COMMENT

ADMINISTERING A CURE-ALL OR SELLING SNAKE OIL?: IMPLEMENTING AN INACTIVE DOCKET FOR ASBESTOS LITIGATION IN TEXAS*

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I. INTRODUCTION

Few legal issues have proven as unusual and problematic as asbestos litigation.[1] In 1991, the U.S. Judicial Conference Ad Hoc Committee on Asbestos Litigation discussed the challenges facing courts, defendants, and plaintiffs:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.[2]

These characteristics have contributed to make asbestos lawsuits among the most costly and controversial type of litigation in U.S. history.[3]

Because of these issues, lawmakers have realized asbestos litigation requires a solution outside of typical litigation approaches.[4] However, a systematic and satisfactory approach to asbestos lawsuits remains elusive,[5] as legislatures and courts

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1. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 865–68 (1999) (Breyer, J., dissenting) (detailing the unique problems posed by asbestos litigation: the large number of asbestos claims filed annually, resulting in delays and higher transaction costs compared to other litigation; the need for creative judicial approaches because of a lack of legislative solutions; the lack of experience in dealing with asbestos cases at an appellate level; and the ineffectiveness of addressing the problems posed by asbestos litigation on an individual level).

2. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (quoting AD HOC COMM. ON ASBESTOS LITIG., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991)).

3. *See* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION COSTS AND COMPENSATION 53–54 (2002), *available at* http://www.rand.org/pubs/documented_briefings/DB397/DB397.pdf (estimating that defendants expended $54 billion on asbestos litigation between 1982 and 2000); *see also* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1 (reporting that American insurance companies alone spent $22 billion by the end of 2000 resolving asbestos claims).

4. *See, e.g.*, *Ortiz*, 527 U.S. at 821 (noting that "[asbestos] litigation defies customary judicial administration"). At the federal level, Congress has recently proposed establishing a $140 billion trust fund for asbestos claimants; under the legislation, claims would be resolved through administrative disbursements and most state actions would be preempted. *See* Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005); *see also* Stephen Labaton, *Senate Votes to Debate Bill for Asbestos Victims' Fund*, N.Y. TIMES, Feb. 8, 2006, at C1.

5. *See* Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 946 (2003) (stating that "courts have generally failed to adapt procedures and common-law principles to address asbestos litigation effectively").

have debated various strategies to handle the overwhelming flood of asbestos claims.[6]

Inactive dockets, also known as deferred dockets or pleural registries, are among the most common,[7] controversial,[8] and, arguably, successful[9] methods for addressing the problems posed by asbestos litigation. Inactive dockets are a pretrial procedural tool created by statute or judicial order that distinguishes "impaired" plaintiffs from "unimpaired" plaintiffs based on adopted medical criteria and subsequently prioritizes the resolution of impaired claims over unimpaired claims.[10] This procedure indefinitely defers the claims of unimpaired plaintiffs, returning their causes of action to the active docket when either all impaired plaintiffs' cases are resolved or an unimpaired plaintiff's injury progresses to the point that the injury meets the criteria for impairment.[11] As of 2005, some form of an inactive

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6. *See, e.g.*, *Amchem Prods.*, 521 U.S. at 628 (recognizing that class action asbestos settlements might not ever satisfy notice requirements because individuals in the exposure-only category may not be aware of the exposure giving rise to their class membership); State *ex rel.* Mobil Corp. v. Gaughan, 563 S.E.2d 419, 422 (W. Va. 2002) (reviewing the defendant's argument that consolidation by the lower court of several thousand asbestos claims into a single trial violated due process and equal protection).

7. *See* Faulk, *supra* note 5, at 977 (noting that the state courts in several states and the federal district courts have used inactive dockets for many years).

8. *See, e.g.*, KELLI SOIKA, HOUSE RESEARCH ORGANIZATION, ASBESTOS LITIGATION: AN INACTIVE DOCKET PROPOSAL, H.R. 78-16, 4th Called Sess., at 8–11 (Tex. 2004), *available at* http://www.capitol.state.tx.us/hrofr/focus/asbestos78-16.pdf (providing a summary of the arguments for and against an inactive docket proposal).

9. *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, 286–98 (2003) (describing the long-term success of inactive dockets in various jurisdictions); *cf. Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, ASBESTOS, Feb. 12, 2002, at 2, 2–3, 70, *available at* http://www.harrismartin.com/tour/pdfs/beyondtheheadlines.pdf (noting that while inactive dockets have been implemented with ease in three states, others have been hesitant to adopt them). However, much of the success of inactive dockets is either anecdotal or focuses simply on the fact that they have been successfully implemented. *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, *supra*. Such accounts lack precise analysis regarding the impact of inactive dockets on case reduction or effectiveness in ensuring both that frivolous cases are omitted and valid claims included.

10. Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 (1992); *see also* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH L. REV. 1, 8 (2001) (defining an inactive docket program as generally composed of the following features: "(1) a docketing procedure, wherein unimpaired claimants are put onto an inactive . . . track . . . [in which] statutes of limitations are tolled and discovery is stayed; (2) guidelines based on standard, objective medical criteria for assessing individual claimants . . . ; and (3) an ordering mechanism for cases removed from the inactive docket and placed on the active docket" (footnotes omitted)).

11. Schuck, *supra* note 10, at 542.

docket had been established, either by statute or by judicial order, in many states, including Illinois,[12] Massachusetts,[13] New York,[14] Pennsylvania,[15] Ohio,[16] and the federal Multidistrict Litigation court.[17]

Commentators, legislators, and special interest groups had long advocated the creation of an inactive docket for asbestos lawsuits in Texas.[18] On May 19, 2005, Texas Governor Rick Perry signed into law Senate Bill 15,[19] establishing the use of an inactive docket mechanism for asbestos litigation.[20] The legislation, codified as Chapter 90 of the Texas Civil Practice and Remedies Code ("Chapter 90"), provides reporting requirements and medical criteria by which to distinguish impaired plaintiffs from unimpaired plaintiffs.[21] Under the law, an unimpaired plaintiff's claim may be dismissed without prejudice, and any cause of action will not accrue until the plaintiff produces a report meeting the medical criteria of the statute.[22] By contrast, impaired plaintiffs will proceed through the judicial system to resolve their claims.[23] This controversial distinction between unimpaired and impaired claimants raises the inevitable

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12. Order to Establish Registry for Certain Asbestos Matters at 4, *In re* Asbestos Cases (Ill. Cir. Ct. Mar. 26, 1991) (on file with author); *see also In re* Asbestos Cases, 586 N.E.2d 521, 524 (Ill. App. Ct. 1991) (upholding creation of the deferred registry by the Cook County Circuit Court).

13. Schwartz et al., *supra* note 9, at 288 (discussing the origin of the Massachusetts Inactive Asbestos Docket).

14. *In re* New York City Asbestos Litig., No. 40000/88, 2002 WL 32151568, at *2 (N.Y. Sup. Ct. Dec. 19, 2002) (establishing a deferred docket for all asbestos claims in New York County).

15. *See* Taylor v. Owens-Corning Fiberglas Corp., 666 A.2d 681, 684 n.1, 688 (Pa. Super. Ct. 1995) (affirming the lower court's deferral of plaintiffs' claims because they involved asymptomatic asbestos injury).

16. *See In re* Cuyahoga County Asbestos Cases, 713 N.E.2d 20, 25–26 (Ohio Ct. App. 1998) (affirming the power of the lower court to create an inactive docket).

17. *In re* Asbestos Prods. Liab. Litig. (No. VI), Civ. A. No. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996).

18. *See* Faulk, *supra* note 5, at 977 & nn.143–45 (citing various scholarly writings advocating inactive dockets).

19. TEX. S.B. 15, 79th Leg., R.S., 2005 Tex. Gen. Laws 169, *available at* http://www.capitol.state.tx.us/data/docmodel/79r/billtext/pdf/SB00015F.PDF (enrolled version of bill); Purva Patel, *Asbestos Law Raises the Bar*, HOUS. CHRON., May 20, 2005, at D1 (reporting the Governor's signing of the bill on May 19). To view a signed version of Senate Bill 15, see http://www.sos.state.tx.us/statdoc/bills/sb/SB15.pdf.

20. Patel, *supra* note 19.

21. TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001–.012 (Vernon Supp. 2005).

22. *Id.* §§ 90.007–.008.

23. *Id.* §§ 90.003, 90.006 (describing the medical criteria that must be satisfied before a claim can be filed and the process of serving defendants to initiate a proceeding in court).

questions of whether the line drawn is just and, more importantly, whether such a line will withstand judicial review.

This Comment seeks to answer these questions and examines the constitutionality of Chapter 90 for purposes of addressing asbestos litigation in Texas. In particular, this Comment considers whether setting a threshold level of impairment based on certain medical criteria deprives plaintiffs who fail to meet that criteria of rights guaranteed under the Texas Constitution.[24] First, Part II examines the characteristics of current asbestos litigation and the effect of implementing inactive dockets as part of asbestos litigation reform. Next, Part III analyzes the law's criteria for defining impairment and considers whether the proposed criteria could withstand constitutional scrutiny under the guarantees of open courts,[25] due process,[26] and equal protection.[27] Part IV concludes that the inactive docket created by Chapter 90 would likely be found constitutional by the Texas Supreme Court.

II. INACTIVE DOCKETS AND ASBESTOS LITIGATION REFORM

To justify alternative approaches to the current asbestos litigation system in most states, proponents of reform point to three related inefficiencies. First, the current system encourages lawsuits by plaintiffs that suffer no or minor functional impairment as a result of asbestos exposure, resulting in a paralyzing number of lawsuits with little merit.[28] Second, both the high transaction costs of asbestos cases relative to other types of litigation[29] and the trend of defendant bankruptcies occurring as a result of the volume of asbestos claims produce significant and destabilizing economic repercussions.[30] Third, the

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24. An analysis of whether the inactive docket comports with the U.S. Constitution is outside the scope of this Comment.

25. TEX. CONST. art. I, § 13.

26. *Id.* § 19.

27. *Id.* § 3.

28. *Asbestos Litigation Crisis: Hearings Before the S. Comm. on the Judiciary*, 108th Cong. 25–27 (2003) [hereinafter *Asbestos Crisis Hearings*] (statement of Steven Kazan, Partner, Kazan, McClain, Abrams, Fernandez, Lyons, Farrise, & Greenwood, PLC).

29. Ortiz v. Fibreboard Corp., 527 U.S. 815, 867 (1999) (Breyer, J., dissenting).

30. *Asbestos Crisis Hearings*, *supra* note 28, at 1–2 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary). Four "waves" of asbestos-related bankruptcies have been identified by commentators: First, the bankruptcies of primarily large asbestos manufacturers from 1978 to 1985; second, a wave from 1986 to 1993 consisting of bankruptcies by smaller manufacturers and direct users of asbestos products; third, a wave of declining filings between 1994 and 1997; and finally, fourth, a wave since 1997 characterized by a significant increase in the number of asbestos-related bankruptcies. Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in*

most seriously ill plaintiffs receive only a fraction of the damages awarded through the current system; the majority of the money goes to plaintiffs with little or no impairment and their attorneys.[31] Inactive docket proposals attempt to remedy these issues by addressing one of the most problematic qualities of asbestos litigation—the characteristics of asbestos exposure and disease—in order to distinguish plaintiffs that are impaired from those that are unimpaired or asymptomatic.[32] The effects of inactive dockets to address these inefficiencies are discussed below.

A. The Problem of Unimpaired Plaintiffs' Claims

To justify the implementation of inactive dockets, asbestos litigation reform proponents often point to the high ratio of unimpaired plaintiffs' claims out of the total claims filed.[33] Before examining the nature of these plaintiffs' claims, however, a review of the origins of the asbestos crisis will be instructive. Worldwide exploitation of asbestos fibers began at the end of the nineteenth century; manufacturers generally used asbestos for thermal insulation and fire protection.[34] Global production of asbestos peaked in 1977, but it has continually declined since then.[35] Not surprisingly, the widespread use of asbestos between 1940 and 1979 accounts for the large number of asbestos claims—a time period in which twenty-seven million U.S. workers were exposed to the carcinogenic fibers.[36] Even today, the American Thoracic Society estimates that asbestos still represents a hazard for over 1.3 million American workers.[37] Accordingly, asbestos exposure has been called "the largest single

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Bankrupt Firms, 12 J. BANKR. L. & PRAC. 51, 62–63 (2002).

31. *Asbestos Crisis Hearings*, *supra* note 28, at 2 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary) (claiming that "[n]onmalignant cases get 65 percent of the compensation awards" and criticizing "abusive trial lawyers" who have used asbestos litigation as a "gravy train").

32. *See* Behrens & Parham, *supra* note 10, at 8 (describing how inactive dockets distinguish plaintiffs).

33. *See* CARROLL ET AL., *supra* note 3, at 20 (reporting studies that estimate the percentage of unimpaired plaintiffs to be between sixty-six and ninety percent).

34. ROBERT L. VIRTA, U.S. DEP'T OF THE INTERIOR, ASBESTOS: GEOLOGY, MINERALOGY, MINING, AND USES 5 (2002), *available at* http://pubs.usgs.gov/of/2002/of02-149/of02-149.pdf.

35. *Id.* (claiming more than a twofold decrease in asbestos production based on tonnage).

36. CARROLL ET AL., *supra* note 3, at 13.

37. *See generally* Am. Thoracic Soc'y, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 AM. J. RESPIRATORY & CRITICAL CARE MED. 691, 693 (2004), *available at* http://www.thoracic.org/sections/publications/statements/resources/asbestos.swf.

cause of occupational cancer in the United States and a significant cause of disease and disability."[38] In short, the medical costs of asbestos exposure are staggering, to say the least, and they continue to rise.

Despite the growing evidence of medical problems related to asbestos in the early twentieth century, researchers did not establish a connection between asbestos exposure and various diseases until the 1960s.[39] Soon thereafter, in 1966, the first plaintiff filed an asbestos claim in Beaumont, Texas.[40] Many more asbestos claims followed, and in the next forty years asbestos lawsuits became one of the most pervasive types of litigation in all U.S. jurisdictions.[41] Indeed, the RAND Institute for Civil Justice identifies asbestos litigation as "the longest running mass tort in U.S. history";[42] through the year 2000, over 600,000 claimants had filed asbestos-related lawsuits.[43] Further, new claims have accelerated in the past decade and should continue to do so; in fact, analysts suggest that total asbestos claims could reach up to three million.[44]

Evidence exists, however, that many of these new asbestos plaintiffs are either asymptomatic or suffer only minor physical impairments as a result of exposure.[45] The reasons for the large number of relatively unimpaired plaintiffs' claims are debatable, but generally three interrelated factors have been identified: the long latency period between exposure and discovery of symptoms;[46] the aggressive practices by plaintiffs' lawyers to identify potential asbestos victims;[47] and, in many jurisdictions,

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38. *Id.* at 691.

39. VIRTA, *supra* note 34, at 14.

40. Susan Kostal, *Proposed Trust Fund Could End Bay Area Asbestos Litigation*, S.F. ATTORNEY, Winter/Spring 2005, at 36, 38.

41. CARROLL ET AL., *supra* note 3, at v.

42. *Id.*

43. *Id.* at 40.

44. *Id.* at 41–42, 77 (stating that the annual claims filed against four major asbestos defendants grew from approximately 15,000–20,000 each in the early 1990s to roughly 50,000 each in 2000).

45. *See Asbestos Crisis Hearings*, *supra* note 28, at 26 (statement of Steven Kazan, Partner, Kazan, McClain, Abrams, Fernandez, Lyons, Farrise, & Greenwood, PLC) (submitting testimony that only ten to fifteen percent of plaintiffs suffer from asbestos-related mesothelioma or breathing problems).

46. *See* Am. Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 AM. REV. OF RESPIRATORY DISEASE 363, 365 (1986) (estimating a minimum of fifteen years between asbestos exposure and manifestation of asbestosis).

47. *Asbestos Litigation: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 119–20 (2003) [hereinafter *Asbestos Litigation Hearing*] (statement of Matthew P. Bergman, Partner, Bergman & Frockt).

the running of the statute of limitations at the first sign of physical changes from asbestos exposure.[48]

First, asbestos fibers embedded in the lungs may have a protracted latency period, "extending from about 15 to 60 years," before any effects or adverse conditions develop.[49] The possible conditions resulting from asbestos exposure are varied and include pleural plaques, pleural thickening, asbestosis, lung and certain other cancers, and mesothelioma.[50] Each of these conditions is distinct and generally not progressive,[51] although the presence of a nonmalignant condition (pleural plaques, pleural thickening, and asbestosis) reflects a statistically-significant increase in the possibility of developing mesothelioma and other malignancies.[52] Additionally, nonmalignant conditions may or may not be symptomatic, meaning that these conditions may not impair actual pulmonary function or result in other symptoms in the exposed individual.[53]

Second, the nature of the conditions resulting from asbestos exposure produces aggressive tactics by plaintiffs' attorneys to identify potential plaintiffs, which, in turn, have contributed to a large number of unimpaired plaintiffs' claims.[54] Oft-repeated assertions exist of plaintiffs' attorneys hiring x-ray trucks, manned by unlicensed medical personnel, to perform mass screenings at hotels or union meeting halls.[55] These mass screenings generate inaccurate diagnoses of large numbers of workers with little or no actual illness.[56] Attorneys, however,

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48. *Asbestos Crisis Hearings*, *supra* note 28, at 26 (statement of Steven Kazan, Partner, Kazan, McClain, Abrams, Fernandez, Lyons, Farrise, & Greenwood, PLC).

49. Schuck, *supra* note 10, at 565 n.95 (quoting ANDREW CHURG & FRANCIS H.Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 289 (1988)).

50. *Id.* at 544–45.

51. *See id.* at 545–47 (detailing the differences between each ailment).

52. Am. Thoracic Soc'y, *supra* note 37, at 710–11. *But see Asbestos Crisis Hearings*, *supra* note 28, at 190 (statement of James D. Crapo, M.D., Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center) (stating that nonmalignant impairments have not been identified as a precursor to more serious conditions).

53. *Asbestos Crisis Hearings*, *supra* note 28, at 189 (statement of James D. Crapo, M.D., Professor of Medicine, National Jewish Center and University of Colorado Health Sciences Center).

54. *Asbestos Litigation Hearing*, *supra* note 47, at 119–21 (statement of Matthew P. Bergman, Partner, Bergman & Frockt); COMM'N ON ASBESTOS LITIG., ABA, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 6–8 (2003), *available at* http://www.abanet.org/leadership/full_report.pdf.

55. *Asbestos Litigation Hearing*, *supra* note 47, at 120 (statement of Matthew P. Bergman, Partner, Bergman & Frockt); COMM'N ON ASBESTOS LITIG., *supra* note 54, at 8.

56. COMM'N ON ASBESTOS LITIG., *supra* note 54, at 8–9 (noting that one doctor testified that of the fourteen thousand workers he screened, one hundred percent suffered from asbestosis).

then file hundreds or thousands of cases, mixing seriously ill plaintiffs' claims and unimpaired plaintiffs' claims under a single docket number, a common litigation strategy to force defendants to settle.[57]

Third, the significant number of unimpaired plaintiffs' claims can also be attributed to the fact that in many states, the statute of limitations begins to run at the discovery of any manifestation of asbestos-related disease.[58] At the earliest indication of pleural changes, plaintiffs file suit, despite a lack of impairment, to avoid their claim being time-barred.[59] The variety of possible manifestations of asbestos exposure, questionable screening of exposed workers, and the triggering of the statute of limitations as a result of these screenings have led to a huge volume of unimpaired plaintiffs' claims. This result has produced skyrocketing costs of asbestos litigation, a problem discussed at length in the following section.

B. The Costs of Asbestos Litigation

As alluded to above, the direct and indirect costs of asbestos lawsuits are substantial. The RAND Institute for Civil Justice estimates that $54 billion was spent to defend asbestos cases between 1982 and 2000.[60] Compared to other litigation, asbestos lawsuits are more costly to litigate because of the medical and scientific complexity of the cases and the long time periods between exposure and manifestation.[61] Estimates of the costs required to resolve future claims range from $200 to $275 billion.[62]

The impact of resulting bankruptcy filings by asbestos defendants has also been significant. As a result of the volume and costs of asbestos claims, at least sixty asbestos defendants have filed for bankruptcy with an estimated reduction of investment by these companies totaling $10 billion.[63]

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57. CARROLL ET AL., *supra* note 3, at 22–23.

58. *See, e.g.*, Pustejovsky v. Rapid-American Corp., 35 S.W.3d 643, 653 (Tex. 2000) (recognizing that an asbestos-related cause of action in Texas accrues on the discovery of a "malignant asbestos-related condition [that] is likely work-related").

59. *Asbestos Crisis Hearings*, *supra* note 28, at 26 (statement of Steven Kazan, Partner, Kazan, McClain, Abrams, Fernandez, Lyons, Farrise, & Greenwood, PLC).

60. CARROLL ET AL., *supra* note 3, at 54.

61. Ortiz v. Fibreboard Corp., 527 U.S. 815, 866–68 (1999) (Breyer, J., dissenting); Schuck, *supra* note 10, at 565 n.95 (quoting CHURG & GREEN, *supra* note 49, at 289).

62. AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 4 (2001), *available at* http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf.

63. *See* CARROLL ET AL., *supra* note 3, at 71–74 (identifying sixteen chapter 11 filings in the 1980s, eighteen in the 1990s, twenty-two from 2000 to 2002, and four

Furthermore, the RAND Institute for Civil Justice estimates that these bankruptcies reduced job creation by approximately 128,000 jobs; future totals are estimated at 423,000 jobs lost and lost investment of $33 billion.[64] Because many major asbestos manufacturers have gone bankrupt,[65] hundreds of new defendants, often with only indirect or tenuous relationships to asbestos manufacturing or use, are now being pursued.[66] As a result, more defendants will likely file for bankruptcy without some type of asbestos reform.[67]

C. Distribution of Damages to Plaintiffs with No or Minor Impairment

Even as more money is spent on settlements, commentators argue that only a fraction of settlement or trust dollars goes to claimants who are, in fact, seriously injured by asbestos exposure.[68] If true and combined with the above factors, this situation would lead to a system in which the volume and costs of litigation force defendants into mass settlements with plaintiffs whose injuries would not satisfy either actual injury standards or proof of causation.[69] The settlements, in turn, would encourage new claimants to file claims despite questionable causes of action.[70] It is this cycle of escalating litigation that inactive dockets are intended to correct.

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indeterminable).

64. *Id.* at 74; *see also* Stiglitz et al., *supra* note 30, at 52 (estimating that as a result of asbestos-related bankruptcy, laid-off workers of bankrupt companies lose between $25,000 and $50,000 on average in wages and the remaining workers lose approximately one quarter of their pensions).

65. Prominent companies that have filed for asbestos-related bankruptcy include: UNR Industries, Johns-Manville Corporation, Todd Shipyards, Hillsborough Holdings, Owens Corning, and Babcox and Wilcox. Stiglitz et al., *supra* note 30, at 62–63.

66. *See id.* at 67 (listing forty-three nonasbestos industries in which defendants have been sued); *see also* Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925, 1931 (2002) ("Because there are virtually no first-line asbestos manufacturers (and few of their insurers) left standing, asbestos litigation has moved on to find new, solvent defendants whose connection to asbestos, or the likelihood of being the causal agent for asbestos harms, becomes increasingly attenuated over time.").

67. *Asbestos Crisis Hearings*, *supra* note 28, at 3 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary).

68. *See* Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 385 (1993) (asserting that only forty percent of the approximately $7 billion spent in the 1980s and early 1990s went to asbestos victims); *see also* CARROLL ET AL., *supra* note 3, at 61 (estimating claimants net recovery at forty-three percent).

69. *Asbestos Litigation Hearing*, *supra* note 47, at 120–21 (statement of Matthew P. Bergman, Partner, Bergman & Frockt).

70. Faulk, *supra* note 5, at 951–52.

Proponents present inactive dockets as a kind of cure-all to costly litigation, arguing that inactive dockets ensure that the limited amounts of damages available from defendants go only to those plaintiffs who are truly sick,[71] lessen the burden on the judicial system,[72] and prevent costly bankruptcies that threaten the very fabric of national and state economies.[73] Opponents counter that the criteria used to distinguish impaired from unimpaired plaintiffs are unreasonable and arbitrary, and therefore violate due process and equal protection rights of plaintiffs that are injured but do not meet the medical criteria.[74] They further question the motives behind establishing an inactive docket, arguing that such measures rescue defendants who, at best, ignored the safety risks posed by asbestos and, at worst, intentionally misled the public about the dangers and extent of asbestos exposure.[75]

III. THE CONSTITUTIONALITY OF AN INACTIVE DOCKET IN TEXAS

A. Asbestos Litigation Reform in Texas

Texas has been, and continues to be, a significantly active jurisdiction for asbestos claims.[76] The Texas legislature and the courts have attempted numerous approaches to dealing with the mass of asbestos claims filed in the state. The first significant reform occurred in 1998 when the Texas Supreme Court recognized that the consolidation of trials with requisite commonality was a way to more efficiently resolve asbestos claims.[77] The next year, the Texas Supreme Court upheld two legislative measures intended to reduce the volume of asbestos claims in Texas.[78] The legislature adapted the forum non

71. *Asbestos Litigation Hearing*, *supra* note 47, at 122 (statement of Matthew P. Bergman, Partner, Bergman & Frockt).

72. *See* Schuck, *supra* note 10, at 593–94.

73. *See Asbestos Crisis Hearings*, *supra* note 28, at 3 (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary).

74. *See id.* at 6–11 (statement of Sen. Max Baucus, Member, S. Comm. on the Judiciary) (arguing that no matter how the medical standard is developed, it will arbitrarily cut off some who are injured or are about to be).

75. *See, e.g.*, Association of Trial Lawyers of America, Excerpts from Court Decisions: Conduct of Asbestos Manufacturers, http://atla.org/pressroom/FACTS/asbestos/courtexcerpts.aspx (last visited Feb. 24, 2006) (citing various court statements that held manufacturers were aware of the dangers).

76. *See* CARROLL ET AL., *supra* note 3, at 34 (listing the top five states with the most asbestos filings over various time periods, and highlighting that since 1988, more claims have been filed in Texas than any other U.S. jurisdiction).

77. *In re* Ethyl Corp., 975 S.W.2d 606, 614 (Tex. 1998).

78. Owens Corning v. Carter, 997 S.W.2d 560, 565 (Tex. 1999).

conveniens rule, section 71.051 of the Texas Civil Practice and Remedies Code, which generally allows a court to decline jurisdiction if, in the interest of justice, a claim would be more properly heard in a forum outside the state; the legislature's exception permitted courts to dismiss asbestos claims in the same way as any other claim under the doctrine of forum non conveniens.[79] Nonresident plaintiffs challenged the law as violative of the U.S. Constitution's Privileges and Immunities Clause, but the court rejected this challenge, finding that section 71.051 did not "discriminate between nonresident citizens and nonresident noncitizens."[80] At the same time, the court upheld section 71.052, which allows, on defendant's motion, dismissal of a claim for personal injury from asbestos exposure if the plaintiff was not a Texas resident and if the claim arose outside of Texas.[81]

After these successive court victories, in 2003 the legislature devised a new, more controversial method to hear asbestos-related claims—the Multi-District Litigation Panel ("MDL Panel").[82] The MDL Panel is empowered to direct civil actions that involve one or more common questions of fact to a designated pretrial court for consolidated pretrial hearings.[83] In December 2003, the MDL Panel ordered consolidation of Texas asbestos cases under one judge.[84] Then, in January 2004, the MDL Panel chose the judge and assigned those cases to the 11th District Court, Harris County, the Honorable Mark Davidson presiding.[85]

The effect of the above reforms are relatively minor compared to the potential effect of the inactive docket the legislature recently codified in Chapter 90 of the Texas Civil Practice and Remedies Code. If proponents of inactive dockets are correct, a significant majority of current asbestos claims will almost immediately be dismissed because many plaintiffs would be defined as unimpaired under the statute.[86] This prospect raises significant constitutional concerns of due process and equal protection. And while supporters of an inactive docket

79. *Id.* at 566.

80. *Id.* at 564–65, 571.

81. *Id.* at 565–66, 580, 583.

82. TEX. GOV'T CODE ANN. §§ 74.161–.164 (Vernon 2005).

83. *Id.* § 74.162.

84. Union Carbide v. Adams, 166 S.W.3d 1 (Tex. M.D.L. Panel 2003) (per curiam).

85. *See In re* Union Carbide Corp., 145 S.W.3d 805, 806 n.1 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

86. *See* Faulk, *supra* note 5, at 949 (highlighting that eighty percent of claimants are either mildly impaired or unimpaired).

system have grown in number and influence in recent years,[87] largely due to the volume of asbestos claims filed in Texas,[88] little of their analysis has focused on whether an inactive docket would be valid under the Texas Constitution.[89] The following sections seek to fill that void of analysis and consider whether Chapter 90's utilization of medical criteria to define impairment from asbestos exposure is constitutional under the guarantees of open courts, due process, and equal protection in the Texas Constitution.

B. Defining Nonmalignant Impairment Under Section 90.003

Under section 90.003, a plaintiff is required to provide all defendants with a report, completed by a qualified physician, detailing the plaintiff's medical condition and occupational and exposure history.[90] Defendants may file a motion to dismiss any action by a claimant who fails to meet the reporting requirements or fails to timely file the required report;[91] furthermore, before serving the required report, a plaintiff can request the action be voluntarily dismissed.[92] Either ground results in dismissal without prejudice,[93] and the statute of limitations is tolled until the plaintiff "serves on a defendant a report complying with Section 90.003."[94]

Section 90.003 details the medical standards that a plaintiff claiming a nonmalignant asbestos-related injury (i.e., those in the gray zone between clearly impaired and clearly unimpaired) must meet in order to proceed with her action.[95] Sections 90.003(a)(2)(C) and 90.003(a)(2)(D) provide a "baseline" medical standard that requires both physical symptoms and pulmonary

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87. *See, e.g.*, George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 986–88 (2003) (discussing an inactive docket proposal for Texas legislation); Faulk, *supra* note 5, at 976–78 (urging the Texas judiciary to consider inactive dockets); *see also* Behrens & Parham, *supra* note 10, at 16–19 (proposing a model for inactive dockets, but not particular to Texas).

88. *See* SENATE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 496, 78th Leg., R.S., at 1 (2003) ("It is estimated that over half of the 200,000 asbestos claims pending in the United States have been filed in Texas courts.").

89. *Cf.* Schuck, *supra* note 10, at 587–94 (providing a thorough analysis of inactive dockets and their validity under the U.S. Constitution).

90. TEX. CIV. PRAC. & REM. CODE ANN. § 90.003 (Vernon Supp. 2005).

91. § 90.007.

92. § 90.008.

93. §§ 90.007(c), 90.008.

94. § 16.0031(a).

95. Chapter 90 also provides reporting criteria for suits by plaintiffs with malignant mesothelioma or other malignant cancers. § 90.003(a)(1)(A). Such suits are then prioritized under statute. § 90.010(c).

impairment.[96] In addition, at least ten years must have elapsed between the plaintiff's asbestos exposure and the date of diagnosis.[97] A plaintiff meeting these baseline criteria is defined as impaired. Plaintiffs who cannot satisfy the medical standards of either section 90.003(a)(2)(C) or 90.003(a)(2)(D) may still be defined as impaired if they satisfy slightly varied criteria, which must be verified by a physician with an established physician-patient relationship.[98] Finally, in an action pending in the MDL court, the MDL judge may allow a plaintiff who does not meet any of the listed criteria to introduce credible evidence showing why the criteria listed in section 90.003 are inadequate and that the person is impaired "to a degree comparable" to the level of impairment required by 90.003.[99] Table A in the Appendix to this Comment lists the distinct standards of medical criteria under which a plaintiff may be defined as impaired under the statute.[100]

The controversial aspect of the statute is its explicit determination that a plaintiff not meeting any of the above standards is unimpaired from asbestos exposure—even if physical symptoms exist and the plaintiff experiences some level of pulmonary restriction—and therefore has no cognizable cause of action.[101] Because Chapter 90 gives priority to plaintiffs with malignant conditions and defined levels of impairment, constitutional challenges would likely come from plaintiffs with nonmalignant conditions, such as pleural thickening, pleural plaques, and some asbestosis, that are either asymptomatic or fail to meet the definition of impairment set out in the statute. These challenges could be made on due process and equal protection grounds, as those guarantees are found in the Texas Constitution.

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96. § 90.003(a)(2)(C)–(D).

97. § 90.003(a)(2)(B). The ABA Standard for Non-Malignant Asbestos-Related Disease Claims, in comparison, requires that at least fifteen years have passed between exposure and diagnosis. COMM'N ON ASBESTOS LITIG., *supra* note 54, at 1.

98. § 90.003(c)–(d) (detailing the alternative criteria to be found impaired if the plaintiff fails to satisfy sections 90.003(a)(2)(D) and 90.003(a)(2)(C)(i), respectively). Unlike subsection 90.003(a), subsections 90.003(c) and 90.003(d) apparently do not require the minimum ten years between exposure and the date of diagnosis.

99. *See* § 90.010(f)(2)(c).

100. *See infra* Appendix.

101. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.007 (Vernon Supp. 2005) (stating that a defendant may file a motion to dismiss if the plaintiff fails to meet the standards of section 90.003).

C. Due Process Challenges

The Texas Constitution contains two due process guarantees: article I, section 13 ("open courts guarantee") and article I, section 19 ("due process guarantee"). These sections are distinct; the open courts guarantee is a separate, more specific guarantee than the traditional due process guarantee of section 19.[102] Accordingly, a plaintiff defined as unimpaired by the medical standards could challenge the statute under both guarantees.

1. The Open Courts Guarantee of Article I, Section 13. The open courts guarantee of the Texas Constitution states, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[103] The Texas Supreme Court has interpreted this provision as preventing the legislature from "'abrogat[ing] the right to assert a well-established common-law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.'"[104] This test, commonly referred to as the open courts challenge, consists of two parts: "First, it must be shown that the [plaintiff] has a cognizable common-law cause of action that is being restricted. Second, the [plaintiff] must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute."[105] A court will "consider both the general purpose of the statute and the extent to which the [plaintiff's] right to redress is affected."[106] The court does not judge the wisdom of the legislation, but only assesses whether it unreasonably abrogates access to courts.[107]

a. Did an Asbestos Plaintiff Defined as Unimpaired Under Chapter 90 Previously Have a Recognized Common-Law Cause of Action? In order to meet the first prong of the test, a plaintiff must have had a common-law cause of action.[108] For example, a plaintiff bringing suit under a negligence cause of action would meet this requirement because negligence originated in common

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102. Lecroy v. Hanlon, 713 S.W.2d 335, 340–41 (Tex. 1986).

103. TEX. CONST. art. I, § 13.

104. Owens Corning v. Carter, 997 S.W.2d 560, 573 (Tex. 1999) (quoting Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 261 (Tex. 1994)).

105. Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983).

106. *Id.*

107. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 523 (Tex. 1995) ("Our duty to enforce the open courts guarantee does not allow us to rewrite legislation merely to try to craft a remedy that we might believe to be more inclusive or equitable.").

108. *Sax*, 648 S.W.2d at 666.

law.[109] It is unclear, however, whether asbestos plaintiffs with changes to the tissue of the lungs, but otherwise asymptomatic or unimpaired as defined by section 90.003, meet the actual injury requirements under Texas common law. The issue then becomes whether Texas courts have treated an asbestos-related disease that does not significantly affect functionality as an actionable injury. Put another way, has Texas law previously defined the occurrence of an asbestos-related injury at the manifestation of disease, regardless of impairment, or only when the disease causes impairment?[110]

Texas lacks a statutory definition of injury or harm for personal injury tort actions, but other sources provide some guidance. *Black's Law Dictionary* defines physical injury as "[p]hysical damage to a person's body"[111] and bodily harm as "[p]hysical pain, illness, or impairment of the body."[112] Section 7 of the *Restatement (Second) of Torts* ("*Restatement*") defines "physical harm" as "the physical impairment of the human body."[113] Comment e of section 7 further clarifies the nature of "physical harm," stating, "Where the harm is impairment of the

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109. *See Garcia*, 893 S.W.2d at 521 (stating that common-law remedies for negligence and other actionable injuries will not be unreasonably abridged by statute). A negligence cause of action "has three elements: 1) a legal duty; 2) breach of that duty; and 3) damages proximately resulting from the breach." Praesel v. Johnson, 967 S.W.2d 391, 394 (Tex. 1998). Other common-law actions are found in Chapter 82 of the Civil Practice and Remedies Code, which states that products liability actions can arise "based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(2) (Vernon Supp. 2005). By contrast, because wrongful death is a statutorily created cause of action, inactive docket legislation could not be challenged under the open courts guarantee by a plaintiff with only a wrongful death action. Andress v. MacGregor Med. Ass'n, 5 S.W.3d 855, 859 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

110. Fear of disease from mere exposure to asbestos is not actionable in Texas. *See* Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 93 & n.29 (Tex. 1999) (refusing to recognize a cause of action for distress over asbestos exposure).

111. BLACK'S LAW DICTIONARY 801 (8th ed. 2004).

112. *Id.* at 734.

113. RESTATEMENT (SECOND) OF TORTS § 7(3) (1965). The tentative draft for the *Restatement (Third) of Torts* defines physical harm in the following manner: "'Physical harm' means the physical impairment of the human body or of real property or tangible personal property. The physical impairment of the human body includes physical illness, disease, and death." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 4 (Tentative Draft No. 1, 2001). However, both comment b and the Reporters' Note indicate that such impairment must be detrimental and distinguish this position from that of the *Restatement (Second) of Torts*. *Id.* § 4 cmt. b; *id.* § 4 Reporters' Note cmt. b. Under such a definition, asymptomatic asbestos disease would not be considered physical harm. However, the Author of this Comment has found no published opinion by a Texas court adopting the definition of "physical harm" set out in section 4 of the *Restatement (Third) of Torts*.

body, it is called 'bodily harm.'"[114] Section 15 defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness."[115] Comment a classifies physical impairment as occurring when "the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm."[116]

The above language indicates that under the *Restatement*, asymptomatic disease caused by asbestos exposure should be actionable because exposure has resulted in alteration or change to the body, a conclusion consistent with *Black's* definition of injury as "[p]hysical damage to a person's body."[117] This position was adopted by the Court of Appeals of Ohio in *Verbryke v. Owens-Corning Fiberglas Corp*.[118] In that case, the plaintiff was exposed to the asbestos used by his employer for pipe insulation and after retirement showed pleural thickening of his lungs.[119] The trial court found that he did not exhibit any symptoms of injury as a result of his exposure.[120] However, the appellate court rejected the lower court's decision that harm required impairment and held that a lack of symptoms or impairment does not automatically mean a plaintiff has not been harmed when disease is present.[121]

Other jurisdictions have explicitly or implicitly rejected this reading of the *Restatement*, however, and instead require symptoms or some level of impairment to maintain an asbestos-related cause of action. In *Owens-Illinois v. Armstrong*, Maryland's intermediate appellate court upheld a trial court's instructions directing a jury that it could not award damages based solely on the presence of pleural plaques or pleural thickening without impairment.[122] In doing so, the court explicitly rejected the applicability of section 15 of the *Restatement* for defining injury from asbestos exposure, stating that comment b of section 7 indicates mere change or alteration does not

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114. RESTATEMENT (SECOND) OF TORTS § 7 cmt. e.

115. *Id.* § 15.

116. *Id.* § 15 cmt. a.

117. BLACK'S LAW DICTIONARY 801 (8th ed. 2004).

118. Verbryke v. Owens-Corning Fiberglas Corp., 616 N.E.2d 1162, 1167 (Ohio Ct. App. 1992).

119. *Id.* at 1163.

120. *Id.* at 1165.

121. *Id.* at 1167 ("[W]e note that even if [plaintiff's] disease is asymptomatic it does not necessarily mean he is unharmed in the sense of the traditional negligence action.").

122. Owens-Illinois v. Armstrong, 591 A.2d 544, 560–61 (Md. Ct. Spec. App. 1991) (stating that the court's instruction was error only if "mere alteration" of the pleura was a legally compensable injury and deciding it was not), *rev'd in part on other grounds*, 604 A.2d 47 (Md. 1992).

constitute harm.[123] The court rejected the plaintiffs' argument that section 15 enables actions for asymptomatic disease:

> [The plaintiffs] contend that their pleural scarrings are nonconsented alterations of their bodies and as such are grounds for compensation. In support of their contention, they cite the Restatement (Second) of Torts § 15, comment a (1965) which discusses the topic of "battery" and provides, "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." This is, however, only a partial quote from comment a which continues, "A contact which causes no bodily harm may be actionable as a violation of the right to freedom from the *intentional* infliction of offensive bodily contact." (Emphasis added). Section 15 is inapposite, therefore, because it broadly defines bodily harm only in the context of an action based on the intentional tort of battery.[124]

The Maryland court's reading of the *Restatement* seems incorrect in two ways. First, the court stated that sections 388 and 402A refer to "harm"[125] when they in fact refer to "physical harm."[126] The plain language of the comments in section 7 in defining "physical harm" requires referencing section 15 for a full understanding of the meaning of bodily impairment.[127] Additionally, the court's reading of the second sentence of comment a seems to render meaningless the first part of the comment. Comment a reads:

> There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm. A contact which causes no bodily harm may be actionable as a violation of the right to freedom from the intentional infliction of offensive bodily contacts.[128]

The second sentence, in fact, refers the reader to a distinct cause of action based not on alteration of the structure or function of the body, but rather from a "violation of the right to freedom from the intentional infliction of offensive bodily

123. *Id.* at 561.

124. *Id.*

125. *Id.*

126. RESTATEMENT (SECOND) OF TORTS §§ 388, 402A (1965).

127. *See id.* § 7 cmt. e (referencing section 15's definition of bodily harm).

128. *Id.* § 15 cmt. a.

contacts."[129] Accordingly, the first sentence clearly states that impairment occurs, and therefore bodily harm occurs, if there is any alteration of the structure or function of the body, even if no other harm exists.[130]

Other jurisdictions have also rejected the holding of *Verbryke* without analyzing the meaning of physical harm under section 7 of the *Restatement*. In fact, cases from other state courts point to a trend away from the *Restatement*'s definition of physical harm. These jurisdictions appear to define physical harm as requiring detrimental impairment of the body, the same meaning adopted in the tentative draft for the *Restatement (Third) of Torts*.[131] In *Giffear v. Johns-Manville Corp.*, the Superior Court of Pennsylvania considered whether asymptomatic asbestos-related disease could sustain an action for physical injuries.[132] Despite extensive pleural thickening and plaques,[133] the court rejected the plaintiff's assertion, stating that, as a matter of law, pleural thickening, without impairment or physical symptoms, is noncompensable.[134] The court continued,

> While we sympathize with [plaintiff's] disturbing discovery, his diagnosis does not warrant compensation. Where we cannot find that one has suffered a symptomatic injury, how is it possible to assess damages? Had [plaintiff] suffered from discernible physical symptoms, a functional impairment or disability resulting from the pleural thickening, the law, supported by the Commonwealth's public policy and economic reason, would clearly recognize that his injury would entitle him to an award of damages.[135]

The court later extended its holding in *Giffear*, stating, "Shortness of breath alone is not a compensable injury . . . because it is not a discernible physical symptom, a functional impairment, or a disability."[136]

Other courts have similarly rejected the notion that unimpaired plaintiffs have a cause of action. The Arizona Court

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129. *Id.*

130. *See id.*

131. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 4 cmt. b (Tentative Draft No. 1, 2001); *id.* § 4 Reporters' Note cmt. b; *see supra* note 113 (detailing the *Restatement (Third)* definition of "physical harm").

132. Giffear v. Johns-Manville Corp., 632 A.2d 880, 881–82 (Pa. Super. Ct. 1993).

133. *Id.* at 882–83.

134. *Id.* at 884.

135. *Id.* at 887.

136. Taylor v. Owens-Corning Fiberglas Corp., 666 A.2d 681, 687 n.2 (Pa. Super. Ct. 1995).

of Appeals rejected claims of plaintiffs who were exposed to asbestos but manifested no effects.[137] The court acknowledged that the inhaled asbestos fibers were changing the tissue of the lungs and that some of the plaintiffs would likely die as a result, but the threat of this future harm was insufficient to sustain a cause of action absent physical impairment.[138] The U.S. Court of Appeals for the Third Circuit, in denying a cause of action under the Federal Employers' Liability Act (FELA) to unimpaired plaintiffs, articulated the reasoning of many courts for requiring plaintiffs to show actual impairment before recognizing a cause of action:

> We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.
>
> Moreover, we are persuaded that a contrary rule would be undesirable as applied in the asbestos-related tort context. If mere exposure to asbestos were sufficient to give rise to a F.E.L.A. cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious that proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do. Requiring manifest injury as a necessary element of an asbestos-related tort action avoids these problems and best serves the underlying purpose of tort law: the compensation of victims who have suffered. Therefore we hold that, as a matter of federal law, F.E.L.A. actions for asbestos-related injury do not exist before manifestation of injury.[139]

Unfortunately, most Texas asbestos cases do not include detailed information regarding the impairment levels of plaintiffs. Nevertheless, the Texas Supreme Court and other Texas courts seemingly have defined injury to require merely the presence of disease caused by asbestos exposure rather than impairment from the disease, thus following the definition of injury in the *Restatement* and in *Verbryke*. Furthermore, the definition of injury from the proposed *Restatement (Third) of*

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137. Burns v. Jaquays Mining Corp., 752 P.2d 28, 30 (Ariz. Ct. App. 1987).

138. *Id.*

139. Schweitzer v. Consol. Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985).

Torts, requiring detrimental impairment, does not appear to have been adopted by any Texas courts.

Accordingly, in Texas, a legal injury generally accrues, and the statute of limitations begins to run, as soon as a plaintiff suffers an injury, regardless of whether all resulting damages have occurred.[140] In *Childs v. Haussecker*, the Texas Supreme Court recognized a discovery rule for latent occupational diseases, thereby tolling the statute of limitations until a reasonable person should have known of the wrongful act and resulting injury.[141] The court stated, however, that when those two requirements are satisfied, the cause of action accrues regardless of the level of seriousness of the injury.[142] Regarding asbestos litigation, the court's holding would seem to indicate that, prior to Chapter 90, a plaintiff with both the knowledge of wrongful exposure and the development of asbestos-related disease would have a cause of action against which the statute of limitations began running, regardless of whether the disease was asymptomatic.

Although published authority on this issue is sparse, various cases in Texas support the conclusion that plaintiffs with nonmalignant or asymptomatic asbestos-related disease had a cause of action prior to the enactment of Chapter 90. In *Fibreboard Corp. v. Pool*, the Sixth District Court of Appeals of Texas overturned an award of future damages to a plaintiff who had suffered only pleural thickening, but did not overrule the award of compensatory damages.[143] The court, thus, impliedly recognized that the plaintiff had suffered some compensable harm.

In *Temple-Inland Forest Products Corp. v. Carter*, the Texas Supreme Court considered whether a plaintiff who had been clearly exposed to asbestos, but had not manifested any related disease, had a cause of action for emotional distress arising from his fear of getting cancer in the future.[144] In upholding summary judgment for the defendants, the court distinguished the *Carter* plaintiffs, who had been exposed to asbestos but did not suffer physical conditions of any kind, from those in *Pool*.[145] The court

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140. S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) (citing Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994)).

141. Childs v. Haussecker, 974 S.W.2d 31, 36–37 (Tex. 1998).

142. *See id.* at 40–41 ("The seriousness of a personal injury need not be fully apparent or even fully developed in order to commence the statute of limitations.").

143. Fibreboard Corp. v. Pool, 813 S.W.2d 658, 681–82, 696 (Tex. App.—Texarkana 1991, writ denied).

144. Temple-Inland Forest Prods. Corp. v. Carter, 993 S.W.2d 88, 89 (Tex. 1999).

145. *Id.* at 94.

described the *Pool* plaintiffs, including the one with only pleural disease, as all suffering from "serious asbestos-related injuries."[146]

In *Pustejovsky v. Rapid-American Corp.*, the Texas Supreme Court considered whether a plaintiff could bring an action for mesothelioma after he had settled an action for asbestosis several years earlier with a different defendant.[147] In rejecting the single-action rule, the court's language focused on the presence of disease as the point of injury.[148] The court stated, "We hold that a person who sues on or settles a claim for a non-malignant asbestos-related disease with one defendant is not precluded from a subsequent action against another defendant for a distinct malignant asbestos-related condition."[149] This holding is consistent with cases involving silica exposure in which the statute of limitations was held to be tolled until discovery of the disease.[150] Again, these cases arguably imply that existence and diagnosis of an asbestos-related condition, and not impairment from the condition, enabled a plaintiff to bring a cause of action under Texas common law prior to Chapter 90.

The constitutionality of minimum impairment levels as a requirement for recovery was examined by the Texas Supreme Court in *Texas Workers' Compensation Commission v. Garcia*, but the holding provides little guidance in the context of asbestos cases.[151] In *Garcia*, the court considered the open courts guarantee regarding impairment levels defined by the legislature that determined whether an injured employee could receive disability income under the Workers' Compensation Act.[152] The legislature changed the statute to require a level of impairment of fifteen percent, and the plaintiff challenged the statute as an inadequate remedy to his common-law negligence claim.[153] The court held that establishing a relationship between benefits and a minimal level of impairment was within the legislature's discretion.[154]

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146. *Id.*

147. Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 644–45 (Tex. 2000).

148. *See id.* at 651–53 (discussing the long latency period of occupational diseases and recognizing that distinct causes of action accrue when each disease manifests itself).

149. *Id.* at 653.

150. *See, e.g.*, Childs v. Haussecker, 974 S.W.2d 31, 40–41 (Tex. 1998) (deferring accrual of a cause of action until "a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related").

151. Tex. Worker's Comp. Comm'n v. Garcia, 893 S.W.2d 504 (Tex. 1995).

152. *Id.* at 520.

153. *Id.* at 510, 514, 520.

154. *Id.* at 522.

The Texas Supreme Court's holding in *Garcia* does not clarify this issue as it relates to asbestos litigation. The facts and considerations in *Garcia* are much different than those of a plaintiff with an asbestos-related disease. First, the level of impairment standard related only to one type of compensation within the structure of workers' compensation—supplemental income benefits.[155] Compensation for all medical expenses and some income benefits were still available without regard to impairment level.[156] Additionally, employees may opt out of workers' compensation.[157] Finally, while asbestos litigation is an adversarial proceeding, a workers' compensation claim is administrative in nature.[158] Therefore, *Garcia* appears to provide little guidance regarding an open courts challenge on inactive docket legislation.[159]

Based on the above holdings, it seems likely that a plaintiff with asymptomatic asbestos-related disease would meet the first prong of the open courts guarantee. Certainly plaintiffs who are functionally affected in any way, but fail to meet any of Chapter 90's medical standards would have had a common-law cause of action prior to September 1, 2005, thus satisfying the first prong of the open courts test. Additionally, plaintiffs with mere physical alterations of the lungs would appear to have had a cognizable claim under the *Restatement*'s definition of injury and under prior Texas law, and therefore would also satisfy the first prong of the test.

b. Is Use of Medical Standards to Define Impairment for Asbestos Plaintiffs Unreasonable and Arbitrary? The second prong of the open courts test requires showing that the restriction of the plaintiff's cause of action "is unreasonable or arbitrary when balanced against the legislative purpose and basis of the statute."[160] A strong presumption exists that a legislative act is constitutional, and the party challenging the legislation bears the burden of proving otherwise.[161] Accordingly,

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155. *Id.* at 514.

156. *See id.* at 513 (mandating four levels of income benefits, two of which were not related to impairment level).

157. TEX. LAB. CODE ANN. § 406.034(b) (Vernon 1996).

158. *See id.* § 402.001 (detailing the administrative structure of the Texas Workers' Compensation Commission).

159. However, *Garcia* is relevant in assessing the constitutionality of inactive dockets under other provisions of the Texas Constitution. *See* discussion *infra* Parts III.C.2 and III.D (regarding due process and equal protection, respectively).

160. Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983).

161. *Id.* at 664.

the law will be upheld if the legislative purpose of the statute reasonably outweighs the individual's right of access to court.[162]

A plaintiff would likely attack the reasonableness of Chapter 90's medical criteria defining impairment because the standards employed would characterize some percentage of plaintiffs with actual injury as unimpaired.[163] Controversy exists regarding what constitutes an appropriate medical standard for determining when and whether asbestos exposure results in physical impairment.[164] The medical standards of Chapter 90 appear to be based on the *ABA Standard for Non-Malignant Asbestos-Related Disease Claims* ("ABA Standard"), although Chapter 90 does diverge from the ABA Standard in several areas.[165] The American Medical Association (AMA) and the American Thoracic Society (ATS) have also published standards for assessing nonmalignant impairment from respiratory diseases.[166] These medical criteria thresholds may provide objective means for assessing impairment, but even those who support the use of medical criteria disagree on whether impairment criteria are normalized between the ABA, ATS, and AMA standards so that a plaintiff is consistently found impaired or unimpaired under each.[167] Evidence also exists showing functional impairment from asbestos-related disease can be lower than the ABA Standard

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162. LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986); *see also* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 523 (Tex. 1995) (noting that the benefits offered by the Texas Workers' Compensation Act provided an adequate substitute for common-law negligence claims).

163. *See* Letter from Thomas R. Martin, President, Am. Thoracic Soc'y, to Dennis Archer, President-Elect, ABA 1 (2003) [hereinafter Letter from Martin to Archer] (on file with author) (expressing "extreme concern with the medical criteria" adopted by the ABA to determine whether an asbestos plaintiff is impaired). For example, a plaintiff with pleural thickening, such as the plaintiff in *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 681 (Tex. App.—Texarkana 1991, writ denied), would almost certainly be defined as unimpaired under Chapter 90. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 90.003(a)(2)(C)–(D) (Vernon Supp. 2005) (requiring a plaintiff to show pulmonary impairment in addition to "pleural thickening").

164. *See Asbestos Crisis Hearings*, *supra* note 28, at 193 (statement of Laura Welch, M.D., Medical Director, Center to Protect Workers Rights) (arguing that the proposed federal guidelines "deviate in some significant ways" from those used by the American Medical Association for evaluating impairment for lung disease).

165. *Compare* § 90.003(a)(2)(C)(i)(a) (requiring "bilateral small irregular opacities . . . with a profusion grading of 1/1 or higher"), *with* COMM'N ON ASBESTOS LITIG., *supra* note 54, at 1 (recommending a standard of "bilateral small irregular opacities . . . graded 1/0 or higher").

166. AM. MED. ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 107–13 (Linda Cocchiarella & Gunnar B.J. Andersson eds., 5th ed. 2000); Am. Thoracic Soc'y, *supra* note 37.

167. *See* Letter from Martin to Archer, *supra* note 163, at 1–2 (expressing concern that the ABA's current medical criteria for asbestosis and pleural thickening are "exclusionary" and "greater [than] what is in common medical practice").

and can manifest in forms not addressed in the ABA Standard, such as chronic pain and obstructive abnormalities.[168] These differences might lead some to question whether the medical criteria are, in fact, objective or rather are arbitrary designations of impairment unrelated to a plaintiff's actual medical condition.[169] An unimpaired plaintiff could similarly argue that the Chapter 90 medical criteria are arbitrary and unreasonable.

In past cases, Texas courts have also held that a statute fails the second prong of the open courts guarantee when the legislature makes the common-law cause of action dependent on an impossible condition.[170] An unimpaired plaintiff could argue that the proposed medical criteria create an impossible condition by permanently suspending her common-law claims if her disease never progresses to the levels established in the statute. In *Sax v. Votteler*, the Texas Supreme Court considered a statute limiting children under the age of six from suing for medical malpractice after their eighth birthday.[171] The court found this limitation to be unreasonable under the open courts guarantee because the child could not bring suit on her own, and if the parents or guardians of the child negligently failed to take action on the child's behalf within the time provided by the statute, the child would both be precluded from asserting a cause of action under the statute and precluded from suing her parents on account of their negligence.[172] The court held so despite finding that the purpose and basis of the statute was legitimate.[173]

However, the statute in *Sax* abrogated a cause of action by accelerating the limitations period for the malpractice action.[174] The plaintiff already had a cause of action that was impermissibly altered by the statute at issue.[175] In contrast, Chapter 90 provides threshold standards that define a plaintiff's cause of action. The legislature has within its power the ability "to define the parameters of a cause of action."[176] As such, the

168. *See* Am. Thoracic Soc'y, *supra* note 37, at 695, 697, 702, 708 (explaining possible symptoms of various asbestos-related conditions).

169. *See, e.g.*, *Asbestos Crisis Hearings*, *supra* note 28, at 193–94 (statement of Laura Welch, M.D., Medical Director, Center to Protect Workers Rights) (arguing that the standard should be "soundly based in medicine" because, as is, the Chapter 90 medical criteria could leave some "medically" impaired plaintiffs without a statutory cause of action).

170. Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984).

171. Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983).

172. *Id.* at 666–67.

173. *Id.* at 667.

174. *Id.* at 663.

175. *Id.* at 667.

176. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 528 (Tex. 1995).

statute does not create the kind of impossible condition that Texas courts have held violates the open courts guarantee.

Additionally, considering the cost and complexity of asbestos litigation, the trend in other jurisdictions to define physical harm as detrimental impairment, and the high level of deference afforded the legislature under this analysis, the Texas Supreme Court would almost certainly reject the assertion that Chapter 90's medical standards are unreasonable and arbitrary. In light of the rationalization outlined in the enrolled version of the bill—eliminating costly bankruptcies, ensuring damages remain available for the most seriously injured plaintiffs, and reducing frivolous lawsuits—the court would likely determine that legislative justification for the statute outweighs the rights of plaintiffs with relatively minor injuries.[177] This conclusion is further justified by the statute's tolling of the statute of limitations for all claims that do not meet the medical standards.[178] Additionally, the MDL exception provides a kind of catch-all mechanism—albeit a difficult one to invoke—for plaintiffs with serious health problems who do not, for whatever reason, meet the pulmonary impairment standards of section 90.003.[179] Accordingly, an open courts challenge by an unimpaired plaintiff would fail.

2. The Due Process Guarantee of Article I, Section 19. Article I, section 19 of the Texas Constitution states that "[n]o citizen . . . shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."[180] Unimpaired asbestos plaintiffs may argue that an inactive docket statute deprives them of their right to seek redress for personal injury or wrongful death, thus violating the due process guarantee.

In considering a due process challenge, a Texas court "balance[s] the gain to the public welfare resulting from the legislation against the severity of its effect on personal and property rights."[181] A law violates the due process provision

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177. Tex. S.B. 15, 79th Leg., R.S., § 1(g), (h), (n), 2005 Tex. Gen. Laws 169, 169–70, *available at* http://www.capitol.state.tx.us/data/docmodel/79r/billtext/pdf/SB00015F.PDF (enrolled version of bill).

178. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.0031(a) (Vernon Supp. 2005) (stating that section 90.003 claims do not accrue until the claimant serves a defendant with a report that meets the statutory requirements).

179. *Id.* § 90.010(f)(2).

180. TEX. CONST. art. I, § 19.

181. *In re* B_____ M_____ N_____, 570 S.W.2d 493, 503 (Tex. Civ. App.—Texarkana 1978, no writ).

"when it is arbitrary or unreasonable," and a law is unreasonable "when the social necessity the law is to serve is not a sufficient justification of the restriction of the liberty or rights involved."[182] The full parameters of section 19 were articulated by the Texas Supreme Court in *State v. Richards*:

> The guarantee of due process does not deprive the state of the right to take private property by the exercise of such power in a proper and lawful manner, but it is essential that the power be used for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists. A large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. If there is room for a fair difference of opinion as to the necessity and reasonableness of a legislative enactment on a subject which lies within the domain of the police power, the courts will not hold it void.[183]

The Fourth District Court of Appeals of Texas has articulated the factors of the due process analysis as follows: "(1) The object of the law must be within the scope of the legislature's police power; (2) the means used must be appropriate and reasonably necessary to accomplish that object; and (3) the law must not operate in an arbitrary or unjust manner."[184] If the statute in question does not involve a fundamental right, then a rational basis for the statute will satisfy constitutional due process requirements, meaning the law "'must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'"[185]

In *Garcia*, while holding that the fifteen-percent impairment requirement did not violate the due process guarantee, the Texas Supreme Court stated, "Under any articulation, however, the [Workers' Compensation] Act's use of impairment in general and the 15 percent impairment threshold for supplemental income benefits in particular is sufficiently rational and reasonable to

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182. *Id.*

183. State v. Richards, 301 S.W.2d 597, 602 (Tex. 1957).

184. Tex. Workers' Comp. Comm'n v. Garcia, 862 S.W.2d 61, 75 (Tex. App.—San Antonio 1993), *rev'd on other grounds*, 893 S.W.2d 504 (Tex. 1995).

185. Lens Express, Inc. v. Ewald, 907 S.W.2d 64, 69 (Tex. App.—Austin 1995, no writ) (emphasis omitted) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

meet constitutional due course requirements."[186] The Texas Supreme Court would likely arrive at the same conclusion in a due process analysis regarding impairment requirements in an inactive docket statute. As stated earlier, the legislature has within its power the ability "to define the parameters of a cause of action."[187] As with an open courts challenge, the court would in all probability determine that the means and operation of the inactive docket are reasonable. Considering the enormous volume and cost of asbestos litigation, the recent acceleration of filings in Texas, and arguments that unimpaired plaintiffs get the majority of asbestos damages, the court would likely find that the government's interest in the general welfare outweighs the private rights of unimpaired asbestos victims.

D. An Equal Protection Challenge

An inactive docket statute could also be challenged on equal protection grounds. Article I, section 3 of the Texas Constitution reads, "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services."[188] The equal protection clause of the Texas Constitution, like that of the U.S. Constitution, prohibits the legislature from singling out and discriminating against a particular class of persons without a legitimate basis.[189] However, the legislature does have "broad power to make classifications" that further the public interest.[190] The Civil Appeals Court of Texas in *Houston Chronicle Publishing Co. v. City of Houston* articulated the three factors of an equal protection inquiry, which include:

> [T]he character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. If fundamental rights are affected, the classification becomes suspect, and the state must show that the classification is necessary to promote a compelling state interest. If other interests are affected, then the state must show that the classification is rationally related to a permissible purpose of the

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186. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995).

187. *Id.* at 528.

188. TEX. CONST. art. I, § 3.

189. Burroughs v. Lyles, 181 S.W.2d 570, 574 (Tex. 1944).

190. State *ex rel.* Grimes County Taxpayers Ass'n v. Tex. Mun. Power Agency, 565 S.W.2d 258, 266 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ dism'd).

> legislation, such that similarly situated persons are treated alike.[191]

An inactive docket statute would meet the elements of an equal protection inquiry and therefore would likely be constitutional. The statute would create a classification of individuals deemed unimpaired who would then be prevented from bringing suit until they met the standards for impairment. The classification involves neither a suspect class nor a fundamental right.[192] Consequently, a court will uphold the classification if it is rationally related to the intended purpose of the statute.[193]

The legislature's purposes in enacting inactive docket procedures—reducing frivolous lawsuits, increasing payments to plaintiffs who are truly ill, and limiting the economic impact of defendant costs and bankruptcies—justify the abrogation of claims by plaintiffs with no or minor symptoms from asbestos exposure. Again, *Garcia* provides some guidance regarding impairment levels and equal protection. The *Garcia* court held that distinguishing benefits based on the level of impairment was rationally related to the State's purpose of ensuring money went to those most debilitated by workplace accidents or illnesses.[194] The court stated,

> It was not irrational for the Legislature to distinguish between moderately severe impairment likely to interfere with long-term employment from less severe impairment. Setting the threshold at 15 percent is a rational means of accomplishing this purpose. Peter Barth, an economist specializing in compensation issues and former executive director of the National Commission on State Workmen's Compensation Laws, testified that the 15 percent threshold "culls out those impairments that are not very serious . . . [leaving] supplemental income benefits for workers with more serious impairments."[195]

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191. Houston Chronicle Publ'g Co. v. City of Houston, 620 S.W.2d 833, 838 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (citation omitted).

192. *See* Stewart v. State, 13 S.W.3d 127, 131 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (identifying "suspect" classifications as those "based upon race, national origin, gender, or illegitimacy," and fundamental rights as "the right to privacy, the right to vote, and those rights guaranteed by the First Amendment" (footnotes omitted)).

193. *Id.* at 131–32.

194. Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 524–25 (Tex. 1995).

195. *Id.* at 524 (alterations in original). Additionally, other jurisdictions have similarly held that the use of a standard for determining asbestos-related impairment satisfies equal protection requirements. *See, e.g.*, Wright v. Leggett & Platt, No. 04CA008466, 2004 WL 2895785, at *3–4 (Ohio Ct. App. Dec. 15, 2004) (holding that the

Unlike the application of *Garcia* to the open courts inquiry, the differences between the administrative structure of the Workers' Compensation Act and the adversarial nature of asbestos litigation do not render *Garcia* irrelevant for assessing whether Chapter 90 is constitutional under the equal protection guarantee. The Texas Supreme Court has expressed a high level of deference to the legislature when examining the rationality of a statutory classification.[196] Even if in practice the classification results in some level of inequality, the court will defer to the legislature's decision although imperfect or if the court believes the same end could have been achieved through better means.[197] As the Court in *Garcia* explained, "That a 15 percent impairment does not perfectly correspond to occupational disability does not render the threshold invalid under the equal protection clause."[198] Therefore, the class of unimpaired plaintiffs created by Chapter 90 would probably not violate the equal protection clause of the Texas Constitution because a rational basis exists for using impairment criteria to achieve the public benefit of asbestos reform.

IV. CONCLUSION

The problems posed by asbestos litigation are undeniable. The volume and cost of claims continue to accelerate even as the pool of available compensation shrinks due to asbestos-related bankruptcies.[199] In response, many jurisdictions have implemented inactive dockets as an innovative approach to the current mass of asbestos claims.[200] In the end, the effectiveness of inactive dockets seems to lie somewhere between the opinions of its proponents and those of its detractors. Although plaintiffs argue that any kind of asbestos reform denies access to the

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Ohio statute's requirement of three items of evidence did not violate the Ohio Constitution's equal protection clause because the statute had a rational basis for distinguishing asbestosis from other diseases).

196. *See Garcia*, 893 S.W.2d at 524 (holding that the legislature need not articulate reasons for a particular classification to satisfy equal protection requirements).

197. *See* Mauldin v. Tex. State Bd. of Plumbing Exam'rs, 94 S.W.3d 867, 873 (Tex. App.—Austin 2002, no pet.) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.").

198. *Garcia*, 893 S.W.2d at 524.

199. *See supra* notes 40–44, 69–70 and accompanying text (documenting the problems of escalating asbestos litigation).

200. *See supra* notes 12–17 (listing those jurisdictions that have done so).

judicial system, evidence suggests that a significant percentage of claims are unwarranted and drain damages away from those with real injuries.[201] The mass screenings and questionable medical assessments by some plaintiffs' attorneys are clearly unethical and should be eliminated. On the other hand, one does not have to be particularly cynical to think that some defendants will benefit from asbestos reform at the expense of victims.

The discussion above points to the deficiencies of the current system for resolving asbestos claims, deficiencies that legislation such as Chapter 90 is intended to address. The intent of Chapter 90 is to provide a workable solution for asbestos litigation: A solution that prioritizes the claims of those with the most serious illnesses, protects defendants from unwarranted claims, protects general economic well-being, and preserves the right of redress to those who have been less seriously injured. Considering these general aims and the enormous expense that has resulted from asbestos claims, Chapter 90 would almost certainly survive scrutiny under the guarantees of open courts, due process, and equal protection of the Texas Constitution. Additionally, the statute requires the MDL Court to report on the effectiveness of the inactive docket system by 2010,[202] a requirement that will hopefully ensure that the statute operates in the equitable manner in which it is intended. Although not a perfect solution, Chapter 90 will likely be seen by the Texas Supreme Court as a reasonable remedy to the complex and troubling malady of asbestos litigation.

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201. *See supra* notes 45–48 and accompanying text (identifying the causes for the large number of claims filed by unimpaired plaintiffs).

202. TEX. CIV. PRAC. & REM. CODE ANN. § 90.010(k) (Vernon Supp. 2005).

APPENDIX

Standards by which a plaintiff may be defined as impaired under Texas Civil Practice and Remedies Code, Chapter 90.

Section	Physical Symptoms Required	Pulmonary Impairment Required
90.003(a)(2)(C) ("baseline standard")	Quality 1 or 2 chest x-ray read by a certified B-reader showing either: Bilateral small irregular opacities (s, t, or u) with a profusion grading of 1/1 or higher for an action filed on or after May 1, 2005 (1/0 for an action filed before May 1, 2005) *Or* Bilateral diffuse pleural thickening graded b2 or higher including bunting of the costophrenic angle *Or* Pathological asbestosis graded 1(B) or higher	Forced Vital Capacity (FVC) below the normal limits of normal or 80 % of prediction and FEV1/FVC ratio of (using actual values) at or above the lower limit of normal or at or above 65 % *Or* Total Lung Capacity (TLC), by plethysmography or timed gas dilution, below the lower limit of normal or below 80 % of predicted
90.003(c)(2)–(3) ("alternative criteria 1")	Quality 1 or 2 chest x-ray read by a certified B-reader showing bilateral small irregular opacities (s, t, or u) with a profusion grading of 2/1 or higher	Physician verification that the exposed person has a restrictive impairment from asbestosis and provides the specific pulmonary test findings
90.003(d)(2)–(3) ("alternative criteria 2")	If radiological findings do not meet the requirements of 90.003(a)(2)(C), a computed tomography scan or high-resolution computed tomography scan showing bilateral pleural disease or bilateral parenchymal	Diffusing capacity of carbon monoxide below the lower limits of normal *And Either* FVC below the normal limits of normal or 80 % of prediction and TLC, by plethysmography or timed gas dilution,

	disease consistent with asbestos exposure	below the lower limit of normal or below 80 % of predicted *Or* FVC below the normal limits of normal or 80 % of prediction and FEV1/FVC ratio of (using actual values) at or above the lower limit of normal or at or above 65 %
90.010(f)(2) ("MDL Exception")	None	Sufficient credible evidence for fact finder to reasonably conclude that the exposed person is physically impaired to a degree comparable to level of impairment designated in Section 90.003