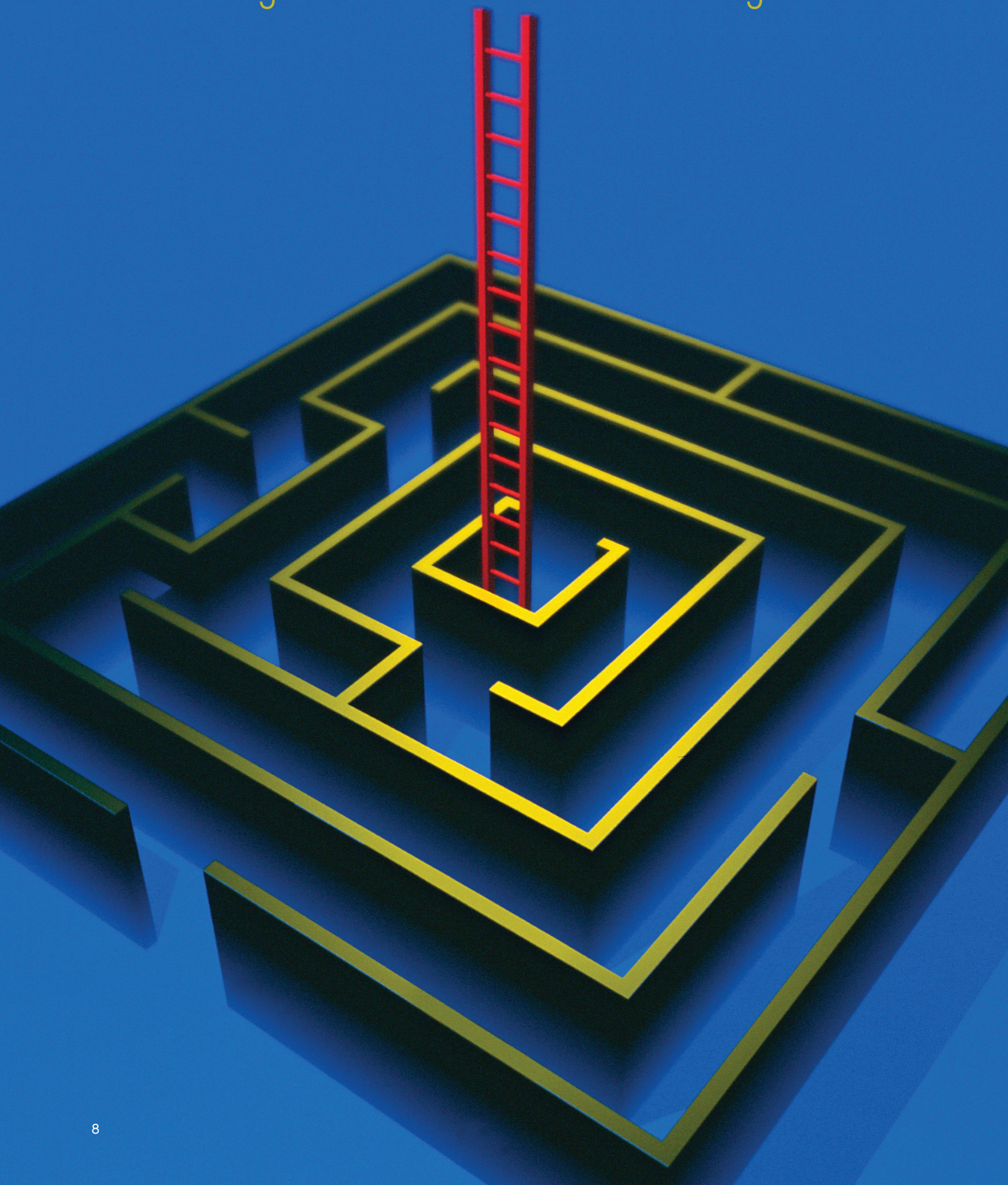
Solving the Problems in Mass Tort Litigation



by Roy T. Atwood, Christopher Groves, and Kelly W. King

The United States judicial system was ill-prepared to handle the flood of litigation spawned by the use of asbestos in America. The deluge of cases involving numerous parties created an environment in which entrepreneurial plaintiffs' attorneys prospered at the expense of businesses and their insurers. The attorneys organized mass screenings to troll for all potential claimants, and they roped clients in by the thousands. With millions of dollars at stake and ample opportunity to scam the system, abuses of the judicial process occurred on a grand scale. Fortunately, courts and commentators are beginning to reveal and rectify those abuses.[1]

Unfortunately, the long history of abuses revealed itself too late for businesses sucked into the asbestos and other mass tort quagmires. For years, mass-toxic-tort plaintiffs' attorneys operated under the same mass tort business model. It required that they sue every entity that might have even the slightest connection to the exposure, no matter how tenuous. And they sued on behalf of anyone and everyone a plaintiff-retained doctor was willing to say might have a condition related to the exposure, based upon crude self-reported work histories and slight shadows on a lung X-ray. Courts accepted bare-bones pleadings spit out by word processors as fast as counsel could substitute the names of new plaintiffs. Plaintiffs named defendants simply because it was conceivable that they *might* have contributed to the plaintiffs' injuries, not because they actually caused them. Plaintiffs then sought to push cases toward trial at the lowest cost possible, using the claims of the most sympathetic to carry the weaker cases. Courts emasculated the rules of procedure and ignored the due-process rights of defendants in an effort to streamline the voluminous litigation burdening their dockets, playing right into the plaintiffs' business model. Ultimately, many defendants either settled for nominal sums or were dismissed outright after the product identification phase[2] ended. Plaintiffs' attorneys then claimed "no harm, no foul" against the settling or dismissed defendants, despite the fact that in many cases, no evidence ever existed that the particular defendant *caused* the plaintiffs' injuries. In fact, rather than "no harm," there is actually enormous harm, considering the number of unsubstantiated claims filed against defendants and the cost of defending each claim.

The solution to this problem is not difficult. The tools exist in the rules of procedure and common law. Courts should require that plaintiffs determine which entities they actually have claims against before filing suit. Courts should also enforce the rules of procedure as written, not as unjustly "amended" because of the number of parties in a case or the number of cases clogging the dockets. Finally, courts should eliminate the ability of plaintiffs' attorneys to procure settlements through blackmail induced by trial setting.

COURTS MUST SCRUTINIZE PLAINTIFFS' PLEADINGS

Courts must require that plaintiffs sue only the defendants against which they have legitimate claims, as universally required by rules of procedure. (Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "statement of the claim showing that the pleader is entitled to relief.") Federal courts and most states have a "notice-pleading" requirement. *See*, *e.g.*, Fed. R. Civ. P. 8(a)(2). "Notice" in this context cannot and does not mean, as is often heard from plaintiffs' counsel, "We sue you all the time in these cases, so we all know what this is about." This requirement means that plaintiffs must put defendants on notice of the relief that they are requesting. And plaintiffs must show that they are entitled to relief. Doing so necessarily requires the plaintiffs to show *some* connection between each defendant and the individual plaintiff's injuries.[3]

In theory, notice-pleading requirements should be sufficient to weed out defendants against which plaintiffs cannot articulate a viable claim at the outset of the lawsuit. Yet courts have not historically required mass tort plaintiffs to plead meritorious allegations of causation. Courts accept pleadings lacking in detail, in which plaintiffs merely recite generally that the defendants caused the plaintiffs' injuries, with no attempt to show how the named defendants are in any way connected to the injuries.

A good example comes from a silicosis case filed in Mississippi, in which 4,200 plaintiffs separately sued 131 defendants. The case was not a class action. The individual allegations of each plaintiff against each defendant, including the statement of the causes of action, consumed only about five pages and were the same for each plaintiff against each defendant. *Prince, et al. v. Pearl River Sand & Gravel Co., et al.*, Cause No. 2002-430, Circuit Court of Noxubee County, Miss. Some defendants are dismissed from more than 90 percent of the cases in which they are sued because the plaintiff fails to identify one of their products as causing the alleged injury. Dismissals of this nature would not occur with such frequency if plaintiffs pled their claims properly.

Postfiling discovery is not the time for plaintiffs to determine which parties they should have sued. Procedures exist for conducting discovery *before* filing suit if a plaintiff needs formal discovery to know which entities to sue. *See* Fed. R. Civ. P. 27(a)(1). Yet when faced with motions to dismiss, plaintiffs readily argue that defendants are seeking to abrogate their due-process rights by moving to dismiss claims before discovery is complete.[4] Courts regularly deny motions to dismiss in mass tort cases on this ground, despite the fact that the plaintiffs' argument establishes their lack of an evidentiary basis for filing suit.

Courts have the tool they need to stop this abuse. Federal Rule of Civil Procedure 11 provides that by filing a pleading, the attorney is certifying that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . ." Fed. R. Civ. P. 11(b)(3). Counsel cannot satisfy this standard based solely on the thought that they may develop evidence that the plaintiff used a product because the product existed. Unfortunately, courts have not used Federal Rule 11 or its state counterparts to address this problem.

In the Advisory Committee Notes to the 1983 Amendments to Rule 11, the committee noted:

> Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. . . . The standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

Fed. R. Civ. P. 11 (1983 Advisory Committee's Note). The Notes to the 1993 Amendments provide:

> Tolerance of factual contentions in initial pleading by plaintiffs or defendants when specifically identified as made on

> information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification.

Fed. R. Civ. P. 11 (1993 Advisory Committee's Note). Defendants that are involved in large-scale mass tort litigation are understandably reluctant to pursue Rule 11 sanctions (or the state-law equivalent) in one venue when the very real chance of retribution exists in another venue. Thus, it is incumbent upon the courts to take charge of the cases pending before them and use the power given to them by Rule 11(c)(1)(B) to initiate sanctions proceedings on their own.[5]

The solution to the problem of mass tort litigation is not difficult. The tools exist in the rules of procedure and common law.

While not using rules relating to pleadings to address the problem, some courts have used their broad case-management powers to address the lack of threshold evidence of causation with the advent of *Lone Pine* orders. *See Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Law Div., Nov. 18, 1986) (unpublished) (not reported in A.2d), and its progeny. *Lone Pine* orders are "pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim." *Steering Comm. v. Exxon Mobil Corp*., 461 F.3d 598, 604 (5th Cir. 2006). *Lone Pine* orders compel plaintiffs to establish minimal causation against defendants upfront, before the parties unnecessarily expend their resources and those of the court. Plaintiffs must present a viable theory of liability, supported by a short expert report. The liability theory must demonstrate that the plaintiff is actually injured and that the named defendants could be liable for the injury. *Lone Pine* orders are particularly useful in previously unexplored tort areas. They give courts a foothold on novel issues and theories of liability. In all cases, *Lone Pine* orders give courts a reasonable preliminary scientific basis for including or excluding appropriate defendants.

In some states, the legislature has stepped in to assist courts in dealing with the abuses in mass tort lawsuits. Recent legislation in these states further details plaintiffs' threshold pleading requirements.[6] The legislation requires that plaintiffs demonstrate a cognizable injury before filing suit. These legislatures have defined "injury" to exist only when a person is physically impaired. By combining legislation requiring proof of impairment with *Lone Pine* orders requiring threshold evidence of causation, courts are attacking the same problems they could cure through the imposition of Rule 11 sanctions against attorneys who file pleadings without adequately investigating their clients' claims. As long as there is no penalty for filing claims with no evidentiary basis and there is a risk of a malpractice claim for not naming a viable defendant, plaintiffs' counsel will always err on the side of suing companies against which they think they might someday be able to establish a claim.

COURTS MUST ENFORCE THE RULES OF PROCEDURE

Courts must preserve justice by enforcing the rules of procedure as written, not as short-circuited in an attempt to accommodate mass tort dockets. The Rules Enabling Act of 1934 gave the United States Supreme Court the power to propose rules as long as the rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Congress retained the right to review rules proposed by the Supreme Court before they become effective. 28 U.S.C. § 2074. As conceived and codified, the rules afford equal justice and freedom from undue cost and burden to plaintiffs, defendants, and nonparties alike. They have been molded by years of judicial precedent. Yet many courts routinely enter standing orders in mass tort cases that selectively enforce the rules of procedure or establish local rules that supplant the promulgated rules, particularly as those rules relate to discovery. The result is the undue burden, expense, and harassment specifically proscribed by the discovery rules. *See, e.g.*, Fed. R. Civ. P. 26(b); *see Scroggins v. Air Cargo, Inc*., 534 F.2d 1124 (5th Cir. 1976); *Baine v. General Motors Corp*., 141 F.R.D. 332, 334 (M.D. Ala. 1991).

Special rules in the form of "standing orders" or "local rules" have long been prevalent in asbestos cases. At one time, the "standing orders" in Dallas County, Texas, consisted of a stack of paper several inches high that was virtually unintelligible to a newcomer. In a group of silicosis cases in Nueces

County, Texas, the courts put in place a scheduling order that required plaintiffs' counsel to designate three groups of 130 plaintiffs for mediation.[7] The courts required plaintiffs' counsel to designate 30 of those 130 plaintiffs for deposition prior to mediation and required defendants' counsel to designate four of them. The court suggested that the parties could easily extrapolate the deposition testimony of 34 plaintiffs to the entire group of 130 plaintiffs at mediation. The court also ordered that it would deem to be timely all master discovery, master expert, and fact witness lists filed *30 days* before trial. On September 6, 2002, in a case in notoriously plaintiff-friendly Jefferson County, Texas, the judge ordered defendants to depose all 300 plaintiffs and begin trial in November 2002 on the first group of 10 plaintiffs, with trials of groups of 10 plaintiffs commencing immediately upon the conclusion of the prior trial until the court tried all 300 plaintiffs' claims. *Aparicio, et al. v. U.S. Silica Co., et al.*, Cause No. A-165,548, 58th Judicial District Court, Jefferson County, Texas. The resulting deposition circus bore no resemblance to the august process appropriate to judicial proceedings, and deprived of any opportunity for a fair trial of even the first 10 plaintiffs, defendants were forced into settlements on the entire 300 that they would not otherwise have made.

COURTS MUST PREVENT PLAINTIFFS FROM INDUCING TRIAL-DATE DURESS THROUGH THEIR INACTION

Mass tort cases clog the dockets of courts around the country. In an effort to dispose of as many cases as quickly as possible, courts are loath to continue trial settings. Courts know from experience that if they set a trial date and stick to it, cases usually settle. Courts despise discovery disputes and tend to favor the little guy in them. Courts are unlikely to grant a defendant's motion to compel in its entirety if they set the motion for hearing in the first place. Knowing all this, in the context of their volume practice, plaintiffs ignore defendants' discovery requests and other efforts to prepare their defenses until the eve of the discovery deadline, when they provide just enough discovery to keep their trial setting. They then pressure defendants to settle rather than defend a case in front of a jury in an undesirable venue without adequate information to prepare thoroughly for trial.

The solution to this problem is an event-based case-management order. Both state and federal courts have implemented day-forward case calendars to ensure that duress induced by trial date and other abuses do not occur. *See, e.g., In re Texas State Silica Products Liability Litigation,* Master Docket No. 2004-70000, in the District Court of Harris County, Texas, Case Management Order No. 8, June 29, 2005. Event-based case-management orders require that plaintiffs fulfill their obligations before defendants' reciprocal obligations accrue. For example, each plaintiff must first file a verified pleading listing the proper defendants to the plaintiff's claims. If the plaintiff does not list a defendant, the defendant is automatically dismissed. Each plaintiff must also file a preliminary medical report establishing a requisite level of injury before that plaintiff's claim may proceed. Formal discovery begins only after the plaintiff makes a threshold showing of injury and identifies the defendants against which he has a claim, complete with identification of the products at issue and the dates and circumstances of product usage. The case then proceeds, with the completion of each event triggering the next appropriate event under the rules of procedure. Depositions of corporate representatives occur only after all plaintiffs have appeared for deposition. Depositions of defendants' experts occur only after plaintiffs' experts have produced reports and been deposed. The parties do not receive a trial setting until all essential discovery is complete, and there is no trial until the court conducts an adequate pretrial hearing. The event-based scheduling order eliminates the plaintiffs' ability to stall the lawsuit and coerce into a settlement defendants that plaintiffs never should have sued in the first place.

DESTROYING THE MASS TORT BUSINESS MODEL

Mass tort litigation has always been a volume play for plaintiffs' counsel. More plaintiffs, plus more defendants, plus low transaction costs, equals more settlements at greater margin and, as a result, more money for the plaintiffs' attorneys. In order to keep transaction costs low and handle the volume that drives the model, plaintiffs need streamlined, less burdensome rules of procedure. Pleadings that are specifically tailored to the facts of the specific case, individualized discovery requests and responses, and the focused attention of experts to each claim are enemies of this model. Anything nonstandardized and plaintiff-specific slows the process and increases the associated per-plaintiff costs.

Applying the procedural rules as contemplated by the drafters destroys plaintiffs' volume-driven business model. First, courts must force plaintiffs' counsel to carry out the presuit

investigation contemplated by the rules so that only legitimately injured plaintiffs will be pursuing claims against defendants whose conduct is directly linked to the injury. Second, courts must enforce the rules of discovery to allow defendants the opportunity to develop the facts of the case fully and in a timely manner. Finally, if courts refrain from setting cases for trial until they are fully developed, defendants can accurately assess the value and strength of each case and, when appropriate, proceed to trial adequately prepared. While counsel who represent plaintiffs may try an occasional case to set values as part of their business model, preparing each case for trial on its individual merits is too time-consuming and expensive when volume is the key.

CONCLUSION

Correcting the abuses that have occurred during the proliferation of mass tort suits is not difficult. The tools to dissuade and remedy these abuses already exist in the rules of procedure and the case-management powers of the courts. Courts simply need to enforce the rules, stop short-circuiting the process, and force counsel on both sides of the docket to do their jobs ethically on behalf of their clients. Crowded dockets are not an excuse to deny defendants the ability to prepare for trial adequately. Instead, crowded dockets require hard work on the part of the litigants and the court, combined with an unflinching dedication to the process that has served our judicial system well for decades. ■

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[1] *See* June 30, 2005, Order in *In Re: Silica Litigation*, MDL No. 1553 (S.D. Texas); David Hechler, "Silica Plaintiffs Suffer Setbacks," *The National Law Journal*, Feb. 28, 2005, at 1–2, 4; Mary Alice Robbins, "Judge's Silica Order Could Affect Future Mass Tort Litigation," *Texas Lawyer*, July 11, 2005, at 1.

[2] The "product identification phase" is the process through which defendants attempt to determine the products the plaintiff actually used or to which the plaintiff was exposed. It often begins with a plaintiff intake sheet designed and produced by the plaintiff in lieu of proper discovery responses and may end with the deposition of the plaintiff or plaintiff's coworkers. Sometimes it continues while the plaintiff attempts to discover whether defendants ever sold any products over the preceding 50 years to any place of business ever visited by the plaintiff and to which the plaintiff may have ever conceivably been exposed.

[3] For example, in *United States. v. Baxter Intern., Inc*., 345 F.3d 866, 881 (11th Cir. 2003), the court determined that the Federal Rules of Civil Procedure require plaintiffs to provide "a statement in their pleadings calculated to give each defendant fair notice of what the plaintiffs' claims are and the grounds upon which they rest." Similarly, in *Northern States Power Co. v. Fed. Transit Admin*., 358 F.3d 1050, 1056–57 (8th Cir. 2004), the court found that "[t]he essential function of notice pleading is to give the opposing party fair notice of the nature and basis or grounds for a claim."

[4] For example, in a case pending in the 17th Judicial Circuit Court in Broward County, Florida, a plaintiff responded to an action to dismiss his case by claiming a violation of his due-process rights because "there ha[d] been no opportunity for the Plaintiff to discover, gather, review or present other supporting evidence of Plaintiff's exposure to Defendant's product. . . . Plaintiff may well uncover . . . evidence that would establish that the Plaintiff was exposed to a product manufactured or otherwise distributed or supplied by various defendants herein." From Plaintiff's Response to Certain Defendants' Notice of Intent to File a Proposed Order of Dismissal with Prejudice in *Bilanich v. Air Liquide America, L.P.*, Case No. 05-06358 (04) in the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida.

[5] "On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." Fed R. Civ. P. 11(c)(1)(B). Mass tort evils are equally visited on the courts in terms of clogged dockets and wasted judicial resources. Efficiency requires court action, with or without litigant initiative.

[6] The Texas Legislature, for example, codified Senate Bill 15 into Chapter 90 of the Texas Civil Practice and Remedies Code, effective September 1, 2005, establishing minimum requirements to bring and maintain a claim involving asbestosis or silicosis. Ohio and Florida have similar statutes.

[7] *Acosta, et al. v. Pulmosan Safety Equip. Corp., et al.*, Cause No. 01-6501-E, 148th Judicial District Court, Nueces County, Texas. While the order was styled as an "Agreed Scheduling Order," it was not the product of open negotiation and not all parties agreed to the order.