

THE FEDERAL ASBESTOS PRODUCT LIABILITY  
MULTIDISTRICT LITIGATION (MDL-875): BLACK HOLE  
OR NEW PARADIGM?

Hon. Eduardo C. Robreno<sup>\*+</sup>

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\* The author was sworn in as a United States District Judge in the Eastern District of Pennsylvania on July 27, 1992. Judge Robreno has presided over the Federal Asbestos Multidistrict Litigation MDL-875 since October 2008.

+ Over the past five years that I have presided over MDL-875, the court has been the beneficiary of substantial assistance by judicial and non-judicial personnel in the adjudication and administration of thousands of cases. Among those whose assistance has been extremely valuable are: District Court Judges Lowell A. Reed and Mitchell S. Goldberg; Magistrate Judges Thomas J. Rueter, David R. Strawbridge, Elizabeth T. Hey, and M. Faith Angell; Special Master Bruce Lassman; Case Administrators Christopher Lyding and Joel Lang; the Clerk's Office personnel in the Eastern District of Pennsylvania under the supervision of Michael Kunz; Asbestos Administrative Law Clerks Nolan Tully, Emily Breslin Markos, Michele Ventura, and Christopher Lucca; and Asbestos Summary Judgment Clerks Mary Pat Stahler and Heather Dixon. Also of assistance to the court has been the work of summer interns Sarah Bily and Emily Kraus, and law extern Nicholas Romeu. Without their faithful contributions, the court could not have achieved any positive results in MDL-875. I have also relied upon their contributions in putting together this article. Of course, all errors of law and fact are totally mine. To all, my most sincere appreciation for their assistance. I am also thankful for the work of my predecessors, Judges Charles Weiner and James Giles for laying the foundation upon which resolution of the cases in MDL-875 has become possible.

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Former Third Circuit Chief Judge Becker described the social effect of the use of asbestos in *Georgine v. Amchem Products, Inc.*,<sup>1</sup> as follows:

[The use of asbestos] is a tale of danger known about in the 1930s, [with] exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to

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<sup>1</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s.<sup>2</sup>

This article traces the development of asbestos litigation in the federal courts for the past twenty-plus years.<sup>3</sup> Part I rehearses how the crisis came about, its impact on the medical and legal system, and the ultimately unsuccessful efforts made by the federal courts to reach a global solution to the asbestos litigation, which grew to over 180,000 cases and more than 10 million claims. Part II describes and recounts the implementation by the Multidistrict Litigation Court (MDL-875) of a new paradigm in the litigation which, over a five year period, led to the resolution of the vast majority of cases. Part III seeks to draw lessons from the experiences of the largest and longest running active MDL<sup>4</sup> in the federal courts and suggests that the asbestos paradigm developed in MDL-875 could well inform the resolution of future mass tort litigation in the federal courts.

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<sup>2</sup> *Id.* at 618 (quoting *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 418-19 (J.P.M.L. 1991)).

<sup>3</sup> The literature is extensive. An overall picture of the crisis is provided in STEPHEN J. CARROLL ET AL., *ASBESTOS LITIGATION* 22 (2005), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf); REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION (Mar. 1991) [hereinafter AD HOC COMMITTEE REPORT]; and Paul D. Carrington, *Asbestos Lessons: The Consequences of Asbestos Litigation*, 26 REV. LITIG. 583 (2007). See also Deborah Hensler, *As Time Goes By: Asbestos Litigation after Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002); Linda Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475 (1991).

<sup>4</sup> MDL-875 is the largest MDL in terms of number of claims and cases historically. MDL-875 was created on July 29, 1991 and has been in existence for over twenty-two years, making it the longest running active MDL. Two other MDL's, however, had a larger "lifespan" but are no longer active today. MDL 381 (*In re "Agent Orange" Products Liability Litigation*) lasted for thirty years and ten months (May 8, 1979 to March 22, 2010). MDL 799 (*In re Air Disaster at Lockerbie, Scotland*, on December 21, 1988) lasted for twenty-three years and six months (January 12, 1989 to July 14, 2012). See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2230 n.30 (2008).

## I. THE BLACK HOLE

### A. *What is Asbestos?*

Throughout history, asbestos was known as a "miracle substance" because of its unique properties: it could "withstand punishing forces of fire, corrosion, and acid, while also being versatile enough to weave into textiles and line automobile brakes, retard shipboard fires, and bind rockets together."<sup>5</sup> Because of its versatility, asbestos has been used in a wide variety of products.<sup>6</sup> Manufacturers employed it as insulation; in various building materials, such as shingles and tiles; as friction products, particularly in automobiles; and in various other heat-resistant materials.<sup>7</sup>

Asbestos is a naturally occurring, fibrous mineral found in rock and soil.<sup>8</sup> Asbestos can be found on or near the earth's surface, and it is extracted through typical mining practices.<sup>9</sup> Asbestos fibers exist in the ambient air, in much of the world's drinking water, and in food and commercial products.<sup>10</sup>

Individuals are at risk of asbestos inhalation when the fibers become "friable," or damaged, and begin floating through the air in sufficient quantity.<sup>11</sup> Asbestos fibers are released into the air only after being handled or otherwise disturbed, such as through mining or construction.<sup>12</sup> Asbestos fibers do not pose any significant danger if they are properly sealed into commercial products; however, as those products become damaged or deteriorate over time, they release asbestos into the air.<sup>13</sup> Aging and decay, building repairs, improper material removal, and improper encapsulation all

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<sup>5</sup> Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 387 (1993).

<sup>6</sup> See *infra* text accompanying notes 7-10.

<sup>7</sup> *Learn About Asbestos*, EPA, <http://www2.epa.gov/asbestos/learn-about-asbestos> (last visited Jan. 8, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Asbestos Injury Litigation*, 60 AM. JUR. TRIALS 73 § 6 (1996).

<sup>10</sup> Carrington, *supra* note 3, at 585.

<sup>11</sup> *Asbestos Injury Litigation*, *supra* note 9, at § 10.

<sup>12</sup> *Learn About Asbestos*, *supra* note 7.

<sup>13</sup> *Asbestos Injury Litigation*, *supra* note 9, at § 10.

cause asbestos fibers to become "friable."<sup>14</sup> Although everyone is exposed to asbestos at some point, there is still controversy as to how much exposure is ordinarily required to affect a person's health.<sup>15</sup> It is estimated that more than 27.5 million Americans had, by 1979, been exposed to the possible risk of inhaling asbestos fibers.<sup>16</sup>

*B. How Did the Asbestos "Health Crisis" Arise?*

Manufacturers first used asbestos in the United States in the late nineteenth century; it was first used commercially as insulation in the 1860s.<sup>17</sup> Asbestos use increased significantly over time; whereas, the United States consumed less than 135,000 metric tons in 1935, consumption increased to nearly 800,000 metric tons at its highest point in 1974.<sup>18</sup> While asbestos consumption in the United States has dropped significantly since then, a number of asbestos-based products manufactured in years past are still in use today.<sup>19</sup>

During World War II, the United States government used asbestos in Navy shipyards when constructing and repairing ships for the war effort.<sup>20</sup> The Navy became the country's largest consumer of asbestos, stockpiling and using it to prevent fires on the newly constructed combat vessels.<sup>21</sup> During that period, the Navy employed approximately 4.5 million shipyard workers who potentially could have been exposed to asbestos fibers.<sup>22</sup>

Evidence produced during litigation has shown that at least some asbestos manufacturers were aware of the risks that asbestos

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<sup>14</sup> *Id.*

<sup>15</sup> *See id.* § 1.

<sup>16</sup> *See* William Nicholson et al., *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality-1980-2030*, 3 AM. J. INDUS. MED. 259 (1982).

<sup>17</sup> Carrington, *supra* note 3, at 585.

<sup>18</sup> Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZO L. REV. 1967, 1973 (1992).

<sup>19</sup> *Id.*

<sup>20</sup> Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1884 (1992).

<sup>21</sup> Carrington, *supra* note 3, at 586.

<sup>22</sup> *Id.*

exposure posed to miners and factory workers as early as the 1930s.<sup>23</sup> In the 1960s, a prominent epidemiological study, directed by Dr. Irving Selikoff and others at Mount Sinai Hospital, described asbestos inhalation's harmful effects on insulation workers' health.<sup>24</sup> Miners, ship workers, construction workers, and those involved in manufacturing other asbestos-based products were at the highest risk of contracting such diseases.<sup>25</sup> Because asbestos-produced diseases have latency periods "anywhere from ten to forty years,"<sup>26</sup> the extent of the diseases those individuals contracted did not become apparent for decades. As a result of the enactment of government regulations and the increased awareness of the danger of exposure to asbestos, the "use of new asbestos in the United States essentially ceased in the early 1970s."<sup>27</sup>

### C. *What Have Been the Medical Consequences?*

Asbestos-related diseases are typically categorized into two groups: malignancies and non-malignancies. The most serious malignancy related to asbestos inhalation is mesothelioma, a rare, fatal cancer that affects the lining of the chest cavity or the peritoneum.<sup>28</sup> Although mesothelioma is a rare form of cancer, the vast majority of mesothelioma diagnoses are associated with asbestos.<sup>29</sup> Mesothelioma has a long latency period: symptoms often become diagnosable thirty or thirty-five years after asbestos exposure.<sup>30</sup>

Mesothelioma is regarded as the malignancy most closely correlated with asbestos exposure; however, lung cancer and various other cancers have also been linked to asbestos exposure

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<sup>23</sup> *Id.* at 585.

<sup>24</sup> CARROLL ET AL., *supra* note 3, at 22.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 737 (Bankr. E. & S.D.N.Y. 1991) (tracing the history of asbestos litigation).

<sup>28</sup> *Asbestos Health Effects*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, [http://www.atsdr.cdc.gov/asbestos/asbestos/health\\_effects](http://www.atsdr.cdc.gov/asbestos/asbestos/health_effects) (last updated Apr. 1, 2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Asbestos Injury Litigation*, *supra* note 9, at § 23.

and have formed the basis of asbestos litigation.<sup>31</sup> Throat and digestive cancers have also been linked to asbestos exposure, although, that relationship is not as widely accepted as the one between asbestos exposure and lung cancer.<sup>32</sup> Malignancies are "the most severe of the asbestos-related illnesses that are alleged to result from substantial and prolonged exposures to asbestos dusts."<sup>33</sup>

The most common non-malignancy associated with asbestos exposure is asbestosis, a sometimes "serious, progressive, long-term disease of the lungs," caused by scarred lung tissue.<sup>34</sup> Whereas mesothelioma is always fatal, asbestosis can be fatal, but can alternatively occur without causing any symptoms or impairment.<sup>35</sup> The severity of asbestosis depends on several factors related to the original asbestos exposure, including dose, duration, source, and individual risk factors.<sup>36</sup>

Pleural plaques, another non-malignant result of asbestos exposure, similarly may not be accompanied by any outwardly visible symptoms.<sup>37</sup> These plaques, also known as pleural thickening, may be caused by asbestos fibers that become embedded in the lungs and cause scarring; those scars can then become calcified.<sup>38</sup> Most pleural plaques are benign: "[t]he vast majority of individuals with plaques have no lung impairment, no restrictions on movement, in fact, no symptomatology whatsoever."<sup>39</sup> Although pleural plaques can produce reduced lung function, they typically do not cause any noticeable symptoms and

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<sup>31</sup> Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 45 (2003).

<sup>32</sup> James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 228 (2006).

<sup>33</sup> Brickman, *supra* note 31, at 44.

<sup>34</sup> *Asbestos Health Effects*, *supra* note 28.

<sup>35</sup> *Id.*

<sup>36</sup> *Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/asbestos> (last visited Jan. 8, 2014).

<sup>37</sup> *Id.* at 51-52.

<sup>38</sup> *Id.* at 51.

<sup>39</sup> *Id.*

can be detected only by radiographic examination.<sup>40</sup> Courts have differed regarding whether or not pleural thickening should qualify as a basis for damage awards in asbestos exposure cases; while some have allowed it, the majority of courts now require injuries that cause some noticeable impairment.<sup>41</sup>

#### D. *What Have Been the Legal Consequences?*

The legal consequences of asbestos exposure first became pronounced in the 1970s, around the time Congress first passed regulations significantly limiting commercial asbestos use.<sup>42</sup> Although the first asbestos lawsuits were filed in the 1930s, those suits settled without reaching trial.<sup>43</sup> The current "litigation crisis" began in earnest in the 1970s after the Court of Appeals for the Fifth Circuit gave the green light to strict liability theory in asbestos cases with its decision in *Borel v. Fibreboard Paper Products Corp.*<sup>44</sup>

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<sup>40</sup> *Id.* at 51-54.

<sup>41</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 278 F.R.D. 126, 134 (E.D. Pa. 2011) (citing *Allied-Signal, Inc. v. Ott*, 785 N.E.2d 1068, 1075 (Ind. 2003); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Md. 1996); *Giffear v. Johns-Manville Corp.*, 632 A.2d 880, 884 (Pa. Super. Ct. 1993); *Owens-Ill. v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. Spec. App. 1991); *aff'd in part, rev'd in part on other grounds*, 604 A.2d 47 (Md. Ct. Spec. App. 1992); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990)); *see also* *Sopha v. Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627, 636 (Wis. 1999) (citing *Wilson v. Johns-Manville*, 684 F.2d 111, 120-21 (D.C. Cir. 1982); *Miller v. Armstrong World Indus. Inc.*, 817 P.2d 111, 113 (Colo. 1991); *Eagle-Picher Indus. v. Cox*, 481 So.2d 517, 520 (Fla. Dist. Ct. App. 1985); *VaSalle v. Celotex Corp.*, 515 N.E.2d 684 (Ill. App. Ct. 1987); *Wilber v. Owens-Corning Fiberglas Corp.*, 476 N.W.2d 74, 78 (Iowa 1991); *Pierce v. Johns-Manville Sales Corp.*, 464 A.2d 1020, 1028 (Md. 1983); *Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 9 (Mich. 1986); *Marinari v. Asbestos Corp.*, 612 A.2d 1021, 1028 (Pa. Super. Ct. 1992)).

<sup>42</sup> Stengel, *supra* note 32, at 227; *see also* Carrington, *supra* note 3, at 588.

<sup>43</sup> Frank J. Macchiarola, *The Manville Personal Injury Settlement Trust: Lessons for the Future*, 17 CARDOZO L. REV. 583, 592 (1996).

<sup>44</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1092 (5th Cir. 1973) (applying Texas law); Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 260 (2006) ("The decision in *Borel* opened the doors to the courthouse

"By the 1980s, 'what had once been a series of isolated cases turned into a steady flow,' which continued to increase over the next decade."<sup>45</sup> Although plaintiffs filed asbestos cases in both state and federal courts, the state cases far outnumbered the federal ones.<sup>46</sup> By 1991, it was estimated that there were 715,000 asbestos personal injury claims pending in federal and state courts.<sup>47</sup> The increased number of filings led some to refer to the "avalanche of litigation"<sup>48</sup> or "elephantine mass of asbestos cases."<sup>49</sup>

In response, the Judicial Conference of the United States established an Ad Hoc Committee on Asbestos Litigation, which, in a 1991 report concluded that the "situation has reached critical dimensions and is getting worse" and that "what has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively."<sup>50</sup>

In addition to the staggering number of cases, as one commentator noted, the cases involved "difficult issues involving the interface of law and science intersect with the uncertainties of substantive law."<sup>51</sup>

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for workers who had been injured by exposure to asbestos."); Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 540 (2007) ("While [*Borel's*] strict liability ruling was important, even more important was the court's broader endorsement of product liability lawsuits against the manufacturers of asbestos products. Moreover, *Borel* widely publicized the product liability end run around workers' compensation and sparked new interest in asbestos cases among plaintiffs' attorneys.").

<sup>45</sup> 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, 594 (2008) (quoting ABA Comm. on Asbestos Litig., Report to the House of Delegates 5 (2003), available at [http://www.abanet.org/leadership/full\\_report.pdf](http://www.abanet.org/leadership/full_report.pdf)).

<sup>46</sup> Carrington, *supra* note 3, at 590.

<sup>47</sup> See Landin et al., *supra* note 45, at 595 (stating that the number of pending asbestos claims went from 100,000 to 200,000 during the 1990s).

<sup>48</sup> *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 (5th Cir. 1986).

<sup>49</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

<sup>50</sup> AD HOC COMMITTEE REPORT, *supra* note 3, at 2.

<sup>51</sup> Carrington, *supra* note 3, at 591.

Where there are multiple possible causes of the disability, may liability be apportioned among numerous defendants, or must the plaintiff prove that the wrongdoing of a particular defendant is the predominant cause? What is the liability of a parent corporation for claims against a subsidiary that were latent at the time the subsidiary was acquired? What is the applicable statute of limitations, and when should the period of limitation be deemed to have commenced? Are the plaintiffs entitled to compensation for "pain and suffering" associated with the fear of illness or death? All these legal issues are governed by the tort law of each state.<sup>52</sup>

By the late 1980s, it was clear that the courts were faced with the most complicated litigation in substance and far-reaching in impact in American history.<sup>53</sup> What to do about it would call upon the creativity and ingenuity of the courts for years to come.

### *E. The Federal Courts' Response to the Crisis*

#### 1. Individual Courts' Efforts

Faced with an increased number of filings based on claimed asbestos exposure, a number of courts pursued innovative methods of handling the crisis.

##### *a. Standard Pretrial and Trial Management*

In some states, all asbestos claims were transferred to a single court, which then employed standardized case management programs to manage the cases.<sup>54</sup> One system used in the Northern District of Ohio matched cases by common characteristics and evaluated their potential settlement values.<sup>55</sup> Although that system was initially successful, its effectiveness slowed by 1990.<sup>56</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *See id.* at 553.

<sup>54</sup> CARROLL ET AL., *supra* note 3, at 29.

<sup>55</sup> *Id.*

<sup>56</sup> AD HOC COMMITTEE REPORT, *supra* note 3, at 16.

Standardized pretrial and trial management procedures managed to streamline litigation somewhat; however, they were unable to alleviate the substantial backlog of cases that the transferee courts faced.<sup>57</sup>

*b. Consolidation*

Consolidation practices that were tried and failed included small consolidations of four to thirty cases, "trials in the round," and local consolidations.<sup>58</sup> While local consolidations cut back on the length of time required to try individual cases, they did not provide any basis for a long-term solution to the so-called asbestos crisis.<sup>59</sup> Judge Robert Parker of the Eastern District of Texas consolidated increasing numbers of cases, from three to thirty, in order to hold trials more efficiently; however, as the Ad Hoc Committee noted, "[s]uch small consolidations . . . did not permit Judge Parker to keep up with the volume of asbestos cases being filed in his district."<sup>60</sup> Judges Jack Weinstein of the Eastern District of New York and Thomas Lambros of the Northern District of Ohio also experimented with consolidated trials.<sup>61</sup>

Consolidation, while administratively efficient, raised concerns regarding due process issues because of the variety of claims and injuries handled within each suit.<sup>62</sup> One judge noted the due process concerns from the defendants' perspective, but then went on to note the unfairness to plaintiffs that would result from declining to consolidate cases: "If this mass litigation is simply halted, clearly all the plaintiffs would be denied their due process rights and their day in court. There should be a simple answer that

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 18; *see also* CARROLL ET AL., *supra* note 3, at 31 (discussing the variety of procedures employed in trial consolidation and the drawbacks associated with them).

<sup>59</sup> AD HOC COMMITTEE REPORT, *supra* note 3, at 18.

<sup>60</sup> *Id.* at 17-18.

<sup>61</sup> *Id.* at 18.

<sup>62</sup> CARROLL ET AL., *supra* note 3, at 33.

would guarantee everyone's due process rights, but I cannot conceive or fashion one."<sup>63</sup>

*c. Class Actions*

Judges Parker and James McGirr Kelly of the Eastern District of Pennsylvania were among those who attempted to use class action certification as a method of addressing asbestos cases.<sup>64</sup> However, class certification failed as an aggregation tool for asbestos litigation under *Georgine v. Amchem Products, Inc.*, when the Court of Appeals for the Third Circuit found that the class could not adequately meet Federal Rule of Civil Procedure 23 requirements.<sup>65</sup> The Supreme Court of the United States ultimately affirmed the Court of Appeals for the Third Circuit's decision in *Amchem Products Inc., v. Windsor*.<sup>66</sup>

Aggregation of asbestos claims through class actions raised policy concerns, in addition to the technical issues posed by Rule 23.<sup>67</sup> For example, some argued that mass litigation of tort claims would unreasonably compromise individualized justice, particularly in dealing with issues of causation and damages that are typically fact-specific.<sup>68</sup> Furthermore, "plaintiffs with large claims would be constrained in negotiating settlements and in allocating any recovery by the duty to represent the entire plaintiff class."<sup>69</sup> Class actions could also give defendants an advantage in coping with the financial costs of class litigation: "the defendant may be able to discourage some plaintiffs from pursuing their

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<sup>63</sup> *Id.* at 45 (quoting *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 330, 333 (2002) (Maynard, J., concurring)).

<sup>64</sup> AD HOC COMMITTEE REPORT, *supra* note 3, at 20.

<sup>65</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996).

<sup>66</sup> *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

<sup>67</sup> See *infra* notes 68-70 and accompanying text; see also Fed. R. Civ. P. 23.

<sup>68</sup> David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 562-63 (1987).

<sup>69</sup> Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1147 (1983).

claims or to achieve cheaper settlements through financial pressure."<sup>70</sup>

*d. Collateral Estoppel*

The Ad Hoc Committee on Asbestos Litigation suggested that using collateral estoppel to prevent "the unnecessary relitigation of certain issues, such as product danger and general causation," would expedite trials as well.<sup>71</sup> It also noted New Jersey's attempts to alleviate similar issues through the use of legislative fact finding.<sup>72</sup> Both of these methods, the Committee posited, would speed asbestos litigation by resolving issues that applied to most asbestos cases in a manner that would bind all future litigation.<sup>73</sup>

*e. Alternative Dispute Resolution*

Judge Parker attempted to utilize alternative dispute resolution (ADR) procedures to resolve asbestos cases, encouraging negotiation and arbitration in place of litigation.<sup>74</sup> However, his system, which included a "three-stage process for handling newly filed claims," did not meet its goals and "was ultimately abandoned and declared a failure."<sup>75</sup> Other jurisdictions that attempted to follow Judge Parker's example were similarly unable to lessen the burden on the court system through ADR procedures.<sup>76</sup>

2. MDL-875

In 1968, Congress established a mechanism that would allow federal courts to consolidate, into one judicial district, the dockets of cases filed in multiple districts within the federal system, involving similar facts and legal issues.<sup>77</sup> Under the statute, a panel of seven federal judges decides whether to consolidate cases, and if

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<sup>70</sup> *Id.* at 1148.

<sup>71</sup> AD HOC COMMITTEE REPORT, *supra* note 3, at 23.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 24.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 28 U.S.C. § 1407 (2006) (multidistrict litigation).

it decides to do so, transfers the cases to a single judicial district for pretrial proceedings.<sup>78</sup> Which district to send the cases to, and which judge will supervise the proceedings, falls within the discretion of the panel.<sup>79</sup> Throughout the late 1970s and 1980s, the panel had rejected, on five different occasions, petitions to consolidate all federal asbestos litigation in one forum.<sup>80</sup> In 1991, eight experienced judicial district judges, from different districts, with significant experience in asbestos litigation wrote to the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> The Judicial Panel on Multidistrict Litigation declined to consolidate asbestos cases in 1977, and again declined to create an asbestos multidistrict docket in 1980, 1985, 1986, and 1987. *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906 (J.P.M.L. 1977); *In re Asbestos Prods. Liab. Litig. (No. II)*, MDL-416 (J.P.M.L. Mar. 13, 1980) (unpublished order); *In re Asbestos Sch. Prods. Liab. Litig.*, 606 F. Supp. 713 (J.P.M.L. 1985); *In re Ship Asbestos Prods. Liab. Litig.*, MDL-676 (J.P.M.L. Feb. 4, 1986) (unpublished order); *In re Leon Blair Asbestos Prods. Liab. Litig.*, MDL-702 (J.P.M.L. Feb. 6, 1987) (unpublished order). The Panel had cited several reasons for its denial in 1977, including: advanced state of proceedings in many of the actions; use of voluntary coordinating arrangements in several districts; lack of commonality among defendants and plaintiffs' circumstances of exposure predominately unique to each action; individual questions of causation in each action; predominately individual questions of liability of each defendant in each action; local issues predominating in the discovery process; absence of possibly inconsistent or overlapping class certifications; the readily discernible nature of the principles common to all actions; and the state of medical and scientific knowledge at a particular time regarding the health hazards posed by exposure to asbestos. *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. at 909-11. The Panel declined to form a multidistrict litigation docket in 1980 primarily because it believed the petitioners failed to cite sufficient reasons to encourage a different outcome than the 1977 denial. *In re Asbestos Prods. Liab. Litig. (No. II)*, MDL-416. The 1985 denial referenced only property claims of school districts that suffered asbestos removal expenses from school buildings; the decision did not apply to personal injury litigation. *In re Asbestos Sch. Prods. Liab. Litig.*, 606 F. Supp. at 713-14. In 1986, the dockets considered for aggregation contained only five suits, and the dockets considered in 1987 contained only two suits. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 417 (J.P.M.L. 1991). Much uncertainty existed regarding potential volume of asbestos claims, and the panel thought judicial remedy might have been unwise to correct an issue it believed could end soon. *See id.*

Judicial Panel on Multidistrict Litigation urging consolidation in a single judicial district.<sup>81</sup> This time the Panel agreed to consolidate and transfer all pending cases for pretrial proceedings to Judge Charles R. Weiner in the Eastern District of Pennsylvania.<sup>82</sup> Pursuant to that order, approximately 26,000 cases were initially transferred to what became known as MDL-875.<sup>83</sup>

### 3. National Class

The foundation of MDL-875 inspired hope for a global and comprehensive settlement that "would establish standardized procedures and values for resolving the tens of thousands of claims pending, as well as the thousands of claims that may appear in the future."<sup>84</sup>

Immediately after MDL-875 was transferred, Judge Weiner undertook an effort to achieve such a global solution.<sup>85</sup> He appointed a steering committee of leading plaintiffs' counsel, who negotiated an agreement with a group of twenty companies known

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<sup>81</sup> *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996) (arguing that consolidation would "facilitate global settlements, and allow the transferee court to fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23").

<sup>82</sup> *See id.* at 619.

<sup>83</sup> The Panel reconsidered its previous refusals to consolidate asbestos claims, and on July 29, 1991, Multidistrict Litigation No. 875 was created for the aggregation of asbestos claims. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. at 415-16. Chairman John F. Nangle and Judges Louis H. Pollak, Halbert O. Woodward, Robert R. Merhige, Jr., and William B. Enright issued the Panel's opinion. *Id.* at 416. MDL-875 was created pursuant to 28 U.S.C. § 1407, and asbestos claims were transferred to the Eastern District of Pennsylvania under Judge Charles R. Weiner. *Id.* at 422. The Panel chose the Eastern District of Pennsylvania because "1) more asbestos personal injury or wrongful death actions [were] pending in that district than in any other; 2) the court there [had] extensive experience in complex litigation in general and asbestos litigation in particular; and 3) the court [had] graciously expressed its willingness to assume the responsibility for this massive undertaking." *Id.* at 422-23. As a result of the creation of MDL-875, 26,639 cases from 87 districts were transferred to Judge Weiner's docket. *Id.* at 416.

<sup>84</sup> Hensler, *supra* note 44, at 266-67.

<sup>85</sup> *See infra* text accompanying notes 86-90.

as the Center for Claims Resolution (CCR).<sup>86</sup> The 101 page agreement sought to settle the claims of between 250,000 to 2,000,000 individuals who had been exposed to asbestos products manufactured by the CCR companies.<sup>87</sup> The settlement included a general provision that would have had the effect of extinguishing asbestos related causes of action of exposed individuals, who currently were suffering no physical ailments, but who could, in the future, develop an asbestos related disease.<sup>88</sup>

Two weeks after the filing of the complaint and the Stipulation of Settlement, Judge Weiner conditionally certified the opt-out class.<sup>89</sup> He then referred the matter to Judge Lowell A. Reed of the Eastern District of Pennsylvania "for the establishment of settlement procedures and the resolution of objections to the settlement."<sup>90</sup> After multiple days of hearings, Judge Reed overruled the objections finding the settlement fair and reasonable, that the class was adequately represented, and approved the class settlement.<sup>91</sup> On appeal, the Court of Appeals for the Third Circuit reversed, holding that the class met neither the Rule 23(a) requirement of typicality or adequacy of representation, nor the 23(b)(3) requirement of predominance and superiority.<sup>92</sup> The Supreme Court of the United States affirmed, finding that the sprawling class certified by the District Court did not satisfy the requirements of Rule 23.<sup>93</sup> The Supreme Court's concerns over the manageability of such a mixed and large class, as well as the inability of the class mechanisms to deal with the issue of future claimants, doomed the search for an overarching, universal, judicially-crafted solution.<sup>94</sup> For such solutions, the parties would have to look to the legislative branch.

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<sup>86</sup> *Georgine*, 83 F.3d at 619.

<sup>87</sup> *Id.* at 617.

<sup>88</sup> *Id.* at 618.

<sup>89</sup> *Id.* at 621.

<sup>90</sup> *Id.*

<sup>91</sup> *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 334 (E.D. Pa. 1994).

<sup>92</sup> *Georgine*, 83 F.3d at 617.

<sup>93</sup> *Id.* at 634.

<sup>94</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831-32, 863 (1999).

#### 4. The Legislative Fix

With the failure of judicial efforts to aggregate asbestos litigation beyond the formation of MDL-875, the focus shifted to the search for a legislative solution. By the early 2000s, "more than 15 bills [had] been introduced in the U.S. Congress proposing to change the nation's approach to resolving asbestos claims" without success.<sup>95</sup> In 1998 and 1999, H.R. 1283, The Fairness in Asbestos Compensation Act, was introduced by Representative Henry Hyde (R. Ill.).<sup>96</sup> The Act would have created an Office of Asbestos Compensation that would operate within the U.S. Department of Justice and pay only claims related to impairing, malignant diseases from an Asbestos Compensation Fund.<sup>97</sup> After failing to receive adequate support, H.R. 1283 was later reintroduced as the Asbestos Compensation Act of 2000, which estimated that the program would cost about \$1.4 billion through 2005.<sup>98</sup> Opposed by labor unions and plaintiffs' lawyers, that proposal also failed.<sup>99</sup>

The next effort came in 2003, when Senator Don Nickles of Oklahoma introduced legislative bill 413, the Asbestos Claims Criteria and Compensation Act.<sup>100</sup> Although the bill ultimately failed when it stalled in the Committee on the Judiciary, it proposed more stringent criteria for asbestos litigation.<sup>101</sup> For instance, the bill required that asbestos be a substantial factor in causing a physical impairment, and that American Medical Association guidelines be used in diagnosis and determining

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<sup>95</sup> CARROLL ET AL., *supra* note 3, at 130.

<sup>96</sup> H.R. 1283, 106th Cong. (1999).

<sup>97</sup> *About MDL 875*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875a.asp> (last visited Jan. 8, 2014); Hensler, *supra* note 18, at 273.

<sup>98</sup> *H.R. 1283 Asbestos Compensation Act of 2000*, CONG. BUDGET OFF. COST ESTIMATE (July 13, 2000), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/22xx/doc2236/hr1283.pdf>.

<sup>99</sup> *Bill Summary & Status 106<sup>th</sup> Congress (1999-2000) H.R. 1283*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:H.R.1283>: (last visited Jan. 8, 2014); *see also* Hensler, *supra* note 18, at 273.

<sup>100</sup> *Bill Summary & Status 108<sup>th</sup> Congress (2003-2004) S. 413 CRS Summary*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:S.RES.413>: (last visited Jan. 8, 2014).

<sup>101</sup> *Id.*

whether a physical impairment exists. The bill also proposed a statute of limitations for nonmalignant claims.<sup>102</sup> It failed to gain sufficient support of the business community and asbestos defendants, however, because "the prospect of an asbestos litigation comprising solely serious claims seemed unattractive."<sup>103</sup> These particular stakeholders began to lean toward a trust fund approach with the incentive that payment into the trust fund would discharge further liability.

Thus, in May 2003, Senator Orrin Hatch (R. Ut.) introduced Senate Bill 1125, the Fairness in Asbestos Injury Resolution ("FAIR") Act of 2003, which was supported by a group of Fortune 500 companies.<sup>104</sup> That bill proposed the establishment of a \$108 billion trust fund that would be subsidized by asbestos defendants and insurers, clarifying any doubts about the necessary funding with an exact figure.<sup>105</sup> Negotiations over the details of the trust stretched into 2004, and the value of the fund was eventually increased to \$118 billion.<sup>106</sup> The legislation again failed to gain adequate support of plaintiffs' attorneys and labor unions, however, and died when it failed a vote for cloture on April 22, 2004.<sup>107</sup>

In 2005, Senator Arlen Specter (R. Pa.) introduced a revised version of the FAIR Act trust fund bill, which aimed to establish "a privately funded and publically administered system to resolve asbestos claims."<sup>108</sup> Sen. Specter "incorporated anti-fraud provisions into the bill to prevent the questionable practices that were occurring in the tort system."<sup>109</sup> The bill purported to create filing procedures, award amounts based on disease degrees, develop the Asbestos Insurers Commission to calculate insurers'

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<sup>102</sup> *Id.*

<sup>103</sup> Hensler, *supra* note 18, at 274-75.

<sup>104</sup> *Id.* at 275.

<sup>105</sup> *Id.* at 275-76.

<sup>106</sup> *Id.* at 276.

<sup>107</sup> *Id.*; see also *Bill Summary & Status 108<sup>th</sup> Congress (2003-2004) S. 2290*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:S2290>: (last visited Jan. 8, 2014).

<sup>108</sup> Elise Gelinas, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 MD. L. REV. 162, 168-69 (2009).

<sup>109</sup> *Id.* at 169-70.

contributions to the trust fund, and establish the Asbestos Injury Claims Resolution Fund to administer payment of claims.<sup>110</sup> The bill failed mainly because of the uncertainty that existed regarding the number of future asbestos claims and the funding amount necessary for the program's solvency.<sup>111</sup> While "the Congressional Budget Office concluded that the fund would need approximately \$140 billion to pay all future legitimate asbestos claims,"<sup>112</sup> some theorize that this figure was overstated because of the office's failure to consider then-recent findings by Judge Janis Graham Jack in the Southern District of Texas<sup>113</sup> that almost all of the silicosis cases on her MDL docket were fraudulent.<sup>114</sup> Given the similarity between silicosis and asbestos claims, some argue that "the Senate did not realize that the tort model they were relying on to predict claims had a grossly inflated number of asbestos claims due to fraud."<sup>115</sup>

Notably, the search for a legislative solution did not occur solely within the legislative branch. After the introduction of the first FAIR Act in 2003, Senator Arlen Specter asked then Chief Judge Edward R. Becker of the Third Circuit to lead mediation efforts among the various stakeholders.<sup>116</sup> With the consent of Senators Hatch and Leahy (respectively, the chairman and ranking member of the Senate Judiciary Committee), Judge Becker agreed to do so, and in August of 2003 he conducted a week-long stakeholder meeting at his chambers in Philadelphia.<sup>117</sup> Following that initial mediation session, he held frequent meetings of both stakeholders and legislators in Washington, D.C., and he

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<sup>110</sup> *Bill Summary & Status 109<sup>th</sup> Congress (2005-2006) S. 3274 CRS Summary*, LIBR. OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S3274> (last visited Jan. 8, 2014).

<sup>111</sup> Gelinis, *supra* note 108, at 163.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*; *see, e.g.*, *Abadie v. Metro. Life Ins. Co.*, 784 So. 2d 46, 97 (La. Ct. App. 2001); Thomas A. Donovan, *Can the Courts Prevent Being Used as an Instrument to Perpetuate Fraud?*, *FED. LAW.*, Nov/Dec. 2005, at 5.

<sup>114</sup> Gelinis, *supra* note 108, at 163.

<sup>115</sup> *Id.*

<sup>116</sup> *See* Judge Edward R. Becker, *Introductory Statement (Aug. 2003)* (on file at the Sterling Memorial Library).

<sup>117</sup> *Id.*

maintained communication with Senator Specter's staff regarding the progress of the negotiations.<sup>118</sup> Due to those and later mediation efforts, Majority Leader Bill Frist credited Judge Becker with getting labor unions to agree to a major reduction in the value of the proposed trust, and praised him for "enabl[ing] all parties to better understand their respective positions and move toward a potential resolution."<sup>119</sup>

Ultimately, despite intense interest, the search for a universal federal legislative solution failed because no consensus ever developed among the principal stakeholders as to how to structure and finance a solution. Consolidation and aggregation, as well as the search for a global solution had not achieved the desired results. The need for a new business model became imperative.

## II. NEW PARADIGM

### A. *Changes in Law and Culture*

In 2008, the search for a new business model for the courts had to take into account the changes in law and culture which had

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<sup>118</sup> See Judge Becker Collection, Sterling Memorial Library, Boxes 7 & 8.

<sup>119</sup> Letter from William H. Frist, Senate Majority Leader, to Hon. Edward R. Becker, Judge for the Third Circuit Court of Appeals (May 10, 2004) (on file at the Sterling Memorial Library); see also Email from Seema Singh, Legal Advisor to Sen. Specter, to Edward R. Becker (Aug. 11, 2004) (on file at the Sterling Memorial Library). Judge Becker passed away on May 19, 2006. Tim Weiner, *Edward R. Becker, 73, Judge on Federal Court of Appeals, Dies*, N.Y. TIMES (May 20, 2006), [www.nytimes.com/2006/05/20/us/20becker.html](http://www.nytimes.com/2006/05/20/us/20becker.html). Substantial documentation of his efforts can be found in Judge Becker's papers at the Sterling Memorial Library at Yale University. Senator Specter also passed away on October 14, 2012. Sheryl Gay Stolberg, *Arlen Specter, Pennsylvania Senator, Is Dead at 82*, N.Y. TIMES (Oct. 14, 2012), [www.nytimes.com/2012/10/15/us/politics/arlen-specter-senator-dies-at-82.html](http://www.nytimes.com/2012/10/15/us/politics/arlen-specter-senator-dies-at-82.html). The archival collection of his papers is currently being organized and preserved by the Specter Center for Public Policy at Philadelphia University, in collaboration with the Archives Service Center at the University of Pittsburgh. Once that process is completed, the collection will be made publicly available, likely at the University of Pittsburgh. Through those two collections, scholars in the future can find a wealth of information on this unusual cooperation between the Article II and Article III branches of government.

spawned over the previous twenty years of asbestos litigation. These changes had altered the asbestos litigation landscape.

### 1. State of Tort Reform

The tort system has been the main venue for asbestos claims; as it "promises individualized justice to plaintiffs and defendants."<sup>120</sup> Several principles underlying tort law, such as market share liability, strict liability, the replacement of automatic contributory negligence restrictions with comparative-fault recoveries, and the allowance of punitive damages, initially tended to favor plaintiffs.<sup>121</sup> As the political climate changed, some forms of tort reform, such as changes in statutes of limitations and efforts to standardize medical criteria, were enacted.<sup>122</sup> By 2007, tort reform legislation had become law in a number of states.<sup>123</sup> For instance, the Florida legislature passed the Asbestos and Silica Compensation Fairness Act in 2005, which required claimants to show a "prima facie physical impairment as a result of exposure to asbestos; to provide evidence verifying that a qualified physician provided the diagnosis; and to be domiciled in the state or to show that the exposure to asbestos occurred in the state."<sup>124</sup> Florida also abolished the availability of punitive damages.<sup>125</sup> The Georgia legislature also enacted tort reform in 2005 through the Asbestos and Silica Litigation Reform Bill, which required "prima facie evidence of physical impairments, plaintiff's burden of proving that asbestos exposure was a 'substantial contributing factor' of the claimant's injury, and venue restrictions."<sup>126</sup> In response to constitutional challenges to the bill regarding retroactive application, the legislature responded in 2007 with Georgia Senate

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<sup>120</sup> CARROLL ET AL., *supra* note 3, at 129.

<sup>121</sup> Valle Simms Dutcher, *The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 PACE ENVTL. L. REV. 955, 966-68 (1993).

<sup>122</sup> CARROLL ET AL., *supra* note 3, at 130.

<sup>123</sup> See *infra* notes 124-30 and accompanying text.

<sup>124</sup> LAWRENCE G. CETRULO, TOXIC TORTS LITIGATION GUIDE § 33:14 (2012).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at § 33:15.

Bill 182, which attempted to correct the issue.<sup>127</sup> In 2007, the Supreme Court of Texas established a proof of causation requirement in asbestos litigation, holding that:

[P]laintiff must provide both quantitative evidence of his or her dose of the alleged exposure to each defendant's product and evidence that said dose is a significant contributing factor to cause the plaintiff's disease. Previously it had been sufficient to establish that the plaintiff had an asbestos-related disease, the plaintiff was exposed to levels of asbestos recognized as sufficient to cause the particular disease, and that the plaintiff was exposed to the defendant's asbestos-containing product.<sup>128</sup>

Furthermore, "[i]n 2004, Ohio became the first state to adopt minimum medical criteria as part of its broader asbestos and silica claims reform legislation under Ohio Rev. Code Ann. § 2307.91 . . . this has cut the number of new case filings by as much as 90%."<sup>129</sup> Some of the changes that facilitated this decrease in filings include "prima facie requirements that non-malignant plaintiffs must demonstrate prior to being permitted to file an active claim; the creation of an inactive docket for claims that cannot yet meet the minimum criteria . . . qualifications for the diagnosing medical authority; and procedural requirements for asbestos claims."<sup>130</sup> These changes in the substantive and procedural law strengthened the defendants' hand in litigation.

## 2. Aging Asbestos Population, Latency of Illness, and Resulting Bankruptcies

Asbestos has not been widely used in the United States since the early 1970s.<sup>131</sup> Although exposure to asbestos has continued to generate illnesses, these illnesses are generally connected to the

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<sup>127</sup> See S. 182, 2007-08 Reg. Sess. (Ga. 2007).

<sup>128</sup> CETRULO, *supra* note 124, at § 33:10.

<sup>129</sup> *Id.* at § 33:12.

<sup>130</sup> *Id.*

<sup>131</sup> See *supra* note 26.

use of or exposure to asbestos that was installed before 1970.<sup>132</sup> One of the principal venues for exposure to asbestos was navy ships, particularly during World War II.<sup>133</sup> Even considering that the most serious asbestos injuries have a latency period of more than forty years, the passage of time has reduced the number of persons who may have potential claims based on asbestos exposure.

### 3. Litigation Strategies

According to a 2003 American Bar Association Report, "more than sixty otherwise financially viable companies have gone into bankruptcy due to asbestos-related liabilities, over twenty in the last two years."<sup>134</sup> A main cause of the widespread bankruptcies was the concentration of plaintiffs asserting non-malignancy claims, meaning individuals who may have diagnostic indications " 'consistent with' exposure to asbestos but do not, and may never, experience any symptoms of asbestos disease or develop any asbestos related conditions that would impair or affect their life or daily functions."<sup>135</sup> The filing of these bankruptcies shifted the focus of the litigation from state courts to bankruptcy courts and from manufacturers of asbestos to manufacturers and suppliers of components that contained asbestos.<sup>136</sup> Moreover, with the changes in the substantive law, defendants found new means to defend these claims.<sup>137</sup>

### 4. Fraud

During litigation screenings, doctors acting in the capacity of "litigation consultants," and not as treating physicians, determined

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<sup>132</sup> See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996) (quoting *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 418-19 (J.P.M.L. 1991)).

<sup>133</sup> Brickman, *supra* note 20, at 1884.

<sup>134</sup> ABA Comm. on Asbestos Litig., *supra* note 45, at 10.

<sup>135</sup> *Id.* at 6.

<sup>136</sup> Stengel, *supra* note 32, at 238.

<sup>137</sup> See *infra* pp. 55-56 (bare metal defense, government contractor defense, and sophisticated user defense).

whether the screening indicated a positive result.<sup>138</sup> "The rate of 'positive' findings by these doctors can be startlingly high, often upwards of 50% and in some studies as high as 90%," suggesting that the readings may not be neutral or legitimate.<sup>139</sup> In fact, "[a] National Institute for Occupational Safety and Health (NIOSH) audit evaluating the 'positive' x-rays of 795 tire workers, for example, showed 'only two had any signs of parenchymal change and only 19 showed pleural abnormalities.'"<sup>140</sup> These statistics align with the findings of Judge Janis Jack of the Southern District of Texas, the presiding judge over the multidistrict litigation docket for silicosis claims.<sup>141</sup> Judge Jack had conducted *Daubert* hearings<sup>142</sup> and determined that almost all of the silicosis cases on her MDL docket were fraudulent.<sup>143</sup> Judge Jack decided:

[O]n the basis of the testimony of the screening company principals, doctors who rendered the diagnoses upon which the claims were based, and the lawyers for whom the screenings were done, that "it is apparent that truth and justice have very little to do with these diagnoses. [Indeed] it is clear that the lawyers, doctors and screening companies were all willing participants" in a scheme to "manufacture [diagnoses] for money."<sup>144</sup>

### 5. Peripheral Defendants

With the increase in bankruptcies of major corporate defendants, "[a] newer generation of peripheral defendants is becoming ensnarled in the litigation' as plaintiffs attempt 'to expand the number of those with assets available to pay for

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<sup>138</sup> ABA Comm. on Asbestos Litig., *supra* note 45, at 10.

<sup>139</sup> *Id.* at 8.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> The Supreme Court held that under Fed. R. of Evid. 702, trial judges have the authority to determine the reliability and relevance of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>143</sup> Gelinas, *supra* note 108, at 163.

<sup>144</sup> Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1227 (2008).

asbestos injuries.'"<sup>145</sup> "[T]he resulting stays in litigation against these [bankrupt] defendants drove plaintiff attorneys to press peripheral non-bankruptcy defendants to shoulder a larger share of asbestos claims value and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease."<sup>146</sup> Those that did not manufacture or distribute asbestos, but that either manufactured or distributed component parts that contained asbestos, have become target defendants in the litigation. Defendants now include, among others, manufacturers or suppliers of brakes, turbines, and packing. Because these defendants could raise additional defenses, not otherwise available to manufacturers, merely naming these peripheral defendants in a suit did not guarantee a plaintiff verdict or prompt a settlement.

#### 6. Rise of Bankruptcy Trusts

The increased number of defendant bankruptcies has also led to the establishment of more bankruptcy trusts.<sup>147</sup> Congress therefore codified the approach used in the Manville reorganization and trust formation, leading Congress:

[I]n 1994 to amend the Bankruptcy Code to include a section, 11 U.S.C. § 524(g), to provide for the resolution of asbestos liability claims against the debtor. Under that section, a debtor is permitted to create, in its plan of reorganization, a trust that is to be the exclusive source of post-confirmation compensation for the debtor's future asbestos liability.<sup>148</sup>

"Put simply, [under Section 524(g)] asbestos plaintiffs were enjoined from initiating litigation against [corporations like] Manville and certain others, the plaintiffs' claims were channeled to a trust funded by these parties and the trust became responsible

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<sup>145</sup> Stengel, *supra* note 32, at 238.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> H.R. REP. NO. 112-687, at 8 (2012).

for processing and satisfying these claims."<sup>149</sup> The existence of the trust became a supplemental source through which claimants can be compensated, thus making exclusive reliance on the tort system unnecessary, "while enabling companies to use the bankruptcy law to shed total liability in exchange for partial payment to victims and to continue as viable companies."<sup>150</sup>

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<sup>149</sup> S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 851-52 (2008).

<sup>150</sup> Joan Claybrook, *Fraud Made the Asbestos Illness Situation Much Worse*, WALL ST. J., May 20, 2013 at A16. After Judge Jack's exposure of abuse in silica litigation, many trusts restricted visibility of its data. H.R. REP. NO. 113-254, at 11 (2013). This trend towards limited access continued, and "because the trusts' current confidentiality provisions and practices make data sharing difficult, individual trusts and the trust system as a whole are susceptible to fraud and abuse." *Id.* Specifically, "[t]he GAO and the non-partisan RAND Corporation, in their respective reports on the trusts, both concluded that asbestos bankruptcy trusts are unlikely to identify and decline payment of improper claims, including claims that are supported by 'altered work histories' or allege inconsistent exposure patterns." *Id.* As a result, Representatives Quayle of Arizona, Matheson of Utah, and Ross of Florida proposed H.R. 4369, the Furthering Asbestos Claim Transparency (FACT) Act of 2012, on April 17, 2012. H.R. 4369, 112th Cong. (2012). "The bill amends section 524(g) of the Bankruptcy Code to require asbestos trusts to file quarterly reports with the court and the United States Trustee for the respective region that detail claimants' names, the amount paid to each claimant, and the basis for such payment." H.R. REP. NO. 112-687, at 14 (2012). Although the House Committee on the Judiciary ultimately recommended that the bill be passed with certain amendments, dissenting views argue that:

H.R. 4369 is troubling because: (1) its reporting and disclosure requirements are an assault against asbestos victims' privacy interests; (2) it is fundamentally inequitable in that it requires disclosure by the trusts, but does not require solvent defendant companies to disclose their confidential settlement agreements; (3) it is not necessary given the absence of any evidence of systematic fraud with asbestos trusts; (4) it is nothing more than an end run by asbestos defendants around the discovery process available under non-bankruptcy law; and (5) it will divert critical funds and further decrease compensation to asbestos victims by forcing bankruptcy trusts to prepare burdensome reports.

*Id.* at 29. A similar version of this bill sponsored by Rep. Farenthold of Texas was introduced on March 6, 2013. H.R. 982, 113th Cong. (2013). The bill is known as H.R. 982, the Furthering Asbestos Claim Transparency (FACT) Act of 2013. *Id.* On November 13, 2013, the House of Representatives passed the bill

As asbestos personal injury trusts have become more prominent, however, some claim that the potential for fraud and duplicate recovery for asbestos claimants has risen.<sup>151</sup> Typically, asbestos trusts pay claimants through two processing "tracks": expedited review and individual review.<sup>152</sup> Under expedited review, claimants who demonstrate the required medical criteria and exposure history receive payments based on a claim schedule; whereas, under individual review, claimants receive a more holistic analysis of their claims' values.<sup>153</sup>

While many trusts have processes in place to prevent fraudulent claims that arise from falsified medical or exposure information, according to a Government Accountability Office report, few trusts have methods of preventing an injured individual from filing the same claims and receiving payments from multiple trusts.<sup>154</sup> In fact, the majority of trust disclosure procedures forbid allowing the release of claimant information during discovery, classifying that information as part of a settlement and, therefore, confidential.<sup>155</sup>

However, defendants in asbestos suits have begun to attempt to limit their liability by demonstrating that plaintiffs in some of those suits have collected from asbestos bankruptcy trusts numerous times; those defendants would use disclosure information to prove that plaintiffs have claimed that multiple defendants were the sole or primary causes of their asbestos-related illnesses.<sup>156</sup> While the information is currently not typically

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by a vote of 221-199. *H.R. 982 – Furthering Asbestos Claim Transparency (FACT) Act of 2013*, CONGRESS.GOV, <http://beta.congress.gov/bill/113th/house-bill/982/actions> (last visited Jan. 8, 2014).

<sup>151</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-819, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 17 (2012), available at <http://www.gao.gov/new.items/d11819.pdf>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 18.

<sup>154</sup> *Id.* at 23.

<sup>155</sup> *Id.* at 26.

<sup>156</sup> See Dionne Searcey, *To Fight Asbestos Cases, Garlock Uses Other Claims as Defense*, WALL ST. J. (July 21, 2013), <http://online.wsj.com/article/SB10001424127887324263404578612303878227188.html>; Joe Nocera, *The Asbestos Scam, Part 2*, N.Y. TIMES (Jan. 13, 2014),

released as part of discovery, defendants are pressing for more disclosures in order to reduce the number and amount of claims the trusts are required to pay.<sup>157</sup>

Plaintiffs' attorneys argue that trust claims are settlement agreements and should, therefore, remain confidential.<sup>158</sup> Recent cases in MDL-875 indicate that bankruptcy trust information that shows whether plaintiffs have made submissions to multiple trusts is "more analogous to a complaint than an offer of settlement or compromise" and is, therefore, subject to discovery.<sup>159</sup> Plaintiffs providing such information have typically been allowed to redact any "statement[s] of a settlement amount or . . . offer[s] of compromise" in order to avoid conflict with Rule 408's requirements regarding the confidentiality of settlement agreements.<sup>160</sup>

Congress<sup>161</sup> and state legislatures<sup>162</sup> are also considering laws requiring heightened disclosures of trust claims in asbestos claim cases. At least two states have already passed such laws:<sup>163</sup> for example, the Ohio state legislature recently enacted a law requiring asbestos claimants to provide a sworn statement detailing any and all of their asbestos trust claims.<sup>164</sup>

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[http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?ref=opinion&\\_r=0](http://www.nytimes.com/2014/01/14/opinion/nocera-the-asbestos-scam-part-2.html?ref=opinion&_r=0).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; see also *Shepherd v. Pneumo-Abex*, MDL No. 875, Civ. No. 09-91425, 2010 WL 3431633, at \*1 (E.D. Pa. Aug. 30, 2010) ("Plaintiff objects to production of the information based on Federal Rule of Evidence 408, which prohibits the admissibility of information regarding settlements and negotiations 'to prove liability for, invalidity of, or amount of a claim.'").

<sup>159</sup> *Shepherd*, 2010 WL 3431633 at \*1.

<sup>160</sup> *Ferguson v. Lorillard Tobacco Co.*, MDL No. 875, Civ. No. 07-69104, 2011 WL 5903624, at \*4 (E.D. Pa. Nov. 22, 2011); see also *Lyman v. Union Carbide Corp.*, MDL No. 875, Civ. No. 09-62999, 2009 WL 6869437 (E.D. Pa. Sept. 18, 2009).

<sup>161</sup> *Bill Summary & Status 113th Congress (2013-2014) H.R. 982 CRS Summary*, LIBR. OF CONG., <http://beta.congress.gov/bill/113th/house-bill/982> (last visited Jan. 8, 2014).

<sup>162</sup> Searcey, *supra* note 156.

<sup>163</sup> *Id.*

<sup>164</sup> Am. Sub. H.B. No. 380, 129th Gen. Assemb. (Ohio 2013), available at [http://www.legislature.state.oh.us/BillText129/129\\_HB\\_380\\_EN\\_N.pdf](http://www.legislature.state.oh.us/BillText129/129_HB_380_EN_N.pdf).

### *B. One Plaintiff-One Claim*

On October 1, 2008, the MDL Panel designated the Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, to preside over MDL-875. Judge Robreno, at the time, had been a district judge for sixteen years in a court with familiarity with complex litigation.

Shortly after being designated as the presiding judge, after consultation with counsel for plaintiffs and defendants, the court developed a management plan. The plan set forth operating principles for the court and the litigation; it recruited sufficient resources of the court toward its implementation; it laid out procedures for litigating the claims; and it established a method of communication for the court and the parties.<sup>165</sup>

#### 1. Operating Principles

After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective.<sup>166</sup> Aggregation stopped progress on individual cases while the parties and the court worked on global solutions. Once the global solutions proved unfeasible, the parties did not return to the task of processing the cases individually. Ultimately, neither the court nor the parties were ready, willing, or able to move cases to trial and settlement. This stage of litigation led some litigants to refer to MDL-875 as a "black hole," where cases disappeared forever from the active dockets of the court.<sup>167</sup>

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<sup>165</sup> See generally Bryan G. Steer, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (urging the creation of networks among plaintiffs' and defendants' counsel, judges, and clients as an alternative to class actions in order to disaggregate the cases).

<sup>166</sup> See Victor E. Schwartz, et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2003).

<sup>167</sup> See, e.g., *In re United States Lines, Inc.*, 1998 WL 382023, at \*7 (S.D.N.Y. 1998) (noting appellants described MDL 875 as "a black hole" and "the third level of Dante's inferno").

Given the apparent failure of aggregation and consolidation, the court determined that each case would be "disaggregated" or "deconstructed" into the lowest common denominator and proceed as "one plaintiff-one claim."<sup>168</sup> The purpose was to separate each case, and within each case, each claim against each defendant so that each claim could stand on its own merit.<sup>169</sup>

Cases with multiple plaintiffs were severed into separate individual cases. Once severed, each case was placed on an individual scheduling order setting forth reasonable but fixed deadlines for completion of discovery and filing of dispositive motions.<sup>170</sup> In issuing the orders placing each case on its own path, the court was committing to hands-on management of the cases. Once the court demonstrated it was ready to adjudicate cases on a fast track basis, the lawyers readily joined in. Each order and the deadlines in the order reflected the realities of each case. In other words, the court was now committed to systematic differential diagnostics – one size would not fit all.

## 2. Personnel and Resources

Given the scope of the substantive issues before the court and the large number of cases and claims pending, it was necessary to bring substantial resources to bear upon the entirety of the litigation. The court organized these resources as follows.

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<sup>168</sup> See Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. L. REV. 667, 670 (2013).

Disaggregating is not incompatible with centralization; rather, the federal system might still gain efficiency by aggregating claims with nominal commonality and allowing the transferee judge to address common, generic questions. But, after doing so, mass centralization should dissolve and yield to the countervailing concerns of the traditional, geographic community. The geographic community is concerned with local judges and juries accurately applying communal norms and state laws to factual claims, a role that remains important so long as state laws continue to govern nationwide mass torts.

*Id.* at 670.

<sup>169</sup> See *id.*

<sup>170</sup> See *Scheduling Order Template*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Sept. 4, 2012), <http://www.paed.uscourts.gov/mdl875u.asp>.

The presiding judge served as adjudicator in substantive legal issues and as case-wide administrator.<sup>171</sup> In support of the presiding judge, four experienced magistrate judges were assigned to MDL-875.<sup>172</sup> In turn, each magistrate judge was assigned a number of cases, generally by districts or circuits, over which the magistrate judge would have day-to-day responsibility. For example, any scheduling or discovery disputes would be attended to by the assigned magistrate judge. Also, the assigned magistrate judge would promote and assist the parties in settlement discussions.

*a. Case Administration*

The clerk established a general docket (MDL-875), as well as an individual docket, for each case. Within this general designation, two sets of cases were amenable to the most intensive case management: the maritime docket (MARDOC), where one plaintiff firm was representing thousands of plaintiffs in cases involving exposure to asbestos aboard commercial vessels in the Northern District of Ohio;<sup>173</sup> and cases in the Eastern District of Virginia involving railroad brakes, where thousands of plaintiffs were also represented by one law firm.<sup>174</sup> Initially, Bruce Lassman, Esquire, a former law clerk to Judge Weiner, was assigned as case administrator to MARDOC.<sup>175</sup> Once Mr. Lassman retired in 2010, Christopher Lyding, Esquire, another former law clerk to Judge Weiner, took his place.<sup>176</sup> Mr. Lassman was later named special

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<sup>171</sup> The undersigned was designated by the MDL Panel to preside over MDL-875 beginning October 8, 2008.

<sup>172</sup> Magistrate Judge M. Faith Angell, Magistrate Judge Thomas J. Rueter, Magistrate Judge David R. Strawbridge and Magistrate Judge Elizabeth T. Hey. See *MDL 875 Official Contacts*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875c.asp> (last visited Jan. 8, 2014).

<sup>173</sup> See *infra* Part II.F.1.

<sup>174</sup> See *infra* Part II.H.

<sup>175</sup> Order Appointing Special Master, *In re: Asbestos Prods. Liab. Litig.* (No. VI), No. 02-cv-875 (E.D. Pa. June 27, 2011).

<sup>176</sup> Notice of Revised Judicial and Administrative Assignments in MDL 875, *In re: Asbestos Prods. Liab. Litig.* (No. VI), No. 01-md-875 (E.D. Pa. Oct. 17, 2011).

master in the Eastern District of Virginia cases.<sup>177</sup> The assigned administrator assisted the magistrate judges in day-to-day supervision of cases. For example, the administrators were available to the parties on the phone to resolve discovery disputes on the spot.<sup>178</sup> Although the administrators were not authorized to make decisions on disputed issues, they were effective in counseling the parties as to likely outcomes of those disputes, thus nipping the controversies in the bud early in the proceeding and allowing the cases to proceed uninterrupted.

*b. Other Judges of the Court*

Judge Lowell A. Reed,<sup>179</sup> a veteran senior judge, agreed to organize the thousands of cases that were filed in jurisdictions throughout the Court of Appeals for the Seventh Circuit by one law firm.<sup>180</sup> Judge Reed met regularly with the parties, developed discovery protocols, and helped the parties screen some non-meritorious cases.

Other judges of the court were available, if needed. In one case assigned to Judge Mitchell S. Goldberg,<sup>181</sup> the case ultimately went to the Supreme Court of the United States, which affirmed Judge Goldberg's decision, resulting in the dismissal of approximately 3,000 cases.<sup>182</sup>

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<sup>177</sup> Order, *In re: Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. Aug. 18, 2011).

<sup>178</sup> See, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), 2:02-md-875, at 2 (E.D. Pa. Nov. 21, 2011) (requiring parties to contact Christopher Lyding in the event of any discovery disputes).

<sup>179</sup> Judge Reed served as a district judge in the Eastern District of Pennsylvania from 1987 to 2011. *History of the Federal Judiciary*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1982&cid=141&ctype=dc&instate=pa> (last visited Jan. 11, 2014).

<sup>180</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. May 4, 2009) (appointing Judge Reed as court annexed mediator for a number of cases filed by the Cascino Vaughan law firm of Chicago, Illinois).

<sup>181</sup> Judge Goldberg has served as a district judge in the Eastern District of Pennsylvania since 2008. *History of the Federal Judiciary*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3193&cid=141&ctype=dc&instate=pa> (last visited Jan. 11, 2014).

<sup>182</sup> *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2011).

*c. Clerk of Court*

The office of the Clerk of the Eastern District of Pennsylvania, under the direction of Michael E. Kunz,<sup>183</sup> proved invaluable. Not only did the Clerk's Office make over 1.5 million docket entries in the cases, but it also reviewed the dockets in the transferor courts in all cases filed in MDL-875 since 1991 to ensure that each case had been reviewed, consolidated, and had a good closing.<sup>184</sup> This work insured a paper trail as to the resolution of each case and each claim filed in MDL-875 since its inception.

Coordination of the activities of MDL-875 was carried out by the presiding judge, his office staff, and the asbestos law clerk.<sup>185</sup> The asbestos law clerk kept in touch with and monitored the activities of the magistrate judges, the case administrator, the JPML's staff, and the Clerk's Office. The coordination involved continuous contacts with the various chambers' staff, the Clerk's Office, and the lawyers in the case. The asbestos law clerk reported directly to the presiding judge.

Once a month, the presiding judge held a luncheon meeting with all the support personnel for reporting and discussion of current activities. In addition, the presiding judge met once a month with the Clerk's Office personnel to hear reports on the progress and issues relating to docketing and monitoring of cases.

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<sup>183</sup> Mr. Kunz has served as a Clerk of the Court since 1979. *Michael E. Kunz*, <http://www.legalspan.com/catalog2/faculty.asp?UserID=20120925229194105151%20%20%20%20%20%20&OwnerColor=%23003366&recID=20121009-229194-92049> (last visited Jan. 11, 2014). He first became employed by the Clerk's Office in 1962. *Id.*

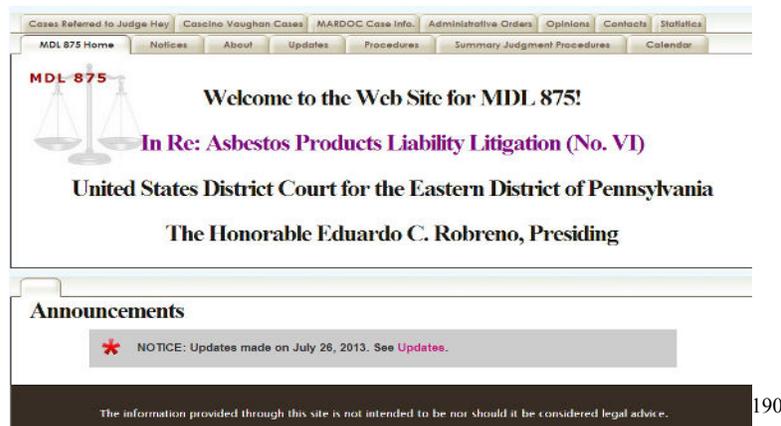
<sup>184</sup> Note that the number of cases filed and the number of claims asserted kept by the Clerk of the Eastern District of Pennsylvania and the statistics kept by the Panel on Multidistrict Litigation vary slightly. In the Eastern District of Pennsylvania, upon the severance of the case, the clerk assigned a new case number to each plaintiff. The Panel continued to identify all plaintiffs in the case with the same number.

<sup>185</sup> Nolan Tully, Esquire (2008-2010), Emily Breslin Markos, Esquire (2010-2011), Michele Ventura, Esquire (2011-2013) and Christopher Lucca, Esquire (2013-Present).

### 3. Communications Module

The task of communication with thousands of litigants required the development of a website through which the court could post current developments, provide guidance as to procedures and practices of the court, and serve as a historical depository of all prior decisions.<sup>186</sup>

The website gathers in one place all information necessary to practice in MDL-875.<sup>187</sup> The website is accessible through the Eastern District of Pennsylvania website.<sup>188</sup> As of October 2013, the website has registered over 175,000 hits.<sup>189</sup> Each hit probably avoided a phone call or e-mail to the court.



The most popular tabs visited by litigants were the Updates Section, with over 70,000 hits, and the Opinions Section, with over 35,000 hits.<sup>191</sup>

The Opinion Section of the website reported on all orders, memoranda, or opinions of the presiding judge, as well as the

<sup>186</sup> See generally *MDL 875 Home*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875.asp> (last visited Jan. 11, 2014) (providing court documents, explaining court procedure, and posting updates).

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> See Attachment A, Website Statistics.

<sup>190</sup> See *MDL 875 Home*, *supra* note 172.

<sup>191</sup> See Attachment A, Website Statistics.

magistrate judge assigned to MDL-875.<sup>192</sup> Along with each opinion is a brief synopsis of the case.<sup>193</sup> The opinions are word searchable by issue, parties, and jurisdiction.<sup>194</sup> Westlaw and Lexis have also placed the vast majority of opinions issued by the MDL court since 2008 in their respective libraries.<sup>195</sup>

The Steering Committee plays both a communication and supervising function.<sup>196</sup> Initially appointed by Judge Weiner, the committee is composed of an equal member of plaintiffs' and defendants' counsel.<sup>197</sup> Copies of all orders entered by the court are electronically forwarded to the heads of the Steering Committee.<sup>198</sup> The court consults with the committee from time to time and has held at least one annual meeting with the committee in Philadelphia, Pennsylvania to discuss the status of the litigation. The committee serves as an important sounding board for the court to determine the practical input of the court's policies and procedures on the litigation and to alert the court to procedural concerns.

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<sup>192</sup> See *MDL 875 Opinions*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875n.asp#> (last visited Jan. 11, 2014).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> The documents on Westlaw and Lexis are word searchable and are easily found by searching for author (Judge Robreno), case caption (MDL-875), or the specific docket number of the case. See, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), 2013 U.S. Dist. LEXIS 60925 (E.D. Pa. Apr. 15, 2013) (Lexis); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012) (Westlaw); *In re Asbestos Prods. Liab. Litig.* (No. VI), 614 F. Supp. 2d 550 (E.D. Pa. 2009) (Westlaw).

<sup>196</sup> See *MDL 875 Official Contacts*, *supra* note 172.

<sup>197</sup> See *id.* (listing the current members of the Steering Committee).

<sup>198</sup> Members of the Plaintiff's Steering Committee include: Peter Angelos, Janet Ward Black, Roger Lane, John Cooney, Steven Kazan, Peter Kraus, Joseph Rice, Russell Budd, and Michael Thornton. *Ten Steps to Resolution of MDL-875*, U.S. DISTRICT CT. E. DISTRICT OF PA. 19-20, <http://www.paed.uscourts.gov/documents/MDL/MDL875/ten%20steps%20to%20mdl%20875%20resolution.pdf> (last visited Jan. 8, 2014). Members of the Defendant's Steering Committee include: Kevin Jordan, William Mahoney, W.G. Watkins, David Landin, John McShea, Thomas Packer, Philip McWeeny, Robert Malaby, and Paul Kalish. *Id.* at 20-21.

#### 4. Court Procedures

The court adopted written procedures and posted them on the website to facilitate the progress of the litigation.<sup>199</sup>

##### *a. Settlement Conferences*<sup>200</sup>

Upon request by any party for a settlement conference, the presiding judge will assign (unless already assigned) a magistrate judge to hold such conference.<sup>201</sup> The written procedures provide for the exchange of discovery information, including the production by plaintiff of the most current medical report and a synopsis of the exposure against each defendant.<sup>202</sup> The magistrate judge assigned to the case sets a date and time for the settlement conference and also has the authority to require decision makers to be available for the conference.<sup>203</sup>

##### *b. Motion Practice*<sup>204</sup>

A procedure for filing both substantive and administrative motions was established and posted on the website consistent with the provisions of the Federal Rules of Civil Procedure and local rules.<sup>205</sup> In addition to providing specific procedural guidance as to how to present contested issues to the court, the written guidance signals to the litigants the court's readiness to entertain and rule on contested matters on a timely basis.<sup>206</sup>

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<sup>199</sup> See *MDL 875 Procedures*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#> (last visited Jan. 11, 2014).

<sup>200</sup> See *MDL 875 Settlement Conference Procedures*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#SettlementConferenceProcedures> (last visited Jan. 11, 2014).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> See *MDL 875 Motion Procedures*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#MotionProcedures> (last visited Jan. 11, 2014).

<sup>205</sup> *Id.*

<sup>206</sup> See *id.*

*c. Trial Scheduling*<sup>207</sup>

Any party wishing to schedule trial in the Eastern District of Pennsylvania is able to do so by certifying that discovery is completed, no motions are pending, and the parties are ready for trial within thirty days.<sup>208</sup>

Trial can proceed before an Article III judge or, with the consent of the parties, before an Article I judge.<sup>209</sup> Under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,<sup>210</sup> trial of cases transferred from other districts can only be held if consented to by all parties.<sup>211</sup>

A specific wheel of district court judges was established for assignment of cases where the parties had properly consented to trial in the Eastern District of Pennsylvania.<sup>212</sup>

*d. Frequently Asked Questions*<sup>213</sup>

The court has collected the most frequently asked questions and has provided answers on the website for the guidance of litigants and counsel.<sup>214</sup>

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<sup>207</sup> See *MDL 875 Trial Procedures*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#TrialProcedures> (last visited Jan. 11, 2014).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>211</sup> *Id.* at 38-39.

<sup>212</sup> See generally *MDL 875 Trial Procedures*, *supra* note 207 ("The trial judge will hold a scheduling conference promptly and assign a trial date within thirty (30) days.").

<sup>213</sup> See *MDL 875 Frequently Asked Questions (FAQs) for Newly Transferred Cases*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#FAQsNewlyTransferredCases> (last visited Jan. 11, 2014).

<sup>214</sup> See generally *id.* (answering such questions as "[w]hat happens after my case is transferred to the EDPA?" and "[w]hat occurs at the status and scheduling conference?").

### *C. Steps to Resolution*

With these general principles, policies, and practices in place, the court implemented a six step process to resolve each case.

#### 1. Transfer All Cases to Eastern District of Pennsylvania

Although the Judicial Panel on Multidistrict Litigation ordered all federal asbestos cases transferred and consolidated in the Eastern District of Pennsylvania since 1991, the case files for these cases remained with the transferor court.<sup>215</sup> The decision to leave the case files containing the active pleadings, and all other information reported in the dockets of the transferor courts, constituted a judgment on the part of then-presiding Judge Weiner that, given the number of cases, the transfer and upkeep of the actual case files would be prohibitively expensive, and that the Eastern District did not have the space or the support personnel to house the records. Concomitantly, however, the lack of case files made it difficult for the court to manage the cases.<sup>216</sup> This physical constraint fell once the federal courts implemented Case Management/Electronic Case Files (CM/ECF) in the early 2000s.<sup>217</sup> Since, by now, electronic filings were the norm and the case files could be transferred and managed electronically, a critical tool for the management of the thousands cases in MDL-875 became available.

On August 16, 2006, then-presiding Judge James Giles entered Administrative Order Number 11, which provided for the transfer of all files and dockets of all pending MDL cases, except in MARDOC, and the transfer of all files and dockets of future

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<sup>215</sup> See *About MDL 875*, *supra* note 97; Administrative Order No. 11, As Amended Effective March 16, 2009, *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, at 1 (E.D. Pa. Mar. 16, 2009) [hereinafter Amended Administrative Order No. 11].

<sup>216</sup> See *generally id.* at 1 (noting that changes to existing procedures needed to be made for reasons of efficiency).

<sup>217</sup> *Case Management/Electronic Case Files*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/CMECF.aspx> (last visited Jan. 11, 2014) ("CM/ECF implementation in the bankruptcy courts has been underway since early 2001. District court implementation began in 2002. Appellate court implementation began in late 2004.")

cases, as they were filed.<sup>218</sup> On March 16, 2009, Judge Robreno entered an Amended Order restating the terms of Administrative Order Number 11, and also "providing that all future filings be made in the Eastern District of Pennsylvania."<sup>219</sup> Gradually, all docket and case files were transferred with electronic access for the court and the parties of the entire MDL-875 docket by the end of 2011.

## 2. Severance of All Cases Into Single Plaintiff Motions

For reasons of economy, among others, plaintiffs' counsel had in many occasions chosen to file complaints naming multiple plaintiffs.<sup>220</sup> Given that the complaint typically named in excess of fifty defendants, and the facts alleged did not arise from the same transaction or occurrence, it was virtually impossible for the court to decipher which claims were addressed to which defendants and what period of time the claims covered.<sup>221</sup> Such state of affairs did not facilitate litigation nor promote individual settlements.

In May 2007, in order to streamline the litigation and focus on the merits of individual claims against individual defendants, Judge Giles entered an order in each case where more than one plaintiff had been named.<sup>222</sup> The purpose of AO-12 was to: (1) assist the district court in managing the large number of cases and the complex issues involved in the litigation; (2) to allow meritorious cases to move to trial or settlement properly; and (3) to avoid unnecessary burdens on defendants by requiring plaintiffs to provide certain medical and exposure information at the onset of the case.<sup>223</sup> AO-12 required the filing of a "Severed and Amended Complaint" by each plaintiff, except the lead plaintiff, and directing the clerk to assign each such severed and amended

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<sup>218</sup> Administrative Order No. 11, *In re Asbestos Prods. Liab. Litig.*, No. MDL 875 (E.D. Pa. Aug. 15, 2006).

<sup>219</sup> Amended Administrative Order No. 11, *supra* note 215.

<sup>220</sup> Administrative Order No. 12, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875 (E.D. Pa. May 31, 2007).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

complaint a new civil action number.<sup>224</sup> Each new complaint was to identify the specific claims against any defendant named in it.<sup>225</sup> As a result, each claim by each plaintiff against an individual defendant could now be identified and defined.

### 3. Amended Administrative Order Number 12

On September 3, 2009, Judge Robreno, building upon AO-12 issued by Judge Giles, issued an Amended Administrative Order 12 (AAO-12),<sup>226</sup> which required plaintiffs to submit *inter alia*, medical reports "[u]pon which the plaintiff now relies for the prosecution of the claims as if to withstand a dispositive motion."<sup>227</sup> Specifically, AAO-12 required that:

Each plaintiff asserting a claim based upon an alleged asbestos-related *malignancy* shall submit to the Court a copy of the medical diagnostic report or opinion which the plaintiff relies for the prosecution of the claims as if to withstand a dispositive motion.

Each plaintiff asserting a claim based upon an alleged *non-malignant* injury or condition shall submit to the court a copy of the medical diagnosing report or opinion upon which the plaintiff now relies for the prosecution of the claim as if to withstand a dispositive motion.

Each report or opinion submitted hereunder shall be based upon objective and subjective data which shall be identified and descriptively set out within the report of opinion.<sup>228</sup>

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Amended Administrative Order No. 12, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875 (E.D. Pa. Sept. 3, 2009).

<sup>227</sup> *Id.* at 2.

<sup>228</sup> *Id.* at 2-3.

As a remedy for non-compliance, AAO-12 provided that "the Court may dismiss pursuant to F.R.C.P. 41(b) the cases of any plaintiffs who fail to comply with the requirements set forth."<sup>229</sup>

AO-12 and AAO-12 have their genesis in the order entered by a New Jersey trial court in *Lore v. Lone Pine Corp.*,<sup>230</sup> which required plaintiffs, in the context of a mass tort action, to provide facts in support of their claims through expert reports or risk having their cases dismissed.<sup>231</sup> Similar orders have been entered by courts presiding over mass tort litigation in a growing number of cases.<sup>232</sup>

AAO-12 requires plaintiffs to base their medical submissions "on medically accepted principles and practices and on statements from reputable medical organizations that require occupational and environmental exposure history when screening for asbestos-related diseases."<sup>233</sup> Additionally, although AAO-12 does not expressly provide that plaintiffs must furnish a complete exposure history as well, courts have interpreted the language to so require.<sup>234</sup>

With the case files transferred, and the cases severed into "*one plaintiff-one claim*," it was now timely to enforce the mandates of AAO-12.<sup>235</sup>

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<sup>229</sup> *Id.* at 3.

<sup>230</sup> *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986).

<sup>231</sup> *See id.* at \*4 ("In this Court's opinion, it is time that prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause.").

<sup>232</sup> David B. Weinstein & Christopher Torres, *Managing the Complex: A Brief Survey of Lone Pine Orders*, 34:3 WESTLAW J. ENVTL. \*1, \*1 (Aug. 21, 2013) (collecting decisions and orders in eighty-three cases where courts have entered and/or enforced Long Pine Orders).

<sup>233</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 2013 WL 5651289, at \*1 (3d Cir. 2013).

<sup>234</sup> *See id.*

<sup>235</sup> *See About MDL 875*, *supra* note 97 (explaining that "the Eastern District of Pennsylvania has approached MDL 875 under a 'one plaintiff, one claim' policy").

#### 4. Show Cause Hearings

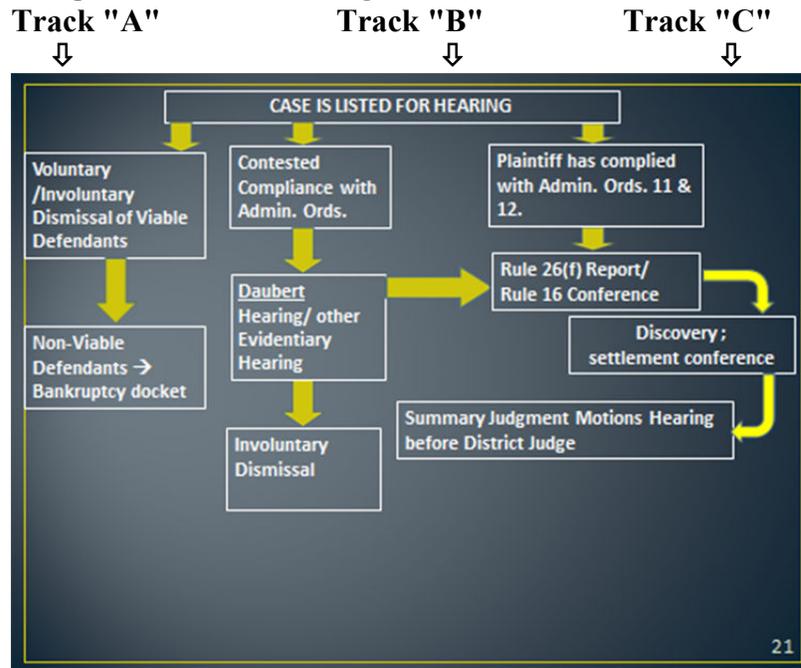
Each case on the court's docket was listed for a show cause hearing and/or in person status and scheduling conference.

The mechanics of each rule to show cause hearing would work as follows: three to four weeks prior to the hearing, an order would issue with a list of cases scheduled for hearing. The order would be entered on the docket of each case and would be published on the MDL-875 website. Anywhere from 300 to 1,500 cases would be listed for hearing, and those cases would come from between one and five federal districts. Cases from similar geographic areas were kept together to minimize travel for the involved attorneys. Prior to the hearing, counsel for plaintiffs were directed to inform the court as to which of the cases were to be dismissed. If the individual plaintiff had claims against one of the defendants in bankruptcy, counsel could request that the plaintiff's case be moved to the 'bankruptcy only docket,' which is an administrative docket consisting of cases with claims against bankrupt entities only. If a case was going to move forward, however, the plaintiff was required to certify that the plaintiff had complied with AAO-12 and had to provide the court with a list of viable defendants, against which the plaintiff was maintaining his or her action.<sup>236</sup> After the conclusion of the hearing, each case received one of five different types of orders: (1) a dismissal for lack of prosecution (if no counsel appeared with information on that plaintiff); (2) a Rule 41(b) dismissal; (3) a Rule 41(b) dismissal with a transfer to the bankruptcy only docket; (4) a scheduling order allowing between 90 and 120 days for fact discovery; or (5) a referral to one of the

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<sup>236</sup> Given that many jurisdictions have now adopted a "two disease" or "multiple disease" rule which permits a party who has been diagnosed with a non-malignancy to wait until he has become impaired for the statute of limitations to begin to run on the malignancy claim, the need to file suit in cases where the plaintiff is unimpaired has now been largely eliminated. *See, e.g.,* Held v. AC and S, Inc., No. 10-67814, Doc. No. 200 (E.D. Pa. June 18, 2013) (Robreno, J.) (construing two-disease rule under Wisconsin law); Larweth v. AC and S, Inc., No. 08-89914, Doc. No. 161 (E.D. Pa. Mar. 13, 2013) (Robreno, J.) (construing two-disease rule under Illinois law); Kiser v. A.W. Chesterton Co., 770 F. Supp. 2d 745 (E.D. Pa. 2011) (Robreno, J.), *aff'd*, 517 F. App'x 109 (3d Cir. 2013).

magistrate judges for pretrial proceedings. Over the course of two years, the court listed every pending case for hearing, as well as any new cases that were transferred in by the Judicial Panel on Multidistrict Litigation. Based on the disposition of the case, each case was placed on the following tracks:



Track "A": Plaintiffs who voluntarily chose *not* to proceed with their cases, who either voluntarily dismissed them or were dismissed for failure to show cause as to all viable defendants. Non-viable defendants who were under bankruptcy court protection were transferred to the bankruptcy inactive docket. These cases were then closed.

Track "B": Plaintiffs who produced evidence of impairment under AAO-12 and who otherwise showed cause, but whose compliance with AAO-12 was challenged by defendants. Those cases were then scheduled for *Daubert* or other evidentiary hearings before a magistrate judge. If the case withstood a challenge to its compliance with AAO-12 or to a dispositive motion, it proceeded to track "C" pursuant to a scheduling order. If the claim could not withstand a dispositive motion, it was involuntarily dismissed.

Track "C": This track was designed for those cases where plaintiffs had claimed that they had complied with AAO-12 and the compliance was not challenged by defendants. These cases proceeded to discovery and summary judgment.

#### 5. Scheduling Orders – Discovery

All cases not dismissed at the show cause hearing, or as a result of subsequent *Daubert* or evidentiary hearing, were placed on a scheduling order, which provided for a discovery cut-off date, dates for exchange of expert reports, and briefing of summary judgment motions.<sup>237</sup> Discovery was usually set at 120 days from the date of the order.<sup>238</sup> Although, initially the parties expressed concern that the discovery deadlines were too short, given the age of the cases, and the familiarity of counsel with the products, sites of exposures, epidemiology of the disease, and the availability of experts, the court found the deadlines to be reasonable. Given that each case had been assigned to a magistrate judge, any discovery disputes could be resolved promptly by the assigned magistrate judge or the administrator.

#### 6. Summary Judgment

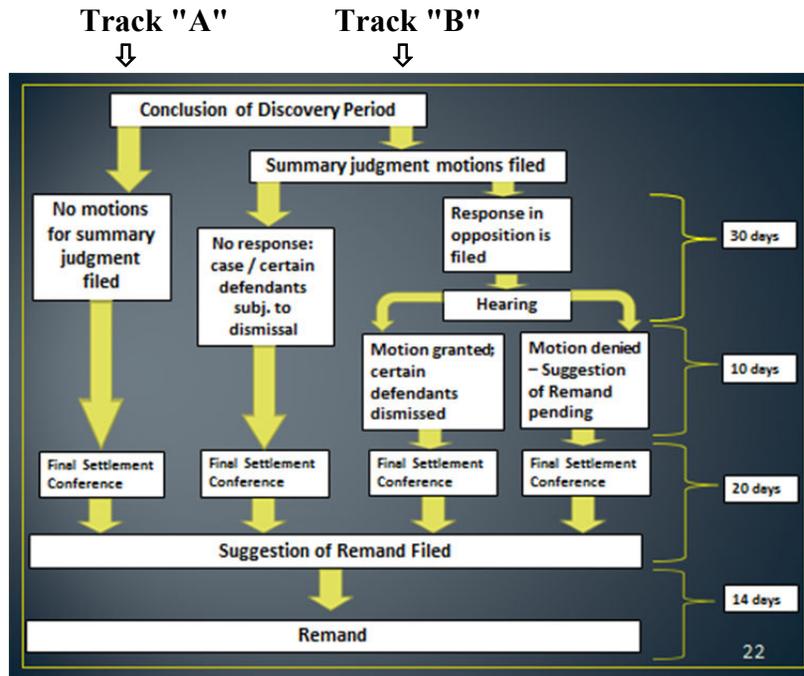
At the conclusion of the discovery period, the parties were permitted to file motions for summary judgment. The MDL court decided to address summary judgment, rather than remanding the cases to the transferor court at that point, for three reasons: (1) substantively, it was most familiar with the nature of the litigation and the legal issues generally involved; (2) rulings by the MDL court would provide predictability and consistency to the adjudication; and (3) placing the parties on a predictable path under the scheduling order required a date certain for summary judgment adjudication. Concerning the substantive law to be applied in diversity cases, the court would apply state law, to the extent that the state law was either settled or could be determined

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<sup>237</sup> See *Discovery Plan Template*, U.S. DISTRICT CT. E. DISTRICT OF PA. 1-2, [http://www.paed.uscourts.gov/documents/MDL/MDL875/discovery\\_plan\\_template.pdf](http://www.paed.uscourts.gov/documents/MDL/MDL875/discovery_plan_template.pdf) (last visited Jan. 8, 2014).

<sup>238</sup> *Id.* at 1.

from the state law jurisprudence, but would remand cases to the transferor court where dispositive issues of state law were unsettled.<sup>239</sup> As far as the applicability of maritime law, the MDL court would apply federal law as interpreted by the Court of Appeals for the Third Circuit, the circuit in which the MDL court sits.<sup>240</sup>



At the conclusion of discovery, each case was placed in one of two tracks.<sup>241</sup> If no summary judgment motion was filed (Track "A"), the case was scheduled for a final settlement conference, and, if not settled, then the court would issue a suggestion of remand.<sup>242</sup> If a summary judgment motion was filed (Track "B"), and there

<sup>239</sup> *Various Plaintiffs v. Various Defendants* ("Oil Field Cases"), 673 F. Supp. 2d 358 (E.D. Pa. 2009) (Robreno, J.).

<sup>240</sup> *Id.* (citing *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987)); see also *In re General Am. Life Ins. Co. Sales Practices Litig.* (Knouse v. Gen. Am. Life Ins. Co.), 391 F.3d 907, 911 (8th Cir. 2004).

<sup>241</sup> See Chart, *supra* p. 44.

<sup>242</sup> *Id.*

was no response, then those plaintiffs who did not file a response to the summary judgment motion, provided the movant was entitled to judgment as a matter of law, were dismissed.<sup>243</sup> If any viable defendants remained, a final settlement conference was scheduled and a suggestion of remand was entered if the case did not settle.<sup>244</sup> On the other hand, if a response to the motion for summary judgment was filed, a hearing was scheduled. If the motion was granted or denied as to certain, but less than all defendants, a final pretrial conference was scheduled, and if the case was not settled, a suggestion of remand would be entered.

The key to the successful execution of the summary judgment procedure was the MDL court's adherence to a rigorous schedule for all cases. Unless there were exceptional circumstances, the court scheduled a hearing within thirty days for the filing of the summary judgment motion and committed to issuing a decision within ten days after the hearing. Moreover, the court also committed to holding a final settlement conference, and if the case did not settle, to enter a suggestion of remand within twenty days from the date of the ruling on the motion for summary judgment, if the ruling did not dispose of all claims against all defendants. In sum, the time between the filing of motions for summary judgment and the Panel's issuing a remand order was seventy-four days. Setting a goal line for the MDL litigation, that is, the time for filing a motion for summary judgment, and thereafter deciding the motions promptly, provided encouragement to counsel to litigate the case diligently in the MDL or to settle.

#### *D. Trial or Remand*

The MDL process was initially designed to consolidate cases in one court for purposes of pretrial proceedings with the expectation that once that goal was achieved, the cases would be returned to the transferor court for ultimate disposition.<sup>245</sup> In

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> See Stanley J. Levy, *Complex Multidistrict Litigation and the Federal Courts*, 40 *FORDHAM L. REV.* 41, 41 (1971). The MDL system has its genesis in the Electrical Equipment Cases tried in the Eastern District of Pennsylvania in

reality, as it has turned out, for a variety of reasons, once the cases are consolidated they rarely are remanded to the transferor court. As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process.<sup>246</sup> That view, together with the business model of aggregation and consolidation of cases for settlement, interfered with the litigation of individual cases in the MDL court.

### 1. Administrative Order Number 18

After 2009, MDL-875 departed from this regimen.<sup>247</sup> Remand was no longer viewed as a failure, but rather very much as a part of the MDL process. If the cases are not adjudicated pretrial or settled, the next step is remand.

Administrative Order Number 18 sets out the conditions and the mechanism which results in the suggestion of remand being entered.<sup>248</sup> A suggestion of remand is appropriate if the moving party certifies that:

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the early 1960s. Later, Congress formalized the structure by enacting what is now 28 U.S.C. § 1407.

<sup>246</sup> See e.g., *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150-52 (D. Mass. 2006).

[A]s MDL practice flourishes, many cases are transferred out of their home courts and away from local juries, but few-very few-ever return for trial. The reasons are twofold. Most cases settle, and this is as it should be . . . . Yet the 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice. The *Manual for Complex Litigation* seems virtually to command this result: . . . 'As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases. Federal Judicial Center, *Manual for Complex Litigation* (Fourth) § 20.132 (emphasis added).' Thus, it is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. This, in turn, reinforces the unfortunate tendency to hang on to transferred cases to enhance the likelihood of settlement.

*Id.*

<sup>247</sup> See *infra* notes 248-58 and accompanying text.

<sup>248</sup> See Administrative Order No. 18, *In re Asbestos Prods. Liab. Litig.* (No. IV), No. 2:01-md-875 (E.D. Pa. Apr. 30, 2009).

1. There has been compliance with AO12 and AAO-12 (production of acceptable diagnostic report);
2. The plaintiff is alive;
3. All discovery has been completed;
4. Settlement prospects have been exhausted;
5. There are no motions outstanding;
6. The plaintiff is prepared for trial without delay in the transferor court; and
7. The transferor court's docket is not congested.<sup>249</sup>

## 2. Suggestion of Remand Memorandum

If the appropriate certification is made by the movant and there is no opposition, the case is remanded.<sup>250</sup>

More typically, remand occurs at the conclusion of the summary judgment stage of the litigation. Once the final settlement conference has been held, or if one was not held following the court's summary judgment adjudication, the MDL court issues a suggestion of remand, if the conditions under Administrative Order Number 18 have been met.<sup>251</sup> The order also identifies the relevant legal rulings the MDL court has made in the case, the remaining defendants, and any motions outstanding.<sup>252</sup> The order also affords the parties the opportunity to try the case in the Eastern District of Pennsylvania if all parties waived the venue requirements under *Lexecon*.<sup>253</sup> If not objected to by the parties, or if the objections are overruled by the Panel, the Panel orders the case remanded to the transferor court.<sup>254</sup>

If punitive damages are present, any claims for punitive or exemplary damages are severed from the case and retained by the

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See *Ten Steps to Resolution of MDL-875*, U.S. DISTRICT CT. E. DISTRICT OF PA. 36-38, <http://www.paed.uscourts.gov/documents/MDL/MDL875/ten%20steps%20to%20mdl%20875%20resolution.pdf> (last visited Jan. 8, 2014).

<sup>252</sup> Administrative Order No. 18, *supra* note 248.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

MDL-875 court in the Eastern District of Pennsylvania.<sup>255</sup> The court has not yet decided on the appropriate protocol for the resolution of punitive damages claims.

### 3. Trial Judge and Appointment of Special Master on Remand

To facilitate remand and lessen the burden of the transferor courts, the MDL court and the Committee on Intercircuit Assignments of the Judicial Conference developed a protocol, whereby the MDL court notifies the chairman of the Intercircuit Committee of the impending remand of a case.<sup>256</sup> In turn, the chairman contacts the chief judge of the transferor district with an offer to identify a senior judge from another district who is ready, willing, and able to try the case.<sup>257</sup> Through this mechanism, the MDL court attempts to ensure that a remanded case is not placed at

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<sup>255</sup> See *In re Collins*, 233 F.3d 809, 810 (3d Cir. 2000) ("It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand."); *In re Roberts*, 178 F.3d 181 (3d Cir. 1999).

<sup>256</sup> See *Committee Answers Courts' Call for Help*, U.S. CTS., (Dec. 2010), [http://www.uscourts.gov/news/TheThirdBranch/10-12-01/Committee\\_Answers\\_Courts\\_Calls\\_for\\_Help.aspx](http://www.uscourts.gov/news/TheThirdBranch/10-12-01/Committee_Answers_Courts_Calls_for_Help.aspx).

<sup>257</sup> The following is a sample letter:

Dear Judges, I have been advised by Judge Robreno's office that asbestos cases are being remanded to your districts; two to the Southern District of New York, two to the Northern District of Georgia, one to the District of Connecticut, and a series to the Northern District of California. The purpose of this email is to ask if you need intercircuit assistance in handling these cases. If so, please let me know. Judge Breyer has agreed to handle the remanded asbestos cases in the Northern District of California . . . I am sending a copy of this email to Chief Judge Royce Lamberth who will be succeeding me as the chair of the Intercircuit Assignment Committee in the fall.

Email from Judge J. Frederick Motz, United States District Judge for the District of Maryland, to Judge Charles R. Breyer, United States District Judge for the Northern District of California, Judge Julie E. Carnes, United States District Judge for the Northern District of Georgia, Judge Loretta A. Preska, United States District Judge for the Southern District of New York, and Judge Alvin W. Thompson, United States District Judge for the District of Connecticut (June 21, 2013) (on file with author).

the 'end of the line' or otherwise delayed for trial for lack of an available judge.

Since 2008, the MDL court has remanded more than 600 cases to 59 districts. Most remanded cases are, in turn, resolved in the transferor court without the need of a trial on the merits. Notably, remands are rare in MDL cases. According to a recent study, only 3.425% of MDL cases have been remanded to the transferor court since the JPML was created in 1968.<sup>258</sup>

At the suggestion of the Steering Committee, the court has appointed a special master for remands. After a hearing, the court appointed Professor Francis E. McGovern, Esquire, an experienced practitioner with a history of involvement in multidistrict litigation and one of the pioneers in the asbestos litigation, to act as special master.<sup>259</sup> This special master is charged with facilitating the smooth transfer of the remanded cases to the transferor court. Upon remand, the special master confers with the parties and offers his services to the transferor judge to facilitate the transition.

#### *E. Legal Architecture*

In deciding literally thousands of motions, the MDL court has sought to provide predictability on both the procedural and substantive issues which regularly come before the MDL court. While procedural issues are generally governed by federal law, the substantive rule of decision is drawn from state law, except where admiralty jurisdiction is implicated in which case federal law applies. The MDL-875 court has presided over cases in all fifty states plus Puerto Rico, Guam, and the United States Virgin Islands, in addition to cases arising under federal maritime law. Since 2008, the MDL Court has issued hundreds of full opinions, including 528 motions for summary judgment involving 32 different jurisdictions.<sup>260</sup> The issues have included:

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<sup>258</sup> Burch, *supra* note 168, at 681.

<sup>259</sup> Order to Appoint a Special Master for MDL-875 Land-Based Cases Only, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875 (E.D. Pa. Sept. 5, 2013).

<sup>260</sup> See *infra* notes 261-304 and accompanying text.

### 1. Major Legal Issues in MDL-875

- Jurisdiction over Military-Related Exposure Claims
- Choice of Law
  - Determining the Applicable State Law<sup>261</sup>
  - Maritime Law<sup>262</sup>
  - Intersection of State Law and Maritime Law: Split Exposures<sup>263</sup>
  - Remanding Unsettled Issues of State Law<sup>264</sup>

<sup>261</sup> See, e.g., *Commissioner v. Estate of Bosch*, 387 U.S. 456, 474-77 (1967); *Van Dusen v. Barrack*, 376 U.S. 612, 637-40 (1964); *Wilson v. ACandS, Inc.*, No. 08-90732 (E.D. Pa. Mar. 12, 2013) (Robreno, J.) (citing *Simon v. U.S.*, 805 N.E.2d 798, 801 (Ind. 2004)); *Pendergast v. Am. Optical Corp.*, No. 10-68061 (E.D. Pa. July 1, 2011) (Robreno, J.); *Talbot v. Allied Signal, Inc.*, No. 09-70499 (E.D. Pa. Dec. 15, 2010) (Robreno, J.); *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F. Supp. 2d 358, 363 (E.D. Pa. 2009) (Robreno, J.).

<sup>262</sup> See, e.g., *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *Lyautey v. Alfa-Laval, Inc.*, No. 10-84922, 2012 WL 2832655 (E.D. Pa. Mar. 20, 2012) (Robreno, J.) (citing *Gibbs ex rel. Gibbs v. Carnival Cruise Lines*, 314 F.3d 125, 131-32 (3d Cir. 2002)); *Deuber v. Asbestos Corp.*, No. 10-78931, Doc. Nos. 138-39 (E.D. Pa. Dec. 2, 2011) (Robreno, J.) (citing *Sisson v. Ruby*, 497 U.S. 358 (1990)); *Conner v. Alfa Laval, Inc.*, No. 09-67099, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.).

<sup>263</sup> See, e.g., *Lewis v. Asbestos Corp.*, No. 10-64625, Doc. No. 81 (E.D. Pa. Aug. 2, 2011) (Robreno, J.); *Bartel v. A-C Prod. Liab. Trust*, 461 F. Supp. 2d 600, 607 (N.D. Oh. 2007).

<sup>264</sup> See, e.g., *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998); *Pavlick v. Advance Stores Co.*, No. 10-67147, 2013 WL 1114646 (E.D. Pa. Feb. 20, 2013) (Robreno, J.); *Robinson v. Air & Liquid Sys., Inc.*, No. 11-67687, 2013 WL 1115108 (E.D. Pa. Feb. 7, 2013) (Robreno, J.); *Vedros v. Northrop Grumman Shipbuilding, Inc.*, No. 11-67281, 2013 WL 1115188 (E.D. Pa. Feb. 1, 2013) (Robreno, J.); *Pray v. ACandS, Inc.*, No. 08-91884 (E.D. Pa. Dec. 17, 2012) (Robreno, J.); *Legg v. Armstrong Int'l*, No. 11-67222, 2012 WL 7761488 (E.D. Pa. Nov. 30, 2012) (Robreno, J.); *Holland v. Armstrong Int'l*, No. 11-67221, 2012 WL 7761422 (E.D. Pa. Nov. 28, 2012) (Robreno, J.); *Bouchard v. CBS Corp.*, 2012 WL 5462612 (E.D. Pa. Oct. 2, 2012) (Robreno, J.); *Thurmon v. Ga. Pac., L.L.C.*, 2012 WL 5395010 (E.D. Pa. Sept. 20, 2012) (Robreno, J.); *Cardaro v. Aerojet Gen. Corp.*, No. 11-66763, 2012 WL 3536422 (E.D. Pa. July 27, 2012) (Robreno, J.); *Krik v. BP Am., Inc.*, 2012 WL 2918745 (E.D. Pa. May 16, 2012) (Robreno, J.); *Wright v. A.W. Chesterton*, No. 11-66748, 2012 WL 2834532 (E.D. Pa. Apr. 6, 2012) (Robreno, J.); *Anderson v. A.W. Chesterton*, No. 11-63482, 2012 WL 2877452 (E.D. Pa.

- Product Identification
  - Defined
  - Various State Standards and Trends<sup>265</sup>

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Apr. 5, 2012) (Robreno, J.); *Musselman v. Amphenol Corp.*, No. 10-69486, Doc. No. 125 (E.D. Pa. Nov. 28, 2011) (Robreno, J.); *Dalton v. 3M, Co.*, No. 10-64604, Doc. No. 204 (E.D. Pa. July 29, 2011) (Robreno, J.).

<sup>265</sup> See, e.g., *Stark v. Armstrong World Indus., Inc.*, 21 Fed. App'x 371, 375 (6th Cir. 2001); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1163 (4th Cir. 1986); *Thurmon*, 2012 WL 5447808 (citing *John Crane, Inc. v. Jones*, 604 S.E.2d 822, 823-36 (Ga. 2004)); *Crater v. 3M Co.*, No. 11-66775, 2012 WL 2989188 (E.D. Pa. July 2, 2012) (Robreno, J.); *McCormick v. A.W. Chesterton Co.*, 2012 WL 2914184 (E.D. Pa. May 15, 2012) (Robreno, J.); *Various Plaintiffs v. Various Defendants ("Amoco Cases")*, 2012 WL 477914 (E.D. Pa. Feb. 15, 2012) (Robreno, J.); *Brindowski v. Alco Valves, Inc.*, No. 20-64684 (E.D. Pa. Jan. 12, 2012) (Robreno, J.); *Elderkin-Graham v. New England Insulation Co.*, No. 10-83243, Doc. Nos. 57-58 (E.D. Pa. Nov. 28, 2011) (Robreno, J.); *Dion v. Anchor Packing Co.*, No. 10-64681, 2011 WL 6026598 (E.D. Pa. Oct. 5, 2011) (Robreno, J.); *Landess v. Baton Rouge Marine Contractors, Inc.*, No. 08-87778 (E.D. Pa. Sept. 1, 2011); *Dalton*, No. 10-64604, Doc. No. 204 (citing *Gorman-Rupp Co. v. Hall*, 908 So. 2d 749, 757 (Miss. 2005)); *Jacobs v. AC&S, Inc.*, No. 06-61612, Doc. No. 66 (E.D. Pa. July 25, 2011) (Robreno, J.) (citing *Owens-Corning Fiberglas v. Watson*, 413 S.E.2d 630, 639 (Va. 1992)); *Prange v. A.W. Chesterton Co.*, No. 09-91848, Doc. Nos. 264-70 (E.D. Pa. July 22, 2011) (Robreno, J.) (citing *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005); *Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1053 (Cal. 1991); *McGonnell v. Kaiser Gypsum Co.*, 98 Cal. App. 4th 1098, 1103 (Cal. Ct. App. 2002); *Rutherford v. Owens-Ill.*, 16 Cal. App. 4th 953, 982-83 (Cal. Ct. App. 1997); *Lineaweaver v. Plant Insulation Co.*, 31 Cal. App. 4th 1409, 1415 (Cal. Ct. App. 1995)); *Mattox v. Various Defendants*, No. 07-73489, Doc. Nos. 113-14 (E.D. Pa. July 7, 2011) (Robreno, J.) (citing *Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 716 (4th Cir. 1995)); *Pendergast*, No. 10-68061, Doc. No. 165; *Tafoya v. AC Delco Auto Serv. Ctr., Inc.*, No. 10-61138, Doc. Nos. 83-86 (E.D. Pa. July 1, 2011) (Robreno, J.) (citing *Wyeth v. Rowatt*, 244 P.3d 765, 778 (Nev. 2010)); *Goldade v. AC&S, Inc.*, No. 09-68096 (E.D. Pa. June 22, 2011) (Robreno, J.) (citing *Andrews v. J.W. O'Hearn*, 387 N.W.2d 716, 726 (N.D. 1986)); *Powers v. F W Webb Co.*, No. 09-80033, Doc. No. 108 (E.D. Pa. Mar. 9, 2011) (Robreno, J.); *Anderson v. Hamilton Materials*, No. 09-80103, Doc. No. 81 (E.D. Pa. Mar. 1, 2011) (Robreno, J.) (citing *McCorvey v. Utah State Dept. of Transp.*, 868 P.2d 41, 45 (Utah 1993)); *Ferguson v. Lorillard Tobacco Co.*, No. 09-91161 (E.D. Pa. Feb. 25, 2011) (Robreno, J.); *Small v. Owens-Ill., Inc.*, No. 07-61174, Doc. No. 35 (E.D. Pa. Jan. 28, 2011) (Robreno, J.) (citing *Henderson v. Allied Signal, Inc.*, 644 S.E.2d 724, 727 (S.C. 2007)); *Archer v. Mead Corp.*, No. 09-70093, Doc.

- Maritime Law<sup>266</sup>
- Intersection of *Daubert* Issues and Product Identification<sup>267</sup>
- Common Causation Issues<sup>268</sup>
- Coworker Testimony<sup>269</sup>

No. 98 (E.D. Pa. Jan. 14, 2011) (Robreno, J.) (citing *Turner v. Azalea Box Co.*, 508 So. 2d 253, 254 (Ala. 1987)); *Talbot*, No. 09-70499, Doc. No. 22 (citing *O'Connor v. Raymark Indus., Inc.*, 518 N.E.2d 510, 512 (Mass. 1988)); *Street v. AC&S, Inc.*, No. 07-62599, Doc. No. 20 (E.D. Pa. Dec. 9, 2010) (Robreno, J.) (citing *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 449 (Md. 1992)); *Brown v. A-Best Prods. Co.*, No. 07-63017, Doc. No. 44 (E.D. Pa. Nov. 2, 2010) (Robreno, J.); *Bielski v. Asbestos Corp.*, Nos. 07-63404, 07-63324, Doc. No. 15 (E.D. Pa. Oct. 13, 2010) (Robreno, J.) (citing *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 761 (N.J. Super. Ct. App. Div. 1997) (quoting *Sholtis v. Am. Cyanamid Co.*, 568 A.2d 1196, 1208 (N.J. Super. Ct. App. Div. 1989)); *Happel v. Anchor Packing Co.*, No. 09-70113, Doc. Nos. 111-15 (E.D. Pa. Oct. 13, 2010) (Robreno, J.); *Weidner v. United Mineral Prods. Co.*, No. 07-63072, Doc. No. 89 (E.D. Pa. Oct. 13, 2010) (Robreno, J.) (citing *Eckenrod v. GAF Corp.*, 544 A.2d 50, 52-53 (Pa. Super. Ct. 1988)); *Reaves v. Armstrong World Indus., Inc.*, 569 So. 2d 1307, 1308 (Fla. Dist. Ct. App. 1990); *Ward v. Celotex Corp.*, 479 So. 2d 294, 295 (Fla. Dist. Ct. App. 1985); *Thomas v. E. Refractories Co.*, CV-04-151 (Me. Super. Ct., 2009); *Campbell v. H.B. Smith Co.*, CV-04-57, at 5-6 (Me. Super. Ct. 2007); *Bessey v. E. Refractories*, CV-99-001, at 11 (Me. Super. Ct. 2002).

<sup>266</sup> See, e.g., *Lindstrom*, 424 F.3d at 492 (citing *Stark*, 21 F. App'x at 375); *Abbay v. Armstrong*, No. 10-83248, 2012 WL 975834 (E.D. Pa. Feb. 29, 2012) (Robreno, J.); *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012) (Robreno, J.).

<sup>267</sup> See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Breedlove v. CSX Transp., Inc.*, No. 09-75120, 2011 WL 499993 (E.D. Pa. Feb. 10, 2011) (Angell, J.); *Schumacher v. Amtico*, No. 10-01627, Doc. No. 143 (E.D. Pa. Nov. 2, 2010) (Robreno, J.); *Eagen v. Kaiser Aluminum & Chem. Corp.*, 677 So. 2d 1027, 1034 (La. Ct. App. 1996); *Kurak*, 689 A.2d at 760, 766; *Betz v. Pneumo Abex L.L.C.*, 44 A.3d 27 (Pa. 2012); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003); *Betz v. Pneumo Abex L.L.C.*, 998 A.2d 962, 982-83 (Pa. Super. Ct. 2010).

<sup>268</sup> See, e.g., *Tafoya*, No. 10-61138, Doc. No. 86; *Pendergast*, No. 10-68061, Doc. No. 166; *Anderson v. Ford Motor Co.*, No. 09-69122, Doc. Nos. 289-300 (E.D. Pa. Apr. 27, 2011) (Robreno, J.); *Anderson*, No. 09-80103, Doc. No. 81; *Ferguson*, No. 09-91161, Doc. Nos. 231-32; *Riggs v. Mead Corp.*, No. 09-70094, Doc. No. 76 (E.D. Pa. Jan. 14, 2011) (Robreno, J.).

<sup>269</sup> See, e.g., *Bossert v. Keene Corp.*, 19 F.3d 1437, 1994 WL 108844, at \*1-2 (8th Cir. 1994); *Walker v. Owens-Ill. Glass Co.*, No. 07-62843, Doc. No.

- Secondary or "Take-Home Exposure"<sup>270</sup>
- Bare Metal Defense
  - Defined<sup>271</sup>
  - Various State Standards and Trends<sup>272</sup>
  - Maritime Law<sup>273</sup>
- Government Contractor Defense
  - Defined<sup>274</sup>
  - At the Removal Stage<sup>275</sup>
  - At the Summary Judgment Stage<sup>276</sup>
- Sophisticated User Defense
  - Defined<sup>277</sup>

85 (E.D. Pa. Jan. 28, 2011) (Robreno, J.) (citing *AC&S, Inc. v. Godwin*, 667 A.2d 116, 123 (Md. 1995); *Reiter v. Pneumo Abex, L.L.C.*, 8 A.3d 725 (Md. 2010)); *Bloom v. Garlock, Inc.*, No. 07-63073, Doc. Nos. 36-39 (E.D. Pa. Oct. 13, 2010) (Robreno, J.).

<sup>270</sup> See, e.g., *Elderkin-Graham v. New England Insulation Co.*, No. 10-83243, Doc. Nos. 57-58 (E.D. Pa. Nov. 28, 2011) (Robreno, J.); *Newell v. 3M Co.*, No. 09-80050, Doc. Nos. 242-52 (E.D. Pa. Aug. 19, 2011) (Robreno, J.); *Curtis v. Borg-Warner Corp.*, No. 5:10-02863, Doc. No. 39 (E.D. Pa. Aug. 9, 2011) (Robreno, J.); *Odom v. Allis-Chalmers Co.*, No. 09-69594, Doc. No. 194 (E.D. Pa. Dec. 16, 2010) (Robreno, J.).

<sup>271</sup> See *Conner*, 842 F. Supp. 2d at 793 n.2.

<sup>272</sup> See, e.g., *Smith v. A.W. Chesterton Co.*, No. 10-69388, Doc. No. 157 (E.D. Pa. July 29, 2011) (Robreno, J.); *Dalton v. 3M Co.*, No. 10-64604, Doc. Nos. 203-05 (E.D. Pa. July 26, 2011) (Robreno, J.); *Holmes v. AC&S, Inc.*, No. 06-61617, Doc. No. 38 (E.D. Pa. July 12, 2011) (Robreno, J.); *Fritz v. Bayer Cropscience, Inc.*, No. 07-65982, Doc. No. 40 (E.D. Pa. Jan. 25, 2011) (Robreno, J.); *O'Neil v. Crane Co.*, No. S177401, 2012 WL 88533 (Cal. Jan. 12, 2012); *O'Neil v. Crane Co.*, 177 Cal. App. 4th 1019, 1026 (Cal. Ct. App. 2009); *Taylor v. Elliott Turbomachinery Co.*, 171 Cal. App. 4th 564, 571 (Cal. Ct. App. 2009); *Scordino v. Hopeman Bros., Inc.*, 662 So.2d 640, 646 (Miss. 1995).

<sup>273</sup> See, e.g., *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371 (6th Cir. 2001) (not precedential); *Conner*, 842 F. Supp. 2d at 793; *O'Neil*, 2012 WL 88533 at \*6; *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495 (Wash. 2008); *Simonetta v. Viad Corp.*, 197 P.3d 127, 137-38 (Wash. 2008).

<sup>274</sup> See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

<sup>275</sup> See, e.g., *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 785 (E.D. Pa. 2010) (Robreno, J.).

<sup>276</sup> See, e.g., *Willis v. BW IP Int'l Inc.*, No. 09-91449 (E.D. Pa. Aug. 26, 2011) (Robreno, J.); *Faddish v. Gen. Elec. Co.*, No. 09-70626, 2010 WL 4146108, at \*8-9 (E.D. Pa. Oct. 20, 2010) (Robreno, J.).

- Various State Standards and Trends<sup>278</sup>
- Duty Owed by Shipbuilder Defendants to Plaintiffs
  - A Maritime Law Issue<sup>279</sup>
  - Duty Defined<sup>280</sup>
  - A Navy Ship is Not a "Product"<sup>281</sup>

## 2. Issues of Federal Law

- Federal Rules of Civil Procedure
  - Federal Rule of Civil Procedure 56(c)(1)(A)<sup>282</sup>
  - Federal Rules of Civil Procedure 12(b)(2) & 12(b)(5)<sup>283</sup>

<sup>277</sup> See, e.g., *Johnson v. Am. Standard, Inc.*, 43 Cal. App. 4th 56, 70 (Cal. Ct. App. 2008); *Stewart v. Union Carbide Corp.*, 190 Cal. App. 4th 23 (Cal. Ct. App. 2010).

<sup>278</sup> See, e.g., *Aikins v. Gen. Electric Co.*, No. 10-64595, Doc. Nos. 42-44 (E.D. Pa. Dec. 8, 2011) (Robreno, J.); *Gottschall v. Gen. Electric Co.*, No. 11-60035, Doc. Nos. 52-53 (E.D. Pa. Dec. 8, 2011) (Robreno, J.); *Willis*, No. 09-91449, Doc. No. 125; *Hoffeditz v. AM Gen., L.L.C.*, No. 09-70103, 2011 WL 5881006, at \*1 (E.D. Pa. 2011) (Robreno, J.); *Constantinides v. CBS Corp.*, 747 F. Supp. 2d 488, 494-95 (E.D. Pa. 2010) (Robreno, J.); *Faddish v. CBS Corp.*, No. 09-70626, 2010 WL 4159238, at \*5-6 (E.D. Pa. 2010) (Robreno, J.); *Johnson*, 43 Cal. App. 4th at 70.

<sup>279</sup> See, e.g., *Deuber v. Asbestos Corp.*, No. 10-78931, Doc. Nos. 138-39 (E.D. Pa. Dec. 2, 2011) (Robreno, J.) (citing *Sisson v. Ruby*, 497 U.S. 358 (1990)); *Conner v. Alfa Laval, Inc.*, No. 09-67099, 2011 WL 3101810 (E.D. Pa. July 22, 2011) (Robreno, J.).

<sup>280</sup> See, e.g., *Robertson v. Carrier Corp.*, No. 09-64068, 2012 WL 7760441 (E.D. Pa. Nov. 8, 2012) (Robreno, J.) (citing *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 813-15 (2001); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866 (1986) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959)); *Hess v. United States*, 361 U.S. 314, 323 (1960).

<sup>281</sup> See, e.g., *Mack v. Gen. Electric Co.*, 896 F. Supp. 333 (E.D. Pa. 2012) (Robreno, J.).

<sup>282</sup> See, e.g., *Deuber*, No. 10-78931, Doc. Nos. 138-39; *Burrell v. Minn. Mining Mfg. Co.*, No. 08-87293, Doc. No. 243 (E.D. Pa. June 9, 2011) (Robreno, J.).

<sup>283</sup> See, e.g., *Lewis v. Asbestos Corp.*, No. 10-64625, Doc. No. 77 (E.D. Pa. July 26, 2011) (Robreno, J.) (citing *Buttitta v. Allied Signal, Inc.*, 2010 WL 1437273 (N.J. Super. Ct. App. Div. 5, 2010)).

- Federal Rules of Civil Procedure 12(b)(4) & 12(h)(1)(B)<sup>284</sup>
- Federal Rule of Civil Procedure 41(b) & MDL-875 AO-12<sup>285</sup>
- Federal Rules of Evidence
  - Federal Rule of Evidence 804(b)(1)<sup>286</sup>
  - Federal Rule of Evidence 611(c): Use of Leading Questions on Direct<sup>287</sup>
  - Federal Rule of Evidence 702<sup>288</sup>
- Jurisdiction and Fraudulent Joinder<sup>289</sup>
- Sham Affidavit Doctrine<sup>290</sup>
- Federal Employees Liability Act (FELA)
  - Releases<sup>291</sup>

<sup>284</sup> See, e.g., *Rabovsky v. Air & Liquid Sys. Corp.*, No. 10-3202 (E.D. Pa. Mar. 12, 2012) (Robreno, J.).

<sup>285</sup> See, e.g., *In re Asbestos Prod. Liab. Litig.*, 718 F.3d 236 (3d Cir. 2013); *In re Asbestos Prod. Liab. Litig.* (No. VI), 278 F.R.D. 126 (E.D. Pa. 2011) (Robreno, J.).

<sup>286</sup> See, e.g., *Brindowski v. Alco Valves, Inc.*, No. 20-64684 (E.D. Pa. Jan. 12, 2012) (Robreno, J.); *Blackburn v. Northrup Grumman Newport News*, No. 06-68004, 2011 WL 6016092 (E.D. Pa. Aug. 31, 2011) (Robreno, J.); *Cowley v. AC&S, Inc.*, No. 07-62831, 2010 WL 5376338 (E.D. Pa. Dec. 23, 2010) (Robreno, J.).

<sup>287</sup> See, e.g., *Anderson v. Ford Motor Co.*, No. 09-69122, Doc. Nos. 296, 301, 303-04 (E.D. Pa. Apr. 26, 2011) (Robreno, J.).

<sup>288</sup> See, e.g., *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993); *Rabovsky*, No. 10-3202; *Betz v. Pneumo Abex L.L.C.*, 44 A.3d 27, 58 (Pa. 2012); *Gregg v. V-J Auto Parts, Inc.*, 943 A.2d 216, 227 (Pa. 2007).

<sup>289</sup> See, e.g., *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985); *Various Plaintiffs v. Various Defendants* ("Oil Field Cases"), 673 F. Supp. 2d 358, 363 (E.D. Pa. 2009) (Robreno, J.) (citing *Abels*, 770 F.2d at 32).

<sup>290</sup> See, e.g., *Krik v. BP Am., Inc.*, 2012 WL 2914246 (E.D. Pa. May 16, 2012) (Robreno, J.); *Albertson v. Nat'l Indus., Inc.*, No. 07-63761, Doc. No. 38 (E.D. Pa. Jan. 31, 2011) (Robreno, J.); *Small v. Owens-Ill., Inc.*, No. 07-61174, Doc. No. 36 (E.D. Pa. Jan. 25, 2011) (Robreno, J.); *Buttars v. Atlas Turner, Inc.*, No. 09-63422, Doc. Nos. 149-51 (E.D. Pa. Dec. 13, 2010) (Robreno, J.).

<sup>291</sup> See, e.g., *Wicker v. Consol. Rail Corp.*, 142 F.3d 690, 701 (3d Cir. 1998); *Clayton v. Burlington N. and Santa Fe Ry. Co.*, 2012 WL 5389803 (E.D. Pa. Aug. 28, 2012) (Robreno, J.); *Bludworth v. Ill. Ctr. R.R. Co.*, No. 10-68527, Doc. No. 9 (E.D. Pa. Feb. 8, 2011) (Robreno, J.); *Maynor v. Ill. Ctr. R.R. Co.*, No. 08-89466, Doc. No. 20 (E.D. Pa. Feb. 8, 2011) (Robreno, J.).

- Statute of Limitations<sup>292</sup>
- The Longshore and Harbor Workers' Compensation Act (LHWCA)<sup>293</sup>

### 3. Issues of State Law

- Statute of Limitations
  - Triggering of the Statute of Limitations<sup>294</sup>
  - One-or Two-Disease State<sup>295</sup>

<sup>292</sup> See, e.g., *Kichline v. Consol. Rail Corp.*, 800 F.2d 356, 358 (3d Cir. 1986) (citing *Urie v. Thompson*, 337 U.S. 163, 169-70 (1949); *Robinson v. Ill. Ctr. R.R. Co.*, No. 08-89339, Doc. No. 15 (E.D. Pa. Feb. 8, 2011) (Robreno, J.) (citing *McCain v. CSX Transp., Inc.*, 708 F. Supp. 2d 494, 498 (E.D. Pa. 2010); *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979)); *McCain*, 708 F. Supp. 2d at 498 (quoting *Czyzewski v. Conrail*, 1997 WL 9791, at \*2 (E.D. Pa. Jan. 9, 1997)).

<sup>293</sup> See, e.g., *Jefferson v. Am. Sugar Ref., Inc.*, 2012 WL 5447436 (E.D. Pa. Aug. 24, 2012) (Robreno, J.) (citing *Hackler v. P & O Ports La., Inc.*, 2011 WL 8747108, at \*1 n.1 (E.D. Pa. Sept. 6, 2011) (Robreno, J.); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 717-25 (1980)); *Landess v. Baton Rouge Marine Contractors, Inc.*, No. 08-87778 (E.D. Pa. Sept. 1, 2011) (Robreno, J.); *Becnel v. Anco Insulations, Inc.*, No. 08-84556, 2011 WL 304866 (E.D. Pa. Jan. 28, 2011) (Robreno, J.).

<sup>294</sup> See, e.g., *Legg v. Armstrong Int'l.*, No. 11-67222, 2012 WL 7761488 (E.D. Pa. Nov. 30, 2012) (Robreno, J.); *Archer v. Mead Corp.*, No. 09-70093, Doc. No. 138 (E.D. Pa. July 28, 2011) (Robreno, J.); *Bunnell v. Metropolitan Life Ins. Co.*, No. 08-85610, Doc. No. 23 (E.D. Pa. May 17, 2011) (Robreno, J.); *Henderson v. MeadWestvaco Corp.*, 23 So. 3d 625, 629 (Ala. 2009); *Johnson v. Garlock, Inc.*, 682 So. 2d 25 (Ala. 1996); *Garrett v. Raytheon Co.*, 368 So. 2d 516 (Ala. 1979); *Austin v. Abney Mills, Inc.*, 824 So. 2d 1137, 1154 (La. 2002) (quoting *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1066 (La. 1992); *Abadie v. Metro Life Ins. Co.*, 784 So. 2d 46, 65 (La. App. Ct. 2001)); *Angle v. Koppers, Inc.*, 42 So.3d 1, 2 (Miss. 2010).

<sup>295</sup> See, e.g., *Kiser v. A.W. Chesterton Co.*, 517 F. App'x 109 (3d Cir. 2013) (relying upon *Kiser v. A.W. Chesterton Co.*, 285 Va. 12 (Va. Jan. 10, 2013)); *Cowcrill v. Raymark Indus.*, 780 F.2d 324, 327 (3d Cir. 1986) (citing *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 574 (3d Cir. 1976)); *Nelson v. A.W. Chesterton Co.*, 2011 WL 6016990, at \*1 (E.D. Pa. Oct. 27, 2011) (Robreno, J.); *Wagner v. Various Defendants*, 801 F. Supp. 2d 333, 334-36 (E.D. Pa. 2011) (Robreno, J.); *Kiser v. A.W. Chesterton Co.*, 770 F. Supp. 2d 745 (E.D. Pa. 2011) (Robreno, J.), *aff'd*, 517 F. App'x 109 (3d Cir. 2013); *Corley v. Long-Lewis Inc.*, 2011 WL 3269324 (E.D. Pa. July 25, 2011) (Robreno, J.); *Mattox v. Various Defendants*, No. 07-73489, Doc. No. 112 (E.D.

- Statute of Repose<sup>296</sup>
- Diagnostic/Medical Evidence Requirement<sup>297</sup>
- Premises Liability and Duties Owed to Non-Employees<sup>298</sup>
- State Workers Compensation Schemes<sup>299</sup>
- Failure to Warn Claims<sup>300</sup>
- Issues of Successor Liability<sup>301</sup>

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Pa. July 11, 2011) (Robreno, J.); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 329 S.E.2d 350, 354 (N.C. 1985); *Harrison v. City of Sanford*, 627 S.E.2d 672, 676-77 (N.C. Ct. App. 2006); *Abrams v. Pneumo Abex Corp.*, 981 A.2d 198, 208 (Pa. 2009); *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 653 (Tex. 2000).

<sup>296</sup> See, e.g., N.C. GEN. STAT. § 1-50(a)(6); *Krik v. BP Am., Inc.*, 2012 WL 2914246 (E.D. Pa. May 16, 2012) (Robreno, J.); *Coble v. 3M Co.*, No. 10-64613 (E.D. Pa. Dec. 22, 2011) (Robreno, J.); *Brackett v. Abex Corp.*, No. 06-69211, Doc. No. 24 (E.D. Pa. Feb. 28, 2011) (Robreno, J.); *Malpass v. Armstrong World Indus.*, No. 06-68065, Doc. No. 10 (E.D. Pa. Feb. 28, 2011) (Robreno, J.) (citing *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30, 34 (4th Cir. 1986) (internal citations omitted)).

<sup>297</sup> See, e.g., *King v. E.I. DuPont de Nemours & Co.*, 741 F. Supp. 2d 699 (E.D. Pa. 2010) (Robreno, J.).

<sup>298</sup> See, e.g., *Rabovsky v. Air & Liquid Sys. Corp.*, No. 10-03202, 2012 WL 2913886 (E.D. Pa. June 8, 2012) (Robreno, J.) (citing *Colloi v. Phila. Elec. Co.*, 481 A.2d 616, 620 (Pa. Super. Ct. 1984)); *Krik*, 2012 WL 2918745; *Landess v. Baton Rouge Marine Contractors, Inc.*, No. 08-87778 (E.D. Pa. Sept. 1, 2011) (Robreno, J.); *Wagers v. SGL Carbon, L.L.C.*, No. 10-02916, 2011 WL 1337154 (E.D. Pa. Apr. 6, 2011) (Robreno, J.); *Anderson v. Saberhagen Holdings, Inc.*, No. 10-61118, Doc. No. 92 (E.D. Pa. Nov. 18, 2010) (Robreno, J.); *McCorkle v. N. Point Chrysler Jeep, Inc.*, 703 S.E.2d 750, 752-53 (N.C. Ct. App. 2010); *Kelley v. Howard S. Wright Construction Co.*, 582 P.2d 500, 505 (Wash. 1978).

<sup>299</sup> See, e.g., *Bearce v. Gen. Dynamics Corp.*, No. 07-69238, Doc. No. 18 (E.D. Pa. Jan. 20, 2011) (Robreno, J.).

<sup>300</sup> See, e.g., *Hoffeditz v. Am. Gen., L.L.C.*, No. 09-70103, Doc. No. 155 (E.D. Pa. July 29, 2011) (Robreno, J.); *Lewis v. Asbestos Corp.*, No. 10-64625, Doc. No. 79 (E.D. Pa. July 29, 2011) (Robreno, J.); *Tafoya v. AC Delco Auto Serv. Ctr., Inc.*, No. 10-61138, Doc. No. 85 (E.D. Pa. July 1, 2011) (Robreno, J.) (citing *Yamaha Motor Co., U.S.A. v. Arnoult*, 955 P.2d 661, 665 (Nev. 1998)); *Coffman v. Keene Corp.*, 628 A.2d 710, 720 (N.J. 1993).

<sup>301</sup> See, e.g., *Various Plaintiffs v. Various Defendants*, 2012 WL 1431223 (E.D. Pa. Apr. 23, 2012) (Robreno, J.); *Hoffeditz*, No. 09-70103, Doc. No. 151; *Anderson v. Ford Motor Co.*, No. 09-69122, Doc. Nos. 289-300 (E.D. Pa. Apr.

- Sovereign Immunity<sup>302</sup>
- Intentional Torts<sup>303</sup>
- Punitive Damages<sup>304</sup>

#### 4. Summary

Since October 2008 until October 2013, the MDL court issued approximately the following number of opinions:

• Number of MSJs decided:	<b>528</b>
• Number of state substantive issues addressed:	<b>59</b>
• Number of federal substantive issues addressed:	<b>16</b>
• Number of federal procedural issues addressed:	<b>16</b>
• Number of cases remanded to state court:	<b>193</b>
• Number of cases remanded to transferor court:	<b>750</b>
• Number of jurisdictions where cases originated:	<b>32</b>
* Alabama, California, Connecticut, Delaware, DC, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Maine, Mississippi, Missouri, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin	

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27, 2011) (Robreno, J.); *Am. Standard, Inc. v. OakFabco, Inc.*, 927 N.E.2d 1056 (N.Y. 2010); *Schmidt v. Boardman Co.*, 11 A.3d 924 (Pa. 2011).

<sup>302</sup> See, e.g., *Hackler v. P&O Ports La., Inc.*, No. 08-87777 (E.D. Pa. Sept. 1, 2011) (Robreno, J.).

<sup>303</sup> See, e.g., *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1015 (6th Cir. 1993) (citing *Fyffe v. Jenos, Inc.*, 570 N.E.2d 1108, 1109 (Ohio 1991) (other internal citations omitted)); *Ellis v. Pneumo Abex Corp.*, No. 11-66774, 2013 WL 1099027 (E.D. Pa. Jan. 3, 2013) (Robreno, J.); *Ellis v. Pneumo Abex Corp.*, No. 11-66774, 2012 WL 7760435 (E.D. Pa. Dec. 28, 2012) (Robreno, J.); *Bunnell v. Metropolitan Life Ins. Co.*, No. 08-85610, Doc. No. 23 (E.D. Pa. May 17, 2011) (Robreno, J.); *Ferguson v. Lorillard Tobacco Co.*, No. 09-91161 (E.D. Pa. Feb. 25, 2011) (Robreno, J.); *Sowizral v. Triple A in the USA, Inc.*, No. 09-74696, Doc. No. 28 (E.D. Pa. Feb. 25, 2011) (Robreno, J.); *Wells v. Shelter Gen. Ins. Co.*, 217 F. Supp. 2d 744, 753 (S.D. Miss. 2002) (citing *Delta Chem. & Petroleum, Inc. v. Citizens Bank*, 790 So. 2d 862, 877 (Miss. Ct. App. 2001)).

<sup>304</sup> See, e.g., *In re Collins*, 233 F.3d 809, 810 (3d Cir. 2000); *In re Roberts*, 178 F.3d 181 (3d Cir. 1999).

*F. The MARDOC Litigation*

## 1. Ohio Connection

Beginning in the mid-1980s, the Jaques Admiralty Law Firm began filing cases in the Northern District of Ohio on behalf of merchant marines, who were alleged to have been injured from exposure to asbestos-containing products located aboard commercial vessels.<sup>305</sup> Named as defendants were manufacturers and suppliers of the products at issue and the ship-owners themselves.<sup>306</sup> Typically, each case named upwards of 100 defendants.<sup>307</sup> Ultimately, by the year 2009, more than 50,000 cases had been filed involving millions of claims against hundreds of defendants.<sup>308</sup>

The cases initially progressed in the Northern District of Ohio under the superintendency of Judge Thomas Lambros.<sup>309</sup> Because the claims fell within the admiralty jurisdiction of the court, they were administratively assigned to a maritime docket, titled "MARDOC."<sup>310</sup> In 1991, the cases were consolidated and transferred to the Eastern District of Pennsylvania as part of MDL-875, and assigned to Judge Charles Weiner.<sup>311</sup>

## 2. MDL-875 (1991-2005)

Shortly after MDL-875 was created, by order dated November 19, 1991, Judge Weiner established a separate maritime docket (MARDOC) for the maritime asbestos cases, for the purpose of assisting the court in "effecting pretrial disposition" of all the

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<sup>305</sup> *In re Asbestos Prods. Liab. Litig. (No. VI)*, MDL 875, 2013 WL 4516651, at \*1 (E.D. Pa. Aug. 26, 2013).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*; see *In re Am. Capital Equip., L.L.C.*, 688 F.3d 145, 149 (3d Cir. 2012).

<sup>311</sup> *In re Asbestos Prods. Liab. Litig. (No. VI)*, 2013 WL 4516651, at \*1.

maritime asbestos cases.<sup>312</sup> The Order further provided that the organizational structure of MARDOC would be applicable to all consolidated actions, whether brought as class actions or as individual actions.<sup>313</sup> Judge Weiner appointed Mr. Jaques as counsel-in-chief to function as lead and liaison counsel of all the plaintiffs' MARDOC cases.<sup>314</sup> It was further ordered by Judge Weiner that the defense organizational structure would consist of all counsel representing ship-owners, manufacturers and suppliers of asbestos insulation, shipboard asbestos products machinery and implements (e.g. boilers and generators), and shipbuilder and vessel designers. Each of these categories was to be represented on a defendants' steering committee lead by Richard Binzley, Esquire.<sup>315</sup>

As a result of Judge Weiner's experience in the New England land cases,<sup>316</sup> he entered Administrative Order Number 2 (AO-2), which set up a protocol for settlement conferences.<sup>317</sup> Specifically, the order directed plaintiffs' counsel to present the court with separate lists for each disease a particular plaintiff was suffering from (mesothelioma, lung cancer, other malignancy, and

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<sup>312</sup> Order Establishing Structural Composition of a Separate Maritime Docket, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 2:02-md-875 (E.D. Pa. Nov. 19, 1991).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> See MARDOC Administrative Order No. 1 [Amended], *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 2:02-md-875 (E.D. Pa. Nov. 3, 2009) (creating a Steering Committee and listing its members). The plaintiffs would supply defendants with medical records, test results, and at least one expert report, together with an affidavit of exposure. The defendants would then treat the action in the form of a claim and make an offer based on the historical averages achieved between the plaintiff's attorney and the defendant for that location. Judge Weiner believed that the same process should apply to the MARDOC cases.

<sup>316</sup> According to Mr. Lyding, Judge Weiner's clerk at the time, Judge Weiner was successful in working with certain defendants in resolving cases started in state courts by requiring plaintiffs to produce medical information at the outset of the litigation.

<sup>317</sup> Administrative Order No. 2, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875 (E.D. Pa. Feb. 20, 1992), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/adord2.pdf>.

asbestosis) that also contained the name of the jurisdiction in which the case was originally filed, the case number, and the names of all remaining defendants.<sup>318</sup> AO-2 provided that the court would set up settlement conferences in the malignancy cases first.<sup>319</sup> Judge Weiner directed plaintiffs' counsel to appear at these conferences "prepared to advise the court regarding its submissions to the defendants of all necessary medical data and employment history for each plaintiff" and to have made demands upon all defendants prior to the conference.<sup>320</sup> The order further directed defendants to appear at the conference armed with settlement authority.<sup>321</sup> Finally, the order directed all counsel to be prepared to "discuss amounts, terms and conditions for the complete settlement" of all remaining state and federal maritime cases.<sup>322</sup>

In order to conserve resources, Judge Weiner issued Administrative Order Number 5, which provided, *inter alia*, that all pending motions to dismiss and motions for summary judgment were denied without prejudice, with leave to renew at the time of any trial, and that the filing of any new dispositive motions would be suspended until the time of trial or the time any other court obtained jurisdiction over a particular MARDOC case.<sup>323</sup> Despite the court's entry of AO-2, plaintiffs' counsel provided minimal evidence of exposure. Consequently, the settlement process did not go forward as anticipated by Judge Weiner.

On July 18, 1995, the court entered Pretrial Order Number 6,<sup>324</sup> which directed plaintiffs' counsel to provide to defense counsel, in 261 randomly selected MARDOC cases, "copies of all medical records and reports, expert reports, x-ray records and reports, pathology records, pulmonary function test

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> Administrative Order No. 5 (Mardoc), *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 2 MDL 875 (E.D. Pa. Feb. 9, 1995), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/adord5m.pdf>.

<sup>324</sup> Pretrial Order No. 6 (MARDOC), *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 2 MDL 875 (E.D. Pa. July 17, 1995).

results and death certificates as applicable, work history and work records, social security records, answers to interrogatories, and evidence of specific exposure to each named defendant in each plaintiff's case."<sup>325</sup> Judge Weiner ordered plaintiffs' counsel to produce this discovery to defendants by no later than September 21, 1995.<sup>326</sup> Plaintiffs' counsel again failed to do so.<sup>327</sup> After several conference calls proved unsuccessful, defendants moved to dismiss the 261 cases.<sup>328</sup>

On November 15, 1995<sup>329</sup> and February 2, 1996,<sup>330</sup> the court entered show cause orders setting a date for hearing.<sup>331</sup> At the hearing on February 28, 1996, plaintiffs advised that they had produced to defendants all of the materials requested by the court in Pretrial Order Number 6.<sup>332</sup> Defendants, however, could only identify two legal record boxes as the total discovery they had received.<sup>333</sup> These two boxes merely contained 261 file folders, many with IDF forms, and many with recent letters from a "B" reader radiologist.<sup>334</sup> Plaintiffs did not provide any documentation or evidence that showed a particular plaintiff was exposed to a particular defendant's product.<sup>335</sup> Plaintiffs also did not identify any malignancy cases that were ready for trial.<sup>336</sup>

On May 2, 1996, finding that plaintiffs' had not produced any discovery to move the 261 cases forward, Judge Weiner entered an Order which dismissed the entire MARDOC portion of MDL-

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Show Cause Order, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 2 MDL 875 (E.D. Pa. Nov. 15, 1995).

<sup>330</sup> Order Granting [1-104] Motion to Substitute Counsel, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 2 MDL 875 (E.D. Pa. Feb. 2, 1996).

<sup>331</sup> Notice of Hearing, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 2 MDL 875 (E.D. Pa. Feb. 2, 1996).

<sup>332</sup> *In re* Asbestos Prods. Liab. Litig. (No. VI), No. 2 MDL 875, 1996 WL 239863, at \*1-2 (E.D. Pa. May 2, 1996).

<sup>333</sup> *Id.* at \*2.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.*

875.<sup>337</sup> Although defendants had requested that the dismissal be with prejudice, Judge Weiner stated that the dismissal would not only be without prejudice, but with the applicable statutes of limitations tolled.<sup>338</sup> Judge Weiner also advised that the court would retain jurisdiction, and that the cases could be reinstated upon showing that the plaintiff had produced satisfactory evidence that the plaintiff suffered from an asbestos-related personal injury compensable under the law, and for each defendant that plaintiffs intended to pursue, the plaintiff had to provide probative evidence of exposure to products connected to, or supplied, manufactured, or installed by said defendant, or, if the defendant was a ship-owner, evidence of service upon the particular defendant's ships.<sup>339</sup> While the court continued to entertain motions to amend or to remand, after 1996, there were no motions to reinstate ever filed. Rather, plaintiffs' counsel continued to file several thousand new MARDOC cases in the Northern District of Ohio.<sup>340</sup>

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<sup>337</sup> *Id.* at \*5.

<sup>338</sup> *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 239863 at \*5.

<sup>339</sup> *Id.*

<sup>340</sup> The story has an unfortunate corollary. Mr. Jaques had reached an agreement with Babcock & Wilcox, one of the defendants in the case. A dispute arose concerning the distribution of the proceeds to the plaintiffs.

As a result, two class actions against the Jaques Admiralty Law Firm were instituted. The First Amended Class Action Complaint filed in the United States District Court for the Eastern District of Pennsylvania on September 8, 1999 set forth claims against the Jaques firm based on conversion, fraud, negligent misrepresentation, negligence, breach of contract, professional malpractice, restitution, unjust enrichment, and breach of fiduciary duty.

A second class action complaint was filed on January 27, 2000 in the United States District Court for the Eastern District of Michigan (Southern Division) alleging two state law claims for legal malpractice and unjust enrichment against the remaining shareholders in the Jaques firm after Mr. Jaques' death. This class action was subsequently transferred to the Eastern District of Pennsylvania where it was consolidated with the earlier class action.

The Jaques firm itself brought two related actions to provide further recourse for the victims. The first was instituted in the Probate Court of Wayne County, Michigan (*In the Matter of the Estate of Leonard C. Jaques, Deceased*, No. 98-592568-SE), for the purpose of imposing a constructive trust on real and personal property held by the widow of Mr. Jaques. The second was a declaratory judgment action brought by the Jaques Firm's professional liability insurer in the United States District Court for the Eastern District of Michigan

### 3. Post 2009 Activity

During the last five years, the MARDOC cases have been subject to intense administrative efforts that have led to the settlement or voluntary dismissal of the vast majority of the cases.<sup>341</sup> As a result, the number of MARDOC cases decreased from approximately 54,000 to below 3,000.<sup>342</sup>

From 2009 through 2012, the MDL court issued a number of Transfer Orders directing the Clerk of Court of the United States District Court for the Eastern District of Pennsylvania to initiate proceedings to have the MARDOC case files transferred from the Northern District of Ohio, the Eastern District of Michigan, the Southern District of New York, and the District for the Virgin Islands to the Eastern District of Pennsylvania.<sup>343</sup> On November

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*(American Guarantee & Liability Insurance Co. v. The Jaques Admiralty Law Firm, P.C., No. 9-CV-70264)*, to resolve whether the insurer was responsible for making any payments to the seamen victims based on alleged misrepresentations made in the application for malpractice coverage.

On September 22, 2000, Judge Weiner conditionally certified a class of 8,321 seamen victims and appointed Elizabeth Ainslie, Esquire as class counsel for the purpose of recovering monies owed by the Jaques firm to the 8,321 seamen. Ms. Ainslie was replaced by Alan Epstein, Esquire, who succeeded in recovering a total of nearly \$8.5 million for multiple plaintiffs. On November 20, 2003, Judge Weiner approved an Amended Settlement Agreement and distributions to the 8,321 plaintiffs affected. No suggestion of wrong doing against anyone but Mr. Jaques, including other lawyers in the firm, was alleged in these actions. The current Jaques Law Firm appearing in this action is under a different management than the Jaques law firm involved in the class action litigation and in fact, the reconstituted firm assisted in the recovery of assets to pay the victims of the fraud.

<sup>341</sup> See Michelle Leslie Stegmann & John C. McMeekin II, *Making Waves: The Impact of MDL 875 on Asbestos Litigation*, RAWLE & HENDERSON LLP (Spring 2012), [http://www.rawle.com/images/uploads/general/Litigation\\_Management\\_Spring\\_2012.pdf](http://www.rawle.com/images/uploads/general/Litigation_Management_Spring_2012.pdf) (noting that administrative efforts have "undoubtedly played a role in the dismissal of approximately 500,000 claims").

<sup>342</sup> See generally *Updated List of MARDOC Cases*, U.S. DISTRICT CT. E. DISTRICT OF PA. (updated Oct. 31, 2013), <http://www.paed.uscourts.gov/mdl875m.asp#CourtAdministration> (listing current MARDOC cases).

<sup>343</sup> See, e.g., Transfer Order No. 1, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Oct. 16, 2009); Transfer Order No. 2, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Nov. 2, 2009); Transfer Order No. 3, *In re: Asbestos Prods. Liab. Litig. All*

17, 2009, Judge Robreno issued Administrative Order Number 1, which set up a steering committee of counsel for plaintiffs and defendants to aid the court in the administration of the MARDOC cases.<sup>344</sup> By Order entered July 22, 2010, Judge Robreno ordered that all the cases that were dismissed without prejudice by Judge Weiner's May 2, 1996 Order were to be reinstated to the court's active docket for final disposition.<sup>345</sup> Judge Robreno also set up a "bankruptcy only" docket, in which claims/cases against defendants who had declared bankruptcy were placed.<sup>346</sup> Judge Robreno designated United States Magistrate Judge Elizabeth T. Hey to oversee and supervise the MARDOC cases and enter orders as necessary, pursuant to 28 U.S.C. § 636 and also appointed a

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Actions, MDL 875 (MARDOC) (E.D. Pa. Jan. 7, 2010); Transfer Order No. 4, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Dec. 21, 2010); Transfer Order No. 5, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Mar. 5, 2010); Transfer Order No. 6, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Mar. 19, 2010); Transfer Order No. 7, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Mar. 19, 2010); Transfer Order No. 8, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Mar. 22, 2010); Transfer Order No. 9, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Apr. 8, 2010); Transfer Order No. 10, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. June 8, 2010); Transfer Order No. 11, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. June 11, 2010); Transfer Order No. 12, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. July 1, 2010); Transfer Order No. 29, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Jan. 3, 2011); Transfer Order No. 57, *In re: Asbestos Prods. Liab. Litig. All Actions, MDL 875 (MARDOC)* (E.D. Pa. Jan. 12, 2012).

<sup>344</sup> See MARDOC Administrative Order No. 1 [Amended], *In re: Asbestos Prods. Liab. Litig.*, MDL 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. Nov. 3, 2009).

<sup>345</sup> See *Various Plaintiffs v. Various Defendants, Consolidated Under MDL 875 (MARDOC)* (E.D. Pa. July 22, 2010).

<sup>346</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875, No. 2:02-md-875 (E.D. Pa. Aug. 26, 2009), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/8.26%20B-Only.pdf> (transferring cases to the "Bankruptcy Only" docket).

Special Master to aid the court in the administration of the MARDOC litigation.<sup>347</sup>

By Order dated July 26, 2011, Magistrate Hey directed plaintiffs' counsel to file with the court, by no later than August 12, 2011, a list or spreadsheet identifying which defendants they intended to pursue in each individual plaintiff's case, that by August 19, 2011 each defendant so identified had to file an entry of appearance, and that by September 2, 2011, defendants were to send a list to Magistrate Hey, advising which preliminary motions they wished to file.<sup>348</sup> Finally, Magistrate Hey directed the plaintiffs to submit, by no later than October 14, 2011, proposed orders for Judge Robreno's signature dismissing those defendants that were currently listed on each plaintiff's docket in the Eastern District of Pennsylvania, but which plaintiffs were no longer intending to pursue.<sup>349</sup>

Meanwhile, on September 22, 2011, the law firm of Motley Rice, LLC, an experienced national plaintiffs' firm, entered its appearance on behalf of the MARDOC plaintiffs and became co-counsel with the Jaques Law Firm on nearly all MARDOC cases.<sup>350</sup>

On October 5, 2011, Judge Robreno and Magistrate Hey jointly issued Administrative Order Number 25 (AO-25) with the

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<sup>347</sup> See Order, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL Docket No. 875 (E.D. Pa. June 27, 2011). See Order Appointing Special Master, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL Docket No. 875 (E.D. Pa. June 27, 2011). Bruce Lassman, Esquire served as special master until his retirement in 2012. Upon Mr. Lassman's retirement, the court appointed Christopher Lyding, Esquire to serve as administrator of the docket. Both Mr. Lassman and Mr. Lyding dealt with the parties on a day to day basis.

<sup>348</sup> See Order Regarding Status and Scheduling Change, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875 (E.D. Pa. July 26, 2011).

<sup>349</sup> *Id.*

<sup>350</sup> See Notice of Appearance of Counsel, *In re* Asbestos Prods. Liab. Litig. (No. VI), No. MDL 2-md-875 (MARDOC) (E.D. Pa. Sept. 22, 2011). See Joe Rice, *Recent MDL 875 Order: A Message from Attorney Joe Rice*, MOTLEY RICE (May 7, 2009) <http://www.motleyrice.com/news/view/a-message-regarding-the-recent-order-in-mdl-875> (noting that "Motley Rice serves as liaison counsel for MDL 875 on behalf of all plaintiffs").

goal of streamlining the MARDOC litigation.<sup>351</sup> AO-25 set forth not only procedural and filing requirements, but also ordered that by October 17, 2011, plaintiffs' counsel were to file a "certification in each plaintiff's case that they have provided all defense counsel in that case (1) a copy of the medical report or opinion containing a physician's diagnosis of the plaintiff with the asbestos-related disease or injury alleged in the complaint."<sup>352</sup> The Order further permitted defense counsel to challenge the certifications in certain limited circumstances by no later than November 14, 2011.<sup>353</sup>

Of particular note to AO-25 is section (B)(4) entitled, "Defense Motions as to Choice of Law and Compensability of Claims."<sup>354</sup> Under this section, defendants could argue, by way of motions to dismiss, that the asbestos-related injuries alleged by plaintiffs are non-cognizable as a matter of law.<sup>355</sup> Defendants were instructed to, in any motions to dismiss, address the law that applies to each plaintiff's claim against each defendant, in addition to discussing the law that applies to cognizable injuries.<sup>356</sup> This provision tracks largely Amended Administrative Order Number 12 (AAO-12), which Judge Robreno signed on September 3, 2009.<sup>357</sup> Although AAO-12 does not apply to MARDOC cases, it serves as a model for AO-25.

Magistrate Hey invited all counsel to submit proposals and suggestions to the court as to the best course of action for moving the approximately 3,500 then remaining MARDOC cases forward. Following extensive correspondence among counsel for the parties and the Special Master, Magistrate Hey issued a total of 7 scheduling orders to govern the discovery process and pretrial

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<sup>351</sup> See Administrative Order No. 25 (MARDOC Only), *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. Oct. 4, 2011).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> Administrative Order No. 25, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. Oct. 4, 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/AO25%20%28MARDOC%20ONLY%29.pdf>.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> Amended Administrative Order No. 11, *supra* note 215.

management of the remaining 3,500 MARDOC cases.<sup>358</sup> The most significant aspect of the 7 scheduling orders was the division of the 3,500 cases into 7 separate groups of 500 cases based on common defendants and regions.<sup>359</sup> Thus, Group 1 consisted of all the "Oil Company" Defendants, Group 2: "West Coast" Defendants, Group 3: "East Coast I" Defendants, Group 4: "East Coast II" Defendants, Group 5: "Gulf Coast" Defendants, Group 6: "Towing" Defendants, and Group 7: "Products" and "Lakes" Defendants.<sup>360</sup> Extremely ambitious deadlines were given in each group for completion of fact discovery, filing of expert reports, and for filing

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<sup>358</sup> See Case Management and Scheduling Order for MARDOC Group 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%201.pdf>; Case Management and Scheduling Order for MARDOC Group 2, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%202.pdf>; Case Management and Scheduling Order for MARDOC Group 3, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%203.pdf>; Case Management and Scheduling Order for MARDOC Group 4, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%204.pdf>; Case Management and Scheduling Order for MARDOC Group 5, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%205.pdf>; Case Management and Scheduling Order for MARDOC Group 6, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%206.pdf>; Case Management and Scheduling Order for MARDOC Group 7, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/schedule%20group%207.pdf>.

<sup>359</sup> See, e.g., Case Management and Scheduling Order for MARDOC Group 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (stating that the cases "are grouped by common defendants and regions").

<sup>360</sup> *Id.*

any dispositive motions.<sup>361</sup> The deadlines for each group were staggered by only sixty days.<sup>362</sup> Magistrate Hey further required that all deposition notices must include, as an attachment, the plaintiffs/injured party's list of employers, list of vessels aboard which the injured party served, as well as full and complete notice of all products a deponent is prepared to address.<sup>363</sup> The Scheduling Orders further directed the plaintiffs to provide to defendants the names of the cases, vessels, and products about which any co-worker witness planned to testify.<sup>364</sup> The list of co-workers was to include the names of all the plaintiffs with whom the co-worker sailed, as well as the names of any vessels on which the co-worker sailed, the co-worker's ratings, and his sailing dates on each vessel.<sup>365</sup>

Meanwhile, on August 13, 2012, Judge Robreno issued a Memorandum Opinion which held that maritime law, rather than a given state's law, would govern the MARDOC cases against shipowners and ruled that "a seaman without physical impairments resulting from asbestos exposure, including one who manifests only pleural changes, has not suffered an 'injury' under maritime law, and therefore has no cognizable claim."<sup>366</sup> Judge Robreno subsequently invited defendants to submit a list of cases to Magistrate Hey that they contended should be dismissed because they did not satisfy the "physical impairment" standard. Plaintiffs were given a chance to respond with appropriate medical evidence

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<sup>361</sup> See generally *id.* (outlining the deadlines imposed).

<sup>362</sup> See *id.* (demonstrating that the deadlines for each stage of discovery are sixty days apart).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> Case Management and Scheduling Order for MARDOC Group 1, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875.

<sup>366</sup> Corrected Memorandum, *In re* Asbestos Prods. Liab. Litig. (No. VI), Consolidated Under MDL Docket No. 875, 6-7 (E.D. Pa. Aug. 13, 2012), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/opinions/8.13.12%20FINAL%20CORRECTED%20MEMORANDUM%20OPINION%20MARDOC%20motions%20to%20dismiss%20opinion.pdf>.

of physical impairment.<sup>367</sup> Magistrate Hey has received such lists for the first five groups of MARDOC cases. Following her review of the lists and the corresponding medical evidence, Magistrate Hey has recommended that several hundred MARDOC cases be dismissed. As a result, the number of MARDOC cases currently pending has fallen below 3,000.<sup>368</sup>

Although the deadlines in the scheduling orders have had to be extended at times, counsel have generally complied with the deadlines in all seven scheduling orders.<sup>369</sup> As a result, fact and expert discovery has been completed in all seven groups. Magistrate Hey has conducted settlement conferences in many of the seven groups.<sup>370</sup> The vast majority of the product manufacturer defendants have reached settlements with the plaintiffs. The ship-owner defendants have declined to enter into any settlement negotiations until after Judge Robreno decides their pending dispositive motions.<sup>371</sup> Following disposition of these motions, the remaining cases will either be dismissed or remanded to the United States District Court for the Northern District of Ohio for trial.

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<sup>367</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), Consolidated Under MDL Docket No. 875 (E.D. Pa. Aug. 7, 2012), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/Mardoc%20Mots%20Dismiss%20ORDE R.pdf>.

<sup>368</sup> See *Updated List of MARDOC Cases*, U.S. DISTRICT CT. E. DISTRICT OF PA. (updated Oct. 31, 2013), <http://www.paed.uscourts.gov/mdl875m.asp#CourtAdministration> (listing current MARDOC cases).

<sup>369</sup> See generally Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. May 3, 2013), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/02cv875-050313.pdf> (extending various discovery deadlines).

<sup>370</sup> See, e.g., Order Scheduling Settlement Conference for MARDOC Group 3, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL Docket No. 875 (MARDOC), No. 2:02-md-875 (E.D. Pa. Sept. 21, 2012), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/Group%203%20settlement.pdf> (ordering a settlement conference be held and requiring the senior attorneys to attend with settlement authority).

<sup>371</sup> See Ama Sarfo, *418 Cos. Freed From Sweeping Asbestos MDL in Pa.*, LAW 360 (Aug. 27, 2013 6:07 PM), <http://www.law360.com/articles/468010> (discussing the motions filed on behalf of the ship-owner defendants and the resolution of those motions).

### G. CVLO Litigation

The Cascino Vaughan Law Offices (CVLO) initially filed more than 5,000 asbestos cases in MDL-875.<sup>372</sup> All of the cases ultimately were referred to Senior Judge Lowell A. Reed, Jr. as Court Annexed Mediator.<sup>373</sup> On May 4, 2009, Judge Robreno referred the first group of these cases to Judge Reed,<sup>374</sup> who in turn held the first mediation conference on August 27, 2009.<sup>375</sup> This first mediation conference focused on organizing and inventorying the thousands of cases which had previously sat dormant for many years.<sup>376</sup> Judge Reed tasked defense counsel with choosing a "three to four person liaison committee" and CVLO with dismissing cases "for which no viable claim [was] present."<sup>377</sup> Utilizing the liaison counsel to communicate with the multitude of individual defendants and encouraging voluntary dismissal of cases became the cornerstones of Judge Reed's success. Within a year, he had disposed of nearly half of the cases.<sup>378</sup>

Judge Reed held additional conferences on November 19, 2009,<sup>379</sup> March 23, 2010,<sup>380</sup> April 15, 2010, August 17, 2010,<sup>381</sup>

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<sup>372</sup> See Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. May 4, 2009), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/CV%20Referring%20Cases%205.2009.pdf> (listing all cases filed by CVLO).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* Subsequent orders referred the remaining cases to Judge Reed.

<sup>375</sup> *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Sept. 3, 2009), <http://www.paed.uscourts.gov/documents/MDL/MDL875/9.3.2009%20Progress%20Report%20and%20Case%20Management%20Order.pdf>.

<sup>376</sup> See generally Ama Sarfo, *supra* note 371 (noting the large amount of cases and the extensive time taken to resolve them in the MDL).

<sup>377</sup> *Id.*

<sup>378</sup> *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, U.S. DISTRICT CT. E. DISTRICT OF PA. (May 10, 2010), <http://www.paed.uscourts.gov/documents/MDL/MDL875/5.10.2010%20Progress%20Report%20and%20Case%20Management%20Order.pdf>.

<sup>379</sup> *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Nov. 23, 2009), <http://www.paed.uscourts.gov/documents/MDL/MDL875/11.23.2009%20Progress%20Report%20and%20Case%20Management%20Order.pdf>.

January 26, 2011,<sup>382</sup> and April 27, 2011,<sup>383</sup> after which time he retired from service.<sup>384</sup> As with the initial conference, these were focused less on the mediation of individual cases and more on the logistics of managing such a high volume of cases and on organizing the cases based on their relative merit.<sup>385</sup> As a result of these conferences, and in order to aid the parties in meeting those goals, Judge Reed, *inter alia*, (1) authorized discovery into the plaintiff's medical, work, and exposure histories, limited third party discovery, and depositions of terminal witnesses; (2) created a document repository to house that discovery; (3) attempted to create a methodology for settling the cases in groups based on disease type; (4) continued to work with the parties to hone their case and active defendant lists and to ameliorate any discrepancies; and (5) created a pilot group of fifty cases to mediate.

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<sup>380</sup> *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Mar. 29, 2010), <http://www.paed.uscourts.gov/documents/MDL/MDL875/3.29.2010%20Progress%20Report%20and%20Case%20Management%20Order.pdf>

<sup>381</sup> *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Aug. 25, 2010), <http://www.paed.uscourts.gov/documents/MDL/MDL875/8.25.2010%20Progress%20Report%20and%20Case%20Management%20Order.pdf>.

<sup>382</sup> *Asbestos MDL 875 Mediation: Items Set at the January 26, 2011 Mediation Management Planning Conference for the Cascino Vaughan Asbestos Cases Referred to Judge Reed*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Jan. 31, 2011), <http://www.paed.uscourts.gov/documents/MDL/MDL875/CV%201.26%20mediation.pdf>.

<sup>383</sup> *Asbestos MDL 875 Mediation: Items Set at the April 27, 2011 Mediation Management Planning Conference for the Cascino Vaughan Asbestos Cases Referred to Judge Strawbridge*, U.S. DISTRICT CT. E. DISTRICT OF PA. (May 2, 2011), <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%205.2.pdf>. This final session was presided over by both Judge Reed and Judge Strawbridge.

<sup>384</sup> See Order, *In re Asbestos Prods. Liab. Litig. (No. VI)*, No. 01-MD-875 (E.D. Pa. Apr. 18, 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%20Judge%20Strawbridge.pdf> (excusing Judge Reed from service).

<sup>385</sup> See generally *Asbestos MDL 875 Mediation: Progress Report and Case Management Order*, *supra* note 383 (outlining the topics discussed at the mediation conference).

In conjunction with the in-person conferences, Judge Reed also held numerous telephone conferences, issued many letter orders to guide counsel, held argument on discrete issues, engaged in mediation sessions between select parties, laid the groundwork for the deposition protocol which ultimately governed the use of all co-worker deposition testimony, and established standard interrogatories to be used in all cases.<sup>386</sup> These interrogatories allowed the plaintiffs, once for all defendants, to identify their disease conditions and damages, work and medical histories, and the products at issue.<sup>387</sup> Ultimately, the efforts of Judge Reed and the parties resulted in the dismissal of over 3,000 cases, mostly by voluntary dismissal.<sup>388</sup>

On April 18, 2011, in light of the impending retirement of Judge Reed, Judge Robreno referred the remaining CVLO cases to Magistrate Judge David R. Strawbridge as Court Annexed Mediator.<sup>389</sup> On June 9, 2011, Judge Robreno expanded the referral order and directed Judge Strawbridge to "conduct pretrial procedures, supervision of discovery, settlement conferences, and

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<sup>386</sup> See, e.g., *id.* (discussing one of various mediation sessions held); *MDL 875 – Order of Mediator*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Oct. 5, 2010), <http://www.paed.uscourts.gov/documents/MDL/MDL875/CV%202.pdf> (ordering the use of standard interrogatories).

<sup>387</sup> *MDL 875 – Exhibit “A” to Letter Order of October 5, 2010*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/documents/MDL/MDL875/CV%201.pdf> (last visited Jan. 8, 2014); *MDL 875 – Order of Mediator*, *supra* note 386.

<sup>388</sup> See Order, *Various Plaintiffs v. Various Defendants, Consolidated Under MDL 875* (E.D. Pa. Aug. 17, 2010), *available at* <http://www.paed.uscourts.gov/documents/MDL/MDL875/CV%20dismiss%208.2010.pdf> (dismissing numerous cases listed in an attachment to the order); *see also* Case Management and Scheduling Order for CVLO-1, *In re Asbestos Prods. Liab. Litig. (No. VI), No. MDL 875* (E.D. Pa. 2011), *available at* <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%207.15%20sched%20order.pdf> (noting that over 3,000 cases have been resolved).

<sup>389</sup> Order, *In re: Asbestos Prods. Liab. Litig. (No. VI), No. 01-MD-875* (E.D. Pa. Apr. 18, 2011), *available at* [www.paed.uscourts.gov/documents/MDL/MDL875/CVLOJudgeStrawbridge.pdf](http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLOJudgeStrawbridge.pdf).

preparation for trial."<sup>390</sup> After the entry of this order, the focus of the referral shifted from mediation to litigation. Judge Strawbridge entered the first scheduling order for a group of ten pilot cases on June 9, 2011.<sup>391</sup> Beginning on July 15, 2011, Judge Strawbridge began placing the remaining cases on scheduling orders, staggered approximately one month apart.<sup>392</sup> The cases were ultimately placed into seven groups with the final scheduling order being issued on January 3, 2012.<sup>393</sup>

On August 4, 2011, Judge Strawbridge issued a revised protocol for taking co-worker depositions, which had been jointly drafted by counsel and the court.<sup>394</sup> The protocol expanded upon a previous version used during the mediation phase of the cases and set out the rights and responsibilities of the parties regarding noticing and taking these depositions.<sup>395</sup> Of particular significance, the protocol provided that CVLO could only utilize the resulting testimony against defendants that it had listed on the deposition notice.<sup>396</sup> It further provided that CVLO could not notice a deposition until it had "complied with all orders regarding discovery applicable to the case," including submitting "complete verified answers to standard interrogatories and complete fact

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<sup>390</sup> See, e.g., Order of Referral to Magistrate Judge for Pretrial Discovery, Settlement Conference, and Trial Preparation, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 875 (E.D. Pa. June 9, 2011).

<sup>391</sup> Scheduling Order for Certain Cascino Vaughan Law Offices Cases, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 875 (E.D. Pa. June 9, 2011), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%20Scheduling%20Order%20for%20Certain%20Cases.pdf>.

<sup>392</sup> Case Management and Scheduling Order for CVLO-1, *supra* note 388.

<sup>393</sup> All of these scheduling orders were amended numerous times at the behest of the parties. See Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. MDL 875 (E.D. Pa. Feb. 1, 2012), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%20Top%2010%20Third%20Amended%20Scheduling%20Order%201-23-12.pdf> (extending the deadlines for motions and discovery).

<sup>394</sup> *Protocol for Plaintiff and Co-Worker Depositions to be Taken in Cascino Vaughan Law Offices MDL 875 Cases Assigned to Magistrate Judge David R. Strawbridge*, U.S. DISTRICT CT. E. DISTRICT OF PA. (Aug. 4, 2011), <http://www.paed.uscourts.gov/documents/MDL/MDL875/CVLO%208.4.pdf>.

<sup>395</sup> *Id.* ¶ 2.

<sup>396</sup> *Id.* ¶¶ 6, 11.

witness disclosures."<sup>397</sup> This provision would prove especially important in determining the future viability of many cases after CVLO failed to provide adequate client verified interrogatory responses before the end of discovery.<sup>398</sup> Judge Strawbridge, with essential input from counsel, followed this pivotal document with additional protocols for governing and managing the cases, including the November 9, 2011 medical records collection protocol<sup>399</sup> and the December 14, 2011 bankruptcy records protocol.<sup>400</sup>

Judge Strawbridge oversaw the CVLO cases until the summer of 2013, shortly after the scheduling order on the last group of cases expired and the cases were ready for final disposition by Judge Robreno. At that time, less than 150 of the original approximately 5,000 cases remained. During his tenure, in addition to issuing nearly 400 orders and opinions, Judge Strawbridge continued to hold regular in-person management conferences, oral arguments, and settlement conferences. He also communicated with counsel on a daily basis and held a set weekly telephone conference to discuss any current issues and issued significant legal decisions.<sup>401</sup>

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<sup>397</sup> *Id.* ¶ 13.

<sup>398</sup> See Memorandum, *Unzicker v. A.W. Chesterston Co.*, MDL-875, No. 11-cv-66288 (E.D. Pa. May 31, 2012), available at <http://www.paed.uscourts.gov/documents/opinions/12d0553p.pdf> (noting that two days before the close of discovery, CVLO served unverified answers to the defendant's interrogatories).

<sup>399</sup> *Exhibit A, Records Collection Protocol*, U.S. DISTRICT CT. E. DISTRICT OF PA. <http://www.paed.uscourts.gov/documents/MDL/MDL875/Medical%20Records%20Collection%20Protocol.pdf> (last visited Jan. 8, 2014).

<sup>400</sup> Pretrial Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL-875 (E.D. Pa. Dec. 12, 2011), available at [www.paed.uscourts.gov/documents/MDL/MDL875/Bankruptcy\\_Records\\_Order\\_12-12-11.pdf](http://www.paed.uscourts.gov/documents/MDL/MDL875/Bankruptcy_Records_Order_12-12-11.pdf).

<sup>401</sup> For example, in his May 31, 2012 and November 16, 2012 decisions, he struck all unverified interrogatory answers. These decisions had the effect of greatly proscribing who the plaintiffs could call as witnesses. Similarly, Judge Strawbridge's December 27, 2012 decision prohibited CVLO from calling witnesses who were identified only on its master lists of co-workers. These lists eventually consisted of nearly 1,500 pages of thousands of names of potential witnesses. Judge Strawbridge found that the "generality and lack of case-specific application render[ed] [the master lists] incapable of being used by any defendant in any particular case." As a result, he concluded that "the individuals

Upon completion of the discovery process, all cases proceeded to the summary judgment stage under Judge Robreno's summary judgment protocol, where they are now awaiting disposition.<sup>402</sup>

#### *H. Railroad Brake Litigation*

Approximately 3,300 cases were filed in the Northern District of Virginia by one law firm.<sup>403</sup> The cases involved claims of exposure to asbestos on locomotives and passenger cars. The cases were consolidated and transferred by the Judicial Panel on Multidistrict Litigation into MDL-875.<sup>404</sup> Magistrate Judge Angell was assigned as a supervising presiding officer.<sup>405</sup> Bruce Lassman, Esquire, was appointed Special Master.<sup>406</sup> Mr. Lassman held a series of conferences with counsel with the view of suspending the litigation and exploring settlement. It was recognized by the parties early in the process that settlement would not be feasible until legal

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on these lists [could] only be disclosed as witnesses at trial or in rebuttal to a motion for summary judgment if they [had] been properly and timely disclosed elsewhere." Finally, on April 3, 2013, he struck the plaintiffs' untimely amended expert witness report from 198 cases after concluding that the amendment was not a proper Federal Rule of Civil Procedure 26(e)(2) supplemental disclosure.

<sup>402</sup> See generally *MDL 875 Procedures*, U.S. DISTRICT CT. E. DISTRICT OF PA., <http://www.paed.uscourts.gov/mdl875p.asp#MotionProcedures> (last visited Jan. 8, 2014) (detailing Judge Robreno's motion procedures). On September 17, 2013, Judge Robreno issued a renewed scheduling order in the CVLO cases that required plaintiffs to respond to court-ordered discovery requests. Renewed Scheduling Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), Consolidated Under MDL Docket No. 875 (E.D. Pa. Sept. 17, 2013), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/PDF%20of%20Renewed%20Discovery%20Order.pdf>. The order was designed to streamline and reorganize the completed discovery to solve the ongoing discovery disputes and better prepare the cases for summary judgment disposition. *Id.*

<sup>403</sup> See Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), Consolidated Under MDL Docket No. 875, n.1 (E.D. Pa. Oct. 10, 2012), available at <http://www.paed.uscourts.gov/documents/MDL/MDL875/opinions/FINAL%2010.9.12%20EDVA%20motions%20to%20dismiss%20FN%20order.pdf>.

<sup>404</sup> See *id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

guidance was provided on the issue of whether the Virginia products liability statute was preempted by federal law.<sup>407</sup>

The case of *Kurns v. Chesterton*<sup>408</sup> originally was brought in the Philadelphia Court of Common Pleas and removed, based on diversity jurisdiction, to the United States District Court for the Eastern District of Pennsylvania.<sup>409</sup> Judge Robreno referred the case to Judge Mitchell Goldberg.<sup>410</sup> Plaintiffs, a husband and wife, asserted state law claims for products liability and negligence, alleging that the husband had been exposed to asbestos products over the course of his employment with a railroad working as a machinist/welder.<sup>411</sup> The defendants moved for summary judgment, asserting that because Congress intended to occupy the field of regulation regarding locomotives and locomotive parts and equipment, the plaintiffs' products liability and negligence claims were preempted by the Boiler Inspection Act (BIA).<sup>412</sup> In granting summary judgment, Judge Goldberg, speaking for the MDL Court, relied primarily upon the Supreme Court of the United States' decision in *Napier v. Atlantic Coast Line Railroad Co.*,<sup>413</sup> which held that:

[T]he power delegated to the [Interstate Commerce] Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances. . . . We hold that state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field.<sup>414</sup>

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<sup>407</sup> See *id.* (noting that the issue was whether the state law claims were preempted).

<sup>408</sup> *Kurns v. A.W. Chesterton*, No. 08-2216, 2009 WL 249769 (E.D. Pa. Feb. 3, 2009).

<sup>409</sup> *Id.* at \*1.

<sup>410</sup> See *id.*

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at \*2; 49 U.S.C. § 20701 (2006).

<sup>413</sup> *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605 (1926).

<sup>414</sup> *Id.* at 611-13; *Kurns*, 2009 WL 249769, at \*2-3.

Plaintiffs appealed to the Court of Appeals for the Third Circuit, asserting that the BIA did not preempt state law related working conditions in a facility that repairs locomotive parts.<sup>415</sup> The Third Circuit rejected this argument, stressing that *Napier* interpreted the BIA very broadly and that Congress "intended federal law to preempt the entire field."<sup>416</sup>

Certiorari was granted on June 6, 2011, and on February 29, 2012 the Supreme Court of the United States affirmed the Third Circuit, holding that although Congress had not expressly preempted state law, Congress intended to exclusively occupy the field, a concept known as "field preemption."<sup>417</sup> In so holding, the Court found that the state and federal laws at issue were both directed to the same subject—the equipment of locomotives, a fact which further justified preemption.<sup>418</sup> The Supreme Court also rejected the plaintiffs' arguments that locomotive repairs and a failure to warn cause of action fell outside the preemptive field occupied by the BIA.<sup>419</sup> The decision led to the dismissal of nearly 3,300 cases pending in the Eastern District of Virginia.<sup>420</sup>

After *Kurns*, the question remained whether the holding applied with equal force to other locomotive equipment, such as "Pullman" cars and railcar brake shoes.<sup>421</sup> Pullman was a defendant on all 3,300 cases pending.<sup>422</sup> Judge Angell began entering scheduling orders setting discovery deadlines. Shortly thereafter, all cases against Pullman were settled. Subsequently, Judge Robreno ruled that the holding in *Kurns* applied with equal force to other locomotive equipment and appurtenances, such as railcar brake shoes.<sup>423</sup>

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<sup>415</sup> *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 393 (3d Cir. 2010).

<sup>416</sup> *Id.* at 396-97.

<sup>417</sup> *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1267-68 (2012).

<sup>418</sup> *Id.* at 1268.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 1270 (ruling that the state law claims were preempted by federal law).

<sup>421</sup> Order, *supra* note 403.

<sup>422</sup> *Id.*

<sup>423</sup> *Perry v. A.W. Chesterton, Inc.*, Civ. No. 95-01996, 2013 WL 6284084 (E.D. Pa. Dec. 4, 2013) (Robreno, J.).

*I. Mass Screening Cases*

In the wake of Judge Janis Jack's June 30, 2005 decision in the *Silica* case, regarding certain "screening" doctors in the silica litigation,<sup>424</sup> defense counsel in the asbestos MDL issued Rule 45 subpoenas seeking documents from suspected asbestos screening physicians, including Dr. Jay T. Segarra.<sup>425</sup> Responding to a motion for protective order, Judge Robreno, on February 25, 2009, determined that these subpoenas were "too broad and overly burdensome," and limited their application to "documents related to diagnoses of asbestos related conditions relied upon by Plaintiffs in MDL 875."<sup>426</sup> Judge Robreno further directed the defendants to file renewed motions to compel Dr. Segarra to produce documents in individual cases.<sup>427</sup> On June 4, 2009, Union Carbide Corporation (UCC) filed such a motion in cases which had been referred to Magistrate Judge Strawbridge.<sup>428</sup>

On June 25, 2009, Judge Strawbridge granted these motions in part and compelled Dr. Segarra to produce certain documents and materials regarding his litigation screening practice.<sup>429</sup> Applying Judge Robreno's February 24, 2009 decision, Judge Strawbridge concluded that the documents "related" to the diagnoses relied upon by the MDL plaintiffs included all screening and litigation documents in Dr. Segarra's possession, not just those "pertaining to individuals who are plaintiffs in the MDL litigation."<sup>430</sup> Judge

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<sup>424</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

<sup>425</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 256 F.R.D. 151, 152 (E.D. Pa. 2009). The court issued the subpoena specific to Dr. Segarra in December 2005. Memorandum Opinion, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. June 26, 2009).

<sup>426</sup> *In re Asbestos Prods. Liab. Litig.* (No. VI), 256 F.R.D. at 153.

<sup>427</sup> *In re Asbestos Products Liab. Litig.*, No. 01-MD-875, 2010 WL 2034636, at \*2 (E.D. Pa. May 14, 2010).

<sup>428</sup> See, e.g., Union Carbide Corporation's Renewed Combined Motion and Brief to Compel Dr. Jay T. Segarra's Production of Documents and Response to Subpoena, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. June 4, 2009).

<sup>429</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. June 26, 2009); Memorandum Opinion, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. June 26, 2009).

<sup>430</sup> Memorandum Opinion, *supra* note 425.

Strawbridge reasoned that the total number of patients screened and the rate of positive diagnoses "could well be factors to be considered in determining the methodology and screening practices which underlie the doctor's diagnoses."<sup>431</sup> On July 9, 2009, plaintiffs' counsel filed, *inter alia*, objections to Judge Strawbridge's decision.<sup>432</sup>

Subsequent to the June 25, 2009 Order, and after consultation with counsel, Judge Strawbridge permitted the parties to conduct depositions of Dr. Segarra and to hire an electronic discovery consultant to assist in the retrieval of documents in a fashion such as to facilitate the determinations of privilege.<sup>433</sup> While these efforts continued, and after establishing a production protocol,<sup>434</sup> Judge Strawbridge, on August 7, 2009, stayed the actual document production pending a review of his June 25, 2009 decision by Judge Robreno.<sup>435</sup> On February 2, 2010, Judge Robreno overruled plaintiffs' objections and paved the way for discovery to continue.<sup>436</sup>

In monitoring the progress of this discovery, Judge Strawbridge arranged for a telephone conference for March 15, 2010, to discuss the then imminent document production from Dr. Segarra.<sup>437</sup> The subject of the conference was altered, however, when Judge Strawbridge learned that plaintiffs' counsel had moved to voluntarily dismiss the seven remaining cases which were

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<sup>431</sup> *Id.*

<sup>432</sup> Motley Rice Plaintiffs' Motion to Intervene and Objections to the Order Re: Subpoena Served Upon Dr. Jay T. Segarra, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875 (E.D. Pa. July 9, 2009).

<sup>433</sup> Discovery Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Sept. 8, 2009).

<sup>434</sup> *Id.*; Amended Discovery Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Oct. 8, 2009); Explanation and Further Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Dec. 8, 2009).

<sup>435</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Aug. 7, 2009).

<sup>436</sup> Order, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Feb. 2, 2010).

<sup>437</sup> Notice of Hearing, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Mar. 4, 2009).

supported by Dr. Segarra's diagnoses "for the reason that Plaintiff[s] no longer desire[] to prosecute th[ese] case[s] and the claims as to any party."<sup>438</sup> UCC filed a response to the motions and sought leave to file a bill of costs for attorneys' fees based on the prejudice arising from counsel's failure to dismiss the cases earlier.<sup>439</sup>

On May 14, 2010, Judge Strawbridge granted UCC's motion in part and concluded that as a condition of dismissal, it could file a bill:

reflecting the reasonable attorney's fees and costs expended in its preparation for, and participation in, telephone conferences regarding the development of the document segregation protocol, the drafting of proposed language for this order, and any other costs and fees reasonably connected to its role in assisting the Court and Plaintiffs in developing this mechanism for the discovery of Dr. Segarra's documents and materials.<sup>440</sup>

In granting this relief, Judge Strawbridge concluded that:

The circumstances in which this act was done—the sudden and unexplained dismissal, which effectively nullified the substantial efforts undertaken by the Defendant and the Court to accommodate the various interests potentially

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<sup>438</sup> Plaintiffs' Motion to Dismiss, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Mar. 15, 2010).

<sup>439</sup> Defendant Union Carbide Corporation's Combined (1) Response to Plaintiffs' Motion to Dismiss, (2) Motion for Leave to File Bill of Costs and (3) Brief on the Impact of Plaintiffs' Motion to Dismiss on Union Carbide Corporation's Combined Motion and Brief Relating to Civil Contempt, Sanctions, Spoliation of Evidence and Costs in These Matters, *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. Mar. 19, 2010).

<sup>440</sup> *In re* Asbestos Prods. Liab. Litig. (No. VI), MDL 875, No. 09-MC-103, 2010 WL 2034636, at \*1 (E.D. Pa. May 14, 2010).

impacted by the Segarra Production Order—guide us to our conclusion that an assessment of costs is proper.<sup>441</sup>

UCC filed a bill of costs in the amount of \$34,994.<sup>442</sup> On July 21, 2010, Judge Strawbridge filed a report recommending that Judge Robreno dismiss the seven cases, subject to payment to UCC of \$34,215.16 in attorneys' fees and costs.<sup>443</sup> Dismissal orders in the cases were entered in August 2010.<sup>444</sup>

### J. Five Year Results

A year to year breakdown of cases transferred and transmitted in MDL-875 in both Land and MARDOC dockets at the end of the five year period is as follows:

CUMULATIVE TOTALS 8/1/2006 - 9/30/2013			
	CASES TRANSFERRED TO EDPA	CASES TERMINATED IN EDPA	CASES PENDING IN EDPA
8/1/2006 - 10/31/2008	53,803	1,985	AS OF 10/31/2008 51,818
11/1/2008 - 12/31/2009	44,779	44,553	AS OF 12/31/2009 52,044
1/1/2010 - 12/31/2010	46,936	79,240	AS OF 12/31/2010 19,740
1/1/2011 - 12/31/2011	38,780	47,485	AS OF 12/31/2011 11,035
1/1/2012 - 12/31/2012	2,142	6,996	AS OF 12/31/2012 6,181
1/1/2013 - 9/30/2013	84	3,286	AS OF 9/30/2013 2,979
<b>TOTAL 8/1/2006 - 9/30/2013</b>	<b>186,524</b>	<b>183,545</b>	<b>AS OF 9/30/2013 2,979</b>

The charts below illustrate that since 2006, there have been 186,524 cases transferred to MDL-875.<sup>445</sup> Of those cases, 183,545 have been resolved, leaving 2,979 cases still on the MDL

<sup>441</sup> *Id.* at \*10.

<sup>442</sup> Bill of Costs of Defendant Union Carbide Corporation, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. May, 28, 2010).

<sup>443</sup> Report and Recommendation, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 09-MC-103 (E.D. Pa. July 21, 2010).

<sup>444</sup> Final Order of Dismissal, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 5:08-cv-87083-ER (E.D. Pa. Aug. 20, 2010); Final Order of Dismissal, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL 875, No. 5:08-cv-87069-ER (E.D. Pa. July 28, 2010).

<sup>445</sup> Michael E. Kunz, *MDL-875 Asbestos Products Liability Litigation Caseload Statistics*, U.S. DISTRICT CT. E. DISTRICT OF PA. 2, <http://www.paed.uscourts.gov/documents/MDL/MDL875/Sept.%202013%20Stats.pdf> (last visited Jan. 8, 2014).

docket.<sup>446</sup> Of the 186,524 cases, 123,157 were part of the Land docket and 63,367 were part of the MARDOC docket.<sup>447</sup>

LAND AND MARDOC CASELOAD			
8/1/2006 - 9/30/2013			
	CASES TRANSFERRED TO EDPA	CASES TERMINATED IN EDPA	CASES PENDING IN EDPA
LAND CASES	123,157	122,855	AS OF 9/30/2013 302
MARDOC CASES	63,367	60,690	AS OF 9/30/2013 2,677
<b>TOTAL</b> 8/1/2006 - 9/30/2013	<b>186,524</b>	<b>183,545</b>	AS OF 9/30/2013 <b>2,979</b>

The next chart breaks down the cases by district where the cases were originally brought, the number of cases terminated in the MDL, and the number of cases pending as of October 1, 2013.<sup>448</sup>

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> The figures differ slightly from the figures maintained by the Panel, as these figures represent the cases as severed in the transferee court, while the Panel's numbers are maintained on the basis as filed in the transferor court. Therefore, while the number of cases in the Panel's statistics is smaller, the number of plaintiffs is the same. *See supra* note 184.

DISTRICT COURT	CASES FILED	CASES TERMINATED	CASES PENDING
<b>DC</b>	<b>34</b>	<b>34</b>	<b>0</b>
District of Columbia	34	34	0
<b>1ST CIRCUIT</b>	<b>2,832</b>	<b>2,832</b>	<b>0</b>
Maine	277	277	0
Massachusetts	2,065	2,065	0
New Hampshire	130	130	0
Puerto Rico	77	77	0
Rhode Island	283	283	0
<b>2ND CIRCUIT</b>	<b>26,278</b>	<b>26,257</b>	<b>21</b>
Connecticut	1,381	1,377	4
New York Eastern	6,924	6,924	0
New York Northern	344	344	0
New York Southern LAND	10,227	10,213	14
New York Southern MARDOC	6,959	6,956	3
New York Western	441	441	0
Vermont	2	2	0
<b>3RD CIRCUIT</b>	<b>10,199</b>	<b>10,156</b>	<b>43</b>
Delaware	460	460	0
New Jersey	828	826	2
Pennsylvania Eastern	8,588	8,556	32
Pennsylvania Middle	1	1	0
Pennsylvania Western	93	93	0
Virgin Islands LAND	203	203	0
Virgin Islands MARDOC	26	17	9
<b>4TH CIRCUIT</b>	<b>20,119</b>	<b>20,102</b>	<b>17</b>
Maryland	1,388	1,388	0
North Carolina Eastern	1,249	1,248	1
North Carolina Middle	828	826	2
North Carolina Western	1,826	1,821	5
South Carolina	2,267	2,265	2
Virginia Eastern	11,463	11,456	7
Virginia Western	921	921	0
West Virginia Northern	66	66	0
West Virginia Southern	111	111	0

<b>5TH CIRCUIT</b>		<b>43,620</b>	<b>43,611</b>	<b>9</b>
Louisiana Eastern		379	375	4
Louisiana Middle		139	138	1
Louisiana Western	LAND	82	82	0
Louisiana Western	MARDOC	1	1	0
Mississippi Northern		568	568	0
Mississippi Southern		33,326	33,323	3
Texas Eastern		6,737	6,737	0
Texas Northern		1,544	1,544	0
Texas Southern		760	759	1
Texas Western		84	84	0
<b>DISTRICT COURT</b>		<b>CASES FILED</b>	<b>CASES TERMINATED</b>	<b>CASES PENDING</b>
<b>6TH CIRCUIT</b>		<b>62,175</b>	<b>59,499</b>	<b>2,676</b>
Kentucky Eastern		278	278	0
Kentucky Western		257	257	0
Michigan Eastern	LAND	120	120	0
Michigan Eastern	MARDOC	368	349	19
Michigan Western		30	30	0
Ohio Northern	LAND	4,151	4,142	9
Ohio Northern	MARDOC	56,013	53,367	2,646
Ohio Southern		236	236	0
Tennessee Eastern		250	248	2
Tennessee Middle		88	88	0
Tennessee Western		384	384	0
<b>7TH CIRCUIT</b>		<b>8,761</b>	<b>8,601</b>	<b>160</b>
Illinois Central		1,724	1,698	26
Illinois Northern		1,132	1,097	35
Illinois Southern		462	452	10
Indiana Northern		1,541	1,531	10
Indiana Southern		1,968	1,960	8
Wisconsin Eastern		1,271	1,230	41
Wisconsin Western		663	633	30

<b>8TH CIRCUIT</b>			
	<b>3,496</b>	<b>3,494</b>	<b>2</b>
Arkansas Eastern	86	86	0
Arkansas Western	19	19	0
Iowa Northern	27	27	0
Iowa Southern	1,924	1,924	0
Minnesota	470	470	0
Missouri Eastern	350	350	0
Missouri Western	130	129	1
Nebraska	126	126	0
North Dakota	362	361	1
South Dakota	2	2	0
<b>9TH CIRCUIT</b>			
	<b>2,977</b>	<b>2,932</b>	<b>45</b>
Alaska	121	121	0
Arizona	602	602	0
California Central	248	240	8
California Eastern	16	16	0
California Northern	843	808	35
California Southern	57	57	0
Guam	3	3	0
Hawaii	81	81	0
Idaho	115	115	0
Montana	165	165	0
Nevada	187	187	0
Northern Mariana Island	4	4	0
Oregon	162	162	0
Washington Eastern	175	175	0
Washington Western	198	196	2
<b>DISTRICT COURT</b>			
	<b>CASES FILED</b>	<b>CASES TERMINATED</b>	<b>CASES PENDING</b>
<b>10TH CIRCUIT</b>			
	<b>2,525</b>	<b>2,525</b>	<b>0</b>
Colorado	503	503	0
Kansas	614	614	0
New Mexico	277	277	0
Oklahoma Eastern	29	29	0
Oklahoma Northern	223	223	0
Oklahoma Western	304	304	0
Utah	453	453	0
Wyoming	122	122	0
<b>11TH CIRCUIT</b>			
	<b>3,508</b>	<b>3,502</b>	<b>6</b>
Alabama Middle	77	77	0
Alabama Northern	748	745	3
Alabama Southern	296	295	1
Florida Middle	121	121	0
Florida Northern	22	22	0
Florida Southern	634	634	0
Georgia Middle	35	35	0
Georgia Northern	688	687	1
Georgia Southern	887	886	1
<b>TOTAL</b>			
	<b>186,524</b>	<b>183,545</b>	<b>2,979</b>

As of October 1, 2013, the cases pending in the MDL consist of the following:

MARDOC	2677 cases
CVLO	160 cases
Pipeline	142 cases
<b>Total (land + MARDOC)</b>	<b>2979 cases</b>

In December 2011, the MDL court suggested to the Judicial Panel on Multidistrict Litigation that, effective January 1, 2012, it should stop transmitting Tag Along actions to MDL-875 except for certain jurisdictions.<sup>449</sup> The Panel agreed with the suggestion and made the Order effective immediately.<sup>450</sup> The MDL court pointed out that the backlog of cases had been largely eliminated, that nearly all cases pending were proceeding under scheduling orders, and that the number of new cases brought nationwide in the federal courts stood at approximately 400 per year.<sup>451</sup> Under these circumstances, the MDL court suggested to the Panel that the interest of justice and the efficient and economical adjudication of each case (with the exception of MARDOC and CVLO) would be promoted by discontinuing their transfer to MDL.<sup>452</sup> The Panel agreed with the suggestion and entered an Order on November 23, 2011, discontinuing transfers of Tag Along cases, effective immediately, with some noted minor exceptions.<sup>453</sup> Thus, since 2012, the MDL court has concentrated its efforts on cases pending in the Eastern District of Pennsylvania, over which it exercises original jurisdiction and cases relating to MARDOC, CVLO, and

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<sup>449</sup> Order Adopting Suggestion to the Panel Concerning Future Tag-Along Transfers, *In re Asbestos Prods. Liab. Litig.* (No. VI), MDL No. 875 (J.P.M.L. Dec. 13, 2011), *available at* <http://www.paed.uscourts.gov/documents/MDL/MDL875/order%20adopting%20judge%20robreno%27s%20suggestion%20to%20the%20jpml.pdf>.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

from other districts which were in the pipeline at the time of the Panel's order.<sup>454</sup>

### III. LESSONS LEARNED AND UNLEARNED

Twenty years, 180 thousand plus cases, and millions of claims later, it would be useful to extract some lessons from the federal court's entanglements with asbestos litigation. Yet, any lessons must be drawn with great cautions save, as in the case of generals fighting the next war on the basis of obsolete lessons learned from the last one, we risk drawing the wrong conclusions.

For one, it is not likely that a case with the characteristics and scope of asbestos litigation may arise in the future. Here was the legal equivalent of a perfect storm: a single product, with pervasive use in the national economy which could potentially have caused harm to millions and went unregulated for at least fifty years.

Second, whether in retrospect a national MDL was necessary at all remains an open question. MDL-875 involves individual claims against individual defendants based on the particular circumstances of the exposures.<sup>455</sup> The circumstances vary greatly from plaintiff to plaintiff and defendant to defendant, as well as exposure sites and products involved.<sup>456</sup> Managing the idiosyncratic factual differences while applying substantive state law proved daunting.

And yet, some limited lessons can be drawn, which, if applied under appropriate circumstances, can serve as guideposts for the litigation of large mass tort cases in the future, whether in national or state MDL's.

#### *A. If We Build It, They Will Come*

Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process.

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<sup>454</sup> See generally *id.* (ordering that actions no longer be transferred to MDL 875).

<sup>455</sup> See *supra* Part I.D.

<sup>456</sup> See *supra* Part I.B.

Therefore, courts must establish procedures by which, at an early point, each plaintiff is required to provide facts which support the claim through expert diagnostics reports or risk dismissal of the case.

### *B. One Plaintiff–One Claim*

Each case is to be 'disaggregated' or 'deconstructed' into the lowest common denominator. The purpose is to separate each case, and within each case, each claim against each defendant to stand on its own merit. Multiple plaintiffs are to be severed into single plaintiff cases. Multiple defendants should be allowed to file dispositive motions addressed to their specific circumstances. Trials should not be reverse bifurcated or trifurcated.

### *C. MDL Litigation is Part of a Continuum*

The objectives of the MDL process are best served by a commitment of the MDL courts to address pretrial issues, but promptly remand cases to the transferor court once the goal of addressing pretrial issues has been achieved.

### *D. Waiting for Superman: The Failure of Aggregation*

The consolidation or aggregation of large numbers of cases distorts the litigation and the settlement process. Aside from the significant due process issues raised by forcing parties to litigate or settle cases in groups, aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case. Additionally, while the court searches for global solutions, the individual cases are not attended to by either the court or the individual lawyers. Since litigation or settlement is to be determined in mass, or at least in groups, there is no perceived need by the parties to litigate each case separately. While the parties wait for 'superman' to resolve the litigation, the cases linger.

### *E. It Takes A Village: The Need for Judicial and Administrative Resources*

Trial judges in general, and federal district court judges in particular, are by their nature and culture lone wolves who act

alone in the execution of their duties. A trial judge, unlike an appellate one, does not need 'a second vote' to issue a decision or to overrule an objection. Additionally, under the now well established individual docket system in the federal courts, each individual federal district judge manages his/her own docket, setting trial, discovery, and other administrative deadlines at his or her own discretion.

This general philosophy is not congruent with the administrative responsibilities of a large MDL. While, of course, the adjudicating role remains the sole responsibility of the district judge, the duties and burden of administering a large MDL must be shared with other judicial officers and retained professionals. Therefore, the court must recruit and rely upon magistrate judges, special masters, other administrative personnel, the Clerk's Office staff, IT specialists, and law clerks for the administration of the case.

*F. Let the Lawyers be Lawyers: The Procedural Road Map*

Counsel in a large MDL need a clear road map of litigation. Written procedures for motion practice, trial or remands, and settlement to assist the parties must be adopted. Once these procedures are established, strict and faithful enforcement of the procedures supply the discipline needed to manage a large number of individual cases. The procedures are to be widely publicized in both the court's and commercial web sites.

*G. Let the Judge be the Judge: The Need for Legal Architecture*

The court must provide timely legal guidance to the substantive and procedural issues by ruling and issuing opinions on matters before the court. This body of law provides counsel with a predictable path on which to formulate and execute their litigation strategy. The decisions are to be made widely available in both the court's and commercial web sites.

*H. No Agenda: A Win-Win for Plaintiffs-Defendants*

In the MDL context, two perceptions may undermine the litigants' confidence in the process. On the part of the plaintiffs, the belief is that the agenda behind the process is designed to simply

'clean house' by dismissing cases or depriving litigants of the opportunity to present their cases to a jury. On the other hand, the belief on the part of defendants that the MDL process is designed to coerce settlements or to deprive them of the right to assert legitimate defenses. Under a 'one-plaintiff-one-claim' process, case outcomes benefit both plaintiffs and defendants. Defendants see a decline in the number of claims which they have to defend, due to an early assessment of the merit of each claim with a concomitant reduction of costs of defense. Conversely, plaintiffs see the more meritorious claim move to the head of the line, as unmeritorious claims are dismissed and removed from the docket. Both sides see the benefits and are prepared to support the court's plan.

For all practical purposes, MDL-875 is near its end. Except for the maritime cases currently on scheduling orders, which will soon be ripe for disposition, asbestos litigation in the federal courts has been returned to the respective districts. Relatively few new cases are currently filed in the district courts, and the medical-legal 'crisis' and 'elephantine' dockets have disappeared. Though the journey has been long and costly, if substantial justice for the litigants has been achieved, in a manner consistent with public policy, the journey will have been worthwhile.

## ATTACHMENT A

<http://www.paed.uscourts.gov>

Website Statistics

3/1/2009 – 9/25/2013

	VISITS													TOTAL
	3/1/09 - 12/31/09	1/1/10 - 12/31/10	1/1/11 - 12/31/11	1/1/12 - 12/31/12	JAN 2013	FEB 2013	MAR 2013	APR 2013	MAY 2013	JUN 2013	JUL 2013	AUG 2013	SEP 2013*	
MDL 875 HOME	3907 5	4855 2	4329 0	3314 0	211 1	171 8	190 4	183 9	173 2	163 7	169 0	159 5	121 3	179

	VIEWS/DOWNLOADS													TOTAL
	3/1/09 -	1/1/10 -	1/1/11 -	1/1/12 -	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	
UPDATES	1291 8	1930 3	1811 0	1396 7	104 2	72 9	75 0	66 3	57 6	66 4	72 9	56 1	43 9	7045 1
OPINIONS	211 1	612 6	1094 3	1036 0	74 0	59 4	72 3	51 0	49 4	67 3	77 7	66 1	38 9	3510 1
PROCEDURES	444 7	873 4	875 3	820 4	46 6	41 0	45 5	46 0	37 0	40 6	52 2	35 8	33 1	3391 6
ADMINISTRATIVE ORDERS	586 6	777 3	847 2	603 5	25 4	27 7	26 9	25 8	20 4	22 4	37 3	22 1	17 1	3039 7
MARDOC CASE INFORMATION	50 4	604 1	844 3	893 9	57 2	51 0	54 2	54 7	52 3	48 3	64 3	55 9	33 0	2863 6
CONTACTS	463 4	644 8	587 7	554 8	36 2	32 0	40 7	39 8	43 4	38 8	50 4	43 1	40 2	2615 3
CASES REFERRED TO JUDGE STRAWBRIDGE	-	188 1	701 6	848 1	51 6	37 7	37 8	28 2	38 0	26 3	38 9	26 4	20 4	2043 1
NOTICES	-	563 8	716 8	506 0	21 2	16 6	20 5	19 6	18 5	21 0	34 7	21 0	14 7	1974 4
ABOUT	-	345 9	576 9	518 3	24 9	17 4	20 1	23 6	19 1	18 3	33 9	20 3	13 7	1632 4
SUMMARY JUDGMENT PROCEDURES	-	413 0	553 0	422 5	13 5	12 9	13 1	12 7	13 2	11 0	25 2	11 1	10 9	1512 1
STATISTICS	110 3	248 9	458 5	444 0	21 1	20 5	19 4	9 7	16 0	17 8	29 9	15 9	15 6	1427 6
COMPREHENSIVE MDL 875 CALENDAR	532 7	326 5	241 4	169 8	16 9	8 7	8 1	8 2	6 4	6 5	6 8	8 3	5 6	1345 9
CASES REFERRED TO JUDGE HEY	-	200 0	453 7	364 1	11 0	9 1	12 6	9 1	10 1	7 6	24 5	10 9	7 4	1120 1

CASE INFORMATION	322 8	408 3	-	-	-	-	-	-	-	-	-	-	-	731 1
ADMINISTRATIVE ORDER NO. 12 (AS AMENDED)	337 0	231 7	65 0	-	-	-	-	-	-	-	-	-	-	633 7
OPINIONS ISSUED BY JUDGE ROBRENO	-	-	168 4	184 1	24 6	18 3	14 6	14 5	11 5	12 2	4 2	0	4 2	456 6
MOTION SCHEDULE	248 0	13 0	-	-	-	-	-	-	-	-	-	-	-	261 0
CASE MANAGEMENT FLOWCHART	62 8	126 5	43 2	48	-	-	-	-	-	-	-	-	-	237 3
DISCOVERY PLAN TEMPLATE	49 2	132 6	27 6	82	-	-	-	-	-	-	-	-	-	217 6
SETTLEMENT CONFERENCE SCHEDULE	180 0	99	-	-	-	-	-	-	-	-	-	-	-	189 9
STEERING COMMITTEES	95 3	38 5	-	-	-	-	-	-	-	-	-	-	-	133 8
OLD ADMINISTRATIVE ORDERS	-	66 6	-	-	-	-	-	-	-	-	-	-	-	66 6

\*Data as of 9/25/2013