
MEDICAL CRITERIA ACTS: STATE STATUTORY ATTEMPTS TO CONTROL THE ASBESTOS LITIGATION

Joseph Sanders*

This essay reviews the efforts of at least six states to control their asbestos docket through legislation. Each of these states have passed a statute designed to prevent individuals from filing a tort claim until they can show some physical impairment resulting from asbestos exposure.¹ Collectively, these statutes may be referred to as medical criteria statutes. In Part I, I discuss some of the events that led to the passage of these laws. Part II reviews the contents of these statutes. Part III assesses what I perceive to be the four objectives of the statutes. I conclude by placing the statutes in the large context of mass torts and their impact on the ways we ordinarily resolve tort suits in the United States.

I. BACKGROUND

Several developments motivated the passage of these statutes: a) large influx of cases filed by individuals who, at the time they filed their claim, were not physically impaired combined with a concern that potential defendants lack the resources to pay all injured parties, b) the failure of congress to remedy this problem by resolving the asbestos crisis through litigation, c) a recognition that the ordinary statute of limitations rules produce incentives to bring suits prematurely, and d) concerns about fraud. I discuss each of these briefly.

* Joseph Sanders is A.A. White Professor of Law at the University of Houston. He attended Northwestern University, where he earned a J.D. and a Ph.D. in Sociology.

1. See Patrick M. Hanlon & Anne M. Smetak, *Asbestos Litigation in the 21st Century: Asbestos Reform in the States*, CM038 A.L.I.-A.B.A. 31, 33-37 (Nov. 30-Dec. 1, 2006).

A. *A Concern That Filings by Those Not Presently Impaired May Result in Insufficient Resources to Pay All Injured Individuals*

Until very recently there has been a steady increase in the number of asbestos claims, even as we seem to have passed the midway point in the total number of anticipated future injuries due to asbestos.² Many, if not most of these claims involved individuals who, at the time they filed their lawsuit, were not suffering from any asbestos-related physical disability.³ Ironically, this increase in claims was in part a response to judicial attempts to deal with the growing mass of cases. The United States Supreme Court's refusal to certify asbestos settlement classes in *Amchem*⁴ and *Ortiz*,⁵ caused many jurisdictions to consolidate cases for trial in an attempt to work through a seemingly impossible asbestos caseload.⁶ One effect of consolidation was to draw more claims.⁷ As noted by Justice Freedman, the increased efficiency of consolidated proceedings encouraged additional filings and may have provided "an overly hospitable environment for weak cases."⁸ Or as Francis McGovern notes with tongue only partially in cheek, "[i]f you build a superhighway, there will be a traffic jam."⁹

Even as the number of plaintiffs grew, the number of clearly responsible defendants shrank.¹⁰ Depending on who you believe, between 50 and 100 firms have declared bankruptcy as the result of asbestos liability.¹¹ These entities comprise a large percentage of the defendants

2. Francis E. McGovern, Public and Private Law Perspectives: Transcript of Professor Francis E. McGovern, 159 (Jan 18, 2008) (unpublished transcript, on file with the Southwestern University Law Review).

3. See Hanlon & Smetak, *supra* note 1, at 33-35.

4. *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997).

5. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

6. For a review of consolidations, see J. Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 518 (2008).

7. See J. Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 TOURO L. REV. 685, 688 (1999).

8. For review of consolidation, see Freedman, *supra* note 7.

9. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 606 (1997). For a useful discussion of aggregate settlements, see Charles M. Silver & Lynn A. Baker, *Asbestos Litigation: The Changing Landscape: Mass Lawsuits and Aggregate Settlement Rule*, CN037 A.L.I.-A.B.A. 259 (Oct. 11-12, 2007). Some of the statutes discussed below prohibit consolidations in the absence of party agreement. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (2007).

10. See Hanlon & Smetak, *supra* note 1, at 33.

11. In his concurring and dissenting opinion in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 169 (2003), Justice Breyer reports that asbestos litigation had driven 57 companies into bankruptcy. For a higher estimate, see Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at 10; Mark D. Plevin, *Asbestos Bankruptcies*, CN037 A.L.I.-A.B.A. 23 (Oct. 11-12, 2007), listing

who clearly acted tortiously toward injured plaintiffs.¹² In the face of the bankruptcy of many traditional defendants, plaintiffs have reached out to find other potential defendants.¹³ In the early 1980s approximately 300 defendants were involved in the asbestos litigation.¹⁴ Today, that number exceeds 8,000.¹⁵

Given the increase in claims and the uncertain liability of the newer defendants, there was a concern that the available defendants in asbestos cases do not have sufficient resources to pay all who have been exposed, regardless of the level of their injury.¹⁶ The truth of this assessment turns in part on where one thinks we are in the claims process. Some believe we have finally arrived at the “end-game” while others believe litigation will continue for many more years.¹⁷ Predictions concerning the number of claims yet to be filed vary widely.¹⁸ The Manville Trust alone, estimated in the early 2000s that it has yet to see 1.5 million claims.¹⁹ Thus, whether there will be sufficient funds to pay these claims remains an open question.²⁰ This is a point to which I return below.

Of course, judgment proof defendants are an unfortunate reality for many plaintiffs, and were this simply a matter of insufficient assets, little could be done absent a congressional decision to divert public funds into the system. However, part of the problem has been that a substantial

80 asbestos related bankruptcies through 2006. A similar list as of the beginning of 2005 can be found in Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157, 169 (2007). Some firms are now emerging from bankruptcy. See, e.g., *Combustion Engineering Bankruptcy Plan Finalized*, No. 13, ANDREWS ASBESTOS LITIG. REP., April 21, 2006, at 1.

12. See Hanlon & Smetak, *supra* note 1, at 33.

13. *Id.*

14. Paul Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 593 (2007).

15. *Id.*

16. See Hanlon & Smetak, *supra* note 1, at 33-34.

17. See Deborah Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 279 (2006); James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 269 (2006); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 527 (2007).

18. See Hanlon & Smetak, *supra* note 17.

19. See STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 107 (RAND Inst. for Civil Justice 2005).

20. For some, the signs are not good. For example, the Manville Trust recently has been paying only 5% of plaintiff's liquidated damages. Stengel, *supra* note 17, at 262. Stengel reports that other trusts also have paid far less than 100% on the dollar. *Id.* On the other hand a number of additional defendants are coming out of bankruptcy and their newly created trust funds add resources available to injured plaintiffs. McGovern, *supra* note 2, at 159-60. Moreover, plaintiffs may be able to double and triple dip in a number of funds and also have a tort suit against non-bankrupt defendants. *Id.*

portion of available funds have been spent in defending suits brought by people who have as yet suffered little or no impairment due to their exposure.²¹ Some, but not all of these people may become impaired in the future, but many may not, and for those who do become impaired, the extent of their future impairment is difficult to predict.

These claims present a problem because courts do not generally operate on a first-come first-serve basis.²² If someone with a minor injury files before someone with a more serious injury, *ceteris paribus* the courts will hear the minor injury case first, which in turn means such cases will be settled first. Although the size of such settlements may be small in comparison to the settlements or judgments involving seriously injured individuals, every suit incurs transaction costs, and cumulatively these cases drain resources.²³

B. Congressional Inaction

Perhaps the best way to resolve the problem of insufficient resources and the many other problems the asbestos cases have posed for the courts is through congressional action. However, despite judicial pleas to Congress to find a legislative solution for asbestos injuries, nothing has been done.²⁴ The most prominent of these pleas came from the Chief Justice in a concurring opinion in *Ortiz v. Fiberboard Corp.*,²⁵ where he called upon Congress to devise a legislative solution to the “elephantine mass of asbestos cases.”²⁶ Justice Rehnquist’s request was not the first. Judge Garza made an earlier plea for Congress to fashion an administrative remedy in the long-running *Cimino* litigation.²⁷

A federal Medical Criteria Act similar to, and in fact a blueprint for the state statutes discussed here, was proposed in Congress in 2001.²⁸ The

21. See Hanlon & Smetak, *supra* note 1, at 35.

22. See Hensler, *supra* note 17, at 262.

23. See *id.* at 262-63 (noting that regardless of how claims are resolved, transaction costs have been high, on average, less than 40 cents of every dollar paid went to plaintiffs, with the rest divided more or less evenly between plaintiffs and defense counsel fees and expenses).

24. See *Ortiz*, 527 U.S. at 865 (Rehnquist, C. J. concurring).

25. *Id.*

26. *Id.*

27. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). Academics have also called for a legislative solution. See Paul Carrington, *supra* note 14, at 605 (2007). See also Francis McGovern, *Asbestos Litigation II: Section 524(G) Without Bankruptcy*, 31 PEPP. L. REV. 233, 233 (reviewing various proposed legislative solutions).

28. See Patrick M. Hanlon, *Federal Asbestos Litigation: Wrestling with the Medical Issues*, 15 J.L. & POL’Y 1171, 1174-75 (2007).

statute was supported by the American Insurance Association, the “Asbestos Alliance” led by the National Association of Manufacturers, and plaintiffs’ lawyers representing cancer victims, led by Steven Kazan of Oakland.²⁹ The legislation was also supported by the ABA’s House of Delegates who adopted a resolution supporting federal legislation establishing medical criteria at its mid-year meeting in February 2003.³⁰ It was opposed by the AFL-CIO, most asbestos (and other) trial lawyers, and some large defendants and insurers who advocated more radical change.³¹

Recently, the medical criteria approach was set aside in search of a comprehensive asbestos fund solution.³² The closest we have come to this type of resolution was in the summer of 2006, although even then success was far from probable.³³ Democratic success in that year’s congressional elections seems to have moved the bill to the back burner³⁴ and it is difficult to imagine passage of any legislation until after the 2008 presidential election at the earliest.

C. *The Perverse Incentives of Traditional Statutes of Limitations*

One of the reasons for the large number of claims by people who do have asbestos-related changes in their lungs but who have not as yet suffered an impairment is the fear that if they do not bring a suit after becoming aware of their injury, they will be time barred.³⁵ Plaintiffs must be reassured that the statute of limitations will not begin to run on all of their claims when they first discover that they have suffered any injury.³⁶

29. *Id.*

30. *Id.* at 1175.

31. *Id.* at 1174-75.

32. See Hanlon & Smetak, *supra* note 1, at 36; see also Patrick M. Hanlon, *An Elegy for the FAIR Act*, 12 CONN. INS. L.J. 517, 520-21 (2006).

33. Hanlon, *supra* note 32 at 517-18. The proposed legislation carried the title the “Fairness in Asbestos Injury Resolution Act.” *Id.* The Act would create a trust fund of approximately \$140 billion to compensate workers exposed to asbestos. *Id.* at 527. Exposed workers would be paid under a no fault system based on the severity of their injury. *Id.* at 521. Workers with mesothelioma would receive \$1.1 million. *Id.* at 564-65. The bill would bar all lawsuits alleging injury from asbestos exposure unless the fund ran out of funds. *Id.* at 537-38. Businesses and insurers would pay into the fund for an estimated 30 years. *Id.* at 527.

34. *Id.* at 517-18.

35. See Hanlon & Smetak, *supra* note 1, at 34. This is far from the only reason. Plaintiffs lawyers had separate incentives to bring forward claims of those not presently impaired. See Carrington, *supra* note 14, at 599-600.

36. For example, prior to passage of the Texas medical criteria act, it was not clear whether the statute of limitations began to run when the plaintiff discovered some asbestos related injury even though the plaintiff was asymptomatic. See James S. Lloyd, *Administering a Cure-All or*

The medical criteria statutes generally address this problem and the related problem that in some states the “single action rule” requires a plaintiff to recover for all injuries arising from the same event.³⁷ The statutes provide plaintiffs with reassurance that if and when their injury ripens into something more serious their cause of action will not be time barred.³⁸

D. Concerns About Fraud

A concern about fraudulent claims also has played a role. Some provisions in the statutes are best understood as methods to control potential abuses in diagnosing patients.³⁹ Anyone who has read Judge Jack’s opinion in *In re Silica Products Liability Litigation*,⁴⁰ must recognize that there are grounds for concern about the objectivity of some “B-readers” who have diagnosed individuals with asbestos related ailments.

II. THE MEDICAL CRITERIA STATUTES

A. Deferred Docket Remedies

The medical criteria statutes are one response to this state of affairs, but they are not the only response. In response to the large number of claims by asymptomatic individuals, a number of courts have created inactive or deferred dockets whereby they set aside the claims of the unimpaired.⁴¹

Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas, 43 HOUS. L. REV. 159, 179 (2006).

37. For example, in *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1136 (5th Cir. 1985) the court, applying Texas law, stated:

[O]nce injury results there is but a single tort and not a series of separate torts, one for each resultant harm. The cause of action thus created is for all the damages caused by the single legal wrong, and a plaintiff may not split his cause of action by seeking damages for some of his injuries in one suit and later-developing injuries in another.

Id.

Subsequently, Texas abolished this rule, at least with respect to asbestos plaintiffs. See *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 646-47 (Tex. 2000). A number of other states have done likewise. See James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 821 (2002).

38. See Hanlon & Smetak, *supra* note 1, at 41-42.

39. See Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 9 CARDOZO L. REV. 513, 517 (2007).

40. 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005).

41. Mark A. Behrens & William L. Anderson, *The “Any Exposure” Theory: An Unsound*

These jurisdictions include New York City, Cleveland, Seattle, Baltimore and the states of Minnesota and Massachusetts among others.⁴² Many jurisdictions have also abolished the single-action rule, at least in asbestos cases.⁴³

B. *The Statutes*

Medical criteria statutes generally incorporate all of these changes and are, therefore, a comprehensive response to these perceived problems. I am aware of six states to date that have passed such legislation, but perhaps there are others in the process of doing so. The six states are: Florida,⁴⁴ Georgia,⁴⁵ Kansas,⁴⁶ Ohio,⁴⁷ South Carolina,⁴⁸ and Texas.⁴⁹ These statutes were passed between 2004 and 2007.⁵⁰ The key provisions in the statutes are directed at individuals with non-malignant injuries and at individuals with malignant injuries (lung cancer, mesothelioma) that may be the result of other factors, primarily smoking.⁵¹ With respect to each of these conditions, the plaintiff must provide substantial evidence of a current physical harm and/or that the harm is asbestos related.⁵² The statutes also have provisions preserving plaintiffs' right to bring their claim forward at a

Basis for Asbestos Causation and Expert Testimony, 37 SW. U. L. REV. 479, 479 (2008).

42. *Id.*

43. See Henderson & Twerski, *supra* note 37, at 821.

44. FLA. STAT. § 774.201 (2007). *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279, 287 (Fla. Dist. Ct. App. 2007) (holding that the Florida act was procedural, not substantive, and thus the retroactive application provision was not a due process violation).

45. GA. CODE ANN. §§ 51-14-1 - 51-14-3 (2007). An earlier version of this statute was struck down by the Georgia Supreme Court in *DaimlerChrysler Corp. v. Ferrante* as unconstitutional as applied to those individuals whose cause of action accrued prior to its enactment. 637 S.E.2d 659, 661 (Ga. 2006). The new version has done away with that provision. See GA. CODE ANN. §51-14-1(a)(12). The court refused to reach other constitutional challenges to the legislation. *Ferrante*, 637 S.E.2d at 662. For a discussion of possible constitutional challenges to the Texas statute, see Lloyd, *supra* note 36.

46. KAN. STAT. ANN. §§ 60-4901 - 60-4911 (2006).

47. OHIO REV. CODE ANN. §§ 2307.91 - 2307.93 (LexisNexis 2005). In *Wagner v. Anchor Packing Co.*, the court held that the statute did not cover claims filed prior to the passage of the law. No. 05CA47, 2006 WL 3861077, at *10 (Ohio App., 4th Dist. Dec. 20, 2006).

48. S.C. CODE ANN. §§ 44-135-40 - 44-135-110. (2007).

49. TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001 - 90.012 (Vernon 2007). Like a number of these statutes, the Texas code also addresses silica exposure claims. *Id.* I do not address the silica provisions in this paper.

50. See *supra* notes 44-49.

51. See KAN. STAT. ANN. § 60-4902, OHIO REV. CODE ANN. § 2307.92, S.C. CODE ANN. § 44-135-50, and TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001 - 90.012.

52. See *supra* note 51.

later time when they can meet the statutory criteria.⁵³

C. *Statutory Details*

1. Non-malignant Injuries

Although each statute is unique in some regards, they share a general set of requirements with respect to non-malignant injuries.⁵⁴ Kansas's provisions are typical.⁵⁵ The statute requires the following before one can bring a non-malignant injury claim:

- a) A medically appropriate occupational exposure, medical, and smoking history undertaken by, or under the direct supervision of a "competent medical authority."⁵⁶
- b) Evidence that at least ten years have elapsed between the date of first exposure to asbestos and the date of diagnosis.⁵⁷
- c) Determination by a competent medical authority based in part on pulmonary function testing that the exposed person has a permanent respiratory impairment rating of at least class 2 as defined by AMA guidelines.⁵⁸
- d) A diagnosis of asbestosis or diffuse pleural thickening based at a minimum on radiological or pathological evidence of these conditions.⁵⁹
- e) A determination, once again by a competent medical authority that either asbestosis or diffuse pleural thickening, rather than chronic obstructive pulmonary disease, is a substantial contributory factor to the individual's physical impairment, based on:

53. S.C. CODE ANN. § 44-135-110(A).

54. For a side-by-side comparison of the statutes *see* Hanlon & Smetak *supra* note 1.

55. KAN. STAT. ANN. § 60-4902.

56. *Id.* § 60-4902(b)(1). The Kansas statute defines "competent medical authority" to mean:

(1) The physician is a board-certified internist, pulmonary specialist, rheumatologist, oncologist, pathologist, gastroenterologist, radiologist or occupational medicine specialist.

(2) The physician has or had a doctor-patient relationship with the exposed person, or in the case of a board-certified pathologist, has examined tissue samples or pathological slides of the exposed person at the request of the treating physician, or in the case of a board-certified radiologist, has reviewed x-rays of the exposed person at the request of the treating physician.

Id. § 60-4901(o)(2).

With respect to diagnosing malignant conditions, it adds the requirement that the competent medical authority be board certified in pathology, pulmonary medicine, gastroenterology or oncology. *Id.* § 60-4902(c)(1). Similar definitions appear in other statutes.

57. *Id.* § 60-4902(b)(2).

58. *Id.* § 60-4902(b)(3).

59. *Id.* § 60-4902(b)(4).

- i) total lung capacity by plethysmography or timed gas dilution, below the predicted lower limit of normal,
 - ii) Forced vital capacity below the lower limit of normal and a ratio of FEV1 to FVC that is equal to or greater than the predicted lower limit of normal,⁶⁰ and
 - iii) a chest x-ray showing small, irregular opacities of s, t, or u graded at least 2/1 on the ILO scale.⁶¹
- f) “A diagnosis by a competent medical authority that the exposed person’s medical findings and impairment were proximately caused by asbestos exposure, as revealed by the exposed person’s occupational, exposure, medical and smoking history. A diagnosis which only states that the medical findings and impairment are consistent with or compatible with exposure to asbestos does not meet the requirements of this paragraph”⁶²

In sum, these provisions and similar language in other statutes require more than a subjective feeling of impairment or a medical doctor’s unsupported clinical judgment that the patient is suffering from an asbestos related physical impairment.⁶³

2. Malignant Injuries

Each state statute also contains a provision concerning malignant injuries. The provisions do vary from statute to statute. The least onerous of the provisions appears in the Texas statute which only requires that a physician who is board certified in one of several areas reports that the exposed person has been diagnosed with malignant mesothelioma or other malignant asbestos-related cancer and that to a reasonable degree of medical probability, exposure to asbestos was a cause of the malignancy.⁶⁴

60. These terms are defined by a number of statutes. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 90.001. FEV1 means forced expiratory volume in the first second, which is the maximal volume of air expelled in one second during performance of simple spirometric tests. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 90.001(9). FVC means forced vital capacity, which is the maximal volume of air expired with maximum effort from a position of full inspiration. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 90.001(10).

61. KAN. STAT. ANN § 60-4902(b)(5). For discussion of ILO scales and their role in diagnosing asbestos, see DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 26:26 (2007).

62. KAN. STAT. ANN § 60-4902(b)(6). Similar language stating that a “consistent with” diagnosis is not sufficient appears in other statutes as well. *See* Hanlon & Smetak, *supra* note 1.

63. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.003.

64. *Id.* § 90.003(a)(1).

Other states place more restrictive requirements on the plaintiff.⁶⁵

The Kansas statute requires a diagnosis by an appropriately board certified physician that asbestos exposure was a substantial contributing factor to the malignancy and a latency period between the date of first exposure and the date of diagnosis.⁶⁶

The Georgia statute is complex because in the aftermath of the *Ferrante* opinion⁶⁷ it sets forth different criteria depending on when one's asbestos claim accrued.⁶⁸ For those claims accruing after May 1, 2007, the statute provides that for non-mesothelioma malignancies the claimant must obtain a signed medical report by a board certified physician stating that to a reasonable degree of medical probability exposure to asbestos was a substantial contributing factor and that "other potential causes (such as smoking) were not the sole or most likely cause of the injury at issue."⁶⁹

The Ohio statute has a special provision for lung-cancer victims who are also smokers.⁷⁰ These individuals must make a prima-facie showing that exposure to asbestos is a substantial contributing factor and that there has been a ten year latency period between first asbestos exposure and diagnosis.⁷¹

Finally, both South Carolina⁷² and Florida⁷³ have provisions that require individuals suffering from a malignant disease to demonstrate that asbestos exposure has played a significant causal role in the plaintiff's disease. For example, the South Carolina Statute requires the following.

- a) A report by a physician board certified in pulmonary medicine, occupational medicine, internal medicine, oncology, or pathology concluding the exposed person has been diagnosed with mesothelioma or other asbestos-related malignancy.
- b) "To a reasonable degree of medical certainty exposure to asbestos was a

65. See *infra* notes 66-70.

66. KAN. STAT. ANN. § 60-4902(c). The physician must also conclude that the "cancer was proximately caused by asbestos exposure, as revealed by the exposed person's occupational, exposure, medical and smoking history. A diagnosis which only states that the lung cancer is consistent with or compatible with exposure to asbestos does not meet the requirements of this section." *Id.* § 60-4902(c)(3).

67. 637 S.E.2d 659.

68. GA. CODE ANN. § 51-14-3(17)(A), (B).

69. *Id.* § 51-14-3(17)(B)(ii).

70. OHIO REV. CODE ANN. § 2307.92(c). A smoker is defined as a person who "has smoked the equivalent of one-pack year, as specified in the written report of a competent medical authority . . . during the last fifteen years." *Id.* § 2307.91(DD).

71. *Id.* § 230292(c). See also FLA. STAT. ANN. § 774.204(3) (LexisNexis 2008). The latency period is a rebuttable presumption. OHIO REV. CODE ANN. § 2307.92(c)(1)(b).

72. See S.C. CODE ANN. § 44-135-50(A)(1)(b).

73. See FLA. STAT. ANN. § 774.204(1).

proximate cause of the diagnosed [disease], accompanied by a conclusion that the exposed person's medical findings were not more probably the result of other causes revealed by the exposed person's employment and medical history. A conclusion that the exposed person's physical impairment(s) is/are "consistent with" or "compatible with" mesothelioma or other asbestos-related malignancy does not meet the requirements of this section."

c) For conditions other than mesothelioma, the person has an underlying nonmalignant asbestos-related condition and that at least fifteen years have elapsed between the date of first exposure to asbestos and the data of diagnosis or the malignancy.⁷⁴

3. Deferred Docket

Plaintiffs who cannot meet these requirements are, according to the Ohio statute, "barred from maintaining an asbestos claim."⁷⁵ However, the statutes also expressly preserve a plaintiff's claim if at some subsequent time the plaintiff can meet the statutory requirements. For example, under the South Carolina statute for any non-malignant asbestos injury not barred before the effective date of the Medical Criteria statute, the statute of limitations shall not begin to run until the exposed person discovers or should have discovered that the person is physically impaired as set forth in the Medical Criteria statute.⁷⁶ Moreover, as is the case in most of these codes, the South Carolina statute provides that a claim arising out of a non-malignant condition is a separate cause of action from a claim for an asbestos related malignant condition.⁷⁷ One is not barred by the single-action rule from bringing the second suit.⁷⁸

III. STATUTORY OBJECTIVES

A. *Four Objectives*

In my opinion, the statutes hope to achieve four goals. First, by abolishing the perverse incentives created by statutes of limitations and the

74. See S.C. CODE ANN. § 44-135-50(A)(1)(b).

75. OHIO REV. CODE ANN. § 2307.92(b), (c).

76. S.C. CODE ANN. § 44-135-110(A).

77. *Id.* § 44-135-110(B).

78. *Id.*

single-action rule, they eliminate the requirement that the factfinder must resolve both the likelihood of, and the compensation for, injuries that have not as yet occurred and which may, in fact, never occur.

Second, the statutes attempt to reduce the number of suspect claims. The “competent medical authority” provisions clearly have this objective.⁷⁹ Some statutes go further. For example, the South Carolina statute has a specific provision stating that the evidence and reports used to make a prima facie case “must not be obtained under the condition that the exposed person retains legal services in exchange for the examination, testing or screening.”⁸⁰

Third, they permit the people who are currently sick to litigate prior to those who are not currently ill.⁸¹ By doing so, the statutes aim to preserve limited defendant resources for individuals who are clearly injured by asbestos and to some extent to preserve limited defendant resources for individuals who will become impaired in the future.⁸²

Fourth, to a greater or lesser degree, the statutes attempt to sort non-mesothelioma malignancy cases.⁸³ These provisions benefit non-smokers with substantial asbestos exposure at the expense of smokers and those with less exposure to asbestos.

B. Assessing the Objectives

In my opinion, it is difficult to argue with the first objective, whether it is done by statute or, as in a number of states, by non-legislative means. The remaining objectives raise more complex issues. The effort to reduce the number of fraudulent cases might seem unnecessary if written on a clean slate. Unfortunately, it is now clear that significant abuses have occurred in the past, often at the hand of “B-readers” employed by plaintiff’s lawyers to screen cases.⁸⁴ The remedy, however, comes with a

79. See KAN. STAT. ANN. § 60-4901(o); TEX. CIV. PRAC. & REM. CODE ANN. § 90.001(17-21), (3); see also *infra* note 80.

80. S.C. CODE ANN. § 44-135-50(C)(3).

81. There is also some effort to allow the sickest go first of all. For example, the Texas statute provides for an expedited trial for living individuals suffering from mesothelioma or other malignant asbestos-related cancer. TEX. CIV. PRAC. & REM. CODE ANN. § 90.010(c). The South Carolina statute contains a similar provision. S.C. CODE ANN. § 44-135-80(B).

82. FLA. STAT. ANN. § 774.202(4).

83. See, e.g., S.C. CODE ANN. § 44-135-50.

84. See Judge Jack’s opinion in *In re Silica Prods. Liab. Litig.*, 398 F.Supp.2d 563 (S.D. Tex. 2005). According to the court,

A “B-reading” is a physician’s report of findings from a patient’s chest radiograph (i.e., an “x-ray”). This report is entered on a standardized form using a classification system devised

cost in the form of increased litigation costs.

The third and fourth objectives raise more complex issues. The third objective, putting those not currently injured on a deferred docket, is based on two premises, that there are limited resources available for asbestos defendants and that given these limited resources is it appropriate that, in Professor Schuck's terms, the worst should go first.⁸⁵ Are these premises correct?

The first premise is an empirical question: Are there insufficient resources? This is difficult to answer. It requires that we assess the assets and potential liability of a new crop of defendants and also evaluate the assets available to plaintiffs from the trust funds of companies that have emerged from bankruptcy caused by their asbestos liability.⁸⁶ I do not know whether anyone can state with confidence what percentage of people who suffer impairment in the future would be unable to recover damages because unimpaired individuals reached a settlement ahead of them.

What one can be more confident of is that the statutes may well reduce the probability this will happen by preventing a collective goods problem. Even if there are sufficient funds to pay everyone eventually, if people fear there may be scarcity, they will bring a claim to avoid being among the individuals for whom there will be insufficient funds. As McGovern notes, the anticipation of scarcity often generates scarcity.⁸⁷ If defendants are able to spread out liability over a period of several years there is in fact less chance that there will be insufficient funds. It is this reality that has made Chapter 11 bankruptcy a win-win solution for many old-line asbestos defendants and those they injured.

by the International Labour Office (ILO). The National Institute for Occupational Safety and Health (NIOSH) issues "B-reader" certifications for physicians in the United States. There are approximately 500-700 certified B-readers currently practicing in the United States.

Id. at 581 n.28.

Judge Jack's opinion was not the first time a federal judge questioned the screening process. See Carl Rubin & Laura Ringenbach, *The Use of Court Appointed Experts in Asbestos Litigation*, 137 F.R.D. 35, 39, 45 (1991); see David Maron, *Taming and Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C. L. REV. 253, 261 (2006); Mark A. Behrens, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 CONN. INS. L.J. 477, 493-95 (2006); Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 98; David E. Bernstein, *Keeping Junk Science Out Of Asbestos Litigation*, 31 PEPP. L. REV. 11, 12-13 (2003).

85. The third objective, putting those not currently injured on a deferred docket, is based on two premises: (1) that there are limited resources available for asbestos defendants and (2) that given these limited resources is it appropriate that, in Professor Schuck's terms, "[t]he [w]orst [s]hould [g]o [f]irst." Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y, 541 (1992).

86. See McGovern, *supra* note 2, at 164-65.

87. Francis McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1726 n.26 (2002).

However, even with medical criteria statutes it may be that some people who are not permitted to bring a claim because they do not currently suffer a sufficient impairment will find that when their injury does ripen that some entities are no longer viable defendants. The problem of inter-temporal equity will still cast its shadow over the asbestos litigation.⁸⁸

The second premise underlying the deferred docket is that people who are sick should go first and those who are not sick should wait.⁸⁹ At first blush, this seems to be an obvious point. One can, however, conjure up cases where the merits of this choice are not so clear cut. In this issue, Professor Owen asks us to compare the family of an elderly, say 87 year old, individual recently deceased from mesothelioma and a younger person with substantial exposure who fears eventually he will eventually develop a malignancy due to the exposure.⁹⁰ Assume that the great majority of the deceased's medical expenses were covered by insurance and that there is no loss to his estate due to lost future income. Do the emotional damages due his survivors clearly trump the potentially decades long emotional distress of the younger person? To Professor Owen, at least, the answer is not obvious.⁹¹

On balance, I come down on the side of the statutes on this point. I accept that emotional harms are real and that fear of a future disease may well create substantial distress in some individuals. But these statutes were not adopted against a backdrop of widespread acceptance of a "fear" cause of action. To the contrary, fear of future disease claims pose a set of special problems that have caused most courts to limit such claims, even in the absence of statutes such as those discussed here.⁹²

Because very few courts recognize a "fear" cause of action in the absence of any evidence of physical change,⁹³ the issue is joined when the

88. The problem of what to do with future claims, both "near futures," i.e. those people who know they have been exposed but who are not yet ill, and "far futures," i.e. those people who do not even know that they have been exposed, has been a central stumbling block in the use of settlement classes to resolve asbestos claims. See Susan Koniak, *How Like A Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1790 (2004); see also McGovern, *supra* note 27 at 236-37.

89. See Schuck, *supra* note 85, at 542.

90. See David G. Owen, *Against Priority*, 37 SW. U. L. REV., 557, 564-65 (2008).

91. *Id.* at 571.

92. See, e.g., *S. Bakeries, Inc. v. Knipp*, 852 So. 2d 712, 718 (Ala. 2008).

93. A leading case rejecting such claims is *Lohrman v. Pittsburg Corning Co.*, 782 F.2d 1156, 1160 (4th Cir. 1986). More recent cases adopting this position include *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237-39 (Pa. 1996), *Temple-Inland Forest Prod. Corp. v. Carter*, 993 S.W.2d 88-94 (Tex. 1999), *S. Bakeries, Inc.*, 852 So. 2d at 717-18, and *Bonnette v. Conoco, Inc.*, 837 So. 2d 1219, 1234-36 (La. 2003). See also D. Alan Rudlin & Sean P. Trendle, *Case Management and Health Claims in Toxic Tort Litigation*, 2007 A.L.I.-A.B.A. 48-55 (Feb. 1, 2007) (providing a useful discussion of where courts are on this and other theories of recovery for exposures that

plaintiff has suffered some “injury.”⁹⁴ The question is how much of a present injury is needed to permit the individual to attempt to collect emotional distress damages arising from a fear of future disease even though the individual does not have any impairment.⁹⁵ Some courts have concluded that pleural thickening, without any physical impairment, is sufficient to give rise to a claim within which emotional distress damages may be sought.⁹⁶ Most courts set a higher threshold.⁹⁷

The United States Supreme Court addressed this issue within the context of a FELA case in *Metro-North Commuter Railroad Co. v. Buckley*⁹⁸ and concluded that fear of future cancer due to extensive inhalation of asbestos, without symptomatic or objective physical injury, is not a cognizable injury under FELA.⁹⁹ The Court examined asbestos decisions in jurisdictions throughout the nation and concluded that most common law courts have denied recovery for those who are disease and symptom free.¹⁰⁰ It identified three reasons for denying recovery in such cases, the “special ‘difficult[y] for judges and juries’ in separating valid, important claims from those that are invalid or ‘trivial,’ (b) a threat of ‘unlimited and unpredictable liability,’ and (c) the ‘potential for a flood’ of comparatively unimportant, or ‘trivial,’ claims.”¹⁰¹

have not produced impairment).

Even states that do recognize a cause of action for the infliction of emotional distress may deny it in the toxic tort situation unless the plaintiff can show that it is more likely than not that a cognizable injury due to defendant’s conduct will occur in the future. *See Potter v. Firestone Tire & Rubber Co.* 863 P.2d 795, 816 (Cal. 1993).

For discussions of the pros and cons of such causes of action see Tamsen Douglass Love, *Deterring Irresponsible Use and Disposal of Toxic Substances: The Case for Legislative Recognition of Increased Risk Causes of Action*, 49 VAND. L. REV. 789, 804 (1996); Henderson & Twerski, *supra* note 37, at 828. The issue is likely to remain a lively one in the face of our increasing ability to predict future injury. *See Jamie A. Grodsky, Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 STAN. L. REV. 1671, 1682-84 (2007).

94. *See Herbert v. Johns-Manville Corp.*, 785 F.2d 79, 85 (3d Cir. 1986).

95. *See, e.g., id.*

96. *See id.*; *Watkins v. Fibreboard Corp.*, 994 F.2d 253, 259 (5th Cir. 1993) (noting that Texas law recognizes a cause of action for emotional distress based on exposures to asbestos in the absence of physical symptoms). The *Watkins* Erie guess about Texas law was rejected in *Temple-Inland Forest Prod. Corp.*, 993 S.W.2d at 90.

97. *Id.* at 92 (stating “[w]hile the existence of physical injury is ordinarily *necessary* for recovery of mental anguish damages . . . such injury may not be *sufficient* for recovery of mental anguish damages when the injury has not produced disease, despite a reasonable fear that such disease will develop.”).

98. 521 U.S. 424 (1997).

99. *Id.* at 433.

100. *Id.* at 432-33.

101. *Id.* at 433 (citations omitted).

The New Jersey Supreme Court in *Mauro v. Raymark Industries*¹⁰² justified a similar result by noting that damages would be speculative, plaintiffs would have an opportunity to litigate a claim for the disease itself if it occurs and that in some situations they can get emotional distress or medical monitoring damages.¹⁰³

Even if a case meets a minimal injury threshold and is permitted to go forward, it presents very difficult damages problems. Although many jurisdictions are prepared to abandon the single-action rule in asbestos cases when an individual subsequently develops a malignancy, they are not willing to do so when a plaintiff without a present impairment later does become impaired.¹⁰⁴ They are not prepared to permit plaintiffs three bites at the apple: one when they are not yet impaired for emotional distress damages, another when they do become impaired for their physical harms, and then a third claim for those plaintiffs who develop cancer. Thus plaintiffs who do sue when they are only suffering from non-impairing pleural plaques may be overcompensated if they never become ill and almost certainly will be undercompensated if they do become ill, e.g. if they develop asbestosis but not cancer.¹⁰⁵ Holding non-impairment cases in abeyance reduces the horizontal inequity that is the likely result of permitting all to go forward as soon as they have been “impacted” by asbestos.

This problem is not entirely alleviated by the medical criteria statutes. Individuals may qualify under the statutes in the sense that they have the minimal injury necessary to bring a claim and after the litigation concludes may suffer a substantial increase in the severity of their injury. However, the range of horizontal inequality should be less in these circumstances, in part because the probable progression of the disease is less uncertain.

We should not be entirely pleased with this outcome. If the deferred docket experience in New York is any guide, the majority of deferred cases will never ripen into a cognizable injury.¹⁰⁶ Under the medical criteria statutes, these individuals will never enjoy any compensation for their exposure. Their consolation, if there is one, is that they probably will never become seriously impaired.

Some of the medical criteria statutes have a fourth objective: sorting non-mesothelioma malignancy cases.¹⁰⁷ Although both these provisions

102. 561 A.2d 257 (N.J. 1989).

103. *Id.* at 266.

104. *See, e.g., id.*

105. *See, e.g., id.*

106. *See Freedman, supra* note 6, at 514 (reporting a decline of 80% of her case load).

107. *See supra* Part II.C.1.

and the provisions concerning non-malignant injuries are designed to restrict recoveries to those who are suffering present injuries due to asbestos,¹⁰⁸ the similarity ends there.

The non-malignant provisions are designed to distinguish the impaired from the non-impaired.¹⁰⁹ They are a specific example of the general tort requirement that in order to prevail in a negligence claim the plaintiff must suffer an “injury” and they provide that “injuries” which do not impair one’s life are not the sort of injuries the tort system should entertain.¹¹⁰ The malignant provisions are about something else altogether.¹¹¹ Clearly, individuals with lung cancer have suffered an injury. Keeping these people from trial is not designed to advance the goal of preventing those who are not currently ill from having their day in court.

The question in these cases is not about whether the individual has suffered an injury but whether asbestos “caused” the injury. The likely result of the malignant injury provisions is two-fold; (1) to direct awards away from those who were minimally exposed to asbestos and toward those who have suffered greater exposure, and (2) to direct awards away from exposed individuals who have a substantial smoking history and toward those who do not.¹¹² Insofar as these provisions advantage those cases where the causal role of asbestos is clearest, it might be said that they do further the goal of saving limited defendant resources for those individuals most clearly injured by asbestos.

As I noted above, one could criticize this goal itself, but I think there is a more fundamental question raised by these provisions. The causal question in these cases is a complex one, turning as it does on issues of whether we should continue with a “substantial factor” analysis as reflected in the Restatement (Second) of Torts¹¹³ or abandon this approach for a “but-for” test as proposed in the Restatement (Third) of Torts: Physical and Emotional Harm,¹¹⁴ and whether we should judge liability based on contribution to injury or contribution to risk.¹¹⁵ These provisions more

108. *See supra* Part II.C.1.

109. *See supra* Part II.C.1.

110. *See supra* Part II.C.1.

111. *See supra* Part II.C.2.

112. The likely result of the malignant injury provisions is two-fold: (1) to direct awards away from those who were minimally exposed to asbestos and toward those who have suffered greater exposure, and (2) to direct awards away from exposed individuals who have a substantial smoking history and toward those who do not.

113. RESTATEMENT (SECOND) OF TORTS § 9 (1965).

114. RESTATEMENT (THIRD) OF TORTS § 26 (2005).

115. *See* Joseph Sanders, Michael D. Green & William C. Powers, Jr., *The Insubstantiality of the “Substantial Factor” Test for Causation*, 73 MO. L. REV. 399 (2008).

nearly invade the traditional role of juries to resolve causal questions and perhaps are an indication that the legislatures in these states believe judges can do a better job of sorting out the complex medical questions in these cases than can juries in the context of adversarial trials. Whether this is a good development turns in part on our opinion as to whether juries make appropriate proportionate responsibility rulings were they allowed to hear cases where the role of asbestos in causing the plaintiff's disease is relatively minor. However, it also turns on our normative commitment to adversarial processes and the ideal of individualized justice under which individuals and their lawyers control their claim.

IV. THE STATUTES AND MASS TORT LITIGATION

From the perspective of those who believe that when it comes to personal injuries the default position in American law should always be an adversarial process by which each individual litigant and her lawyer is entitled to present his or her claim to a jury within the context of traditional adversarial processes, there is something disconcerting about these statutes. They sacrifice some aspects of an adversarial process to achieve other goods.¹¹⁶ This is most clearly manifested in the provisions dealing with malignant injuries¹¹⁷ but it is also present in other provisions as well.

Ultimately, the statutes pose the most fundamental of questions. To what extent should we attempt to preserve individualized justice in the mass tort context? This question has arisen repeatedly in the asbestos litigation.¹¹⁸ The question of whether each plaintiff would have a right to a separate trial or whether they would have their damages determined by a set of bellweather cases was at the center of the long-running *Cimino* case.¹¹⁹ The Supreme Court's refusal to permit class action settlements in

116. Those who feel that these statutes stray too far from adversarial proceedings and individualized justice are likely to mount constitutional challenges to the legislation. As noted above, there already have been successful challenges concerning whether deferred procedures may apply to claims pending before the statute was enacted. The larger question is whether the statutes are unconstitutional as applied to anyone. Challenges based on due process and special laws are in the offing. The Georgia Supreme Court specifically left open challenges to its statute based on due process and special laws provisions of the Georgia Constitution. *Ferrante*, 637 S.E.2d at 662. Others may claim the statutes violate equal protection and open courts provisions of state constitutions. For a discussion of possible constitutional challenges to the Texas statute, see Lloyd, *supra* note 36, at 169.

117. See *supra* Part II.C.2.

118. See, e.g., *Cimino*, 751 F.Supp. at 652, *rev'd*, 151 F.3d 297 (5th Cir. 1998).

119. *Cimino*, 751 F.Supp. at 652-53; see also Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads*, 80 S. CAL. L. REV. 969, 976 (2007).

*Amchem*¹²⁰ and *Ortiz*¹²¹ turned significantly on whether there were sufficient differences among the asbestos plaintiffs. In these cases, the courts came down on the side of individualized justice.¹²² But this certainly did not settle the issue. In the aftermath of *Amchem* and *Ortiz* courts proceeded to use case consolidation to aggregate cases in a less formal, and some would say a less helpful way.¹²³ Moreover, the multiple bankruptcies of asbestos defendants have resulted in claims resolution facilities that dispense with most adversarial procedures and that tend toward paying many claimants according to more or less flexible payment schedules.¹²⁴ Likewise, the recent efforts to find a payment fund legislative solution is premised on the prohibition of individual common law suits.¹²⁵

The medical criteria statutes must be judged in the light of this history. They, like trial consolidations, judicially imposed deferred dockets and bankruptcy schedules, are examples of the fact that mass trials inevitably produce some movement toward inquisitorial justice.¹²⁶ And they do so in part for good reasons. In a world where we know that many people are suffering from very serious and often fatal diseases caused by a particular product, it is difficult to justify a system of individualized justice if the cost of operating such a system consumes more than half of the funds available to compensate the injured.¹²⁷ In such a world, if there is a default rule, perhaps it should not be the business as usual adversarial system, but rather any reasonable alternative that maximizes recovery by those who have been harmed. By this standard, on balance, the medical criteria acts are a step in the right direction.

120. *Amchem Prods., Inc.*, 521 U.S. at 25-28.

121. *Ortiz*, 527 U.S. at 864-65.

122. *Amchem Prods., Inc.*, 521 U.S. at 625-28; *Ortiz*, 527 U.S. at 864-65.

123. See Deborah Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1910-15 (2002) (examining the state of the litigation subsequent to those cases); Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157, 166-67 (2007).

124. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1372-73 (2005); Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Distribution Plans*, 62 N.Y.U. ANN. SURV. AM. L. 163, 175 (2006).

125. See *supra* note 33 (discussing the FAIR Act).

126. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1194 (2005); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes*, 48 DEPAUL L. REV. 355, 386 (1998).

127. See Hensler, *supra* note 17, at 262-63.