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**STILL CRAZY AFTER ALL THESE YEARS: HOW FIVE
LOCAL COURTS MANAGE ASBESTOS LITIGATION AND
WHETHER COMPARABLE CASE VALUES CAN HELP
CALM THE CRAZINESS**

Jeff Trueman, Esq.*

I. INTRODUCTION

Once known as a “magical fiber,” asbestos is an abundant mineral with adaptable insulating properties that has helped countless industries grow into economic and cultural mainstays.¹ But exposure to asbestos fibers can cause various lung-related malignancies such as mesothelioma, an incurable form of cancer causing painful death.² Non-fatal injuries from direct and second-hand exposures can take decades to manifest.³

The infamous, inexhaustible asbestos litigation crisis began when courts allowed asbestos producers to be held liable for exposure injuries under product liability laws.⁴ In addition, plaintiffs’ lawyers arranged mobile health screenings at industrial work sites where claimants were enlisted with false diagnoses.⁵ Had there been tighter

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1. ANDREA BOGGIO, COMPENSATING ASBESTOS VICTIMS: LAW AND THE DARK SIDE OF INDUSTRIALIZATION 4–5 (2013) (crediting asbestos as a critical resource for industries that produced electricity, combustible engines, assembly lines, shipping and transportation mechanisms, building materials, cement, and even cigarette filters).
2. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 101–04 (2013); MASS TORTS SUBCOMM., AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS CLAIMS ISSUES AND TRENDS 2 (2007).
3. BOGGIO, *supra* note 1, at 5–6; Robreno, *supra* note 2, at 103.
4. BOGGIO, *supra* note 1, at 153; *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331, 336–38 (2002) (discussing the “explosion” of asbestos litigation that occurred after the first asbestos product liability lawsuits were brought in the 1970s).
5. Victor E. Schwartz, *A Letter to the Nation’s Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 6 (2012).

controls on such practices, the asbestos litigation crisis may not have happened.⁶

However, the crisis did happen and it remains.⁷ Immeasurable numbers of cases have been filed and continue to be filed in federal and state courts.⁸ Global settlements under federal class actions were curtailed by Supreme Court rulings in the late 1990s.⁹ Legislative attempts to streamline asbestos litigation not only failed, but they intensified the problem, prompting more lawsuits out of concern that tort remedies would be eliminated.¹⁰ Bankruptcy protection, a natural consequence for defendants besieged by litigation, led to the creation of settlement trusts for past and future claimants.¹¹ The plaintiffs' bar responded with new theories of liability, such as second-hand exposure and premises liability.¹²

Asbestos disputes are complex and voluminous.¹³ Many defendants are implicated, some facing third, fourth, and fifth-party liability with related contribution and cross-claims.¹⁴ Injuries are diverse, progressive, and latent.¹⁵ The nexus between a defendant and a source of exposure can be difficult to prove.¹⁶ Multiple experts

6. *Id.*

7. *Id.* at 2–5.

8. *See id.* at 6–7.

9. *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

10. BOGGIO, *supra* note 1, at 153, 167–71.

11. *Id.* at 171–73; Behrens, *supra* note 4, at 337–42; Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021, 1025–27 (2014).

12. David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & POL'Y 589, 593, 623–24 (2008).

13. *See infra* notes 14–17 and accompanying text.

14. *See, e.g.*, BOGGIO, *supra* note 1, at 181–82; Schwartz, *supra* note 5, at 2; N.J. JUDICIAL COUNCIL, CASE MANAGEMENT MANUAL FOR ASBESTOS CASES 2–3 (2006), <https://www.judiciary.state.nj.us/attorneys/assets/mcl/asbestos/asbestosmanual050306.pdf> [hereinafter N.J. CASE MANAGEMENT MANUAL]. Defendants have included mining companies, sellers, suppliers, or distributors of products that contained or could later contain asbestos, and owners of worksites alleged to have contained asbestos that were serviced by contractors and insurance inspectors. N.J. CASE MANAGEMENT MANUAL, *supra*, at 2. Settlement discussions with multiple defendants can be particularly difficult. *See* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 483–84 (1986). Individual defendants tend to be preoccupied with offers from other defendants before considering the overall settlement picture. *Id.* at 484.

15. N.J. CASE MANAGEMENT MANUAL, *supra* note 14, at 1.

16. *Id.*; BOGGIO, *supra* note 1, at 181.

are needed to establish and rebuff decades-old medical, liability, and economic claims.¹⁷

After decades of litigation, state courts have large numbers of asbestos cases on their dockets.¹⁸ When dockets ballooned thanks to “hyper-management strategies,”¹⁹ such as mass consolidations of dissimilar cases, courts turned to individual or cluster (small groupings) case management.²⁰ If tighter, focused case management is the most efficient way for courts to control such a large, long-standing problem, how does it work? Part II of this article explains how courts have become front-line managers of the asbestos crisis.²¹ Brief summaries of case management principles and practices are included.²² Part III examines how five local courts manage their asbestos dockets with additional case management suggestions for the Circuit Court for Baltimore City.²³ Part IV travels back in time to study the Ohio Asbestos Litigation Case Management Plan as a tool, or decision support system, for negotiating case values.²⁴ While recognizing the tension that exists between efficiency and fairness when courts push for negotiated settlements, this article concludes that input from the asbestos bar, with balanced priorities and accountability, give legitimacy and competency to state court asbestos case management plans.²⁵

II. COURTS AS MANAGERS OF ASBESTOS LITIGATION AND MASS TORTS

There may be a strong need for a national solution to the problem of asbestos personal injury litigation, but meaningful, comprehensive federal legislation has not succeeded.²⁶ Lawyers have not come

17. N.J. CASE MANAGEMENT MANUAL, *supra* note 14, at 2, 4.

18. *See, e.g.*, Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 REV. LITIG. 501, 505, 507–09 (2009); Schwartz, *supra* note 5, at 4.

19. BOGGIO, *supra* note 1, at 188.

20. Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531, 542–43 (2001). The usual rules of discovery and procedure were also relaxed “in the push for efficiency.” Schwartz, *supra* note 5, at 2–3.

21. *See infra* Part II.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

26. BOGGIO, *supra* note 1, at 153.

together to create a solution either.²⁷ State courts are the only institutions, for now, that seem to have practical legal solutions to the exposure to asbestos.²⁸ Although two or more adversaries may choose to litigate and empower a third party to decide the outcome, courts can also provide opportunities for private, litigant-controlled outcomes that work for everyone²⁹—including future “claimant[s] whose fate must be negotiated today.”³⁰ Case management initiatives—some actual, some aspirational—can be grouped into four general categories.³¹

A. *Active Case Management*

Case management orders (CMOs) or individual administrative orders (i.e., scheduling or status conference orders) set forth detailed schedules and procedures for filing claims, setting case priorities, exchanging discovery, motions practice, negotiating settlement, and trial.³² Some CMOs require parties to make core discovery disclosures before an initial status conference.³³ Courts should encourage a balance between the scope of discovery and the importance of the information sought.³⁴ Dispositive motions should not be routinely filed.³⁵ Firm trial dates, agreed to by counsel, are an

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27. See McGovern, *supra* note 14, at 446 (identifying some attorneys who may be more focused on “maximizing marginal gains by strategic manipulation of the adversarial process than in insuring [sic] that those gains exceed the marginal costs of obtaining them”).
 28. See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1, 33–34 (2001); see also McGovern, *supra* note 14, at 448–49 (noting that *The Manual for Complex Litigation Second* provides guidelines for courts to use when managing complex cases).
 29. McGovern, *supra* note 14, at 446.
 30. Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1604 (1995).
 31. See *infra* notes 32–48 and accompanying text.
 32. See *infra* Figure 1; see also TORT TRIAL & INS. PRACTICE SECTION, AM. BAR ASS’N, MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER 15 (2005) [hereinafter MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER].
 33. See *infra* notes 96–98 and accompanying text.
 34. Jack Zouhary, *Ten Commandments for Effective Case Management*, 60 FED. LAW., Mar. 2013, at 38, 38. Courts should consider allowing full discovery in response to marginal or frivolous claims to reduce the incentive to file such claims. Rothstein, *supra* note 28, at 33.
 35. Zouhary, *supra* note 34, at 39.

effective way to make settlement discussions tangible and therefore more meaningful.³⁶

B. *Priority for the Truly Sick*

Plaintiffs who are demonstrably sick with a terminal illness such as mesothelioma should have their claims prioritized so that assets are not depleted by claimants who are unimpaired.³⁷ In addition, courts should require claimants to disclose other sources of recovery such as bankruptcy trusts,³⁸ as many do.³⁹ Punitive damage claims should be deferred against periphery defendants when there is no evidence of intentional, aggravating conduct.⁴⁰

C. *Application of Civil Procedure and Tort Law*

Claimants without injury should not expect recovery.⁴¹ Many courts deny extended liability arguments such as second-hand exposure to spouses, component-part manufacturing, and “any exposure” theories where plaintiffs argue that asbestos-related diseases are “dose responsive.”⁴² Experts should have an adequate factual basis for their claims.⁴³ Claims should be dismissed on summary judgment when plaintiffs fail to provide evidence of viable claims.⁴⁴

36. *Id.*; see also *infra* notes 63–66, 103 and accompanying text (highlighting the importance of firm trial dates).

37. Behrens, *supra* note 4, at 349; Landin et al., *supra* note 12, at 613.

38. See, e.g., Peggy L. Ableman, *The Time Has Come for Courts to Respond to the Manipulation of Exposure Evidence in Asbestos Cases: A Call for the Adoption of Uniform Case Management Orders Across the Country*, MEALEY’S LITIG. REP.: ASBESTOS, Apr. 2015, at 1, 1; Lisa Rickard, *Maryland Asbestos Litigation*, U.S. CHAMBER INST. FOR LEGAL REFORM (Feb. 19, 2014), <http://www.instituteforlegalreform.com/resource/maryland-asbestos-litigation>.

39. See, e.g., Landin et al., *supra* note 12, at 644–46; Schwartz, *supra* note 5, at 17–20.

40. See Landin et al., *supra* note 12, at 652–53; see also Schwartz, *supra* note 5, at 31–32 (arguing that the deterrent effect intended by punitive damages would not be promoted against peripheral defendants).

41. See Schwartz, *supra* note 5, at 2–3; see also Rothstein, *supra* note 28, at 8 (“Many courts have adopted substantive or procedural mechanisms designed to streamline dockets and move these cases through the system, without regard to the merits of the claims.”).

42. Behrens, *supra* note 18, at 528–31; Rickard, *supra* note 38.

43. Behrens, *supra* note 18, at 528–33 (describing instances where courts have rejected “any exposure” expert testimony as unscientific or insufficient to support causation).

44. Rothstein, *supra* note 28, at 33.

D. *Prevent the Return of Prior Abuses by Asbestos Claimants*⁴⁵

Courts should require asbestos claimants to submit verifiable, credible medical information in support of their claims.⁴⁶ One of the most effective tools against premature or sham claims is a credible diagnosis of impairment.⁴⁷ Dispositive motions should be granted when there is no evidence that a defendant is responsible for a plaintiff's exposure to asbestos.⁴⁸

III. LOCAL COURT CASE MANAGEMENT PRACTICES: FIVE CASE-STUDIES⁴⁹

A. *New Jersey Superior Court, Middlesex County*

In every asbestos case in New Jersey, lawyers negotiate the details of a CMO.⁵⁰ Sometimes the parties exchange information early in order to eliminate costs.⁵¹ In addition to the usual details, the parties disclose "all anticipated problems with regard to the introduction of evidence in each party's case in chief."⁵² According to Special Master Agatha Dzikiewicz, docket efficiency results from meaningful deadlines that move cases along.⁵³ Purportedly, motions in New

45. See *supra* notes 5–6 and accompanying text; see also Behrens, *supra* note 18, at 513, 513 n.59, 516 (quoting *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005)) ("[T]hese [mass screening] diagnoses were driven by neither health nor justice: they were manufactured for money.").

46. MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER, *supra* note 32, at 3–5 (requiring complaints to include a medical test administered by a treating physician, reliable history of exposure to asbestos, and any evidence relating to claimant's tobacco use). In addition, medical reports should verify that the examining doctor performed all tests and that findings of an asbestos-related disease are based on "a reasonable degree of medical probability," rather than based on "findings 'consistent with' an asbestos-related disease." *Id.* at 4–5.

47. Landin et al., *supra* note 12, at 613.

48. See MODEL ASBESTOS PRE-TRIAL CASE MANAGEMENT ORDER, *supra* note 32, at 14 ("The Court shall have the discretion to make a ruling based upon the submitted papers and without the need of a hearing . . . if either side has filed a document under this section without substantial justification.").

49. Figure 1 summarizes the case management elements and practices in each of the five jurisdictions examined in this article. Rather than rehash the content summarized in the chart, the text of this Part will highlight practices that this author finds noteworthy.

50. Telephone Interview with Agatha Dzikiewicz, Special Master, N.J. Superior Court, Middlesex Cty. (Nov. 22, 2016).

51. *Id.*

52. *Pretrial Information Exchange*, N.J. CTS. 1, http://njcourts.gov/attorneys/assets/mcl/asbestos/asbestos_pretrial_form-1-05-15.pdf (last updated Jan. 5, 2015).

53. Telephone Interview with Agatha Dzikiewicz, *supra* note 50.

Jersey do not linger.⁵⁴ An asbestos advisory committee keeps the local asbestos bar involved with the case management process.⁵⁵ Special Master Dzikiewicz reports that “lawyer trust” in the management plan is a key reason why the New Jersey docket runs efficiently.⁵⁶

B. Court of Common Pleas of Philadelphia County

Similarly, the Court of Common Pleas of Philadelphia County uses its designated Complex Litigation Center to maintain good relations with the local asbestos bar.⁵⁷ Due to rules re-written by the bar, the court recently reported a decrease in discovery disputes and an increase in settlement activity.⁵⁸ Case clusters are limited to eight cases minimum, ten cases maximum, involving the same law, disease, lawyers, and other factors.⁵⁹ Only a maximum of three cases can be tried with the rest resolved through settlement or relisted for trial.⁶⁰ After rulings on summary judgment, the court encourages mediation with a panel of retired judges.⁶¹ Mediators inform the court whether counsel participated “in good faith” and, if not, the coordinating judge may remove cases from the trial list or add cases to it, depending on whether the bad faith negotiator was counsel for a plaintiff or defendant.⁶²

According to Special Master Stanley Thompson, the program’s efficiency relies on general cooperation among all the players and effective communication between the court and the asbestos bar.⁶³ The court’s CMOs are both “aggressive and malleable”; adjustments are made immediately and the court actively monitors the docket.⁶⁴

54. *Id.*
 55. *Id.*
 56. *Id.*
 57. Telephone Interview with Stanley Thompson, Dir., Complex Litig. Ctr., Court of Common Pleas of Phila. Cty. (Nov. 18, 2016).
 58. COURT OF COMMON PLEAS OF PHILA. CTY., FIRST JUDICIAL DIST. OF PA., GENERAL COURT REGULATION NO. 2013-01: NOTICE TO THE MASS TORT BAR AMENDED PROTOCOLS AND YEAR-END REPORT (2013), <https://www.courts.phila.gov/pdf/regs/2013/cpajgcr2013-01.pdf> [hereinafter GENERAL COURT REGULATION No. 2013-01].
 59. *Id.*
 60. *Id.*
 61. *Id.*
 62. *Id.*
 63. Telephone Interview with Stanley Thompson, *supra* note 57.
 64. *Id.*

Trial dates are firm.⁶⁵ Statistical analysis of the docket informs the court's policy decisions.⁶⁶

C. *New York Supreme Court*

The New York Supreme Court's New York City Asbestos Litigation (NYCAL) court amended its CMO in 2017.⁶⁷ Although the court consulted with the asbestos bar, it did not believe that attorneys from both sides could reach consensus on a new CMO.⁶⁸ In deciding not to hold a vote among participating lawyers, the court noted that both sides were "far apart" and not likely to come together.⁶⁹ Rather than invest more time in an attempt to build consent, the court decided "to issue a CMO that is fair to both sides."⁷⁰

The new NYCAL CMO maintains the structure of three dockets that depend on the severity of a plaintiff's illness: accelerated, active, and deferred.⁷¹ Accelerated cases may be clustered together if application is made within certain time limits, and active cases are clustered by the date the actions commenced.⁷² The CMO limits joinder of jury trials to no more than two, unless punitive damages are sought, as explained below; but if good cause is shown, three jury trials may be joined together.⁷³ Discovery is standardized and consolidated.⁷⁴ Failure to comply with discovery deadlines can lead to sanctions, including preclusion of witnesses and striking of pleadings.⁷⁵ Pretrial conferences are conducted to encourage the resolution of cases or issues that arise during the litigation.⁷⁶ Attendance at settlement conferences is mandatory and representatives must have full authority to negotiate and commit parties to agreements.⁷⁷ The court encourages counsel to settle entire

65. *Id.*

66. *Id.*; see also GENERAL COURT REGULATION NO. 2013-01, *supra* note 58 (noting the adjustments made based on recent statistics).

67. Decision & Order at 31, *In re: N.Y.C. Asbestos Litig.* (N.Y. Sup. Ct. June 20, 2017).

68. *See id.* at 13–15.

69. *Id.* at 15.

70. *Id.*

71. Case Mgmt. Order at 24, *In re: N.Y.C. Asbestos Litig.*, No. 782000/2017 (N.Y. Sup. Ct. June 20, 2017).

72. *Id.* at 28–30.

73. *Id.* at 39–40.

74. *See id.* at 12–18.

75. *Id.* at 34.

76. *Id.* at 2.

77. *Id.* at 37.

clusters, not just individual cases.⁷⁸ After deferring punitive damage claims for years, the new NYCAL CMO permits them, but adds due process protections for defendants, such as notice requirements, additional discovery, motions for summary judgment, and the elimination of joinder to any other case that will be tried before a jury.⁷⁹

Perhaps the new CMO will make strides toward improving management efficiency, but as court personnel have learned, “the asbestos docket settles when cases are sent for jury selection . . . [and] the heat is on.”⁸⁰

D. Circuit Court for Madison County

In Madison County, Illinois, “the number of asbestos suits has reached record levels, with caseloads that surpass specialized courts in far larger cities such as New York, [Cook County,] Chicago[,] and Baltimore.”⁸¹ Asbestos claimants do not have to live in Madison County or Illinois; they need only show that the defendant(s) did business there.⁸² As challenging as it may be for defendants in Madison County, they generally do not seek dismissal or transfers to other jurisdictions.⁸³

Despite the impression that it is a magnet for asbestos litigation, cases purportedly settle in Madison County because demands are more reasonable than in larger urban jurisdictions such as New York

78. *Id.*

79. Decision & Order, *supra* note 67, at 21–22.

80. E-mail from Shelley Rossoff Olsen, Special Master, N.Y.C. Asbestos Litig., to author (Nov. 6, 2016, 9:24 AM EST) (on file with author); *see also* Decision & Order, *supra* note 67, at 12 (“[S]ettlements in NYCAL . . . would largely be driven by the imposition of firm trial dates.”).

81. *Edwardsville Does Booming Business in Asbestos Lawsuits*, ST. LOUIS POST-DISPATCH (May 3, 2015), http://www.stltoday.com/news/local/crime-and-courts/edwardsville-does-booming-business-in-asbestos-lawsuits/article_e1019c29-e41f-58c1-9a29-3756e9d1f26b.html. *But see* Heather Istringhausen Gvillo, *Asbestos Attorney Napoli Expects Decline in Madison County Case Filings*, MADISON-ST. CLAIR REC. (Mar. 30, 2016, 8:53 AM), <https://madisonrecord.com/stories/510704583-asbestos-attorney-napoli-expects-decline-in-madison-county-case-filings> (“Madison County has begun seeing a gradual decline in asbestos case filings in recent years after it saw a record-breaking docket in 2013 with 1,678 asbestos cases filed.”).

82. *Edwardsville Does Booming Business in Asbestos Lawsuits*, *supra* note 81.

83. Rachel Lippmann, *It’s Called a “Hellhole.” But Madison County Defense Attorneys Say Better the Devil You Know*, ST. LOUIS PUB. RADIO (Jan. 15, 2014), <http://news.stlpublicradio.org/post/its-called-hellhole-madison-county-defense-attorneys-say-better-devil-you-know#stream/0>.

City.⁸⁴ This may be due to the pre-bargaining process.⁸⁵ Forty-five days before trial, the plaintiff must make a written demand to all defendants.⁸⁶ Plaintiffs must disclose the amount of outstanding demands and credits received in settlements.⁸⁷ Counsel familiar with the case must attend court-ordered settlement conferences; representatives must attend with settlement authority or be readily available by phone or e-mail.⁸⁸ Sanctions for not negotiating “reasonably” include costs, fees, continuance of the trial, or striking of pleadings.⁸⁹ Trials can be continued if the mediator believes further discussions would be helpful.⁹⁰

E. *Circuit Court for Baltimore City*

In Baltimore City, Maryland, a variety of factors have come together to create a backlog of over 11,000 asbestos cases.⁹¹ Some of the problems include different case-tracking systems, pleadings that lack information sufficient to reveal the status of claims, and in the past, a lack of proactive management by the court.⁹² But positive change is on the way in the form of a new plan inspired by the Honorable Eduardo C. Robreno, Senior United States District Judge of the United States District Court for the Eastern District of Pennsylvania.⁹³ His management of multidistrict asbestos litigation in the United States District Court for the Eastern District of Pennsylvania disposed of 183,545 cases in five years.⁹⁴

The city’s new plan will include a full-time magistrate (special master) who will conduct status and settlement conferences under a

84. E-mail from Mark A. Behrens, Partner, Shook Hardy & Bacon, to author (Nov. 7, 2016, 12:01 PM EST) (on file with author).

85. See *infra* notes 86–90 and accompanying text.

86. Standing Case Mgmt. Order for All Asbestos Pers. Injury Cases at 53, *In re: All Asbestos Litig.* Filed in Madison Cty. (Madison Cty. Cir. Ct. filed Aug. 19, 2016).

87. *Id.* at 54.

88. *Id.*

89. *Id.* at 55.

90. *Id.*

91. See CHAIRMEN OF THE S. BUDGET & TAXATION COMM. & H. APPROPRIATIONS COMM., REPORT ON THE FISCAL 2015 STATE OPERATING BUDGET (SB 170) AND THE STATE CAPITAL BUDGET (SB 171) AND RELATED RECOMMENDATIONS, S. 434, 2014 Sess., at 2–3 (Md. 2014).

92. ADMIN. OFFICE OF THE COURTS, MD. JUDICIAL CTR., BACKLOG OF CIVIL ASBESTOS CASES IN BALTIMORE CITY 1 (2014) [hereinafter BACKLOG OF CIVIL ASBESTOS CASES IN BALTIMORE CITY] (on file with author).

93. See *id.* at 3–4, app. 4 (quoting Robreno, *supra* note 2, at 186–89).

94. *Id.* at 3.

new, differentiated case-management plan.⁹⁵ Under the plan, counsel will be required to exchange core information, including demands and credits received from prior settlements.⁹⁶ Counsel will also be expected to discuss the prospects of early resolution at a status conference.⁹⁷ Plaintiffs will be required to disclose the identity of all defendants—including those that have settled—along with details concerning other asbestos-related proceedings for compensation, exposure history that includes the identification of witnesses who can identify the plaintiff at a source of exposure, medical reports, experts, and information that form the basis for their opinions.⁹⁸ Cases can be dismissed for failure to comply.⁹⁹

1. Additional Case Management Suggestions for Baltimore City

The Circuit Court for Baltimore City should consider taking additional measures to increase the efficiency of the asbestos docket. As stated by Special Master Agatha Dzikiewicz in New Jersey: “[M]eaningful deadlines . . . move cases along.”¹⁰⁰ Thus, judicial rulings should be issued in a timely manner, if they are not already, and postponements should be reserved only for truly exigent circumstances.¹⁰¹ Summary judgment should be granted when plaintiffs fail to provide sufficient evidence of viable claims.¹⁰² Firm trial dates must be maintained in order to make the parties seriously consider the risks of losing control over the outcome.¹⁰³ Care should

95. *See id.* at 5.

96. E-mail from Marla Johnson, Magistrate, Asbestos, Circuit Court for Balt. City, to author (Sept. 26, 2017, 4:02 PM EST) (on file with author).

97. *See* BACKLOG OF CIVIL ASBESTOS CASES IN BALTIMORE CITY, *supra* note 92, at 5.

98. *Model Status Conference Order* 1–2 (draft administrative form on file with author); Interview with Hon. Pamela Lee North, Judge (retired), Circuit Court for Balt. City, in Balt., Md. (Oct. 24, 2016).

99. *Model Status Conference Order*, *supra* note 98, at 2.

100. Telephone Interview with Agatha Dzikiewicz, *supra* note 50.

101. Scheduling modification requests in the Civil Division of the Circuit Court for Baltimore City are reserved for exigent circumstances, defined as “an unforeseen development occurring within 30 days of [the event] . . . which prevents compliance with the schedule.” W. Michel Pierson, *Scheduling Modification Policy (Including Postponement)*, CIR. CT. FOR BALT. CITY, <http://www.baltimorecitycourt.org/wp-content/uploads/2016/01/Scheduling-Modification-Policy.pdf> (last visited Apr. 20, 2018).

102. Rothstein, *supra* note 28, at 33.

103. THOMAS E. WILLGING, FED. JUDICIAL CTR., TRENDS IN ASBESTOS LITIGATION 59 (1987) (“No one pays without a trial date.”).

be taken not to schedule too many trials closely together or else viable defendants may fall into bankruptcy.¹⁰⁴

As the Court of Common Pleas has done in Philadelphia, the Circuit Court for Baltimore City could create an in-house mediation panel comprised of retired and sitting judges who have presided over asbestos cases.¹⁰⁵ This in-house mediation panel could apprise the supervisory judge as to whether settlement discussions were meaningful, and if not, the supervisory judge could have the discretion to divide case clusters, scheduling some for trial and others for another round of settlement talks.¹⁰⁶

Borrowing a practice from an earlier version of NYCAL's CMO, the burden of verifying inactive cases should reside with the plaintiffs' firms and not the court.¹⁰⁷ This shift could occur in stages in order to reduce opposition from plaintiffs' firms who might prefer keeping as many cases open as possible.¹⁰⁸ The Circuit Court for Baltimore City should dismiss and close cases that appear open on the inactive docket but are not reported open by plaintiffs' firms.¹⁰⁹

Early efforts to assess and potentially resolve conflict can pay dividends for both sides.¹¹⁰ Although some plaintiffs may be interested in expedited compensation, defendants may oppose early resolutions in order to more closely scrutinize weaker claims and to slow down the cash outlays, particularly if other jurisdictions push early resolution as well.¹¹¹ As a counterbalance, plaintiffs often revert back to jury trials to keep the pressure on.¹¹²

104. Telephone Interview with Francis E. McGovern, Professor of Law, Duke Univ. Sch. of Law (Nov. 16, 2016).

105. See GENERAL COURT REGULATION NO. 2013-01, *supra* note 58. Other courts that manage mass tort dockets require attendance of all parties, counsel of record, and adjusters at court-convened settlement conferences. See, e.g., Case Mgmt. Order, *supra* note 71, at 37; Standing Case Mgmt. Order for All Asbestos Pers. Injury Cases, *supra* note 86, at 53–54.

106. See GENERAL COURT REGULATION NO. 2013-01, *supra* note 58.

107. Amended Case Mgmt. Order at 17, *In re: N.Y.C. Asbestos Litig.*, No. 40000/88 (N.Y. Sup. Ct. May 26, 2011).

108. See *supra* Section III.C.

109. See Amended Case Mgmt. Order, *supra* note 107.

110. See Jeff Trueman, *Can the Rider Make the Elephant Move? Motivating Lawyers Toward Early ADR Efforts*, MD. ST. B. ASS'N (Sept. 14, 2016), http://www.msba.org/Bar_Bulletin/2016/09_-_September/Can_the_Rider_Make_the_Elephant_Move__Motivating_Lawyers_Toward_Early_ADR_Efforts.aspx (discussing how early alternative dispute resolution (ADR) efforts can lead to positive outcomes); see also Case Mgmt. Order, *supra* note 71, at 2 (listing early pretrial conferences as a goal of the 2017 NYCAL CMO).

111. McGovern, *supra* note 14, at 483.

112. See *id.*

Despite these tensions, counsel will consider reasonable settlement terms. When it comes to resolving personal injury litigation, information such as historical settlement and verdict ranges can approximate the value of most claims.¹¹³ One source of information maintained by counsel and insurance professionals, but untapped by the courts, is comparative case values.¹¹⁴

IV. GETTING TO “THE NUMBER”: DECISION SUPPORT USING COMPARABLE VALUES¹¹⁵

In the mid-1980s in the United States District Court for the Northern District of Ohio, Special Masters Eric Green and Francis McGovern developed a program called the Ohio Asbestos Litigation (OAL) that focused on early resolution.¹¹⁶ During interviews conducted by the Special Masters, litigants disclosed objective and subjective factors upon which they relied to evaluate cases.¹¹⁷ A standard questionnaire was developed and responses were collected from counsel before court-ordered settlement conferences.¹¹⁸ The Special Masters fed the responses into a computer database that identified three cases from prior litigation that most resembled the instant case.¹¹⁹ The analysis compared over 300 factual and legal variables, including settlement and verdict values.¹²⁰ At a subsequent hearing or settlement conference, the Special Masters offered an

113. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1371 (2005).

114. *See infra* Part IV.

115. A complete analysis of damage valuation methods is beyond the scope of this article, although courts should consider employing valuation techniques in mature mass torts. *See* McGovern, *supra* note 113, at 1371–72, 1372 n.36 (discussing algorithms used in asbestos bankruptcy cases that incorporate known variables and regression analysis used in the Dalkon Shield Claimants’ Trust to identify unknown factors that influence value).

116. WILLGING, *supra* note 103, at 60.

117. McGovern, *supra* note 14, at 484. Data collection of settled cases grew to over 300 variables. *Id.* at 487. With regard to the apportionment of damages among defendants, the parties shared information concerning “the historic shares paid by each defendant in past trials and settlements.” *Id.* A short-lived, three-year claims facility had been established by asbestos producers who “developed a formula for allocating a liability share to every subscribing producer.” *Id.* at 487 n.202. Thus, the difficult, time-consuming task of negotiating between and among defendants was not necessary.

118. WILLGING, *supra* note 103, at 60–61.

119. *Id.* at 61.

120. McGovern, *supra* note 14, at 487.

estimated settlement range based on all available information.¹²¹ Estimates varied between ten to twenty percent of each other, which was often less than the transaction costs of preparing for trial.¹²² All 112 cases in the OAL settled within twenty-seven months.¹²³

However, the OAL received mixed reviews on perceived fairness.¹²⁴ Notably, plaintiffs and their attorneys did not object to the use of computer-assisted negotiation because the process left enough room to bargain.¹²⁵ Defendants, however, felt a loss of control over the litigation and preferred the traditional method of bargaining.¹²⁶ Plaintiffs were more satisfied with faster resolution that bypassed adjudication.¹²⁷ Although defendants did not feel they overpaid, the legal defense, in their view, was inadequate.¹²⁸

Although the OAL program offered a number of decision-support mechanisms,¹²⁹ courts are free to fashion their own program using comparative data. For example, without the aid of a computer, Judge Stanley Brotman of the District of New Jersey supported his settlement discussions by keeping track of all previous demands, offers, and settlement amounts.¹³⁰ In response to the concerns of OAL defendants, comparative settlement ranges can be offered at different points along the litigation timeline (which can be its own variable) so that parties can decide for themselves whether they want to invest the time, expense, and lost opportunity costs in pursuing an adjudicated outcome.¹³¹

V. CONCLUSION

Courts employ active, yet flexible asbestos litigation management strategies that improve the prospects of settlement because, in the end, cases need to be closed. Although mass torts are highly likely to settle,¹³² the judicial drive for settlements can create fairness

121. *Id.* at 488.

122. *Id.*

123. WILLGING, *supra* note 103, at 62.

124. McGovern, *supra* note 14, at 490.

125. *See id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See id.* at 488 (referencing a decision-tree analysis designed to help the parties assess the risk of each step in the litigation, an evaluative decision-making simulation, and summary jury trials offered to help parties assess case value).

130. WILLGING, *supra* note 103, at 74.

131. *See supra* notes 126, 128–29 and accompanying text.

132. *See, e.g.*, 1-5 ACTL MASS TORT LITIGATION MANUAL § 5.02 (“[T]he dominant form of resolution of mass tort claims remains the negotiated settlement of individual

concerns.¹³³ As explained above, defendants in the OAL wanted to slow down the process and exercise greater control, whereas plaintiffs wanted to speed it up so that claimants get compensated in their lifetime.¹³⁴ Courts and commentators cite party autonomy¹³⁵ and participation¹³⁶ as critical interests that cannot be sacrificed for efficiency.

Asbestos litigants balance fairness and efficiency when they negotiate privately.¹³⁷ But the devil is in the details as to how courts can best manage the inevitable gravitational pull toward settlement.¹³⁸ In this author's opinion, sound management begins with buy-in from the asbestos bar¹³⁹ and a balanced process that holds all parties accountable when exchanging information, negotiating settlements, and advocating positions.¹⁴⁰ Time will tell

cases.”); Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 593 (2007) (citing STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 56 (2002), https://www.rand.org/content/dam/rand/pubs/documented_briefings/2005/DB397.pdf) (“[F]ewer than two thousand out of almost a million asbestos cases have been tried on the merits.”); Hensler, *supra* note 30, at 1601–02 (discussing the effect of settlement on asbestos litigation); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 502 (1994) (“[S]ettlement will be the result in close to 100 percent of the cases.”).

133. See, e.g., Hensler, *supra* note 30, at 1594 (describing tension between efficiency of reducing costs and delay with fairness of party control over the process); E-mail from Mark A. Behrens, *supra* note 84 (discussing fairness concerns in settlement conferences).
134. Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) (“[T]housands of claimants . . . would gladly have traded their pristine due process rights for substantial monetary compensation.”).
135. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (noting a “deep-rooted historic tradition that everyone should have his own day in court”) (internal citations and quotation marks omitted). *But see* Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1064 (2012) (arguing that protection of litigant autonomy in mass torts is “self-defeating” because it limits collective action, which may lead to more mass torts by reducing the deterrent effect of litigation).
136. Hensler, *supra* note 30, at 1626 (“[I]t is time to bring plaintiffs into the dialogue on mass personal injury litigation.”).
137. See Harry H. Wellington, *Asbestos: The Private Management of a Public Problem*, 33 CLEV. ST. L. REV. 375, 375 (1984–1985).
138. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1634 (2004) (casting the historical development of aggregate settlement mechanisms of similar personal injury claims as the inevitable result of a commitment to litigant autonomy and the private interests that drive American tort law).
139. See *supra* Sections III.A–C.
140. See *supra* Part III.

whether the local asbestos bar will embrace the new case management practices initiated by the Circuit Court for Baltimore City. The lessons learned from other jurisdictions,¹⁴¹ along with those that emerge from Baltimore,¹⁴² will prove valuable when the next element, drug, or product turns from miracle-maker or trusted brand into a source of mass harm and litigation craziness.

141. *See supra* Sections III.A–D.

142. *See supra* Section III.E.

FIGURE 1

**COMPARISON CHART OF CASE MANAGEMENT
ELEMENTS & PRACTICES**

Case Management Elements	New York City (NYCAL)ⁱ	Middlesex Cty., N.J.ⁱⁱ	Philadelphia, Pa.ⁱⁱⁱ	Madison Cty., Ill.^{iv}	Baltimore City, Md.^v
Judges dedicated to asbestos docket	One dedicated	One dedicated	Six (for entire Complex Litigation Center, not exclusively asbestos)	One dedicated – others for trial, if needed	One retired, part-time; two added in 2017; others for trial, if needed
Special Master	Yes	Yes	Yes	No	Yes
CMO	CMO with periodic amendments	General Order, Management “Manual”	Master CMO with periodic amendments	Standing Case Management Order – periodically updated	1987 Master Pre-Trial Order, Consolidation & Pretrial Schedule, Status Conference Order in each case
Docket divisions	Accelerated, Active, Deferred	No inactive docket (Ps are impaired or not). Acceleration only for living malignancies	Expedited process available – criteria required	Active & Deferred Registry	Active & Inactive
Form pleadings	Yes – master pleadings	Yes	Yes – Complaints, Objections & Answers	Yes	Yes – master pleadings
Preliminary medical information requirement	More informational than medical	More informational than medical	Required in complaint	Required in complaint	Yes
Early settlement talks	Yes	Yes – scheduled at status conference	Two months before jury selection	No	Determined at status conference
Settlement conference	Yes – Special Master; mandatory attendance	Yes – Special Master	Six-judge (retired) mediation panel available; mediators hired privately also	Yes – forty-five days out	In all cases as of 2017
Consolidation of claims & joinder of parties	Yes – clusters Accelerated & Active Jury trial limits (2–3)	Factual basis required for joinder of third parties	Yes – clusters of same law, same P firm, same disease. Non-pleural meso. cases not consolidated with pleural meso.	Yes – work site, disease, exposure similarities, common defendants	Yes – clusters

Discovery requirements, coordination, etc.	Coordinated discovery in grouped cases	Consolidated in cases with common issues; agreed deadlines set at status conference	Master forms. All discovery must occur in Philadelphia	Precondition to trial	Set forth in Consolidation Order & Pre-Trial Schedule
Punitive Damages	No longer deferred	Deferred	Most are deferred unless a compensable verdict, then judge will consider	Yes, if P has a reasonable likelihood of proving it against certain Ds	Not deferred
Limits on forum shopping	NYC nexus required	All NJ asbestos cases are processed and tried in Middlesex County	Non-PA lawyers cannot try more than four asbestos cases per year	Many filings from claimants who reside outside of Illinois	Cases may be transferred from other counties for placement on the inactive docket
Docket coordination with counsel	P burden to produce current lists of pending cases subject to dismissal	Current docket of open cases is known and manageable. In the past, P lists were required	Weekly meetings (calls) to coordinate open cases, trials, discovery, etc.	Ps file pretrial reports certifying trial ready cases	P sets monthly schedule subject to D objection
Firm trial dates	Yes	Yes for living malignancies; otherwise delays allowed for settlement	Yes – max. three cases tried at once; remainder settle or go back	Yes	Court will consider motions to postpone or sever
Sanctions	Yes – failure to respond to discovery	Court will issue a warning then rule on a motion to strike a pleading or move trial	Yes – failure to comply with CMO	Yes – show cause	Yes – failure to disclose information (dismissal of claim without prejudice)

- i. N.Y.C. Asbestos Litig., No. 40000/1988, 2015 WL 10889996 (N.Y. Sup. Ct. Aug. 28, 2015); *In re* N.Y.C. Asbestos Litig., 130 A.D.3d 489, 490 (N.Y. Sup. Ct. 2015); Amended Case Mgmt. Order, *In re*: N.Y.C. Asbestos Litig., No. 40000/88 (N.Y. Sup. Ct. May 26, 2011); E-mail from Shelley Rossoff Olsen, Special Master, N.Y.C. Asbestos Litig., to author (Nov. 6, 2016, 9:24 AM EST) (on file with author).
- ii. N.J. JUDICIAL COUNCIL, CASE MANAGEMENT MANUAL FOR ASBESTOS CASES (2006), <https://www.judiciary.state.nj.us/attorneys/assets/mcl/asbestos/asbestosmanual050306.pdf>; *Pretrial Information Exchange*, N.J. CTS., http://njcourts.gov/attorneys/assets/mcl/asbestos/asbestos_pretrial_form-1-05-15.pdf (last updated Jan. 5, 2015); Telephone Interview with Agatha Dzikiewicz, Special Master, N.J. Superior Court, Middlesex Cty. (Nov. 22, 2016); Email from Glenn Chew, Law Clerk, N.J. Superior Court, Middlesex Cty., to author (Dec. 2, 2016, 2:04 PM EST) (on file with author).

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- iii. Master Case Mgmt. Order for Asbestos-Related Pers. Injury Claims, *In re: Asbestos Litig.*, No. 0001 (Phila. Cty. Ct. Com. Pl. 1986), <https://www.courts.phila.gov/pdf/clc/861000001-12012010.pdf>; COURT OF COMMON PLEAS OF PHILA. CTY., FIRST JUDICIAL DIST. OF PA., GENERAL COURT REGULATION NO. 2013-01: NOTICE TO THE MASS TORT BAR AMENDED PROTOCOLS AND YEAR-END REPORT (2013), <https://www.courts.phila.gov/pdf/regs/2013/cpajgcr2013-01.pdf>; Telephone Interview with Stanley Thompson, Dir., Complex Litig. Ctr., Court of Common Pleas of Phila. Cty. (Nov. 18, 2016).
 - iv. Standing Case Mgmt. Order for All Asbestos Pers. Injury Cases at 53, *In re: All Asbestos Litig.* Filed in Madison Cty. (Madison Cty. Cir. Ct. filed Aug. 19, 2016); Telephone Interview with Circuit Clerk's Office of Madison Cty., Ill. (Nov. 17, 2016).
 - v. ADMIN. OFFICE OF THE COURTS, MD. JUDICIAL CTR., BACKLOG OF CIVIL ASBESTOS CASES IN BALTIMORE CITY (2014) (on file with author); *Model Status Conference Order* (draft administrative form on file with author); Interview with Hon. Pamela Lee North, Judge (retired), Circuit Court for Balt. City, in Balt., Md. (Oct. 24, 2016); Email from Hon. Pamela Lee North, Judge (retired), Circuit Court for Balt. City, to author (Nov. 27, 2016, 9:53 PM EST) (on file with author).

