1-1-2004

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THE ASBESTOS LITIGATION SYSTEM IN THE SAN FRANCISCO BAY AREA: A PARADIGM OF THE NATIONAL ASBESTOS LITIGATION CRISIS

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I. INTRODUCTION

Northern California courts' are experiencing a crisis in the handling and resolution of asbestos-related bodily injury lawsuits. The size of the asbestos docket, the number of defendants, the variety of competing interests among the parties involved, and a history of judicial band-aids has left the asbestos litigation system in a grave state of disrepair, if not "verging upon the edge of collapse." This article explores a

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1. This article focuses on San Francisco and Alameda Counties, the largest and most active civil courts in Northern California.

2. Defense counsel recently filed a declaration in support of a motion to vacate all cases filed by one particular law firm stating, "this Declarant believes that a firm intervention is necessary from the Court in order to restore order to a system which is verging upon the edge of collapse." See Carroll, Burdick & McDonough LLP's Decl. of James G. Scadden in Support of Volkswagen of America, Inc.'s et al. Joinder in Designated Defense Counsel's Motion to Vacate All Brayton Cases at 2, In re Complex Asbestos Litigation (Super. Ct. S.F. County Oct. 23, 2004) (No. 828684).
variety of problems and issues that exist under the current system and possible solutions Northern California courts could implement to improve their ability to dispose of these cases in a fair and expeditious manner.

Every year, there are approximately 2000 asbestos cases pending in Northern California. Approximately 800 cases are filed annually in San Francisco County alone. In December 2003, nearly 300 cases were scheduled for trial-setting. The sheer number of cases pending at any given time results in a virtually unmanageable asbestos docket. Not surprisingly, Alameda and San Francisco County have both been recognized as among the United States’ "Judicial Hellholes."

In San Francisco, the court system places no limit on the number of cases that can be assigned a trial date. If all of the eligible cases evaluated at the trial setting conference are presumed ready for trial, they are given trial dates. However, many of the cases are usually not ready for trial, and the ensuing rescheduling and push to get the cases to trial creates utter chaos. The large number of cases in the discovery stage makes it nearly impossible for defense counsel to keep up with their day-to-day schedules. On average, fifteen

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5. See Designated Defense Counsel Berry & Berry’s Status Report and Recommendations to the Court Regarding Upcoming Brayton Status and Setting Conferences at 1, In re Complex Asbestos Litigation (Super. Ct. S.F. County Apr. 1, 2004) (No. 828684) [hereinafter Berry & Berry Brief].

6. While both San Francisco and Alameda Counties were on the list in 2002, in 2003 both were off the list. AM. TORT REFORM ASSOC., BRINGING JUSTICE TO JUDICIAL HELLHOLES at 2-3 (2003), available at http://www.atra.org/reports/hellholes (last visited Oct. 18, 2004).

7. See generally S.F. COUNTY SUPER. CT. R. 6.

8. The Presiding Judge in the San Francisco Superior Court may require, upon request of any party, that the plaintiff’s deposition be completed before trial will be set. See generally General Order 129, In re Complex Asbestos Litigation (Super. Ct. S.F. County Jan. 1, 1997) (No. 828684) [hereinafter S.F. Gen. Order No. 129]. In Alameda, cases are set for trial at the judge’s discretion. See ALAMEDA COUNTY SUPER. CT. R. 4.5.

to twenty plaintiff depositions may be scheduled to take place in any given week.\textsuperscript{10} Cancellation of these depositions occurs on a regular basis,\textsuperscript{11} often immediately before the deposition is to begin and sometimes after the parties have already traveled great distances to attend.\textsuperscript{12} Only one law firm, the “Designated Defense Counsel,”\textsuperscript{13} is allowed to schedule plaintiff depositions for all cases.\textsuperscript{14} As a result, this law firm alone has access to information regarding the scheduling and rescheduling of key depositions for all 2,000 asbestos cases and for all 300 defense firms involved in the litigation.\textsuperscript{15} Finally, quite frequently, new defendants are added at the last minute, after discovery is complete, and after trial is scheduled.\textsuperscript{16} This creates an administrative nightmare for counsel as well as for the courts.

This article addresses the following specific issues which currently contribute to the situation the courts and litigants face in Northern California asbestos litigation: (1) docket management issues (e.g., too many cases scheduled to go forward at any given time, undermining the parties and the judicial system);\textsuperscript{17} (2) unrealistically short timelines for taking asbestos cases to trial (a timely issue in light of the courts’ recent dismantling of the “Fast Track” and related rules);\textsuperscript{18} (3) issues with the Designated Defense Counsel system; and, (4)

\begin{itemize}
  \item \textsuperscript{10} Id.
  \item \textsuperscript{11} See, e.g., Plaintiff Depositions, available at http://www.berryandberry.com/main/PlaintiffDepos.aspx (according to Designated Defense Counsel’s website on any given week several of the depositions are cancelled or rescheduled) (last visited Dec. 19, 2004).
  \item \textsuperscript{12} Transcript of Oct. 31, 2003, Hearing on Motion to Compel Audit of Berry & Berry as Designated Defense Counsel, at 5, In re Complex Asbestos Litigation, S.F. Civ. No. 828684.
  \item \textsuperscript{13} See infra Part IV.
  \item \textsuperscript{15} See S.F. Gen. Order 41, supra note 14, at 5-6; Alameda Gen. Order 14.00, supra note 14, at 5-6.
  \item \textsuperscript{16} See, e.g., Allgood v. Asbestos Defendants, S.F. Civ. No. 320887. New defendants were added three years after the complaint was filed, and after the case was set for trial. Docket list available at http://www.sftc.org (last visited Nov. 14, 2004) (docket list on file with the Santa Clara Law Review).
  \item \textsuperscript{17} See infra Part II.
  \item \textsuperscript{18} Trial Court Delay Reduction Act of 1990, CAL. GOV'T CODE §§ 68600-20 (West 2004).
\end{itemize}
the effect of the bankrupt entities' "empty chair" in relation to Proposition 51. This broad-brush list of problems, while expansive, is in no way intended to be exhaustive of the issues litigants face in Northern California asbestos litigation.

This article suggests some fairly simple strategies to begin correcting the problems. In order to allow courts to maximize their efficiency and counsel to be more fully prepared to defend their cases, we propose the following strategies for administration and management of the Northern California asbestos docket:

- Implementation of an inactive docket system that would preclude "unimpaired" cases from proceeding, unless and until plaintiffs could show impairment based on generally accepted medical criteria. This would reduce the number of cases going through the court system by at least sixty-five percent, thereby reducing the current "clog" in the system;

- Abolish the presumption that asbestos cases should be rushed to trial. If, as a rule, cases were not presumed ready to be set for trial within a year of their original filing, the courts would not be forced to repeatedly reschedule status and setting conferences. And, where a newly discovered defendant is added to the case, scheduled trial dates should automatically be vacated or continued in order to afford defendants adequate time to prepare for trial;

- Administrative duties now performed by Designated Defense Counsel, including scheduling of discovery and record procurement, should be allocated to a vendor, not a law firm, who could per-

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19. The Fair Responsibility Act of 1986, CAL. CIV. CODE §§ 1431-1431.5 (West 2004). This broad-brush list of problems, while expansive, is in no way intended to be exhaustive of the issues litigants face in Northern California asbestos litigation.

20. In addition to these proposals, this article also analyzes Proposition 51, California Civil Code sections 1431-1431.5, and its effect on Northern California asbestos litigation. See infra Part V.

21. The term "unimpaired" refers to a claim filed by a plaintiff who is not functionally impaired, i.e. has no physical symptoms or limitations as a result of the alleged injury.

22. See Joinder, supra note 4, at 1-2, as referring to Jackson & Wallace LLP cases.
form such tasks more efficiently and economically, including the use of modern technology to keep the parties informed of schedules in "real time."\textsuperscript{23}

II. DOCKET MANAGEMENT ISSUES – THE INACTIVE DOCKET SOLUTION

Northern California asbestos litigation grows more complex and cumbersome each year, and it appears that this trend will continue. As such, the courts should act now to manage the out-of-control docket by implementing an inactive docket before the problem worsens. Recent examples of the success of the inactive docket system have been seen in the courts of New York City, Boston, and several jurisdictions in Illinois, among others. This is precisely the type of creative judicial solution needed to allow courts and counsel to effectively manage asbestos litigation.

A. Filing Trends in Northern California

Twenty years ago, over 21,000 asbestos claims had been filed,\textsuperscript{24} and by 2000 well over 600,000 claims had been filed.\textsuperscript{25} In 2001, approximately 90,000 new cases were filed.\textsuperscript{26} According to a recent Rand Institute report, there may be millions of claims that have yet to be filed.\textsuperscript{27} In addition, the number of asbestos defendants has grown from approximately 300 in the early 1980s to more than 8,400 in 2003.\textsuperscript{28}

Many blame the increase in claims filed, and the corresponding increase in the number of defendants sued, on more

\textsuperscript{23} "Real time" is a technology term meaning in the time that the event actually happens or shortly thereafter. See Word Definition From the Webopedia Computer Dictionary, available at http://www.pcwebopedia.com/TERM/r/real_time.html (last visited Oct. 21, 2004) (on file with the Santa Clara Law Review).


\textsuperscript{25} Id.


\textsuperscript{27} Rand Institute Report, supra note 24, at 78.

\textsuperscript{28} Victor E. Schwartz et al., Congress Should Act To Resolve the National Asbestos Crisis: The Basis in Law and Public Policy for Meaningful Progress, 44 S. TEX. L. REV. 839, 859 (2003).
aggressive efforts by plaintiffs' counsel to generate new clients.\textsuperscript{29} Often, these aggressive "recruitment" efforts are carried out using mass screenings, which have suspect results for several reasons.\textsuperscript{30} First and foremost, the diagnoses issued during mass screenings are not made by a treating or examining physician and, therefore, cannot as easily be confirmed or replicated.\textsuperscript{31} Also, as a result of these large-scale screenings in search of potential plaintiffs, a large number of all new claims are brought by persons with either minor lung impairment or no lung impairment at all.\textsuperscript{32}

A prominent California plaintiffs' attorney recognized this problem when testifying before Congress in 2002, stating, "the engine that drives the filing of non-malignant cases is litigation screening. The Manville Trust\textsuperscript{33} estimates that as many as 90\% of non-cancer claims are generated

\begin{itemize}
\item \textsuperscript{29} AM. ACADEMY OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS, PUBLIC POLICY MONOGRAPH at 3 (December 2001) [hereinafter Actuaries Report].
\item \textsuperscript{31} The National Institute for Occupational Safety and Health (NIOSH) evaluated the x-rays of 795 "tire workers" who had been diagnosed through screening and found that, "only two had any signs of parenchymal change and only 19 [of the 795] showed pleural abnormalities." See Raymark, 1990 WL 72588 at *16; see also David E. Bernstein, Asbestos Litigation & Tort Law: Trends, Ethics, \& Solutions: Keeping Junk Science Out of Asbestos Litigation, 31 PEPP. L. REV. 11, 11-13 (2004).
\item \textsuperscript{32} See Actuaries Report, \textit{supra} note 29, at 3; see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 631 (1997) (quoting Christopher F. Edley, Jr. \& Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 HARV. J. LEGIS. 383, 384, 393 (1993) ("up to one-half of asbestos claims are now being filed by people who have little or no physical impairment")).
\item \textsuperscript{33} The Trust is set up to handle and process the claims through the Johns Manville Bankruptcy Trust. See Manville Personal Injury Settlement Trust, available at http://www.mantrust.org/history.htm (last visited Nov. 14, 2004).
\end{itemize}
through screenings . . . .

Litigation screenings have absolutely nothing to do with medicine - they are a device for recruiting clients . . . .

. . .

The results of such screenings are totally unreliable. 34

In fact, the 2002 Rand Report found that, although the combined number of mesothelioma and other cancer filings had remained almost constant since 1990, the number of non-cancer claims had almost tripled since 1990. 35 In San Francisco alone, over 2,000 asbestos cases are currently pending. 36 It is estimated that over sixty-five percent of all asbestos claims are filed by claimants who are functionally "unimpaired," as defined by the American Bar Association in February 2003. 37 In fact, one of the most visible plaintiffs' lawyers in Northern California recently stated publicly that close to seventy percent of the claims filed by his office would not

35. Rand Institute Report, supra note 24, at 44.
36. See Chiantelli, supra note 3, at 171.
37. In February 2003, the American Bar Association House of Delegates passed a resolution calling for Congress to adopt legislation that would defer the claims of "unimpaireds," while tolling all applicable statutes of limitations, until the claimants are able to satisfy medical criteria of an impairment. See Asbestos Litigation Crisis: Oversight Hearing Before the Sen. Comm. on the Judiciary, 108th Cong. at 4, 14 (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-elect, American Bar Ass'n) [hereinafter ABA Guidelines]. The medical criteria recommended by the ABA were based on guidelines similar to those adopted by the American Thoracic Society. Id. at 15. The ABA Commission interviewed several nationally recognized pulmonologists and other medical specialists with extensive knowledge of asbestos-related non-malignant conditions to determine the objective medical criteria which would constitute the threshold level of asbestos-related injury that would permit a plaintiff's case to be placed on an active docket. See id. at 10-12. Based on those interviews, the ABA Commission promulgated a Standard for Non-Malignant Asbestos-Related Disease Claims (the "ABA Standard"). See id. at app. B. The ABA Standard is also based both on guidelines for diagnosing asbestos-related conditions which have been published by the American Thoracic Society (a division of the American Lung Association) and on guidelines for the evaluation of impairment published by the American Medical Association. See id. See also AM. THORACIC SOC'Y, OFFICIAL STATEMENT: THE DIAGNOSIS OF NONMALIGNANT DISEASES RELATED TO ASPEROS, 134 AM. REV. RESP. DIS. 363-368 (Mar. 1986); AM. THORACIC SOC'Y, LUNG FUNCTION TESTING: SELECTION OF REFERENCE VALUES AND INTERPRETIVE STRATEGIES, 144 AM. REV. RESP. DIS. 1202-1218 (1991).
meet those ABA medical criteria.\textsuperscript{38}

Across the country, the majority of asbestos claimants exhibit no impairment, or even symptoms. Their lung function is normal; they suffer no pain or shortness of breath. They do not run an increased risk of cancer. In fact, they may never become impaired. Based on similar findings, several leading jurisdictions in the United States have implemented some form of an "inactive docket" system, prohibiting recovery for claims unless and until the plaintiff can show evidence of actual impairment.\textsuperscript{39}

This section analyzes types of inactive dockets implemented in other jurisdictions, and the appropriateness of implementing an inactive docket in Northern California to prevent unimpaired claims from continuing to consume the courts.

B. Inactive Dockets in Other Jurisdictions

Many courts have already taken steps to give priority to asbestos claimants who are truly sick. Inactive dockets, sometimes called "deferred dockets" or "pleural registries," are court-implemented systems that defer the claims of unimpaired plaintiffs by moving claims to an "inactive docket."\textsuperscript{40} This allows the claims of truly impaired plaintiffs to be heard more promptly.\textsuperscript{41} In an inactive docket, plaintiffs do not lose


\textsuperscript{40} See, e.g., Order to Establish Registry for Certain Asbestos Matters, In re Asbestos Cases (Cir. Ct., Cook County, Ill. Mar. 26, 1991) [hereinafter Cook County Order].

\textsuperscript{41} In California, impaired plaintiffs may move for trial preference under California Code of Civil Procedure section 36 if (a) the plaintiff is over 70 years old, has a substantial interest, and his health is a factor; (b) the plaintiff is under the age of 14; or (c) there is clear and convincing medical documentation
their right to have their cases heard because statutes of limitations are tolled on their claims. Instead, they must simply wait until they show signs of actual physical impairment. At that point, they can have their cases removed to the active docket and set for trial.

Courts throughout the country have implemented inactive dockets, or deferred registries, in order to enable efficient and equitable handling of congested asbestos dockets. The judges in those jurisdictions who have had an opportunity to see the effects of the inactive docket system consistently report that the plans are working well for all parties involved. This article discusses the basic structure and practical implications of various inactive docket models that have been implemented in courts across the country.

C. Inactive Docket Models

The types of inactive dockets implemented thus far vary in how they handle claims brought by plaintiffs who are functionally unimpaired. Some courts actually stay claims of unimpaired plaintiffs until and unless the plaintiffs are able to demonstrate physical impairment, based on established medical criteria. Alternatively, other courts simply prioritize claims based on levels of impairment, deferring claims of that plaintiff suffers from an illness or condition raising substantial medical doubt of survival beyond six months. Under section 36(f), upon granting of a motion for preference, the court shall set the case for trial within 120 days. Once a case is assigned a preferential trial date, San Francisco General Order 140 governs discovery and motion practice. General Order 140, In re Complex Asbestos Litigation (Super. Ct. S.F. County Nov. 15, 1996) (No. 828684). San Francisco General Order 156 governs expert witnesses. General Order 156, In re Complex Asbestos Litigation (Super. Ct. S.F. County Nov. 15, 1996) (No. 828684). Similarly, Alameda General Order 11.00 governs preferential trial settings pursuant to California Code of Civil Procedure section 36. General Order 11.00, In re Complex Asbestos Litigation (Super. Ct. Alameda County Feb. 1, 1990) (No. 607734-9).


43. Id. (citing Inactive Asbestos Dockets: Are They Easing the Flow of Litigation? HARRISMARTIN’S COLUMNS: ASBESTOS 2 (Feb. 2002)); see also Memorandum Opinion and Order, In re USG Corp. at 8 n.3 (Bankr. Del. Feb. 19, 2003) (No. 01-2094). “The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in various jurisdictions.” Id.

44. See, e.g., Cook County Order, supra note 40.
unimpaired plaintiffs only until the claims of impaired claimants are resolved.  

Under the traditional inactive docket model, any claim that does not meet set medical criteria is stayed until the claimant can demonstrate a threshold level of impairment, or until the parties stipulate to allow the case to move forward. This type of system has been implemented in such jurisdictions as Cook County, Illinois, New York City, New York, Baltimore, Maryland, Syracuse, New York, and Madison County, Illinois. The definition of "impairment" is fairly consistent throughout all these jurisdictions, generally requiring a 1/1 ILO reading or a 1/0 ILO with other reliable evidence of impairment, which may be established through pulmonary function testing, that demonstrates reduced forced vital capacity or total lung capacity. This standard is consistent with, if not identical to, the ABA Standard for Non-Malignant Asbestos-Related Disease Claims.

45. See, e.g., Order Re: Asbestos-Related Disease Protocol, In re Asbestos Cases of King County (Super. Ct., King County, Wa., Feb. 3, 2004) (No. 89-2-18455-9 SEA) [hereinafter King County Order].
46. See Cook County Order, supra note 40.
47. Id.
52. ILO refers to radiological ratings of the International Labor Office. ILO grades are obtained by a physician who grades a chest film as to the most likely level of severity: 0 for none, 1 for slight, 2 for moderate, and 3 for severe. The physical then gives a second grade as the next most likely level of severity. See AMERICAN THORACIC SOCIETY, THE DIAGNOSIS OF NONMALIGNANT DISEASES RELATED TO ASBESTOS, 134 AMERICAN REVIEW OF RESPIRATORY DISEASE 363, 365-66 (1986).
53. See, e.g., New York City Order, supra note 48.
54. In February 2003, the American Bar Association House of Delegates passed a resolution calling for Congress to adopt legislation that would defer the claims of unimpaired plaintiffs, while tolling all applicable statute of limitations, until the claimants are able to satisfy medical criteria of an impairment. The medical criteria recommended by the ABA were based on guidelines similar to those adopted by the American Thoracic Society. Schwartz, supra note 42, at 297.
Under the traditional inactive docket, unimpaired plaintiffs are actually barred from bringing their claims unless and until they meet the impairment requirements. This system accomplishes more than simply prioritizing the claims; it actually prevents unimpaired claimants from litigating their claim unless and until they are impaired. This allows the courts and parties to focus their resources on the claims of plaintiffs who are truly sick without the burden of also managing claims of plaintiffs who do not allege injury sufficient to meet the medical criteria required for removal to the active docket.

As an alternative to an inactive docket, King County (Seattle), Washington recently implemented a modified docket management system termed “Asbestos-Related Disease Protocol.” Under this system, there is no “inactive docket” or “deferred registry” for unimpaired claims. Rather, claims are prioritized and placed in trial groups based on disease severity and the ability of plaintiffs to meet certain medical criteria. The medical criteria contained in the order are somewhat less stringent than the ABA standards and the criteria set forth in the jurisdictions mentioned above.

This distinction is significant because, under the King County system, unimpaired plaintiffs are not prevented from pursuing their claims; rather, they are simply moved to the bottom of the docket until the claims of more severely injured plaintiffs are litigated. In a jurisdiction with a lighter caseload, this model might not significantly affect the number of unimpaired cases that remain active, because the unimpaired claims would be allowed to go forward in the absence of a large number of severely ill plaintiffs. However, in a...
court that consistently sees many impaired plaintiffs, this type of prioritization scheme could have the same practical effect as the traditional inactive docket: the constant influx of impaired claims would result in indefinite deferral of claims brought by plaintiffs who are unimpaired.

Other courts have implemented creative case management orders as a means of reducing the burden of handling claims of unimpaired plaintiffs. For example, the trial judge who oversees asbestos litigation in West Virginia, Judge Arthur Recht, recently established an "exigent docket," under which a set number of claims are chosen by plaintiffs' counsel to move forward on an expedited trial schedule every other month. Similarly, in Cleveland, Ohio, the Court of Common Pleas of Cuyahoga County implemented a case management order aimed at focusing judicial resources on claims of truly sick plaintiffs. Under the order, all upcoming discovery and trial preparation is focused on groups of plaintiffs who demonstrate substantial impairment.

Finally, Federal District Court Judge Charles Weiner, who oversees the federal asbestos docket, has entered a court order that is similar in effect to that of an inactive docket. Under the order, cases brought by plaintiffs suffering from mesothelioma or lung cancer are given immediate priority, while all other cases are placed in disease categories based on severity. The system works to give priority to "malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury." Thousands of cases involving claimants who could not demonstrate functional impairment have been dismissed without prejudice based on this prioritization scheme.

All of the case management strategies described above reflect a general recognition among asbestos jurists that the growing number of unimpaired asbestos claims is a major

66. Id.
68. Id.
problem modern courts face. As Judge Weiner recognized in 2002, "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."

D. An Inactive Docket Is the Most Fair, Efficient, and Effective Means to Resolve the Northern California Docket Management Issues

An inactive docket system would benefit both impaired and unimpaired claimants, as well as the courts, in Northern California. Such a system would enable impaired claimants to move "to the front of the line," ensuring that their cases would be heard more quickly, and that they would be compensated before the plaintiffs with little or no actual impairment. In addition, litigating the claims of impaired claimants first ensures that scant financial resources would be devoted to deserving plaintiffs, which becomes increasingly important in light of the growing number of defendants who are forced into bankruptcy.

The creation of an inactive docket would also preserve indefinitely the claims of unimpaired plaintiffs, preventing them from being time-barred and allowing the plaintiffs to proceed when and if their injuries manifest. Although California's provision regarding the statute of limitations for filing an asbestos personal injury claim is relatively favorable to plaintiffs, unimpaired claimants may nonetheless be inclined to file suit prematurely for fear that their right to bring a claim may expire before they have any cognizable injury.


70. See Behrens, supra note 39, at 6. An attorney from Oakland, California's Asbestos Cancer Center recently expressed concern that the unimpaireds' claims will deplete available resources such that his clients will be left without compensation. See Statement of Steven Kazan, supra note 34, at 28-29.

71. See Editorial, Asbestos Dreams, WALL ST. J., Oct. 17, 2003, at A10 [hereinafter Editorial] (asserting that at least seventy-eight companies have been driven into bankruptcy by asbestos liabilities).

72. Section 340.2 of the California Code of Civil Procedure states that a plaintiff may bring an asbestos claim within one year of the later of the following: a) the date of the plaintiff's disability which has been defined as permanent termination of an individual's capacity to perform the tasks involved in his regular occupation, see Puckett v. Johns-Manville Corp., 215 Cal. Rptr. 726, 731 (Cal. App. 1985), or b) the date the plaintiff knew or should have known that his injuries were caused by asbestos exposure. See CAL. CIV. PROC. CODE. §
An additional benefit of creating an inactive docket is that discovery for unimpaired claims is also stayed. Therefore, the courts would have fewer cases in the discovery stage and a less congested docket, allowing them to focus attention and resources on the cases requiring the most attention: those of the truly impaired.\(^7\) As a plaintiff’s attorney recently testified before Congress, a defect in the asbestos litigation system is that “[s]tate courts do not in practice require claimants to show impairment using objective medical criteria . . . .”\(^\text{\textsuperscript{74}}\) The first essential step toward solving this problem is to defer the claims of those who are not sick, but preserve their rights to sue, if and when they become sick in the future.\(^7\)

Judge Henry Needham of Alameda County recently heard a motion for inactive docket in Alameda County, California.\(^7\) Although Judge Needham declined to grant the motion, he did so without prejudice, stating that the issue of unimpaired asbestos claims is “something we all should be concerned about.”\(^7\) Judge Needham denied the motion because he did not feel the moving party presented sufficient evidence of a problem with unimpaired claims in Alameda;\(^7\) however, he stated that if he had been presented with “more evidence that something was actually taking place in this particular county, [he]’d be the first to get something going in that regard.”

\(^340.2(a)(2)\) (West 2004). Some argue this makes an inactive docket unnecessary because a plaintiff’s claim does not accrue until he or she has suffered “disability” as defined by the statute, which is, in essence, impairment. However, courts have distinguished accrual for purposes of the statute of limitations from accrual in the sense of a claim being actionable. Buttram v. Owens-Corning Fiberglas Corp., 941 P.2d 71, 77 (Cal. 1997). In order to bring a claim, a plaintiff must only have suffered “appreciable harm,” so there is in fact no built-in requirement of impairment in California procedural law. \(^\text{id.}\)

\(^73\). See Behrens, \textit{supra} note 39, at 8.

\(^74\). See Statement of Steven Kazan, \textit{supra} note 34, at 24.

\(^75\). See generally \textit{id.}


\(^78\). See \textit{id.} at 53, In. 4-5.

\(^79\). \textit{id.} at 53, In. 6-8.
E. California Law Grants Courts Authority to Implement an Inactive Docket

The majority of jurisdictions with inactive dockets have established such systems by order of the individual court where the docket itself was established. Section 187 of the California Code of Civil Procedure grants California courts broad discretion to issue case management orders and to implement procedures necessary to effectively manage their dockets:

[w]hen jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Further, the courts' authority to implement an inactive docket is supported by section 19 of the California Standards of Judicial Administration, which grants courts dealing with complex litigation even greater authority to craft orders as necessary to manage their dockets. Section 19 states, "trial judges should be encouraged to use their inherent powers under Code of Civil Procedure Section 187 to manage complex cases in the most efficient and expeditious manner." Since most courts in California have deemed asbestos litigation "complex," such courts have authority to implement some type of deferred registry, if prudent and necessary to tame

81. CAL. CIV. PROC. CODE § 187 (West 2004).
82. Rule 1800 of the California Rules of Court defines a complex case as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." CAL. R. OF COURT R. 1800 (West 2004).
84. Id.
unmanageable asbestos dockets.\textsuperscript{85}

Under California Code of Civil Procedure section 187, and section 19 of the California Standards of Judicial Administration, the Northern California courts have inherent power to manage litigation, including the power to implement a form of an inactive docket system. In fact, the flexibility afforded the courts by Code of Civil Procedure section 187 is particularly applicable in cases designated as complex litigation, such as asbestos litigation.\textsuperscript{86} Unimpaired claims and the burden they place on the courts present a serious problem that threatens to undermine the Northern California asbestos litigation system. As such, some form of a docket management system should be created now in Northern California to ameliorate the chaos plaguing the current docket, before a looming avalanche of future asbestos-related claims is filed.\textsuperscript{87}

\section*{III. Timelines for Trial Setting and Taking a Case to Trial; Elimination of Fast Track Rules}

Another major issue facing Northern California courts is determining the appropriate pace for taking asbestos cases to trial, particularly in light of the recent statewide elimination of the "Fast Track" rules. In the name of efficiency, the Northern California court system has made efforts to push asbestos cases through the system more quickly. However, there is evidence that expediting the trial process in fact has the opposite of its intended effect. Some scholars who have analyzed asbestos litigation nationwide have concluded that creating a procedure that moves large numbers of cases through the tort system actually encourages more cases to be

\textsuperscript{85} One provision of California law that arguably could affect the creation of an inactive docket is California Code of Civil Procedure section 583.310 which states, in pertinent part, "[a]n action shall be brought to trial within five years after the action is commenced against the defendant." \textsc{Cal. Civ. Proc. Code} § 583.310 (West 2004). This statute provides for mandatory dismissal of any claim that is not brought to trial within five years of the filing of the complaint. \textsc{Cal. Civ. Proc. Code} § 583.360 (West 2004). However, the five-year period in which an action must be brought to trial is tolled (extended) by any period of time during which prosecution of the action was stayed or enjoined. \textsc{Cal. Civ. Proc. Code} § 583.340 (West 2004); see \textsc{Rutter Group, Cal. Prac. Guide Civ. Proc. Before Trial Ch. 11 at 11:203} (2004); see also Maryland Order, supra note 49. In Baltimore, Maryland, the court simply stated that "claims on the Inactive Docket will not be subject to the provisions of Md. Rule 2-507 [5 year statute] for so long as they remain on the Inactive Docket." \textit{Id.} at 7-8.

\textsuperscript{86} See \textsc{Lu v. Superior Court}, 64 Cal. Rptr. 2d 561, 565-66 (Cal. App. 1997).

\textsuperscript{87} See Rand Institute Report, \textit{supra} note 24, at 40-48.
filed.\textsuperscript{88}

Beginning in the mid-1980's, Northern California began a pilot program known as the "Trial Court Delay Reduction Act,"\textsuperscript{89} or "Fast Track" system. By the early 1990s, the program applied to all California civil cases.\textsuperscript{90} This set of rules was created in response to a growing backlog of civil cases, many of which were taking up to five years to reach trial.\textsuperscript{91} Under California Rule of Court 209, all cases were assigned to a "Plan."\textsuperscript{92} Plan I meant the case had to be disposed of within twelve months of the filing of the complaint, Plan II—eighteen months, and Plan III—twenty-four months.\textsuperscript{93}


[judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase the demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam . . . .]

\textit{Id.} at 606.

\textsuperscript{89} These standards were adopted under the Trial Court Delay Reduction Act of 1990, which provides in relevant part:

[t]he Judicial Council shall adopt standards of timely disposition for the processing and disposition of civil and criminal actions. The standards shall be guidelines by which the progress of litigation in the superior court of every county may be measured. In establishing these standards, the Judicial Council shall be guided by the principles that litigation, from commencement to resolution, should require only that time reasonably necessary for pleadings, discovery, preparation, and court events, and that any additional elapsed time is delay and should be eliminated.


\textsuperscript{91} CAL. R. OF COURT R. 209.

\textsuperscript{92} Id.
were presumed to be, and automatically set as, Plan I, unless a party promptly filed a request for Plan II or Plan III. The program was successful in some respects. By the end of 2002, sixty-five percent of unlimited cases and eighty-five percent of limited cases were disposed of within one year.  

Pursuant to San Francisco General Order 129, all asbestos cases are automatically designated as "Plan II," thus requiring them to proceed to trial within eighteen months of filing. The Order also requires status and trial setting conferences to be set approximately eleven months after the case is filed. Finally, the order anticipates that the trial date be set approximately six to nine months after the status and setting conference date. Hence, there is a "rush" to get asbestos cases to trial within the Plan II, eighteen-month period.

Has this rush to trial helped the litigants and the court, or has it instead helped to create a traffic jam? Recently, Designated Defense Counsel filed a letter brief before San Francisco Presiding Judge Donna J. Hitchens stating, "[s]everal years ago, the court was setting between 60-80 cases for each status conference. Currently, we are seeing status and setting conference dates with 175 cases on the calendar."

The same counsel went on to argue that only a handful of the cases at the status and setting conferences are in fact ready for trial. Furthermore, because of the increase in the volume of filings, coupled with the rush to set those cases for trial, numerous cases are now continued from one status conference to another and as a practical matter the cases are

95. S.F. Gen. Order No. 129, supra note 8, at ¶ 2; see also Alameda Gen. Or. Nos. 3.30 and 13.01, supra note 90 (describing their participation in the Trial Court Delay Reduction Act. Currently in Alameda, however, trial dates are assigned by Judge Henry Needham based on the court's calendar and the individual circumstances of the case).
96. "Plans" are defined in S.F. COUNTY SUPER. CT. R. 3.
97. S.F. Gen. Order No. 129, supra note 8, at ¶ 2. In November 2003, "well over 200 cases" were designated to be addressed at a single status and setting conference. See also Berry & Berry Letter, supra note 9.
98. S.F. Gen. Order No. 129, supra note 8, at ¶ 2
99. See infra Part IV.
100. See Berry & Berry Letter, supra note 9.
101. Id.
no longer routinely disposed of within 18 months of filing. Cases are now being sent to trial departments and trailing in those departments for several months. The medical discovery becomes stale during this time period and the litigants are unable to plan their trial schedules.\textsuperscript{102}

In order to enable the courts and counsel to better manage their daunting caseloads, during 2003, Northern California defense and plaintiffs' counsel began discussions about modifying the current system to schedule fewer cases for trial at a time. The defense counsel proposed a modification that would change the asbestos case timeline from Plan II to Plan III, which requires that a case proceed to trial within twenty-four months after filing. The proposed change of the asbestos case timeline to Plan III would provide an additional six-month period for the parties to prepare for trial and engage in settlement discussions. At least one plaintiffs' attorney proposed to defer all of the cases his firm filed with the exception of 120 cases per month, which his firm would choose to proceed to trial.\textsuperscript{103} Discussions on this issue are ongoing.

Since those discussions began, however, the rules underlying the Plan, on which the General Orders were based, were abolished, as discussed below. Nonetheless, the timelines described above remain in place for complex asbestos litigation. This is true even despite the fact that the "Fast Track" system, providing the foundation for General Order 129, no longer applies. The next section analyzes the appropriateness of retaining the scheduling portions of General Order 129 that push cases through to trial in spite of the abolition of the "Fast Track" rules.

\subsection{A. Blue Ribbon Panel Report on Fair and Efficient Administration of Civil Cases}

On February 17, 2003, California Supreme Court Chief Justice Ronald M. George appointed the "Blue Ribbon Panel of Experts on the Fair and Efficient Administration of the

\textsuperscript{102} \textit{Id.} The same letter brief also explained that this "rush to trial" has the effect of causing numerous depositions to be scheduled for any given day, as plaintiff's depositions must be completed before the status and trial setting conference. \textit{See id.}

Civil Cases" (the Panel). The Panel was comprised of the Chair, Richard D. Aldrich, and a distinguished group of experts and practitioners in the field of civil procedure for court administration. Specifically, Chief Justice George charged the panel with developing recommendations to solve the following questions:

1. Are civil cases in the trial courts currently being managed so as to promote both efficient case resolution and the fair treatment of parties and counsels?

2. Should the Judicial Council change civil case procedures and practices to promote more timely resolution of cases?

3. Should the Judicial Council change civil procedures and practices to facilitate the granting of reasonable requests for time extensions and other litigation accommodations to parties and attorneys, as appropriate to achieve the fair administration of the civil cases?106

After the Panel conducted research and formed recommendations, the recommendations were sent to the Civil and Small Claims Advisory Committee of California (the Committee). The Committee reviewed the Panel recommendations, and on October 8, 2003, reported to the members of the Judicial Council. The Committee generally supported the recommendations of the Panel report with only some relatively minor modifications.

In reviewing the Trial Court Delay Reduction Act, the Panel concluded that the Act created some significant problems. Of particular concern was the Panel's finding that certain courts were inflexible in their application of the rules, for example: setting all cases for trial within one year; refusing to grant continuances of trial dates where appropriate; not allowing sufficient time for the disposition of cases; and, generally being too rigid in the application of the rules.110

Based on its findings, the Panel recommended the following changes to provide a more flexible approach to managing

105. Id.
106. Id. at 4.
107. Id.
108. See id. at 1.
109. Id. at 1-2.
civil cases, to which the Committee agreed: (1) amend the Case Management Conference rule (Rule of Court 212), (2) amend the rules for continuances (Rule of Court 375), and (3) amend the Trial Court Delay Reduction Act (Rule of Court 209).

The Panel sought comments to their report from the legal community. For the most part, the response to the Panel's findings was positive and supportive. One comment sent to the Panel by a law firm with extensive experience in asbestos litigation suggested that the Panel's proposed changes should apply to all civil litigation, including asbestos. The Panel replied: "[t]he case management rules will be reviewed comprehensively in 2003-2004... under the current case management and case differentiation scheme, complex cases are handled differently than ordinary civil cases."

The Panel's comment reveals its perception that asbestos litigation may be in limbo as to which rules apply to trial readiness. For example, there is a question as to whether the rules for setting cases for trial and the automatic assignment of an asbestos case to a Plan is still appropriate in light of the elimination of the Fast Track rules. The relevant portions of the Panel's recommendations follow.

1. Trial Setting Readiness

California Rule of Court 212, the main rule governing management of civil cases, requires the court to review a case no later than 180 days after the filing of the initial complaint in order to decide whether to set it for trial. The Panel proposed adding a new subdivision to Rule 212, which would provide express criteria for a court to consider when setting a case for trial. The Panel proposed that the court should consider:

the type and subject matter of the action to be tried, whether the case has statutory priority, the complexity of the issues, and the amount of discovery, if any, that remains to be conducted in the case. In setting the trial
date, the court should also consider its own calendar and the achievement of a fair, timely, and efficient disposition of the case.

The Panel also agreed that in setting a case for trial, the court should consider the facts and circumstances of the particular case, including the trial dates proposed by the parties and their attorneys, the professional and personal schedules of the parties and their attorneys, as well as any conflicts with "previously assigned trial dates or other significant events."  

All of the factors enumerated above are equally applicable to asbestos litigation as to other types of civil cases. Courts hearing asbestos cases, especially those in San Francisco, should therefore follow the logic of the Panel's suggestions and consider these factors for each asbestos case (i.e., treat every case individually in order to achieve fairness, timeliness, and efficiency in the disposition of the case). Courts should discontinue their practice of treating all asbestos cases as identical for purposes of scheduling and trial setting.

2. Continuances of Trial

With respect to requests for continuances of trial, the Panel suggested the repeal of California of Court Rule 375(a) which previously stated that continuances before or during trial in civil cases are disfavored.  

Instead, the proposed replacement for this rule as enacted provides: "[to] ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain."  

Perhaps more significantly, the Panel proposed and Rule 375(b) has now been amended to provide that a party may request a continuance by ex-parte application as well as by notice of motion. The Panel also proposed, and the Rule has also now been amended accordingly, to clarify the "good cause" necessary to obtain a continuance. Factors that allow a proponent to gain a continuance after a showing of good

116. Id. at 4.
117. Id.
118. See CAL. R. OF COURT R. 375(a).
119. See CAL. R. OF COURT R. 375(b).
120. See CAL. R. OF COURT R. 375(c).
cause include the unavailability of a witness, the unavailability of trial counsel, the substitution of trial counsel, or the addition of a new party, but only if the new party has not had a reasonable opportunity to conduct discovery or other parties have not had a reasonable opportunity to conduct discovery in regard to that new party's involvement.\footnote{121}{See CAL. R. OF COURT R. 375(c), (d); see also discussion of this rule as it relates to the issue of "Late-Served Defendants," infra Part III.B.}

Adhering to the logic of the Panel's recommendations, the courts should analyze each asbestos case individually and be more lenient in granting a continuance of trial. Rushing to trial, especially where parties are not prepared, does not further justice or due process. In contrast, the trial continuance criteria recognize the importance of giving late-served defendants ample opportunity to conduct discovery and prepare for trial while still recognizing the need to move cases forward. This is of particular concern as the problem of dealing with late-served defendants has become a significant issue in Northern California litigation.\footnote{122}{See infra Part III.B.}

3. Fast Track Rules

Perhaps the most significant modification the Panel suggested was the elimination of Rule 209, the "Fast Track" rule. The Panel concluded that the Rule's automatic assignment of civil cases to Plan I for civil cases (twelve months to trial)\footnote{123}{Asbestos cases were likewise automatically assigned, but instead to Plan II, which allows 18 months to trial under the San Francisco General Orders. Given the number of parties involved in most asbestos cases, and the amount of discovery involved, this timeline is clearly unrealistic for the resolution of most asbestos cases.} is a "source of the arbitrary assignment of many civil cases to unrealistic trial dates."\footnote{124}{See Judicial Council Report Summary, supra note 91, at 7.} Accordingly, the Panel recommended repealing the section on automatic assignment to a Plan,\footnote{125}{CAL. R. OF COURT R. 209(B).} as well as the automatic presumption that cases should be assigned to Plan I.\footnote{126}{CAL. R. OF COURT R. 209(C).}

The Panel's recommendations have now been adopted. Under the revised rules, at the time of the case management review, the trial court must review and consider statements submitted by the parties, holding a conference where appropriate, and then issue an order "managing the case through to
The Panel concluded that "[t]his approach should reduce arbitrariness and promote the individualized treatment of every single case based on its particular facts and circumstances."\(^{128}\)

Under the Panel's rationale, automatic assignment to a Plan is arbitrary. San Francisco's current automatic assignment of asbestos cases for trial within six to nine months after the status and setting conference is as arbitrary as assigning any other civil case to a Plan. The courts should follow the Panel's logic and the Committee's rule changes and accordingly amend the related Plan provisions in the courts' Asbestos General Orders to dispose of the system process of automatic assignment to a Plan. Instead, each case should be handled individually, based on its particular facts and circumstances.

B. Late-Served Defendants

1. The Practice of Late Service

It is common practice in Northern California asbestos litigation to identify new defendants during the plaintiff's deposition, an event that frequently does not occur until a month before the initial status and trial setting conference. According to the California Code of Civil Procedure, newly identified defendants may be substituted in for "DOE" defendants at any time via a motion by plaintiffs counsel requesting leave to substitute in a new defendant.\(^{129}\) In Northern California, such motions are regularly granted, are often done so ex-parte and are rarely, if ever, denied.

2. The Effect of Late Service

Adding new defendants late in litigation reopens discovery and prejudices the late-served defendants by forcing them to prepare for trial on a curtailed schedule.\(^{130}\) And, because "newly discovered" defendants are occasionally added after

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128. Id.
129. These are generally covered in the California Code of Civil Procedure, not in the General Orders. However, S.F. Gen. Order No. 129, supra note 8, at ¶ 7F, does provide that late-served defendants can request further depositions of plaintiff. See, e.g., CAL. CIV. PROC. CODE §§ 472, 473(a)(1), 474 (West 2004).
130. See S.F. Gen. Order No. 129, supra note 8, at ¶ 7F.
discovery is closed, discovery is sometimes reopened several times. Such reopening of discovery can even occur as late as during trial.

Despite the late substitutions and the resulting continuation of discovery, defendants are not guaranteed a continuation of the trial date if one has already been set. In fact, trials are rarely continued due to the addition of a late-served defendant. The net effect of this process on an asbestos trial is that discovery is never really complete, and a defendant can never really be sure that it is fully prepared for trial.

A possible solution for limiting this prejudice is to have a cut-off date for discovery, after which no additional defendants could be substituted, or at which time, a case could be required to be “at issue” as to all defendants before trial is set. Another option is to dismiss any remaining DOE defendants at the trial setting. This would force plaintiffs to timely identify all defendants or risk being precluded from doing so. A third alternative is for the courts to implement a rule that if a defendant is substituted after a trial date has been set, there is an automatic extension of the trial date. Recent amendments to the California Rules of Court support this last solution.

Chief Justice Ronald M. George’s Blue Ribbon Panel proposed, and Rule of Court 375(b) has now been amended to provide that a party may request a trial continuance by ex-parte application as well as by notice of motion. The Panel also proposed, and the rule has also now been amended to remove any requirement of showing an “emergency” before a court could issue a continuance. Instead, a broader list of factors was supplemented to allow a court to grant a continuance based simply on a showing of good cause.

Circumstances that may indicate good cause include . . .

(5) The addition of a new party if: (A) the new party has not had a reasonable opportunity to conduct discovery and prepare for trial, or (B) the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party’s involvement in the case.”

Under this new rule, continuances based on newly added

131. See supra Part III.A.
132. See CAL. R. OF COURT R. 375(b).
133. CAL. R. OF COURT R. 375(c).
defendants would more likely be granted. If requests to substitute in a defendant after trial have been routinely granted, requests to continue the trial should also be granted. Regardless of how the issue is resolved, the court's intervention is appropriate.

C. Appropriate Timelines for Asbestos Litigation?

As noted above, counsel and the courts are currently discussing how the procedure for scheduling asbestos cases should be modified, if at all, in light of the elimination of the "Fast Track" Rules. In the meantime, however, asbestos litigants continue to face timelines that are simply unrealistic for complex cases, which often involve dozens of defendants, some of whom may be added immediately before trial.

Among the questions in need of immediate resolution are: What rules will govern the timing of taking an asbestos case to trial in light of the recent elimination of the Fast Track rules from which the asbestos General Orders were framed? Why would the courts do away with Fast Track rules deemed arbitrary for civil cases, yet make an exception for asbestos cases that are already deemed complex litigation? Why would the modifications to Rule of Court 209 not be appropriate for asbestos litigation as well?134

Cases should proceed to trial when parties have had adequate time to prepare, however long it takes.135 And, if appropriate for any reason, including the addition of a late-served defendant, trial should be continued, unless and until the parties are ready to try the case. The practice of rushing to set cases to trial, only to have the case assigned out to trial departments and then trailing in those departments for several months does not benefit anyone, and only contributes to the current chaos in the system.136

IV. DESIGNATED DEFENSE COUNSEL

Northern California is the only jurisdiction in the country

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134. Were the courts to treat asbestos cases differently from other civil cases on this issue, it might be advisable to consider some additional means of controlling the docket. See discussion on inactive dockets, supra Part II.

135. Keep in mind that, absent a tolling agreement, every case must be dismissed if it is not brought to trial within five years of when the complaint was filed. CAL. CIV. PROC. CODE § 583.310 (West 2004).

136. See Berry & Berry Brief, supra note 5.
where, by court order, all defense counsel are required to utilize the services of a single law firm, called “Designated Defense Counsel,” as co-counsel for all administrative duties related to case management, including scheduling functions and document procurement. This section analyzes the system that was created over ten years ago and questions whether it has kept up with the changing face of Northern California asbestos litigation, or if instead it needs to be modified to meet current demands.

A. History of Creation of Designated Defense Counsel

Under section 19 of the Complex Litigation Standards in both San Francisco and Alameda counties, the courts have designated all death and injury asbestos exposure cases as “complex litigation.” Under that authority, and beginning in 1986, San Francisco and Alameda courts issued General Orders establishing various rules to specifically govern complex asbestos litigation. One General Order was entitled “Designation of Defense Counsel for Discovery Purposes.” The purpose of the General Orders appointing Designated Defense Counsel (hereinafter “DDC”) is to:

A. Promote a cost-effective, simple but competent system for defendants to acquire information necessary in order to facilitate the evaluation of these cases;
B. Curtail and prevent unnecessary and repetitious discovery whenever possible;
C. Provide continuity, efficiency and economy in completing discovery procedures;
D. Encourage delegation of work responsibility in sharing of cost to avoid unnecessary duplication and to reduce expense to the litigants;
E. Bring asbestos litigation to early and meaningful settlement negotiations in each case.

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The Orders also established that the DDC would perform the following functions on behalf of all asbestos defendants:

1. schedule and notice plaintiffs' depositions, after receiving a list of cases selected for deposition by the Committee;\(^\text{141}\)

2. schedule defense medical examinations and preliminary screenings and any other necessary testing or medical reviews, after receiving the Committee's determination of the nature and propriety of such examinations and screenings;

3. initiate procedures, including necessary stipulations, authorizations, and waivers, to obtain medical and employment records and related materials;

4. store and provide reasonable access to radiograph, pathology materials, and other related medical evidence;

5. schedule, notice, and coordinate depositions of plaintiffs' designated experts and jointly designated defense experts, after receiving the Committee's determination of which plaintiffs' experts should be deposed; and

6. file and serve a joint defense designation of medical experts on behalf of those defendants who so authorize.\(^\text{142}\)

The courts' apparent goal in creating the DDC role was to expedite the management of complex asbestos cases by centralizing the above functions in hopes of making the handling of asbestos defenses more efficient.

**B. Asbestos Claims Facility v. Berry & Berry**

In approximately 1990, a fee dispute arose between the DDC law firm\(^\text{143}\) and a group of defendants who requested an accounting of fees and costs billed and collected by DDC.\(^\text{144}\)

\(^{141}\) A "Defense Discovery Committee" also was contemplated in the General Orders. This Committee was to be comprised of defense counsel who would strategize on each case and give directives to the Designated Defense Counsel. While this may have been effective when first created, according to local defense practitioners, the Committee no longer meets for this purpose.


\(^{143}\) Since the creation of the General Orders establishing this position, the same law firm, Berry & Berry, has remained in the Designated Defense Counsel role. \textit{See} Berry & Berry Law Offices, \textit{at} http://www.berryandberry.com (last visited Nov. 12, 2004).

DDC brought a motion to compel payment of its fees, and the defendants responded with various objections to the DDC system. The trial court rejected the defendants' arguments and ordered them to pay DDC's immediate, as well as future bills.

Upon reviewing the case, the Court of Appeal noted that the issue was one of a conflict of interest - that DDC was simultaneously representing multiple defendants with conflicting interests at the same time - which could not be dealt with for the first time on appeal because the issue had not been raised at the trial court level. The court stated:

our conclusion that the issue is not properly before us should not be construed to mean that we see no conflict of interest problem in the designated defense counsel system as it is apparently being operated in complex asbestos litigation in both San Francisco and Alameda counties.\footnote{145}

Further, the Court went on to cite former rule 5-102(B) of the California Rules of Professional Conduct of the State Bar of California:

[a] member of the State Bar shall not represent conflicting interests, except with the written consent of all parties concerned. An attorney's simultaneous representation of clients with differing interests poses the classic conflict situation. A client is entitled to his attorney's unimpaired loyalty and the danger is that an attorney representing conflicting or potentially conflicting interests will be tempted to favor one client over the other.\footnote{146}

While this article does not explore in detail the conflict issue as identified by the court, the practice of a single law firm handling discovery matters on behalf of defendants with differing interests is clearly problematic.

The appellate court disagreed with the appellants' argument that the courts did not have the authority to create the DDC or to require all defense counsel to use DDC for the administrative functions the courts had identified. Instead, the court held that the court rules provide flexibility for courts when dealing with complex litigation and that it has the authority to create the DDC for that purpose:

\footnote{145} Id. at 907.
\footnote{146} Id. at 906 (internal citations omitted). The court further mentioned that this rule also applies to non-legal services provided by a lawyer. Id. (citing William H. Raley Co., v. Superior Court, 149 Cal. App. 3d 1042, 1046-47 (Cal. App. 1983)).
The enumerated functions assigned to [Designated Defense Counsel] were primarily administrative in nature, and the effect of the orders was not to substitute [Designated Defense Counsel] for appellants' attorney of choice. Complex asbestos litigation involves over 2000 cases in Alameda County and a similar number in San Francisco. Given the burdens placed on the judicial system by that litigation, we conclude that the trial courts acted well within their inherent managerial powers when they appointed [Designated Defense Counsel] as designated defense counsel to perform the limited functions specified in those orders for all defendants . . . .

Finally, the appellate court addressed the appellants' challenges to DDC's fees. The trial court had held that the defense counsel must pay all disputed fees immediately, and also pay all fees billed thereafter by the DDC within thirty days of their billing. However, the appellate court again disagreed. It held that the DDC's fees must be treated and analyzed like other legal counsel fees, and that the DDC must first make a detailed showing of the reasonable fees before the court could enforce them. Further, the appellate court pronounced that since the trial courts had created the DDC, it is the obligation of the trial courts to monitor the appointed DDC.

Asbestos Claims Facility reinforces the need for judicial oversight and management of the DDC in its role as administrator of all Bay Area asbestos litigation. This dynamic litigation climate calls for such proactive judicial intervention in order to ensure that the DDC system achieves the goals for which it was created.

C. Recent Challenge to DDC

Under the San Francisco and Alameda County asbestos General Orders, defense counsel has the right to select a new DDC every other year. No specific reason is required, let

147. Id. at 904.
148. Id. at 904-05. Designated Defense Counsel's support for its billing during the appeal was merely a one page "Professional Billing System Summary Report" that the appellate court found insufficient to support the Designated Defense Counsel's request for payment. Id. at 905.
149. Id. at 905.
150. See S.F. Gen. Order No. 41, supra note 14, at ¶ I(A)(4); Alameda Gen. Order No. 14.00, supra note 14, at ¶ I(A)(4); see also Certain Defendants' Responsive Statement Regarding the Initial Designated Defense Counsel Selection
alone a showing of good cause to make the change. The only requirement is that a group must agree to make a change.\textsuperscript{151} Pursuant to the General Orders, the court’s involvement is only mandatory where defense counsel cannot agree on a replacement.\textsuperscript{152}

In November 2003, a group of interested defendants invoked their right under the General Orders to solicit applications for a possible replacement of the current DDC.\textsuperscript{153} Reasons cited during a hearing on the issue included a lack of appropriate technology currently in use by DDC\textsuperscript{154} and a general frustration with the way DDC carries out its responsibilities.\textsuperscript{155}

The Orders creating the DDC specifically limit the DDC’s role to administrative functions only, stating that DDC “shall not be deemed an attorney for any defendant solely as a result of such activities . . . .”\textsuperscript{156} Thus, these purely administrative functions could also be conducted by non-lawyers, at non-lawyer costs, who could utilize technology, such as web-based sites, to keep the parties up to date on schedules in real


\textsuperscript{151} See S.F. Gen. Order No. 41, supra note 14, at ¶ I(A)(4); Alameda Gen. Order No. 14.00, supra note 14, at ¶ I(A)(4). Revised Alameda Gen. Order 14 and Revised San Francisco Gen. Order 41 state that “[i]f defense counsel cannot agree on the procedure for the ensuing two years, the Court shall make provision for the selection.” \textit{Id}. The term “agree” is not defined in the orders, and there is some dispute over whether it requires unanimity or simply a majority consensus. In addition, it is also unresolved whether this decision is to be made by defense counsel, or by defendants.

\textsuperscript{152} \textit{Id}.


\textsuperscript{155} See Certain Defendants’ Responsive Statement, supra note 150. The conflict issue of Designated Defense Counsel was also raised during these hearings.

\textsuperscript{156} Alameda Gen. Order No. 14.00, supra note 14, at ¶ III(B)(2); S.F. Gen. Order No. 41, supra note 14, at ¶ III(B)(2).
time. These and other possible solutions to the current issues with the DDC system are currently under review by the defense.

D. Monitoring of DDC Performance

As the appellate court’s decision in *ACF v. Berry & Berry* suggests, it is the trial courts’ obligation to be proactive in monitoring the DDC and to ensure that the DDC’s practices are appropriate and up to date. Since the courts used their inherent power to create the DDC, they must be proactive in monitoring the DDC. One way to be proactive is to require that the DDC enter into a service contract that spells out the expectations for its services. Legal contracts specifying the billing rates, work to be performed and other requirements are the norm when hiring legal counsel. Similarly, a service contract for the DDC should also include billing expectations (e.g., billing guidelines, bills to be submitted electronically every thirty days) and could also include a requirement that the DDC utilize technology both to keep costs down and to keep litigants instantly informed of schedules.

The same law firm has been the DDC for ten years with little judicial oversight of its services. Some view this as an attempt to continue what has been an unsupervised monopoly for ten years. The courts should instead be proactive in monitoring the DDC and not simply extend the monopoly era. In doing so, the courts would provide defendants and defense counsel with the efficiency and effective case management that were the central goals of the General Orders.

V. PROPOSITION 51 AND BANKRUPT ASBESTOS DEFENDANTS

Proposition 51 allows defendants to limit their liability for non-economic damages in asbestos lawsuits by implicating third parties who may be responsible for the plaintiff’s alleged injuries. The effect of this law is increasingly important in asbestos litigation as more and more potential defendants

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seek protection from liability under the Bankruptcy Code.\textsuperscript{161} However, this principle is somewhat misunderstood and underutilized. This section of the article discusses the general purpose and effect of Proposition 51, and how counsel could better utilize its provisions to limit liability for asbestos bodily injury claims.

\textbf{A. Proposition 51 – Background and Intent}

In 1986, California citizens modified the rules of tort liability in California by voter initiative, replacing the traditional rule of joint and several liability with a more equitable approach to apportionment of damages.\textsuperscript{162} California Civil Code section 1431.2 (Proposition 51) subpart (a) states, in pertinent part,

[i]n any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.\textsuperscript{163}

Under this modified approach, contributory wrongdoers are still jointly liable for economic damages, but individually are only liable for a percentage of non-economic damages in proportion to the fault allocated to them by the jury.\textsuperscript{164} For example, a peripheral defendant in an asbestos bodily injury case found to be five percent at fault would be jointly and severally liable for the entire award of economic damages, but would only be individually responsible for paying five percent of the non-economic award.

Proposition 51 was enacted as part of an initiative measure called the “Fair Responsibility Act” of 1986.\textsuperscript{165} Popularity known as Proposition 51,\textsuperscript{166} the measure “was a response to a

\textsuperscript{161} See Editorial, \textit{supra} note 71 (asserting that at least seventy-eight companies have been driven into bankruptcy by asbestos liabilities).
\textsuperscript{162} CAL. CIV. CODE § 1431 (West 2004).
\textsuperscript{163} CAL. CIV. CODE § 1431.2 (West 2004).
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} See Evangelatos v. Superior Court, 753 P.2d 585 (Cal. 1988).
\textsuperscript{166} \textit{Id.} at 586.
perceived crisis in tort law." The express purpose of the statute was "to eliminate the perceived unfairness of imposing all the damage on defendants who were found to share only a fraction of the fault." In other words, the initiative was intended to protect solvent defendants with "deep pockets" from having to pay large awards to plaintiffs where that defendant's contribution to causing a plaintiff's injuries was minimal.

Proposition 51 has been somewhat effective in the context of large-scale tort cases involving numerous defendants. Although the total amount awarded in California asbestos verdicts has increased, the defendants remaining at the time of trial are only being held liable for small percentages of the total liability that correspond to their individual degree of fault. However, as asbestos litigation has forced many defendants into bankruptcy, the issue of apportioning liability under Proposition 51 has become more complicated. With virtually all the large asbestos manufacturing defendants now bankrupt, asbestos plaintiffs' counsel commonly target "peripheral defendants" — companies that never manufactured or sold asbestos, but who may have somehow contributed to causing the plaintiff's alleged exposure.

The large percentage of primary defendants who are now bankrupt gives rise to several questions about Proposition 51's application and effect. First, the issue arises whether juries should apportion liability for asbestos-related injuries to bankrupt defendants at all. Second, assuming fault should be apportioned to bankrupt defendants where appropriate, how does a solvent defendant ensure that all potentially liable parties are identified in the case and that the jury understands those entities' role? Finally, in the evidentiary context, how should courts handle plaintiffs who have received money from bankruptcy trusts and should solvent defendants have access to this information? We address these issues in turn.

B. Should Bankrupt Defendants Be Apportioned Liability

169. See Editorial, supra note 71.
170. Id.
Under Proposition 51?

Although no case directly addresses the issue of whether liability can be apportioned to bankrupt entities under Proposition 51, case law indicates that bankrupt entities should be apportioned liability if they are, in fact, at fault. In Evangelatos v. Superior Court, the California Supreme Court upheld the constitutionality of Proposition 51, despite recognition that "one consequence of the statute's adoption of several liability for noneconomic damages will be that persons who are unfortunate enough to be injured by an insolvent tortfeasor will not be able to obtain full recovery for their noneconomic losses . . . ." While the court did not directly address the issue of apportionment of liability to a bankrupt defendant, its constitutional analysis of the statute strongly suggests that Proposition 51 mandates apportionment of liability for noneconomic damages to all parties at fault, including those that are bankrupt or insolvent.

In discussing the Evangelatos decision in a later case, the California Supreme Court explicitly stated that "[w]ith respect to these noneconomic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury." The indication here is that, with regard to noneconomic damages, it is the plaintiff, rather than the solvent defendants, who bears the risk that he or she may not be able to collect from one or more defendants. Clearly, the focus of Proposition 51 is limiting inequitable results for the defendants, rather than ensuring that injured plaintiffs receive the full amount of compensation awarded by the trier of fact.

Similarly, cases have upheld the apportionment of liability under Proposition 51 to parties that are statutorily immune from having to pay for a judgment. In Taylor v. John Crane, Inc., a plaintiff alleging bodily injury caused by exposure to asbestos argued that, because the Navy is immune from paying for torturous acts, it was error for the court to allow the jury to allocate any fault to the Navy under Proposition 51. The California Supreme Court rejected this argu-
ment, holding that it was proper to include the Navy in the Proposition 51 fault allocation, despite the fact that the plaintiff could not recover the portion attributable to the Navy.\footnote{176} The court pointed out that the Navy is not immune from liability, but is simply not required to pay for its torturous conduct.\footnote{177} However, if the legislature creates statutory immunity intending to declare that a party's conduct is not torturous, it would then be improper to allocate fault to that party.\footnote{178}

In sum, California Supreme Court rulings support allocation of fault to bankrupt defendants. Bankrupt defendants are not immune from liability; they are merely unable to pay for their liability, at least not through the tort system. In light of this fact and the rise in asbestos bankruptcies, identification of bankrupt defendants who may have contributed to a plaintiff's injuries becomes a crucial issue in any litigation. Because plaintiffs have little incentive to identify bankrupt defendants, the burdens have essentially been shifted to solvent defendants to conduct discovery and prove up the liability of bankrupt entities in order to avoid increased liability under Proposition 51.

C. Practical Effects of Proposition 51 in the Asbestos Arena

In theory, because liability can be apportioned to bankrupt defendants under Proposition 51, named defendants have the opportunity at trial to convince the jury that others are responsible for the plaintiff's alleged injuries, essentially pointing the finger at an empty chair. In practice, however, this is often more difficult than it should be. More often than not, juries do not hear the names of potentially liable third parties. Given the number of bankrupt asbestos manufacturers and distributors, why is the empty chair defense with respect to bankrupt defendants?

Bankruptcy laws preclude plaintiffs from suing bankrupt companies as potentially liable parties in their lawsuits.\footnote{179} In

\footnote{176} Id. at 702.  
\footnote{177} Id.  
\footnote{178} The court used the example of the California Civil Code section 1714.45, the rule that temporarily granted statutory immunity to tobacco defendants from any liability for tobacco-related injuries. Id. at 700. This statute actually stated that a tobacco company "commits no tort" by supplying cigarettes. Id.  
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theory though, the identities of potentially responsible bankrupt defendants should nonetheless come to light during discovery, when parties are asked to identify all products to which they may have been exposed during their history of employment. However, if plaintiffs were actually identifying every product to which they may have been exposed, as well as the circumstances of every possible exposure, an asbestos manufacturing company should theoretically be identified in each such interrogatory response regarding the alleged exposure history. Discussions with asbestos defense practitioners reveal a prevailing belief that plaintiffs do not identify these parties because of the effect of Proposition 51.

Thus, while Proposition 51 theoretically provides an empty chair for asbestos defendants to point to, this defense is significantly underutilized because the identities of bankrupt manufacturing defendants are not easily obtainable through discovery. Defendants do not often use discovery motions to press plaintiffs for information about potentially liable third parties. As long as plaintiffs are allowed to withhold information or knowledge about product identification and other issues relating to exposure, defendants will be unable to utilize Proposition 51 to its fullest extent. Defendants should insist that courts enforce the General Orders’ interrogatories and force plaintiffs to reveal all available information about their exposures to the named defendants in the case.

Proposition 51 places a significant burden on a defendant hoping to implicate and have fault allocated to a third party. Even if the plaintiff does reveal the identity of a potentially liable third party, Proposition 51 forces a defendant to make its own case against that third party by pursuing discovery


181. S.F. Gen. Order No. 41, supra note 14, at ¶ 1(C)(1)(d); Alameda Gen. Order No. 14.00, supra note 14, at ¶ 1(C)(1)(d). “Each defendant is entitled to move to compel responses or further responses to the interrogatories provided the defendant has notified Designated Defense Counsel prior to filing such motion.” Id.
and finding appropriate witnesses. As one would imagine, most defendants do not have the time or resources to spend building a case against a third-party defendant on the off chance that a jury will accept the proffered evidence and apportion some liability to the third party, thereby reducing the named defendants’ liability for non-economic damages. Some asbestos defendants are defending hundreds of cases at a time; as such, the focus in defending the case is economy and efficiency, leaving little room for investigation into which manufacturers’ asbestos the plaintiffs may have been exposed. However, with more and more such bankruptcies, the original rationale behind Proposition 51 may be slowly eroded as the economics of asbestos litigation force defendants to forgo this important defense.

D. Proposition 51 and Bankruptcy Trusts

Discussion of bankrupt entities calls for discussion of the impact of bankruptcy trusts. If a plaintiff has received compensation from a bankruptcy trust, should defendants be privy to the nature and amount of the award? Technically, plaintiffs are required to disclose this information during discovery; however, rather than provide this information they often object and ultimately do not disclose it.

This information would be useful to defendants for several reasons. Most relevant to this discussion is the fact that it would help defendants identify potentially liable third parties for purposes of pointing the finger at the empty chair at trial. Technically, the fact that a plaintiff received money from a bankruptcy trust is not an admission of fault on the part of the bankrupt entity, but it is a good indicator for defendants as to who else may have contributed to the plaintiff’s injuries. In addition, this information provides leverage in settlement discussions, improving defendants’ ability to value claims against them. Without this information, asbestos defendants feel that they are “negotiating in a vacuum,” not knowing whether the plaintiff has received nothing for his in-


183. See S.F. Gen. Order No. 129 Ex. B, supra note 180, at Interrogatory Nos. 48-49; Alameda Gen. Order No. 8.00, supra note 180, at Interrogatory Nos. 61-62 that require plaintiffs to disclose the nature and amount of any compensation received from a bankruptcy trust.

184. Common responses include, “[i]nvestigation and discovery are continuing,” or objections based on collateral source rule.
juries, or whether he has already received hundreds of thousands of dollars from bankruptcy trusts or other defendants, ultimately receiving what could amount to double or even triple recovery.

E. Asbestos Defendants Should Utilize Proposition 51 to its Full Effect

Proposition 51 provides a powerful tool for asbestos defendants to limit their liability for large non-economic awards, particularly in light of the number of potentially liable bankrupt entities. However, the tool is underutilized because asbestos defendants either do not have or choose not to use the resources at their disposal to (a) identify potentially liable third parties, or (b) use the discovery process to force plaintiffs to reveal all available facts about their exposures. Defendants, particularly peripheral defendants, should be far more aggressive in pointing the finger at bankrupt entities that may be primarily responsible for the plaintiffs' injuries. In addition, courts should enforce the rules requiring plaintiffs to disclose information about alternative sources of compensation they have received, thereby enabling defendants to be informed in the handling and disposition of claims pending against them.

VI. CONCLUSION

The time is ripe for the Northern California courts to examine the problems with the current asbestos litigation and take control. With over 2,000 cases pending, over 800 new cases filed each year, more than 300 cases up for trial setting at any given time, over fifteen depositions scheduled to go forward on any given week, and the pressure of getting all asbestos cases to trial within eighteen months, courts are left with an incredibly difficult task of managing their asbestos docket and the parties with the almost impossible task of being fully prepared for trial. Northern California courts should take action now to actively and effectively manage their asbestos dockets.

For these reasons, we submit that these courts should consider the following solutions: implementation of an inactive asbestos docket to limit the number of pending asbestos claims; elimination of unrealistic timelines for taking asbestos cases to trial to provide for more flexible scheduling; and
streamlining the function of Designated Defense Counsel, delegating administrative duties to an appropriate specialized vendor. Additionally, Northern California defense counsel should be more proactive in utilizing the tools available to them, such as Proposition 51 and standard discovery procedures, to help them more effectively defend their cases.