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# **Asbestos Case Management: Pretrial and Trial Procedures**



Federal Judicial Center

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# **ASBESTOS CASE MANAGEMENT: PRETRIAL AND TRIAL PROCEDURES**

**By Thomas E. Willging**

**Federal Judicial Center  
1985**

This publication is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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## I. INTRODUCTION

Asbestos litigation is cloaked in mystique and paradox. On one hand, the literature contains reports that asbestos cases have produced a "flood of litigation"<sup>1</sup> that has been likened to a "tidal wave."<sup>2</sup> Some commentators doubt the ability of the judicial system to cope with the "crisis" because "[t]his vast litigation has produced numerous legal, social, and political issues that may prove too numerous and too complex for the court system to handle adequately."<sup>3</sup> Some conclude that "existing systems of compensation are ineffective to deal with the asbestos problem."<sup>4</sup> While the debate rages, delays in scheduling asbestos cases for trial deprive victims of asbestos-related cancers and other diseases of the opportunity for compensation that may alleviate their suffering. Participants at the Federal Judicial Center's Asbestos Case Management Conference reported that many plaintiffs die before their cases are tried or settled.

On the other hand, asbestos cases constitute a relatively small percentage of the civil caseloads of state and federal courts.<sup>5</sup>

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1. Comment, *Issues in Asbestos Litigation*, 34 *Hastings L.J.* 871 (1983).

2. Winter, *Asbestos Legal "Tidal Wave" Is Closing In*, 68 *A.B.A. J.* 397 (1982); see also references cited in Parrish, *Dimensions of the Problem*, 8 *State Ct. J.* 5, 5 nn.9-12 (1984), to "a litigation crisis," a "social problem," a "potential . . . corporate catastrophe," and the "asbestos mess."

3. Special Project, *An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 *Vand. L. Rev.* 573, 577-78 (1983); see also Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 *Harv. L. Rev.* 851 (1984), in which the author analyzes the ability of the tort system to prevent mass-exposure "accidents," including asbestos claims, and to compensate the victims.

4. Comment, *supra* note 1, at 872.

5. In the federal courts, estimates of the number of cases currently pending range from 6,655 to 7,170. Compare Administrative Office of the United States Courts, Statistical Analysis and Reports Division (SARD), *Asbestos Personal Injury Products Liability Cases Commenced, Terminated, and Pending in the U.S. District Courts During the Ten Month Period Ended April 31, 1984* (1984), with R. Pellicoro & D. Hopkins, *Asbestos Cases by District* (Administrative Office of the United States Courts, Clerks Division 1984). As of December 31, 1982, there were 217,613 pending civil cases in the federal courts. See Reports of the Proceedings of the Judicial Conference of the United States, in Administrative Office of the United States Courts, 1983 Annual Report of the Director 4.

In the state courts, asbestos cases constitute no more than 0.1 percent of the total civil caseload. Parrish, *supra* note 2, at 5.

## Introduction

One recent insurance industry study of the costs of asbestos litigation concluded that “[a]ll observers agree that the vast majority [of claims] fall into a few easily recognizable types” and that “[v]ery few claims pose novel legal issues.”<sup>6</sup> Indeed, “[t]he basic information necessary to adjudge the value of most claims is entirely standard from one claim to the next.”<sup>7</sup> All aspects of the litigation process “are eminently subject to standardization and resulting economies of scale.”<sup>8</sup>

A study sponsored by the National Center for State Courts found that “[a]s the bar has learned more about the factual issues that occur frequently in the cases, the handling of individual cases has become more routine, simple, and inexpensive.”<sup>9</sup> The study concluded that “sound judicial case management practices and effective settlement techniques have combined to bring about the resolution of large numbers of cases.”<sup>10</sup>

Do the latter assessments outweigh the cries of alarm? Is there currently a crisis in the federal courts caused by asbestos litigation? If so, what are its dimensions and what remedies seem appropriate? These are the major questions that I address in this report. My principal finding is that the reports of the demise of the federal judicial system, like the reports of the early demise of Samuel Clemens, are “greatly exaggerated.”<sup>11</sup> There are a number of procedures and case management alternatives that can alleviate the pressures of asbestos litigation and facilitate a reasonably prompt hearing for the parties. Standardization of pretrial procedures and consolidation of cases can promote the scheduling of firm, credible trial dates, which, in turn, lead to resolution of asbestos claims.

The findings reported in this study derive primarily from a conference of federal judges, magistrates, clerks, and other support personnel held in Baltimore, Maryland, on June 18 and 19, 1984. The Federal Judicial Center, in consultation with the Clerks Division of the Administrative Office of the United States Courts, conducted this Asbestos Case Management Conference.

The report also draws heavily on orders provided to the Center by conference participants, by federal courts, and by the Clerks Division. These orders represent a valuable resource for courts that have yet to adopt a standard system for asbestos litigation (or other

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6. Hamilton, Rabinovitz and Szanton, Inc., *Cutting the Overhead Costs of Resolving Asbestos Claims: A Time for Action*, 6 J. Prod. Liab. 17, 22 (1983).

7. *Id.*

8. *Id.*

9. Parrish, *supra* note 2, at 11.

10. *Id.*

11. S. Clemens, cable from Europe to the Associated Press, *quoted in* 2 A. Paine, *Mark Twain: A Biography* 1039 (1912).



litigation involving a significant number of similar claims and parties) and for courts that are considering changes in their procedures. The Center has also developed a summary and an index for these orders. (Copies of the summary and index and of any order referred to in this report are available from the Information Services Office or the Research Division of the Center.)



## II. SUMMARY OF CONCLUSIONS

In this section, I set forth the major conclusions of the report. In later sections I elaborate on the bases for these conclusions and illustrate them with references to current court practices.

1. Asbestos cases, however complex they may have been at first, have become relatively routine products liability cases that involve a large number of parties. The major complications that remain relate to (1) disposition of claims against multiple defendants, who frequently have cross-claims against each other, and (2) disputes among defendants and their insurers about coverage.

2. Statistical reports of asbestos cases in federal courts fail to provide a clear picture of the burdens resulting from the high incidence of multiple plaintiffs, defendants, and third-party defendants. The current system does not take account of a variety of court practices regarding filing of multiple claims, and as a result, resources may be misallocated to the courts. Modified pretrial docketing and filing procedures (such as the use of "master files," appointment of liaison counsel for notices, and elimination of filing of discovery materials) have helped to alleviate the flow of paperwork in the clerk's office. Allocations of clerks and word-processing equipment also have helped to reduce the burden of making similar entries on multiple docket sheets, providing notices to numerous parties, and meeting other paperwork demands.

3. In some districts, the court has assigned all asbestos cases to a single judge or magistrate, who has developed standardized pretrial procedures and scheduling orders. Such procedures are uniform for all asbestos cases in that court, and they reduce pretrial judicial involvement. Standardized discovery pleadings and rulings minimize disputes and help ensure that parties obtain information necessary for settlement or trial. Assignment of pretrial proceedings to magistrates also improves efficiency, but at the risk of insulating the judges from the cases and diminishing the judges' ability to set firm, credible trial dates.

4. The vast majority of asbestos cases settle on the eve of trial, after use of various traditional forms of active case management that involve assigning a firm, credible trial date. The type of judicial involvement in the promotion of settlement (a range of prac-

### *Summary of Conclusions*

tices that includes serious pretrial preparation with little reference to settlement, judicial mediation, use of alternative dispute-resolution mechanisms to enhance settlement, and active judicial participation in settlement discussions) appears to be secondary in importance to the setting of firm, credible trial dates.

5. Standardized trial procedures and clustering of cases for joint trials conserve judicial trial time. Other innovations (such as use of deposition summaries and limiting the number of medical experts) show promise of further increasing the efficiency of trial courts in hearing asbestos cases.

6. There is an asbestos case management crisis in several district courts, as is evident from their large caseloads and paucity of case terminations. This crisis appears to result from a lack of judicial resources assigned to asbestos cases and the consequent inability of judges to communicate firm, credible trial dates to the parties. Courts can avoid serious management problems with asbestos cases by using standard pretrial procedures and calendaring systems designed to establish firm, credible trial dates for all civil and criminal cases.

### III. DISCUSSION

#### Asbestos Cases as Routine Products Liability Cases

##### Number of Parties

In the early years of asbestos litigation, there were a number of factors that inhibited judicial speed and efficiency. Some of these factors continue to plague asbestos cases. First, there is the sheer number of parties. In asbestos cases hundreds of plaintiffs may join in an action based on exposure to the same products at a common work site.<sup>12</sup> Because most plaintiffs have been exposed to a variety of products in a variety of employment settings, it is not unusual for plaintiffs to join twenty or more defendants from the asbestos industry.<sup>13</sup> Those defendants, in turn, may bring third-party complaints against the federal government and other producers and may bring cross-claims against each other. These primary cases may produce secondary litigation in the form of declaratory judgment actions regarding the scope of insurance coverage.<sup>14</sup> Such actions may involve disputes about whether an insurer has a duty to defend an action and pay any judgment. All of these actions produce paperwork that renders the asbestos cases voluminous, if not complex. The multiplicity of actions may also lead to delays caused by the need to decide preliminary issues in secondary litigation (such as the duty of an insurer to defend) before the primary case can proceed. Chapter 11 proceedings in bankruptcy court have also postponed jury trials against those companies that have filed petitions.<sup>15</sup>

12. In *Austin v. Johns-Manville*, No. 75-754 (D.N.J. filed May 6, 1975), there were 687 named plaintiffs.

13. Parrish, *supra* note 2, at 6-7; *see also* Hamilton, Rabinovitz and Szanton, Inc., *supra* note 6, at 22.

14. *See, e.g.*, Comment, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis*, 97 Harv. L. Rev. 739, 739 & nn.3 & 5 (1984); Case Comment, *Insurance Law and Asbestosis—When Is Coverage of a Progressive Disease Triggered?—Keene Corp. v. Insurance Company of North America*, 58 Wash. L. Rev. 63 (1982).

15. *See generally* Special Project, *supra* note 3, at 809-10, 826-28. In general, issues relating to the reorganization of defendants were not on the conference agenda and are beyond the scope of this report.

## Number of Issues

A second aspect of the early asbestos cases that created complications was the plethora of legal and factual issues presented that were unprecedented but likely to serve as precedents for numerous future claims. Asbestos-related diseases such as asbestosis<sup>16</sup> and mesothelioma<sup>17</sup> have a latency period of ten to twenty-five years or more from initial exposure to apparent damage.<sup>18</sup> This delayed onset leads to factual and legal disputes about application of the appropriate statute of limitation or statute of repose.<sup>19</sup> Evidence, including business and insurance records of the defendants, may be lost, destroyed, or rendered incapable of authentication during the lengthy latency period. On the other hand, evidence of the disease process improves.<sup>20</sup>

This melange of legal and factual issues, magnified by the latency period of the disease, produced lengthy trials in the pioneer asbestos cases. For example, in the *Borel* case,<sup>21</sup> the court faced such issues as the standard of liability under state law and the form of instructions to the jury,<sup>22</sup> the sufficiency of the evidence to raise a jury question,<sup>23</sup> apportionment of damages among joint tortfeasors,<sup>24</sup> standards and instructions regarding contributory negligence and assumption of risk,<sup>25</sup> and the statute of limitations,<sup>26</sup> as

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16. Asbestosis is a nonmalignant disease that involves either scarring of the lungs or pleural thickening and other changes in the pleural cavity. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); Locks, *Asbestos-Related Disease Litigation: Can the Beast Be Tamed?*, 28 Vill. L. Rev. 1184, 1185 n.8 (1983).

17. Mesothelioma is a form of lung cancer that affects the mesothelial walls of the pleural, peritoneal, or pericardial membranes and is primarily caused by exposure to asbestos dust. Locks, *supra* note 16.

18. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d at 1083.

19. Special Project, *supra* note 3, at 641-59.

20. *Id.* at 657 & n.505.

21. 493 F.2d 1076.

22. *Id.* at 1087-92. Subsumed in these issues were the questions whether the asbestos products were unreasonably dangerous because of the failure to give adequate warnings about known or knowable dangers, whether the dangers were reasonably foreseeable or scientifically knowable, whether the manufacturer should be held to possess the knowledge and skill of an expert, whether there was an independent duty to test the product, whether the utility of the product would be considered in assessing its danger, and whether the manufacturer's duty extends beyond the industrial purchaser to the ultimate consumer or user.

23. *Id.* at 1092-94. This set of issues primarily focused on whether there was sufficient evidence that each defendant's product was a substantial cause of the asbestosis injury.

24. *Id.* at 1094-96.

25. *Id.* at 1096-1100.

26. *Id.* at 1100-02. Consideration of this issue included determination of the effect of prior filing of an application for workers' compensation and application of the "discovery rule" to the facts of Mr. Borel's claim.

well as several evidentiary issues.<sup>27</sup> The court concluded, however, that “though the application is novel, the underlying principle is ancient.”<sup>28</sup> Thus, a review of the *Borel* case—the bellwether asbestos case—confirms the consensus of the judges, magistrates, and clerks at the Center’s Asbestos Case Management Conference that asbestos cases have come to be like routine “comp cases” in the application of relatively fixed legal standards.

A review of current topics in asbestos litigation leads to a similar conclusion.<sup>29</sup> Although new theories of causation, such as market share liability and enterprise liability, have evolved during the past decade,<sup>30</sup> they are incremental developments in the common law of torts.

### Settlement Complications

The multiplicity of parties and the number of unsettled legal issues led to a further complication in early asbestos litigation—namely, minimal opportunity to settle cases prior to trial. This occurred for several reasons. The “sheer number of interested parties—including named defendants, insurers of defendants, and third party defendants—impede[d] the settlement process.”<sup>31</sup> Because of concerns about the statutes of limitation and repose and also because of the lack of insurance claims facilities, plaintiffs’ attorneys generally filed actions without prior presentation of claims to insurers.<sup>32</sup> State law rules regarding the effects of settlement among joint tortfeasors also inhibited separate settlements.<sup>33</sup>

With the passage of time, the actors in the asbestos litigation process have simplified these complicating factors. As is discussed later in this report, courts and litigants have taken steps to standardize pleadings and reduce the impact of paperwork on the courts. Appellate rulings such as *Borel* have clarified the legal standards to be applied in a given jurisdiction. Counsel have organized themselves on a national scale and share evidence discovered in earlier cases.<sup>34</sup> Jury decisions have particularized a range of possible out-

27. *Id.* at 1102-03.

28. *Id.* at 1103.

29. *See, e.g.*, Special Project, *supra* note 3, at 573-77.

30. *Id.* at 607-26.

31. Locks, *supra* note 16, at 1189 (footnotes omitted).

32. Parrish, *supra* note 2, at 5.

33. *See, e.g.*, Takiff, *Pennsylvania's Joint Tortfeasor Act: Settlement and Releases*, Mealey's Litig. Reps. Asbestos, July 27, 1984, at 937.

34. *See, e.g.*, Buell, *Managing Asbestos Litigation Through Local Defense Counsel Committees*, For Def., Oct. 1982, at 23; Ranh, *How the Plaintiffs' Bar Shares Its Information*, Nat'l L.J., July 23, 1984, at 1, col. 4.

comes and allowed the parties to identify salient factors likely to affect the value of a case.

Settlement issues remain complicated, but efforts to reduce these complications have borne fruit and show promise of further progress. Prior verdicts and settlements have cleared a path for future settlements. As defendants learn to apportion liability among themselves in cases related to a specific job site, they establish formulas for future apportionment. Formation of local committees of counsel to coordinate litigation in a given district promotes a structure for discussion of settlement issues among defendants. Formation of a cost-containment group by insurers and other defendants presents similar opportunities on a national level. Finally, efforts to develop a national claims facility hold the promise of establishing a firm framework for allocating liability among multiple defendants without litigation. At the time this report was written, a group of thirty asbestos manufacturers and insurers had signed a national agreement to establish such a claims facility and to settle their own disputes regarding insurance coverage.<sup>35</sup>

In sum, asbestos cases have become routine products liability cases that involve a large number of parties. As the law becomes settled and the facts more organized, the cases become more susceptible to relatively brief trials of consolidated claims. Evaluation of the cases also becomes more routine and settlement more likely. National efforts to coordinate plaintiffs' and defendants' counsel and to establish a national claims facility show promise of further accelerating the disposition of asbestos cases.

### **Statistics and Allocation of Resources**

Two estimates of the total number of asbestos cases in the federal system as of April 31, 1984, are 6,655 and 7,170.<sup>36</sup> Neither of these figures, however, gives an accurate picture of the number of claims represented in the case filings. In some districts, plaintiffs have filed multiple claims under a single case name. For example, in one case in the United States District Court for the District of New Jersey, 687 individual claimants filed their cases under a single case number.<sup>37</sup> The Clerks Division of the Administrative

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35. *Thirty Companies Have Conditionally Signed Wellington Pact*, Mealey's Litig. Reps. Asbestos, July 27, 1984, at 919.

36. The former figure is based on a provisional estimate from SARD, *supra* note 5; the latter is from R. Pellicoro & D. Hopkins, *supra* note 5. Pellicoro and Hopkins derived their data from a survey of clerk's offices conducted during the winter of 1984.

37. *Austin v. Johns-Manville*, No. 75-754 (D.N.J. filed May 6, 1975).



Office (AO) attempted to remedy this information gap. According to data collected by the division, the 7,170 cases it identified represent 12,873 individual claimants. The Statistical Analysis and Reports Division of the AO is currently in the process of obtaining information on the number of claims represented by its data.

Asbestos cases are concentrated in a small number of federal district courts. The highest concentrations are in the U.S. district courts for Massachusetts, New Jersey, Eastern Pennsylvania, Southern Mississippi, and Eastern Texas, all of which have more than eight hundred individual claims pending.<sup>38</sup> Several other districts, such as Maine, Western Pennsylvania, Maryland, South Carolina, Virginia, Eastern Louisiana, Southern Texas, Northern Ohio, Eastern Tennessee, Southern Indiana, Northern California, and Southern Georgia, have approximately two hundred or more claims pending.<sup>39</sup>

Allocations of judgeships—but not of clerks and other support personnel—are determined in large part through the use of a measure of the relative difficulty of a court's caseload, called a "weighted caseload."<sup>40</sup> The case weights used to produce a weighted caseload were last determined in a time study conducted by the Federal Judicial Center in 1979, prior to the onset of major asbestos litigation. Under the categories used in the 1979 time study, asbestos cases are commonly classified as "Diversity-Product Liability Personal Injury" cases, to which a weight of 1.5119 has been assigned.<sup>41</sup> The table that follows shows some comparable case weights. These weights are based solely on estimates of the amount of judge time required for these classes of cases and do not refer to the time required of clerks, magistrates, or other court personnel.

No additional credit is allotted for cases with multiple parties, which are typical of asbestos litigation. Courts have to handle extraordinary numbers of motions, discovery issues, trials, and appeals in such cases, but do not receive additional credit for any additional judicial work created by the multiple plaintiffs and defend-

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38. R. Pellicoro & D. Hopkins, *Districts with Large Caseloads* (unpublished report, Administrative Office of the United States Courts, Clerks Division 1984).

39. *Id.*

40. S. Flanders, *The 1979 Federal District Court Time Study 2* (Federal Judicial Center 1980).

41. *Id.* at 4-6. This number represents an estimate that approximately four hours of judge time is spent on the average products liability case.

In some jurisdictions, asbestos cases are filed as admiralty cases and may be classified as "Federal Question-Marine Personal Injury" and given a weight of 0.7675.

## Selected Case Weights

Case Type	Weight
Federal Question--Marine Personal Injury <sup>1</sup>	0.7675
Diversity--Motor Vehicle Personal Injury	0.8917
Diversity--"Other" Personal Injury	1.1152
Diversity--Product Liability Personal Injury <sup>1</sup>	1.5119
U.S. Defendant--"Other" Personal Injury	2.5839
Airplane Personal Injury	3.0302
Antitrust	5.3499

SOURCE: S. Flanders, *The 1979 Federal District Court Time Study* 4-6 (Federal Judicial Center 1980).

<sup>1</sup>This category includes some asbestos cases.

ants. Designation of a case as a class action also does not change the case weight.<sup>42</sup> But the fact that class actions are treated similarly to cases with multiple parties does not dispose of the question, because class actions frequently involve only one defendant with one counsel, whereas multiparty asbestos litigation involves an average of twenty defendants' lawyers. Class actions also frequently fail to be certified as such under rule 23 of the Federal Rules of Civil Procedure.<sup>43</sup> Furthermore, because of the enormous potential liability in class actions, they usually result in a settlement. Whether asbestos cases demand more judicial resources than class actions or other products liability cases demand remains problematic and deserves further study.

Clerks report that asbestos cases present special problems because the number of parties creates additional work such as service of process on foreign defendants, filing and copying multiple cross-claims, changing multiple docket sheets after filing of an amended complaint, communicating rulings on motions, sending notices to parties, helping out-of-town counsel to understand and comply with local rules, indexing and cross-indexing cases, filing and docketing separate appeals from rulings on motions, and finding space to file the volumes of paperwork, including discovery materials. Many of these problems have been alleviated by the acquisition of word processors and adoption of local rules limiting the filing of discovery material.<sup>44</sup> Some courts also use master docket files rather

42. *Id.* at 56-60.

43. *Id.*

44. For further discussion of a controversy surrounding the decisions of some courts to preclude filing of discovery, see *Philadelphia Newspapers v. Publicker Industries*, 733 F.2d 1059 (3d Cir. 1984), discussed in Lauter, *Public, Press Access Backed in Civil Cases*, Nat'l L.J., May 28, 1984, at 10.

than filing a copy of duplicate pleadings in each individual file.<sup>45</sup> The use of liaison counsel serves to reduce the clerk's burden of providing notices and orders to all parties.<sup>46</sup>

The 1979 time study was designed primarily to allocate judge-ships. The system for allocation of clerk positions differs. Using a formula derived from a 1981 work measurement study that identified caseload and the number of judges as the major factors affecting demands on the clerks of court, the Clerks Division of the AO presents an annual request to Congress for allocations of positions for the coming year, based on a projection of caseload figures for that year.<sup>47</sup> Once the budget allocations are made, the division assesses the needs of the courts, based in part on the weights of their caseloads, and allocates the new positions. Under this system, if the statistics do not accurately portray the workload, the Clerks Division has some discretion to address problems as they arise. In the past, the division has adjusted the allocation of new positions to account for special difficulties in a class of cases. Adjustments in personnel, whether temporary or permanent, are based on present and future caseloads, not on past burdens.

The question remains whether the system of allocation of personnel adequately responds to the needs generated by asbestos litigation. Clearly, the initial onslaught of asbestos litigation generated intense demands on the resources of the clerk's offices and the judges to whom asbestos cases were assigned. As procedures become established and the cases become more routinized, the future needs for special personnel to deal with asbestos cases are less clear. To the extent that measures such as word processors and modifications of filing practices can be used to control the asbestos paperwork, they are, because of their flexibility, generally preferable to the addition of personnel.

The question whether the collection of statistics by cases rather than by individual claims disadvantages courts with high asbestos caseloads does not admit of a simple answer. There is no doubt that a case with 687 claimants presents extreme demands on both judicial and nonjudicial personnel in a district court. To what extent, however, do these demands differ from those of other aberrant cases, such as school desegregation cases or protracted antitrust cases?<sup>48</sup> Allocations based on the time study are necessarily de-

45. See, e.g., T. Lambros, E. Green, & F. McGovern, Ohio Asbestos Litigation Case Management Plan 15-16 (1983); see also Order, *In re* Related Asbestos Cases: Richard F. Gerry, No. C-83-6251 (N.D. Cal. Oct. 14, 1983).

46. See discussion at notes 62 to 68 *infra*.

47. See generally Administrative Office of the United States Courts, 1984 Annual Report of the Director 45.

48. See G. Bermant et al., Protracted Civil Trials: Views from the Bench and the Bar (Federal Judicial Center 1981).

## Discussion

rived from aggregate data tailored to show an average expenditure of time. Looking only at extreme cases distorts the picture. To find comparable data on multiple-party cases one must determine the extent to which other products liability cases involve multiple claimants or defendants. If "enterprise liability" and "market share liability" theories<sup>49</sup> become accepted in products liability cases, suits against multiple defendants will become the norm. There is also evidence that other environmental tort cases involve multiple plaintiffs.<sup>50</sup> Thus, comparisons of asbestos cases with other products liability cases as well as with other multiple-party cases will be necessary to test the proposition that existing case weights are inadequate to measure the special burdens of asbestos litigation. Such studies will likely be useful for analysis of judicial and clerical burdens imposed by other types of mass toxic tort cases.

## Summary

The following are my observations regarding the statistical issues:

1. Asbestos cases have imposed substantial clerical and judicial demands on some federal courts.
2. The asbestos caseload and its demands tend to be concentrated disproportionately in several districts.
3. Judicial case weight studies could not have taken into account the special demands of asbestos cases or other multiparty toxic tort cases.
4. Standardization and routinization may have reduced some of the pretrial burdens on judges in asbestos litigation.
5. There are short-term procedures for assessment of problems and interim alleviation of the major burdens on the clerk's offices imposed by asbestos litigation.
6. Further study is necessary to determine whether new case weights are needed for determining allocations of judicial and clerical personnel.

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49. Special Project, *supra* note 3, at 618-26.

50. See, e.g., *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (1,192 named plaintiffs in an atomic-testing case); Riley, *Lawyers Take Aim at Dioxin: A Silver Bullet—Or Merely a Dud?*, Nat'l L.J., July 23, 1984, at 1, col. 1 (172 plaintiffs in one dioxin trial in Charleston, West Virginia; 75 plaintiffs in a Sturgeon, Missouri, case).

## Standardized Pretrial Procedures

### Consolidation and Assignment

Faced with the flood of paperwork associated with asbestos cases, most of the courts in districts with substantial caseloads have devised standardized procedures for routine handling of pretrial issues. Generally, these courts have assigned the cases to a single judge for pretrial purposes.<sup>51</sup> Sometimes the court will designate a magistrate or special master to supervise discovery proceedings<sup>52</sup> or to develop standardized discovery materials.<sup>53</sup>

Rule 42(a) of the Federal Rules of Civil Procedure provides for consolidation of cases in these terms:

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any and all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Federal courts have consolidated asbestos cases primarily for pretrial purposes, focusing on the supervision of discovery.<sup>54</sup> Rule 42(a) authorizes more extensive consolidation, and some courts have taken advantage of that opportunity.<sup>55</sup>

51. See, e.g., Lambros et al., *supra* note 45, at 3; see generally Pellicoro & Hopkins, *supra* note 5.

52. See, e.g., *In re Massachusetts Asbestos Cases*, Pretrial Order No. 1, M.B.L. No. 1 (D. Mass. Feb. 7, 1979).

53. See, e.g., Lambros et al., *supra* note 45, at 3-6.

54. See, e.g., Pre-trial Order No. 1, *In re General Dynamics Asbestos Cases*, C.M.L. No. 1 (D. Conn. 1976) ("consolidated for purposes of discovery, and tentatively for purposes of trial"); see also *Neubauer v. Owens Corning Fiberglas Corp.*, 686 F.2d 570, 571 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983).

55. In the Eastern District of Texas, the district court has discussed with counsel the possibility of trying about fifty cases in a consolidated format on liability issues and considering damages in clusters of five to ten. *Judge Parker Mulling New Trial Approaches*, Mealey's Litig. Reps. Asbestos, July 27, 1984, at 933. Judge Parker finally decided on a group of thirty plaintiffs, all represented by the same counsel and each case involving similar injuries to insulation workers or their spouses. *Newman v. Johns-Manville*, No. M-79-124-CA (E.D. Tex. Oct. 24, 1984).

In Maryland, the district court invoked rule 42(a) to support the consolidation of five to eight claims for trial. The claims were grouped according to "(1) common worksite; (2) similar occupation; (3) similar time of exposure; (4) type of disease; (5) whether plaintiffs were living or deceased; (6) status of discovery in each case; (7) whether all plaintiffs were represented by the same counsel; and (8) type of cancer alleged (e.g., lung, colon, mesothelioma)." Memorandum Order, *In re All Asbestos Cases Pending* (D. Md. Dec. 16, 1983).

Pretrial consolidation of cases and assignment to a single judge or magistrate serve the important purpose of facilitating the active, unified management of the litigation without unnecessary duplication of effort. A single judge or magistrate can monitor the pretrial activities of counsel and rule on motions with a uniformity and consistency that rarely can be achieved by a multiplicity of judges. By monitoring a wide range of asbestos litigation, a single judge also accumulates thorough knowledge of technical issues common to the cases.

Such benefits, however, may be limited. The ultimate goal of case management is to set a firm, credible trial date and bring the case to a conclusion through either trial or settlement. If the judge to whom the asbestos cases have been assigned is the only person on the court with the ability to bring the cases to trial, the ultimate purpose of the assignment may be lost. The court simply may not be able to schedule enough cases for trial. If the pretrial issues have been assigned to a magistrate, the effects may be worse because of the inability of the magistrate to conduct trials without the consent of the numerous parties,<sup>56</sup> a consent unlikely to be given by the multiple parties in a typical asbestos case.

Assignment to a magistrate has additional advantages and disadvantages. The magistrate may become the only "specialist" in asbestos litigation; and other judges' lack of familiarity with asbestos cases may help to perpetuate the myth of the complexity of those cases. On the other hand, the magistrate may be better able to facilitate settlement precisely because the magistrate is unlikely to preside at trial.<sup>57</sup>

When properly balanced with the participation of judges who will be available to conduct trials in asbestos cases, use of a magistrate can help to clear the proliferation of motions that a multiplicity of parties creates. Delegation of duties to a magistrate should be seen as part of the process of bringing a case to a firm trial date and not as a substitute for judicial involvement in the process.

Courts have dealt with assignment of pretrial issues in several ways. One court has divided cases by work site and assigned a different judge to each site, presumably on the theory that similar discovery issues will relate to the records of the employer at one site.<sup>58</sup> That court also established a master trial calendar that dis-

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56. See 28 U.S.C. § 636(c).

57. See H. Will, R. Merhige, Jr., & A. Rubin, *The Role of the Judge in the Settlement Process* 18-19, 22 (Federal Judicial Center 1977).

58. See *Baltimore Multiple Litigation Nos. 1, 2, 3, and 4* (D. Md. 1980, 1981, 1983, 1984).

tributed all pending cases among seven judges on a rotating basis; one judge is assigned each month to hear two clusters of approximately five cases each.<sup>59</sup>

Several courts have assigned pretrial matters to one judge and then reassigned the cases to all members of the court for trial.<sup>60</sup> Other courts have assigned all cases to a single judge on the theory that the cases will settle as the staggered trial dates approach and the burden on the single judge will not be overwhelming.<sup>61</sup> (For further discussion of systems of calendaring cases for trial, see “Systems of Calendaring” *infra*.)

### Appointment of Liaison and Lead Counsel

Most courts that consolidate asbestos cases also make some provision for designation or selection of liaison counsel to coordinate pretrial matters such as encouraging joint filings and appearances among counsel for each side, scheduling depositions, and distributing notices. Some courts also make provision for lead counsel to appear as representatives of the interests of all parties similarly aligned. One court approved a committee structure to coordinate liaison functions and discovery.

The order of the United States District Court for the Eastern District of Virginia illustrates the coverage of a pretrial order regarding organization of counsel:

(c) [C]ounsel shall confer and name one person on each side as liaison counsel for the handling of scheduling of hearings, discovery, motions, determination of issues, court appearances, interrogatories, depositions, briefing and arguing motions, production and examination of documents, obtaining independent medical examinations, requests for admissions, and such other matters as may be proper.

. . . . Liaison counsel have explicit responsibility to receive and distribute all notices and documents from the court or other parties.<sup>62</sup>

The Eastern District of Virginia’s order also provides for designation of a lead and a backup counsel “where the interests of more than one party are the same.”<sup>63</sup> Such counsel are to represent the

59. Memorandum Order, *In re All Asbestos Cases Pending*, Attachments A, B, C (D. Md. Dec. 16, 1983).

60. The U.S. district courts for the Western District of Pennsylvania, the District of New Jersey, and the Eastern District of Texas follow this approach.

61. The U.S. district courts for the Northern District of Ohio and the District of South Carolina follow this procedure.

62. *Bailey v. Johns-Manville*, No. 76-155NN, Initial Pretrial Order at 4, 6-7 (E.D. Va. Aug. 25, 1977).

63. *Id.* at 4.

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common interests; however, designation of lead and backup counsel "shall not preclude the counsel of any party from participating to the extent necessary to represent the individual interest of his client as long as said participation does not involve unnecessary duplication."<sup>64</sup> The lead counsel is given authority to speak for all parties represented; any party dissenting from the position of the lead counsel must express that dissent prior to the time designated for further action on the position.<sup>65</sup> The lead counsel is also responsible for conducting depositions and acting as spokesperson at all conferences and meetings, subject to the need of others to represent their individual clients.

The use of liaison and lead counsel affords the court a structure for dealing with counsel for both sides on a more manageable basis, without constant repetition of argument or proof. The court is able to control "unnecessary duplication," while allowing room for a limited amount of individual representation. Encouraging cooperation among counsel may also improve coordination of settlement efforts on each side.

A court can anticipate disputes about who will serve as lead or liaison counsel and who should pay for the services. The Eastern District of Virginia offers some flexibility by permitting rotation of the positions.<sup>66</sup> In the Middle District of North Carolina, the court recognized the organization of a steering committee to coordinate the defendants' interests and allowed the rotation of the positions of liaison counsel and spokesperson.<sup>67</sup> In Massachusetts, the district court provided that "liaison counsel shall be reimbursed periodically, not less often than every three months, by defendants for the expense and time involved in preparation, duplication, and distribution of court orders, notices, and other papers . . . and for other services rendered pursuant to the Order of the Court."<sup>68</sup> The liaison counsel submits a statement of expenses to defendants for payment after it has been reviewed and approved by the court. Absent a court order, any inequities in the costs of these efforts are to be resolved among the parties.

As was noted earlier, voluntary efforts of counsel for plaintiffs and defendants to coordinate their respective positions have increased as experience with asbestos litigation has grown. Court

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64. *Id.* at 5.

65. *Id.*

66. *Id.*

67. *In re Asbestos Litig.*, Order Coordinating Proceedings, MDCP-82-1, at 5-6 (M.D.N.C. Feb. 26, 1982).

68. *In re Massachusetts Asbestos Cases*, M.B.L. No. 1, Order at 2 (D. Mass. May 8, 1979).



orders recognizing those efforts and approving their structure can stimulate their further growth.

### Scheduling

Some courts incorporate a schedule into their pretrial orders. In the Northern District of Ohio, the court established a comprehensive schedule for all asbestos cases, including future filings. The schedule provides for a trial within 480 days of the filing of the complaint and a concentrated effort to settle the case at a settlement status conference to be held 120 days before trial and prior to some of the major discovery events.<sup>69</sup> The District of Maryland also prescribes a detailed pretrial schedule for the ten months preceding trial, setting specific deadlines for each form of discovery, for amendments of pleading, and for pretrial motions.<sup>70</sup>

The Western District of Pennsylvania imposes a similar schedule and includes provision for a final pretrial conference after the parties file a detailed pretrial stipulation specifying the evidence to be presented at trial, voir dire questions, and proposed jury instructions. A party that fails to comply runs the risk of sanctions.<sup>71</sup> In a separate order, the court specified that it will apply the sanction of preclusion of evidence when a party fails to submit a timely or complete pretrial statement.<sup>72</sup>

### Standardized Sanctions: Discovery

Rules 16(f) and 37(b)(2) of the Federal Rules of Civil Procedure authorize the court to impose specific sanctions for failure to comply with a scheduling, discovery, or pretrial order. Rule 11 permits imposition of sanctions for improper certification of pleadings. In the Western District of Pennsylvania, the court has issued an order that facilitates the imposition of sanctions for violations of discovery orders.<sup>73</sup> Other courts have made it clear in their orders

69. Lambros et al., *supra* note 45, at 30-31.

70. Pre-Trial Schedule for Asbestos Cases, *In re* Baltimore Asbestos Litig., BML-1, 2, 3, 4 (D. Md. Dec. 16, 1983). The court states that the schedule "shall be adhered to strictly by all parties and their counsel." *Id.* at 2.

71. *In re* Asbestos Litig., Order of Court, Misc. No. 8482 (W.D. Pa. July 1, 1982).

72. Memorandum Order, *In re* Asbestos Litig., Misc. No. 8482 (W.D. Pa. March 29, 1984), citing *In re* Japanese Elec. Prods., 723 F.2d 238, 259 (3d Cir. 1983), for its explicit approval of a final pretrial order "with preclusive effect."

73. If a party files a motion to compel discovery or a motion for sanctions, that party must file a certificate of compliance with a local rule and an affidavit of costs and attorneys' fees related to the motion. Sanctions are automatically imposed unless the respondent files a counteraffidavit sufficient to raise an issue about the motion or about the reasonableness of the fees and costs. If a hearing is held and the movant prevails, the court awards additional fees and costs engendered by the hearing. If the respondent prevails on the merits of the motion, the court awards

that sanctions will be applied for failure to comply with scheduling orders.<sup>74</sup>

### Standardized Sanctions: Rule 11

Faced with a considerable number of situations in which plaintiffs' counsel failed to uncover sufficient evidence of product identification to justify having named a company as a defendant, the court in the Western District of Pennsylvania devised a method of standardizing the imposition of sanctions for improper certification of the pleadings by plaintiffs' counsel under rule 11 of the Federal Rules of Civil Procedure.<sup>75</sup>

Upon the granting of a defendant's motion for summary judgment because of lack of product identification or upon a voluntary dismissal of a defendant by the plaintiff, the court automatically invokes a standard order. This order requires plaintiffs' counsel to provide an affidavit setting forth the specific legal and factual basis for identification of the defendant's product as one to which the plaintiffs had been exposed. The affidavit is to be submitted within ten days of a voluntary dismissal of a defendant or the granting of a motion for summary judgment based on insufficient product identification, but it must refer to facts known at the time of the inclusion of the defendant in the action and must include "the attorney's own statement of the investigation and research upon which the inclusion of the defendant or third-party defendant was based."<sup>76</sup> If the attorney fails to file the affidavit or fails to demonstrate that the joinder complied with rule 11, "the court will impose such sanctions, including, inter alia, attorneys' fees and costs, as appear to be warranted."<sup>77</sup>

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fees and costs against the original movant. If the respondent shows that the costs and fees are not fair and reasonable, the movant forfeits the right to any fees or costs. Memorandum Order, *In re Asbestos Litig.*, Misc. No. 8482 (W.D. Pa. July 27, 1982).

74. See, e.g., Lambros et al., *supra* note 45, at 23, 40, 57, 74, 91; *In re Asbestos Litig.*, Standing Order 226 (E.D. Tex. July 7, 1982); *Bailey v. Johns-Manville Corp.*, Initial Pretrial Order 214 (E.D. Va. Aug. 25, 1977).

75. Rule 11 provides, in pertinent part, that

[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

76. *In re Asbestos Litig.*, Memorandum Order, Misc. No. 8482 (W.D. Pa. Dec. 13, 1983). The court permitted a grace period of thirty days from the date of its order for plaintiffs to dismiss voluntarily any defendants joined improperly. *Id.*

77. *Id.* Under the terms of rule 11, however, an attorney might be able to show that joinder of any defendant who manufactured asbestos products is supported by

Such an order sends a clear signal to counsel that the court will not tolerate the proliferation of defendants without regard to evidence that their product may have damaged the plaintiff. The order also tends to mitigate the harshness of imposition of sanctions by affording attorneys a clear description of the conditions under which sanctions will be imposed.

### Standardization of Pleadings and Discovery

Because asbestos cases have repetitious elements of routine products liability cases, courts and counsel have been able to develop standardized pleadings and discovery documents. Such routinization serves to reduce the costs of litigation to the parties and reduce or eliminate disputes about some subjects, such as discovery.

Courts have standardized pleadings in several ways, generally with the assistance of committees of counsel for plaintiffs and defendants. Some courts have required the submission of complaints or affidavits containing standard allegations, such as plaintiff's diagnosis, alleged period of exposure to asbestos, occupation, and social security number.<sup>78</sup> Some courts use form discovery documents to standardize factual matters, and other courts use both affidavits and form interrogatories and requests for production of documents.<sup>79</sup>

### Standardized Motions and Rulings

To prevent the proliferation of routine motions that are subject to routine responses, some courts have ordered that specific motions be deemed to have been filed. For example, in the Western District of Pennsylvania, the court ordered that "all defendants

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existing law, or a good faith argument for extension of existing law, on market share liability; *see, e.g.*, *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1358-59 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982), and cases cited in Special Project, *supra* note 3, at 622 n.279.

78. *See, e.g.*, BML-1, Discovery Order No. 1 § 3 (D. Md. Dec. 17, 1980); *Wedgeworth v. Armstrong Cork*, Order (D. Miss. Jan. 4, 1980); *In re Asbestos Litig.*, Standing Order for Asbestos Cases § 1 (E.D. Tex. July 7, 1982) (affidavit with detailed information about plaintiff's claim, treatment, and damages, as well as complete answers to master interrogatories—required prior to filing unless the statute of limitation is about to run or testimony needs to be perpetuated).

79. *See, e.g.*, *Lambros et al.*, *supra* note 45, Forms 1-6; *In re Asbestos Litig.*, Standing Order for Asbestos Cases § 1(e) and Attachment (E.D. Tex. July 7, 1982). It should be noted that a rigid requirement of filing an affidavit raises questions of conformity with rules 3, 7, and 8 of the Federal Rules of Civil Procedure, whereas a requirement of responding to form discovery pleadings seems to be clearly within the purview of rules 16 and 42(a). The affidavit requirement may also be seen as creating an obstacle to access to the federal courts, *cf.* *Boddie v. Connecticut*, 401 U.S. 371 (1971), whereas the form discovery pleadings have no such effect.

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and third-party defendants . . . shall be deemed to have filed cross-claims for contribution and indemnity against each other and to have filed answers to all crossclaims, denying liability for contribution or indemnity, and that said parties need not file individual crossclaims or answers thereto."<sup>80</sup> Later, the court carried this idea to its logical conclusion and ruled that

when any defendant or third-party defendant in any of the asbestos cases files a motion, the granting of which would in normal course inure to the benefit of the other defendants or third-party defendants, the motion will be treated as having been made for the benefit of all defendants and third-party defendants . . . .<sup>81</sup>

In its standing order for asbestos cases, the United States District Court for the Eastern District of Texas listed several standard motions deemed to have been made and ruled upon. For example, the court deemed to have denied motions for summary judgment based on collateral estoppel<sup>82</sup> and on lack of evidence of exposure to the defendant's product and granted leave to assert punitive-damages claims against certain defendants and to use depositions from other cases.<sup>83</sup> The court also encouraged parties to file motions jointly and to designate a lead counsel to present arguments, without prejudice to the rights of each party to present nonduplicative arguments.<sup>84</sup>

## Coordination with State Courts

Because asbestos cases are usually diversity cases, a substantial number of them are filed in the state courts.<sup>85</sup> Some federal courts have undertaken formal steps to coordinate activities with state courts. The United States District Court for the Eastern District of Virginia and the circuit courts for the City of Norfolk and the City of Portsmouth conferred and issued a consolidated pretrial order covering a wide spectrum of pretrial activities.<sup>86</sup> Judge Thomas D.

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80. Order of Court, *Johnston v. Johns-Manville Prods. Corp.* (W.D. Pa. Jan. 23, 1980). By order of April 3, 1980, the court added that all affirmative defenses would be deemed to have been raised in response to the cross-claims and ordered that plaintiffs' counsel attach a copy of the order to any future complaints. By order of September 20, 1983, the court further amended the order to require that any future cross-claim for indemnity be filed against a particular defendant and pleaded with specificity.

81. Order of Court, *Ryden v. Johns-Manville Prods. Corp.* (W.D. Pa. May 19, 1981).

82. See *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982).

83. *In re Asbestos Litig.*, Standing Order § 11 (E.D. Tex. July 7, 1982).

84. *Id.* at § 13.

85. See, e.g., Parrish, *supra* note 2, at 5.

86. *Bailey v. Johns-Manville*, Initial Pre-Trial Order, No. 76-155-NN (E.D. Va. Aug. 25, 1977).

Lambros of the United States District Court for the Northern District of Ohio issued a "Federal-State Memorandum of Accord on Asbestos Litigation" and considered the joint hiring of a special master.<sup>87</sup>

Coordination with state courts often becomes critical in scheduling of trials because the same counsel are frequently involved in both courts. In addition, development of standardized pleadings and orders presents an opportunity to economize and avoid duplicative efforts.

### Coordination Among Federal Courts

Frequently, courts have devised these pretrial orders independently, without awareness of the activities in other districts outside the state. Despite this independence of action, the orders are remarkably similar in scope and general content. There is a special need for coordination of efforts in cases that involve some common factors but are not sufficiently similar in regard to facts and law to qualify for multidistrict litigation<sup>88</sup> or class action treatment.<sup>89</sup>

Duplication of effort runs counter to one of the primary purposes of use of standardized procedures—the efficient allocation of scarce judicial resources for the resolution of legal disputes. Unsystematic development of a myriad of similar orders stands in contrast to reports of increasing cooperation and sharing of information and form pleadings within the plaintiffs' bar and the defendants' bar. There are at least two commercial information services that disseminate legal and factual materials of interest to attorneys in asbestos cases. Prior to the Center's asbestos conference, no comparable mechanism served to identify and disseminate information about standard orders and other procedural devices that would be useful to members of the federal judiciary.

In summary, courts have experimented with efforts at standardization of all aspects of asbestos litigation. Coordination of efforts among federal district courts may facilitate development of standard procedures and forms. The similarity and apparent success of

87. *In re Ohio Asbestos Litig.* (U.S.D.C., N.D. Ohio; Cuyahoga Cty. C.P. July 14, 1983); see *Lambros et al.*, *supra* note 45, at 4-5.

88. See *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.D.L. 1977).

89. See *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984); see also *In re N.D. Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1111 (1983). *But cf. In re "Agent Orange" Prods. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980), *cert. denied sub nom. Diamond Shamrock Chem. Co. v. Ryan*, 104 S. Ct. 1417 (1984); see also *In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chem. Co.*, 725 F.2d 858 (2d Cir. 1984) (class certification for punitive damages under rule 23(b)(1)(B)).

### *Discussion*

these efforts to standardize confirm my basic finding that asbestos cases are routine cases cloaked in the apparent complications presented by multiple parties. Once active steps are taken to reduce the duplication inherent in multiple representation, asbestos cases become manageable.

## **Firm and Credible Trial Dates**

Paradoxically, experience with asbestos litigation both confirms and questions the conventional wisdom of case management, namely, that “setting early and firm trial dates is an effective control” against unreasonable delays in the docket<sup>90</sup> and that calendaring of cases should be done in a way that produces a reasonably certain and realistic trial date.<sup>91</sup> Apparently because asbestos cases were originally viewed as complex, or at least unwieldy, few trials were set. As standardized pretrial practices have reduced the complexities to manageable proportions, a number of courts have been able to establish firm, if not “early,” trial dates. Courts set these trial dates after completion of pretrial activity, culminating a natural progression of active judicial control of the cases.

The relationship between the number of cases set for trial and the judicial resources available for trials raises questions about how credible the trial date must be. Similarly, the relationship of the firmness of the trial date to its apparent ability to stimulate settlement discussions raises questions about how flexible the trial date might be. Nonetheless, discussions at the asbestos conference confirmed that courts that set relatively firm and relatively credible trial dates stimulate settlement negotiations and termination of cases through trial or settlement. Courts that have been unable to establish such trial dates exhibit a slow pace of litigation. In some of the latter courts, the lack of trial scheduling has produced localized crises in the management of asbestos-related litigation.

### **Firmness of Trial Date**

Experiences in at least two of the district courts represented at the asbestos conference suggest that some flexibility in the firmness of the trial date is acceptable. In one court, the judge assigned to asbestos cases set a “term” in which forty to fifty asbestos cases were scheduled for trial. The court established its roster of cases

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90. S. Flanders, *Case Management and Court Management in United States District Courts* 33 (Federal Judicial Center 1977).

91. *Id.* at 52-53.

six weeks prior to the beginning of the term, and the plan was to try all the cases in sequence. The judge's practice is to meet with all of the attorneys and deal with problems; he rarely grants continuances.

In the asbestos cases, the judge announced plans to consolidate fourteen cases, clustered by plaintiffs' place of employment. About one-third of the cases settled before the start of the term. The remainder settled after jury selection had commenced.<sup>92</sup>

During the pretrial process, the court ruled on some motions; however, the court did not exert strong pressure on the parties to settle. The judge's plan was that he would serve as a mediator after the parties had bargained to impasse, suggesting a formula for settlement only after the parties had exhausted their own efforts.

In a variant of this process, the same court set three special terms of court of 20 asbestos cases each in three successive months. If the first 20 cases settled, the following month's cases would not be expedited. If some cases were not concluded during the first month, they would be added to the following month. All of these cases settled. The court has terminated two-thirds of its asbestos case docket and is probably the most current court in the nation, having terminated at least 273 out of 454 cases. About 5 of those cases were tried to conclusion, and there were no jury verdicts for the plaintiff.

In another court, approximately seven hundred cases were set for trial at a fixed time; the plan was that four judges would hear the asbestos cases until completion while other judges handled the criminal docket. One of the judges played an active role in settlement negotiations; he reviewed a significant sample of the cases, evaluated the medical evidence, and assigned a dollar figure to each case. He then aggregated these figures, averaged them, and multiplied the average by the number of plaintiffs to determine a range of values for the total case. With the permission of counsel, the judge met privately with the lawyers to determine their positions. After the judge's active involvement in the negotiations, all the cases were settled at a figure within the court's estimated range of values.<sup>93</sup>

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92. The court used a system of selection of multiple panels of jurors at the outset of the term. The judge's practice is to complete voir dire during the first day or two of the term; juries are then available to hear cases in sequence. Use of this procedure probably enhances the credibility of the court's intent to try cases as scheduled.

93. Repetition of this plan was thwarted, however, when the circuit court granted a stay of the trial date. By the time the stay was lifted, the caseload of the court had mushroomed, and the assistance of the three judges was no longer available to the single judge to whom the asbestos cases had been assigned.

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In both of these courts, the firmness of the trial date was less than absolute. In the first, only the cases at the top of the list for the term could truly be said to have had fixed dates. The other cases were to be tried on a "trailing docket" by a single judge. In the second court, only a smattering of the seven hundred cases could have had a fixed trial date. The parties could have held out for full trials in the later cases and thus put off those trials for a long period of time. The intention to try some test cases, however, raises the risk of all-or-nothing success or failure for both parties. This raising of the stakes may be the driving force behind settlement of similar cases when the first of a set is called for trial. The experience of these two courts is that setting a reasonably firm trial date for the first of a series of cases facilitates settlement of the entire series. A small expenditure of judicial resources appeared to result in a major reduction in the asbestos caseload of those courts.<sup>94</sup>

### **Credibility of Trial Date**

The two brief case histories just presented suggest that the scheduled trial date need not be absolutely credible. In the first court, it was apparent that a single judge would not be able to try fifty or sixty cases during a single one-month term of court. In the second court, four judges would have had to devote a long period of time, perhaps a lifetime, to the trial of seven hundred cases. It may be sufficient to set a firm trial date for a cluster of cases involving the same counsel and then proceed with preparatory work, such as the final pretrial conference and jury selection. Participants at the asbestos conference indicated that various factors were important in the settlement of asbestos cases, especially the quality and experience of attorneys on each side and their ability to communicate with co-counsel in allocating the settlement among their clients. All participants agreed that setting a firm trial date is the primary catalyst to settlement.

### **Timing of Trial Date or Settlement Efforts**

All of the conference participants agreed on the importance of giving counsel sufficient time and information to evaluate a case before pressing forward with settlement efforts. There was dis-

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94. This initial observation assumes that other factors, such as the skill of the attorneys and the flexibility of the clients, are favorable. Where attorneys' evaluations of the cases are widely divergent or where the client's expectations are unrealistic, those factors may predominate.



agreement, however, as to the most effective ways to accomplish that end.

In the Ohio Asbestos Litigation (OAL) Case Management Plan, created for District Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio, Professors Eric D. Green and Francis E. McGovern formulated a strategy for developing sufficient information for counsel to evaluate a case before the parties incur major expenses for depositions and trial preparation.<sup>95</sup> Under the OAL plan, the parties spend the first 280 days after the complaint is filed responding to pleadings and engaging in standardized discovery, including a deposition of the plaintiff and co-workers and extensive exchanges of information relating to product identification. On the 330th day, the plaintiff is expected to submit a demand. On the 360th day, a settlement conference is scheduled. Trial is scheduled for the 480th day. Discovery relating to expert witnesses is deferred until after the settlement conference.<sup>96</sup>

The reason for this schedule is to give the parties sufficient information to evaluate the case, including damages, before they incur the major costs of discovery of expert medical and scientific evidence. The bargaining range will be greater before the parties incur such costs than it will be after such costs are incurred.<sup>97</sup>

The issue is whether a trial date 120 days after the settlement conference is sufficiently close to induce the parties to settle. Participants at the asbestos conference expressed considerable skepticism about the prospects for success of this method outside of the court of its origin. The primary reason for this skepticism was that the plan assumes that counsel will make the cost savings known to the parties and that these savings will outweigh the savings to defendants resulting from delayed settlements. Some of the participants posited that attorneys would not communicate this information to their clients in a positive manner and that the interests of both the clients and the attorneys might be served by prolonging the litigation.

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95. Lambros et al., *supra* note 45, at 10-12.

96. *Id.* at 30-31. In addition, the special masters developed a computer-based method of comparing the cases with prior settlements. Approximately 350 items of information, such as age, sex, dependents, period of projected loss of earnings, diagnosis, and prognosis, are fed into the computer and compared with information from settled cases. This results in identification of the judgments in the three cases most similar to the plaintiff's, information that is then communicated to the parties. The purpose is to create a realistic floor and ceiling for the initiation of negotiations.

97. See generally G. Bellow & B. Moulton, *The Lawyering Process* 479-95 (1978); Note, *An Analysis of Settlement*, 22 *Stan. L. Rev.* 67, 70-80 (1969).

Surviving its initial test, the OAL plan produced settlements in the first cluster of ten cases.<sup>98</sup> Future results from the Northern District of Ohio, and perhaps from other courts, will be required to test the viability of this plan. In the interim, the traditional approach focuses on the initiation of final pretrial preparation, such as requiring submission of a pretrial statement, as the demarcation point for serious negotiations.

### **Judicial Involvement in Settlement**

Judicial involvement in settlement negotiations is as varied as the personalities and experiences of judges. Such involvement ranges from serious preparation for trial (with little or no discussion of settlement) to intense participation in case evaluation and allocation of payments among the parties. According to reports from participants at the asbestos conference, however, the type of judicial involvement appears to have only a marginal effect on the rate of settlement of asbestos cases. For example, one judge avoids settlement discussions and devotes his primary attention to preparation for trial. He has tried a large number of cases to verdict and has experimented with consolidation of cases. The judge reports that approximately four out of five cases on his trial docket settle on the eve of trial; however, this trial-to-settlement ratio appears to be only slightly higher than that of courts that actively promote settlement.<sup>99</sup>

### **Clustering of Cases**

Courts may cluster cases differently for trial than they do for settlement. Cases for trial are grouped according to such factors as evidentiary issues and representation by counsel. Generally, courts strive to combine cases involving similar diseases from the same work site and involving the same trial counsel. One court includes a range of cases, from the least serious to the most serious, in each group, thereby giving each side an incentive to settle the entire package.<sup>100</sup> In other courts, cases may be grouped according to

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98. *First Ten Cases in Cleveland Asbestos Suits Settled in Major Breakthrough*, 2 *Alternatives to the High Cost of Litigation* 1, 3 (June 1984).

99. For most courts, precise information on asbestos trials and settlements is not available at this time. From reports at the asbestos conference, one can infer the rate of trial to settlement in several courts. In one the rate is approximately 3 percent of all terminations. In two other courts, no trials have been held.

In the federal courts for 1983, the percentage of all cases that reach trial is 5.4. Administrative Office of the United States Courts, 1983 Annual Report of the Director 272, table C4. Of the total dispositions that involve court actions, 10.1 percent result from jury or nonjury trials. *Id.*

100. Courts have recognized that an ethical problem is involved in the distribution of a lump-sum settlement to multiple plaintiffs. In one case, the court appoint-

work site, occupation, time of exposure, disease, and counsel.<sup>101</sup> None of the courts group cases of living plaintiffs with those of the estates or survivors of deceased plaintiffs.

In theory, clustering cases for trial and clustering them for settlement are not incompatible; in practice, it may be difficult to implement separate tracks for trial and settlement because of the strong correlation between settlement and establishment of a firm trial date. In a plan such as the OAL one, in which there are 120 days between the major settlement conference and the trial, the cases might be reorganized for trial if settlement efforts fail.

### Ruling on Motions

Several conference participants noted the consequences of deferring rulings on pretrial motions until a trial is imminent. Not only does the court conserve its own resources, but it also facilitates settlement by maintaining an air of uncertainty about the outcome of the case and by including a maximum number of parties in the case. Any unfairness to a party might be remedied by imposition of sanctions after a favorable ruling is made on the motion (see "Standardized Sanctions: Rule 11" *supra*).<sup>102</sup>

### Alternative Dispute-Resolution Mechanisms

In the federal courts, alternative dispute-resolution mechanisms, such as summary jury trials, court-annexed arbitration or mediation, or minitrials, have not been applied until very recently to asbestos cases. In the OAL plan, the court notes that "[m]ost of these alternative dispute resolution processes have been developed and applied primarily in situations that differ in many important respects from asbestos litigation."<sup>103</sup> Accordingly, the court con-

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ed two retired state court judges to distribute a settlement fund to numerous plaintiffs. See also *Inside Agent Orange*, Nat'l L.J., May 21, 1984, at 1, col. 1. In that settlement, the parties and the court created an administrative structure to distribute the fund.

101. See, e.g., Memorandum Order, *In re All Asbestos Cases Pending* (D. Md. Dec. 16, 1983).

102. This approach would not apply, of course, to standardized motions and rulings, discussed earlier (see notes 80-84 and accompanying text) and below (see note 113 and accompanying text).

103. Lambros et al., *supra* note 45, at 28. In a descriptive analysis of the summary jury trial procedure, the authors conclude that summary jury trials are applicable to "a fairly narrow profile of cases," generally those involving only one plaintiff and one defendant. M.-D. Jacobovitch & C. Moore, Summary Jury Trials in the Northern District of Ohio 32 (Federal Judicial Center 1982).

cludes that "alternative dispute resolution processes will be applied to OAL cases only (1) on an individualized or small group basis, (2) after careful tailoring of the process to the specific case, and (3) with the appropriate cooperation of counsel."<sup>104</sup> Routine use of alternative dispute-resolution mechanisms awaits the results of developments in the Northern District of Ohio, where summary jury trials are being used in asbestos cases. The Asbestos Claims Facility to be created by defendants and their insurers also provides for alternative dispute-resolution mechanisms.

There is room for skepticism about the applicability of alternative dispute-resolution mechanisms to asbestos litigation. In the Court of Common Pleas of Philadelphia, Judge Harry A. Takiff devised a program called the Philadelphia Non-Jury Trial Program.<sup>105</sup> Asbestos cases were presented for bench trials, using a reverse bifurcation in which the issue of damages was tried prior to the issue of liability. The theory was that a reason for delay in settlement is a lack of information about the value of the case. If settlement was not reached after the damages portion, liability was tried. If no settlement was reached after the bench trial, either party had a right to a trial de novo.

After experience with 234 nonjury verdicts, the court suspended operation of the program because of the number of appeals for a trial de novo—approximately 130, or 55 percent of the total.<sup>106</sup> In Judge Takiff's opinion, the delay in scheduling jury trials on appeals from the bench trial thwarted the successful operation of the program; the judge believes that the jury trial should be held within fifteen days of the appeal of the nonjury verdict.<sup>107</sup> Prior to the program's suspension, the nonjury trials lasted either a day or a half-day, compared with a week or more for jury trials. Originally, the nonjury trials lasted two to two and one-half days.<sup>108</sup>

Given the experience of the Philadelphia program and the federal courts' lack of experience with alternative dispute-resolution mechanisms in the context of asbestos litigation, the most that can be said is that the applicability of such alternatives to asbestos litigation has not been proven. Assuming that the parties have a right to a de novo jury trial,<sup>109</sup> one must question whether mandatory

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104. Lambros et al., *supra* note 45, at 28.

105. See generally Judicial Administration Working Group on Asbestos Litigation, Final Report With Recommendations 15-16 (National Center for State Courts 1984).

106. Judge Takiff Reviews Philadelphia Non-Jury Trial Program, Mealey's Litig. Reps. Asbestos, July 13, 1984, at 872.

107. *Id.* at 872-73.

108. *Id.* at 873.

109. See generally G. Bermant et al., *supra* note 48, at 6-9.

nonjury procedures are economical. A hypothetical example illustrates this point. Assume a caseload of one hundred cases and that one-half of the cases (the approximate rate in the Philadelphia program<sup>110</sup>) proceed to alternative dispute-resolution proceedings that require one day each of judicial time. Conducting the alternative proceedings might require more judicial time than would conducting jury trials. The fifty alternative proceedings would require fifty days of trial time plus an unknown number of days for those cases in which one of the parties exercises the right to a jury trial. Assuming a traditional system and a 90 percent settlement rate, the ten cases that went to trial would require fifty days of trial time at a rate of one week per case. Although creation of an alternative system made sense when asbestos cases showed strong resistance to settlement, such a system may be unnecessary and even counterproductive as settlement of asbestos cases becomes more routine.

In summary, even the experience in Philadelphia with an alternative dispute-resolution mechanism demonstrates the validity of the general principle of case management that setting a firm and credible trial date is the most effective stimulus to final disposition of a case. Insertion of a procedure prior to the trial may only serve to prolong many of the cases and siphon resources away from traditional judicial functions such as ruling on motions and trying cases. Experience with asbestos litigation to date tends to show that the trial date need not be absolutely firm or credible as long as the court demonstrates a concrete commitment to proceed to trial in the near future and takes steps to uphold that commitment.

### Standardized Trial Procedures

The length of recent asbestos trials at which conference participants presided ranged from five days to five weeks. In the court with the shorter trials, application of some standard as well as some innovative case management procedures appears to account for much of the difference. Use of these procedures seems to enhance the ability of a court to schedule and conduct trials of asbestos cases; it also augments the credibility of trial dates that the court sets.

### Clustering and Consolidation

As discussed earlier,<sup>111</sup> most federal courts have grouped asbestos cases in clusters that are appropriate for trial. Clusters of five

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110. Judicial Administration Working Group, *supra* note 105, at 15-16.

111. *See* discussion at notes 100 and 101.

## *Discussion*

to ten cases are common; one court recently conducted the first phase of a trial of thirty cases by a single jury.<sup>112</sup> That court has also experimented with the use of multiple juries and has considered the consolidation of up to fifty cases. Use of selection factors such as similarity of injuries, common work sites and product exposure, and identity of plaintiffs' counsel facilitates the efficient presentation of evidence. For example, once records of the products used at a work site during a period of time have been identified and introduced into evidence for one worker, they need not be introduced for each worker at the same work site during the same time period.

### **Lead Counsel**

Having the same counsel for all the plaintiffs in a group should result in a unified trial plan and permit the court to hold one individual accountable for managing the flow of evidence. To achieve equivalent results on the defense side, some courts have formulated trial ground rules that require defendants to select individuals to represent all the defendants in opening and closing arguments and cross-examination of witnesses. Only if a witness specifically identifies a defendant's product can that defendant's counsel conduct a supplemental cross-examination. Even if the counsel assigned to a particular witness has settled a client's case, the court expects that lawyer to follow through on the examination of that witness.

### **Motions In Limine**

As more and more asbestos cases come to trial, the courts will develop standardized responses to the standard motions in limine, dealing with issues such as the admissibility of correspondence or depositions used in virtually all asbestos litigation.<sup>113</sup> There are clear advantages to adoption of districtwide rulings. Because of the high likelihood of settlement of asbestos cases, courts generally do not rule on such motions until just prior to voir dire.

### **Voir Dire**

Time spent on jury selection can be greatly reduced through the use of several techniques. First, a court can select multiple juries from a single venire to hear a series of asbestos cases. One court calls in several hundred jurors and selects individual juries of six and one alternate. All but one of the juries are put on call. When

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112. *Newman v. Johns-Manville*, No. M-79-124-CA (E.D. Tex. Oct. 24, 1984).

113. Special Project, *supra* note 3, at 698-99.

one case is finished, the next jury is available immediately. Another court uses the same process to select three juries at one sitting. Both courts report that this voir dire procedure takes less than one day.

Second, a court can streamline the participation of counsel in the jury selection process. For example, one court allows counsel ten minutes each to question the panel. Other courts report that they use no time limits because case law in their circuit discourages such limits. They do, however, impose an implicit limitation by requiring written questions.

### Jury Instructions

In some asbestos trials, courts have provided jurors with a brief set of informal instructions at the outset of the case; these instructions describe the general type of case and present an overview of the applicable law. Use of preliminary jury instructions is also a common practice in most protracted civil trials, and some courts use them in all trials.<sup>114</sup> Presumably such instructions outline the general rules for the jurors and give them a cognitive map for organizing the evidence as they hear it. Social psychological theory and experimental data support the validity of such a practice.<sup>115</sup>

### Offensive Collateral Estoppel and Judicial Notice

Some decisions have relied on the concept of offensive collateral estoppel to preclude relitigation of basic issues of liability in asbestos cases, including the danger of asbestos, the lack of adequate warning by the manufacturers of asbestos products, and the causal relationship between exposure to asbestos and the malady of asbestosis. Alternatively, a court could take judicial notice of the causal relationship between asbestos products and asbestosis.<sup>116</sup>

114. G. Bermant et al., *supra* note 48, at 50.

115. I. Horowitz & T. Willging, *The Psychology of Law* 186-91 (1984).

116. In *Hardy v. Johns-Manville*, 509 F. Supp. 1353, 1360-63 (E.D. Tex. 1981), *reversed*, 681 F.2d 334 (5th Cir. 1982), the trial court held that the decision in *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), precluded relitigation of the issues of dangerousness, failure to warn, and causation of diseases such as asbestosis or mesothelioma. The United States Court of Appeals for the Fifth Circuit ruled that offensive collateral estoppel was not properly applied because some of the defendants had not participated in the *Borel* case and because the jury verdict in that case was ambiguous as to some crucial findings. See generally Note, *Collateral Estoppel in Asbestos Litigation*, 14 *Env'tl. L.* 197 (1983); Special Project, *supra* note 3, at 659-90. The Fifth Circuit also ruled that judicial notice was not yet appropriate in asbestos cases because the evidence was not undisputed or self-evident. *Hardy*, 681 F.2d 334, 347-48 (5th Cir. 1982).

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As asbestos litigation continues and more verdicts and judgments establish facts, collateral estoppel and judicial notice may be used to find key facts and eliminate the need for extensive expert testimony on issues that have become well established in litigation involving the same defendants. Use of special interrogatories may help to identify those issues and avoid ambiguity in jury verdicts.<sup>117</sup> Clustering of major groups of cases serves a similar function in that the jury need only hear evidence on general matters relating to causation; it can then apply that evidence to issues of liability and damages in multiple cases.

### Limiting Expert Testimony

Another procedure used by some courts to streamline asbestos trials is to limit the number of experts who may testify and the length of their testimony. At pretrial, the court may obtain stipulations on such relatively undisputed issues as whether asbestos can be a cause of mesothelioma or lung cancer. This procedure serves to focus the cases on the issues that are typically disputed, namely, whether the plaintiff was exposed to the defendant's product and whether other medical conditions may have led to the disease. After laying this groundwork, courts have limited expert testimony on medical issues to two witnesses per side.

A court may choose to control the amount of testimony on a given issue by listening carefully for duplication, limiting the time available for a witness, and prodding counsel to cover new matters. Any controls in this area should be responsive to the actual testimony and not be arbitrary time limits.

### Deposition Summaries

One court accelerates the pace of its asbestos trials by encouraging the use of summaries of depositions and tightly edited videotaped depositions. Through the use of a summary format, with page references and occasional verbatim reading of important passages, a fifty-page deposition can be summarized in about ten minutes.<sup>118</sup> Regarding videotaped depositions, the court rules on the

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117. Note, *supra* note 116, at 222. In a consolidated case in the Eastern District of Texas, the court apparently used this approach. *Newman v. Johns-Manville*, No. M-79-124-CA, Special Verdict Form (E.D. Tex. Oct. 24, 1984).

118. *Cf. Richey, A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 *Geo. L.J.* 73 (1983).



objections prior to editing. The court has found that demonstrative evidence, such as use of the asbestos product at the job site, enhances jurors' interest in videotapes. Presumably such techniques reduce the need for presentation of similar evidence in the courtroom.

### **Opening and Closing Arguments**

Courts traditionally limit the time for opening and closing arguments, for obvious reasons. The general idea is to establish a structure within which counsel can present their case to the jury. However, courts do not limit the facts or arguments that counsel may present. Counsel make decisions as to what will be most persuasive to the jury. The court establishes a structure that permits the adversaries to marshal their best arguments and also forces them to set priorities.

In summary, courts have used traditional and innovative techniques to streamline the structure in which asbestos cases are tried to a jury. Courts report that these procedures serve to expedite the trial of asbestos cases without placing undue restrictions on the ability of counsel to present their clients' cases.

### **Calendaring Systems**

Several district courts have current case management crises. Some common features of these courts are that (1) they assign asbestos cases to a single judge; (2) there are at least several hundred asbestos cases on that judge's docket; (3) the court follows an individual trial calendaring system; and (4) few, if any, trials have been scheduled or completed. In two or three other districts, there are large asbestos caseloads that seem to command a great deal of the courts' attention, yet appear to be under control in the sense that cases are being terminated as rapidly as new cases are being filed. Finally, several courts with moderately high filings (one hundred to three hundred cases) have eliminated any initial backlog and continue to reduce the number of pending cases.

The cause of the severe crisis in several districts is not clear. However, whether the cause is a lack of judicial resources, lack of support personnel and equipment, lack of an effective case management system, or some combination of these and other factors, the effects are clear. The backlog is growing in these courts, and cases have not been scheduled for trial. Participants at the Center's asbestos conference focused on two types of solutions to the most serious problems. Both solutions relate directly to the consensus of par-

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ticipants that scheduling firm, credible trial dates is essential to reduction of the backlog. The solutions are to (1) increase the number of judicial personnel available to try asbestos cases and (2) adapt the system of calendaring of cases so that it will bring large numbers of cases to a firm and early trial date.

### **Increases in Personnel**

Conference participants made several suggestions for improving the personnel situation in courts with large asbestos case backlogs. As the discussion in the section entitled "Statistics and Allocation of Resources" *supra* indicates, all the participants questioned whether current statistical measures adequately show the impact that asbestos cases with multiple claimants have on judicial resources. Further study may result in suggestions for some long-term improvements. The problem, however, is current and demands immediate attention.

One suggestion was that a task force of experienced trial judges travel to the problem districts and schedule and try as many asbestos cases as possible. Such a step would produce more bases for settlement through jury verdicts and would also lend credibility to trial dates. Use of judges unfamiliar to the lawyers in the district might produce a degree of uncertainty that would aid the negotiation process. At the same time, the visiting judge could educate the local bench and perhaps demystify the complexity of asbestos trials.

Another suggestion for dealing with the personnel issue was to develop a team of senior judges who could oversee pretrial management of asbestos cases. By directing the cases to senior judges, the other members of the court would be free to handle the balance of the docket. This proposal, however, seems similar to the delegation of asbestos cases to magistrates for pretrial work. The effect would be that only the magistrate or senior judge would be familiar with the cases, and assignment of the cases to other judges for trial would become problematic. Unless the senior judges were from outside the district, which seems unlikely, such a procedure would not add to the judicial resources of the district. It would, however, focus such resources on asbestos cases, and that in itself is salutary.

### **Systems of Calendaring**

As noted earlier, most courts originally assigned all asbestos cases to a single judge, at least for pretrial preparation. One or two courts have successfully retained this system through the trial

phase. According to conference participants, however, most of the courts represented at the conference have come to the conclusion that the assignment of all asbestos cases to a single judge was, in the words of one, a "big mistake." Continuation of the single-judge system has failed to provide adequate resources for scheduling a significant number of cases for trial. Accordingly, most of the courts with substantial asbestos caseloads have assigned those cases to other active judges on the court or are planning to assign them in the near future.

What type of trial calendaring system is likely to be effective in attacking a backlog of asbestos cases? The goal is to fix a firm trial date for as many cases as possible. One system that has worked to control a moderate backlog is that used by the District of Maryland. This approach combines a master calendar, involving seven judges, with clustering of five to eight cases per month. The result is that sixty to ninety-six cases a year are scheduled for trial without the imposition of a serious burden on any single judge of the court. A court could easily adjust the numbers to fit the size of its backlog and the resources of the court. The Maryland system involves initial planning and lead time. It seems most appropriate for a court in which the backlogged cases are not ripe for trial. This system could also be applied to prevent a backlog in new filings.

Several of the courts with serious backlogs have apparently devoted considerable attention to pretrial preparation of the cases. These courts might want to consider a variation of the joint calendar system used twice a year in the Western District of Missouri and reportedly used with success in the Eastern District of Louisiana on an ad hoc basis to clear up a backlog.<sup>119</sup> Under this system all of the judges of a court reserve the same three or four weeks of time and compile a list of cases that will be ready for jury trial by that time. The key to the system is that the court makes a commitment that all of the cases on the list will be tried during the three to four weeks by one of the judges on the court. The combination of a fixed trial date and uncertainty as to the judge who will try the case reportedly results in the disposition of a substantial proportion (around 75 percent) of the cases on the calendar. Apparently, the system works best if the court has reached agreement on selection criteria for the cases and a definition of the minimum standard of trial readiness.<sup>120</sup>

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119. D. Stienstra, *The Joint Trial Calendars in the Western District of Missouri* (Federal Judicial Center, in press).

120. *Id.*

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In Western Missouri, attorneys are notified of the listing of cases eighty to ninety days before the calendar commences. After the final pretrial conference, a case is listed for trial by the clerk's office. No case can be removed from the list without approval of all of the judges, and generally the only reason for removal is settlement, dismissal, or waiver of the jury demand. If a case is not at the top of the list pursuant to a request from counsel or assignment by the court, the case will be in a standby status until a judge becomes available. Each judge continues to try cases until all of the cases on the list have been tried.

Application of a variation of this system to asbestos cases may present problems because of the potential length of the cases and the overlap of counsel. In Western Missouri, the court does not assign cases in which more than four trial days are anticipated, on the ground that such cases will take a judge out of the rotation for too long a period. In addition, if counsel are the same in many cases, it may be an unfair burden on both sides to require the simultaneous trial of a large number of cases. One procedure for dealing with these problems would be to integrate all civil cases into such a system, with a heavy load of asbestos cases sprinkled into the joint calendar in order to work on the backlog.

Another variation would be to have a term of court for asbestos cases and have a single judge handle all cases that are ready for trial. To make this system work, it might be necessary to have other members of the court help with the docket of the "asbestos judge" during the special term. At least one court with a moderate backlog of asbestos cases has used this method to trim its backlog. In the District of South Carolina, the court scheduled twenty cases a month, organized in clusters and all assigned to one judge, for three successive months. Perhaps because of the commitment of the court to try the cases within this brief period, the cases settled. This system seems to place substantial pressure on counsel to prepare the cases for trial, without imposing the more questionable burden of preparing to conduct multiple asbestos trials at the same time.

Another variation of the joint calendar system would be to adopt a joint calendar to handle the court's criminal cases and ensure that asbestos cases are not continually bumped because priority is given to criminal cases. The Western District of Missouri has had great success with its joint criminal calendar.<sup>121</sup>

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121. *Id.*

Other variations of the individual assignment system are possible. Judges can schedule more asbestos trials than would otherwise be possible if there is some assurance of a backup in the event that too many trials are actually held. The vast majority of cases will settle, so the need is to schedule more trial dates so that more cases will settle. Having a backup will ensure that the need to try criminal cases within Speedy Trial Act deadlines does not continually prevent the scheduling of civil cases.

In summary, variations in the methods of assignment and calendaring of asbestos cases can produce a system that will bring more cases to a firm, credible trial date. This system, in turn, promises to result in a vast increase in the number of settlements, with a relatively small increase in the number of trials. Because asbestos cases have become fairly routine products liability cases, the time required for the few trials that may be necessary to move a large block of cases appears to be a good investment toward meeting the challenge of the asbestos "crisis."



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