, courts in New York and Washington have created deferred dockets. Other state courts, such as those in Ohio and in South Carolina have taken less formal steps, such as giving priority to the claims of plaintiffs who are functionally impaired and allowing them to be decided before the claims of unimpaired parties.

143. See, e.g., Faulk, supra note 3, at 3.
146. See Mark A. Behrens, Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 BAYLOR L. REV. 331, 347 & n.88 (2002) (referring to a litigation order in Middlesex County Superior Court).
147. See id. at 347 & n.90 (referring to an order from the Circuit Court of Cook County, Illinois). The Cook County order has played a large part in reducing the caseload from over 8,000 cases to the current level of 800 cases. As of 2001, approximately 1,200 cases were registered but inactive.
148. See id. at 348 & n.95 (referring to an order establishing an inactive docket granted by the Circuit Court for Baltimore County, Maryland).
149. See id. at 349 & n.100 (A district court in Pennsylvania “recently ordered that all cases initiated through a mass screening shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.”).
150. See In re Fifth Judicial District Asbestos Litig.: Amended Case Management Order No. 1, N.Y. Sup. Ct. (Jan 31, 2003.).
151. See Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties, at 1(Dec. 3, 2002).
152. See Behrens, supra note 146, at 349 & nn.98 & 99 (explaining the inactive docket program utilized by the Court of Common Pleas of Cuyahoga County, Ohio). Currently, a trial court in Oregon is considering such a proposal.
153. See In re Wallace & Graham Asbestos-Related Cases, Wallace & Graham Case Mgmt. Order, at 1 (Greenville County, SC [-----], 2002).
154. See In re All Asbestos Exposure Cases Filed in Multnomah County, First
This should be considered by Texas courts.\textsuperscript{155} Most importantly, these are tools that are immediately available to restore fairness to the system and break administrative traffic jams.

IV. 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 failure to adapt common law doctrines and procedures to correct the current system repeatedly produces dispositions based upon economics rather than justice. Although decades of experience demonstrate that this process creates an ever-widening black hole that devours resources necessary to compensate parties who are truly impaired, many courts seem determined to follow failed traditions into the vortex. Indeed, by erroneously characterizing premises liability litigation as mature, these courts accelerate the process by blurring the distinctions between causes of action and bypassing clear common law rules.

Although the situation is dire, there is still time to chart a new course. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants.

At 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.\textsuperscript{156}

Since case management tools to ease the current crisis are already available for informed judges, there is no reason to insist that the adaptations discussed in this article must be endorsed by the legislature. In many circumstances, judges themselves hold the keys to solving their own problems—common law keys that, when used, assist the plight of the truly impaired while simultaneously preserving assets necessary to compensate persons who later develop asbestos-related

\textsuperscript{Amended Draft Gen. Order Re: Asymptomatic, Untreated, or Inchoate Disease Cases, No. 0003-0000B, at 5 (Cir. Ct. Multnomah County, OR 2002).}

\textsuperscript{155} See Behrens & Parham, \textit{supra} note 145, at 18; Behrens, \textit{supra} note 146.

\textsuperscript{156} Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir. 1993) (Weis, J., dissenting).
diseases. To the extent additional reforms are needed through statutory amendments, some have already been enacted\textsuperscript{157} and others were recently considered by the Texas legislature.\textsuperscript{158} In the meantime, with careful attention to the causes underlying the current crisis and with compassionate concern for those who merit current compensation, Texas state courts have the ability and power to bring asbestos litigation under control. It remains to be seen, however, whether litigants will give them the opportunity to do so and whether, given that opportunity, Texas judges will use the spirit of the common law to ensure the rendition of justice to all participants in this unfortunate controversy.

\textsuperscript{157} The Texas tort reform act that passed in the last regular legislative session enacted important reforms regarding joint and several liability. The reforms partially leveled the playing field for asbestos litigation by removing an exception that made asbestos defendants jointly and severally liable if their proportionate responsibility share exceeded fifteen percent as opposed to the over fifty percent threshold applicable in nontoxic tort cases. See Reform of Certain Procedures and Remedies in Civil Action, 78th Leg., R.S., 2003.

\textsuperscript{158} A statutory "inactive docket" plan was part of the asbestos litigation reform bill that failed to pass the legislature in the last regular legislative session and in a special session. Tex. S.B. 496, 78th Leg., R.S. (2003); Tex. H.B. 1240, 78th Leg., R.S. (2003); Tex. S.B. 8, 78th Leg., 1st C.S. (2003); Tex. H.B. 47, 78th Leg., 1st C.S. (2003). As noted earlier, however, judges already have inherent authority sufficient to create such plans without statutory authorization.
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