Conversations With...

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The Honorable Dick Thornburgh
William Gallagher
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Robert Vagley

The Issue: Asbestos Litigation

In the past two decades, asbestos litigation has spawned over 600,000 claims for damages filed in American courts against over 6,000 defendants. To date, these defendants have paid out over $20 billion in damages. Nearly seventy companies have gone bankrupt under the crushing weight of asbestos lawsuits, twelve in just the last year. The overwhelming number of claims has inspired courts to cast aside basic notions of due process and centuries of tort law tradition in an effort to clear their dockets of asbestos cases.

There is broad agreement that asbestos litigation in America has plunged the legal system and free enterprise into crisis, but no solutions seem forthcoming. The U.S. Supreme Court has been repeatedly asked to address the issues, but has responded each time that it is Congress' responsibility to act. Congress, though intently examining the problem at the time this publication went to press, has not yet responded with reform.

In this inaugural edition of WLF's CONVERSATIONS WITH publication series, former United States Attorney General Dick Thornburgh leads a discussion on the critical issues and controversies arising out of the constantly shifting landscape of asbestos litigation. The conversation addresses ongoing efforts in the courts, Congress, and state legislatures to bring sanity to the asbestos litigation crisis; its root causes; and its impact on companies of all sizes.

The Honorable Dick Thornburgh: Victor, why don't we get started with a few general questions for you. Even though medical evidence demonstrates that asbestos-related illnesses are on the decline, asbestos litigation is on the rise, with damage awards higher than ever and lawsuits being filed against companies that never manufactured asbestos. Why haven't the number of cases ebbed along with the reduction in illnesses?

Victor Schwartz: The number of asbestos cases has risen because some courts have not acted as good gatekeepers against baseless litigation. They have lowered barriers on the admissibility of scientific evidence, declined to allow careful depositions of plaintiffs, consolidated cases that are not alike (for example, people who are sick are grouped with plaintiffs who are unimpaired), and have not required careful proof that a specific defendant has been at fault. With the signal going out to plaintiffs' lawyers that normal barriers of litigation have been lowered, an onslaught of cases has been the natural and expected result.[1]

Governor Thornburgh: What makes asbestos litigation different from other mass tort litigation, such as tobacco?

Mr. Schwartz: Asbestos litigation for people who are really hurt is different from tobacco litigation because at the time of exposure the plaintiffs knew absolutely nothing about the risks involved with asbestos. In tobacco, plaintiffs are generally aware of risks associated with smoking. Second, so-called "victims" in asbestos cases were working in their jobs – engaging in constructive and meaningful activities. Juries see smoking, drinking, and

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Robert Vagley

eating fast food as activities associated with pleasure. Asbestos victims garner much more sympathy with juries than smokers.

Governor Thornburgh: Bob Vagley, let's have you weigh in on that question. What are your thoughts from an insurer's perspective?

Robert Vagley: Asbestos differs in both size and scope from other mass tort problems. Most mass torts tend to stabilize over time, but with asbestos, the reverse has been true. Each year, more and more asbestos claims are being filed – and the litigation web is ensnaring increasing numbers of peripheral defendants. The most striking thing about these new claims is that the vast majority are being filed on behalf of plaintiffs who do not exhibit any signs of illness or injury. This combination of factors has led to an unprecedented and accelerating number of defendant company bankruptcies.

The existing situation is patently unfair. Plaintiffs who are really sick – those with mesothelioma, for example – may find it impossible to obtain any compensation at all, or find their tort recoveries delayed and greatly diminished (ultimately, many victims receive only pennies on the dollar compared to their initial awards). Meanwhile, unimpaired claimants may recover amounts ranging from several thousand to several million dollars (this huge range in itself is indicative of the random nature of asbestos justice). On the defendant side, asbestos liability has led to nearly 70 bankruptcy filings, costing jobs, health benefits, and retirement security for tens of thousands of workers. Many of these companies would not have been forced into bankruptcy had it not been for the overwhelming number of unimpaired claims.

The only winners in the existing litigation system are lawyers who represent unimpaired plaintiffs. They have successfully created a real "growth industry" by actively recruiting unimpaired plaintiffs, and they will fight to maintain their profit center, even if it comes at the direct expense of individuals dying of mesothelioma. V.J. Dowling, a well-known insurance industry analyst, summed up the situation we are now experiencing: "While prior analysis had been based upon a 'medical model' (based on exposure to asbestos), the reality is that the lawyer-driven asbestos litigation field is better viewed by an 'economic model' [where the deepest pockets pay]."

Governor Thornburgh: How has asbestos litigation especially impacted the insurance industry?

Mr. Vagley: Asbestos is the most significant and difficult mass tort issue facing the property/casualty insurance industry and our policyholders. Actuarial experts estimate that payments to individuals exposed to asbestos in the U.S., along with related expenses, ultimately could total $200 billion or more. These costs will be shared among policyholders, U.S. insurers/reinsurers, and foreign insurers/reinsurers and ultimately will be reflected in the cost of commercial insurance. This is a problem we are facing with our policyholders, and we are working with our policyholders toward constructive solutions.

Current loss estimates are nearly two-thirds higher than those developed only a few years ago. This is reflective of the recent claim surge, particularly among claimants who show no signs of asbestos-related disease but nonetheless are seeking large awards. Where successful, such awards often come at the expense of those who already are desperately ill. Moreover, now that almost all original asbestos manufacturers have gone bankrupt, the plaintiffs' bar is expanding its target list of companies to include virtually any company that had a connection with asbestos, no matter how tenuous. Even companies that once owned a subsidiary which prior to the time they owned it may have used, sold, or distributed products containing asbestos, are now being targeted. This represents a tremendous portion of the U.S. economy. To date, approximately 8,400 companies have been sued.

Governor Thornburgh: Bill Gallagher, your company seems quite unfortunately to be the ultimate example of the "peripheral" asbestos liability defendant. How did Crown Cork &

1. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247 (2000).

Seal get embroiled in this litigation?

William Gallagher: Crown Cork & Seal is one of the world's leading manufacturers of packaging products for consumer goods. Our company was founded in 1892 by the inventor of the bottle cap, a 'crown cork' as it was then called. As you may recall, bottle caps used to be lined with cork. Today, the company is headquartered in Philadelphia and employs approximately 30,000 men and women working in 200 manufacturing plants. We still manufacture bottle caps. But today we also make soft-drink cans, food cans, toothpaste caps, lipstick cases, and many other packaging products that you would find in your home.

Although Americans will find Crown Cork & Seal's packaging products in their homes and workplaces, no one will ever find a Crown Cork & Seal asbestos product there or anywhere else. Crown has never manufactured, sold, or installed a single asbestos-containing product in the company's 110-year history. Unfortunately and very unfairly, Crown has been named in an increasing number of asbestos related lawsuits in recent years because of a stock interest Crown obtained back in 1963 in a small family-owned business named Mundet Cork Company that was also a manufacturer of cork-lined bottle caps. Up until that time, Mundet also had a side business as a manufacturer of thermal insulation products. But by the time of Crown's stock purchase, Mundet had already shut down its insulation manufacturing operations.

Within 93 days of Crown's obtaining its stock interest in Mundet, what was left of the Mundet insulation division – idle machinery, left-over inventory, customer lists and all other assets of the business – was sold by Mundet to an insulation company. Not long after, Mundet and its bottle-cap operations were merged into Crown. As a result of this merger with Mundet almost 40 years ago, Crown has been named in over 300,000 asbestos claims and has paid almost approximately $400 million in asbestos-related payments.

Governor Thornburgh: How has being named a defendant in hundreds of cases impacted the company financially?

Mr. Gallagher: As I mentioned, the merger of Mundet into Crown has spawned several hundred thousand claims against Crown, costing the company several hundred million dollars. Because of the bankruptcies of most of the major asbestos manufacturers, Crown's annual payments for asbestos claims have increased fifty-fold over the last several years, from an average of $2 million per year over the 20-year period from 1977 through 1997 to the current annual amount of $100 million. Crown's initial investment of $7 million in Mundet nearly 40 years ago has now cost our company approximately $400 million. The asbestos litigation crisis has also led to the downgrade of our company's debt resulting in a loss of liquidity and higher interest rates, exacerbating the financial pressure on our company.

Governor Thornburgh: What about the impact on the company's employees, management, and shareholders?

Mr. Gallagher: Our employees and retirees, from executives to hourly employees, are invested in Crown's stock – whether in their 401k's, pensions, employee stock-purchase plan or stock option plans. We have watched our stock drop dramatically, because of asbestos litigation, from over $50 per share to $5 per share. So the impact on the financial security of the affected employees and retirees is devastating. On top of this, because of the burden of asbestos claims, Crown has reduced capital expenditures for job-creating factory expansions and also reduced medical benefits for employees and retirees. Think of the irony of this. We are a company that never made, sold or installed a single asbestos product, but we are caught in an unfair and devastating legal situation that forces us to pay medical compensation to claimants who never worked for our company and were never hurt by our products – and this money is coming out of the pockets of tens of thousands of Crown employees and retirees who have built our company to what

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William Gallagher

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Victor Schwartz

we are today. And as far as our shareholders are concerned, it might be convenient to think that they are rich people who will survive with less. Well, our largest shareholders are institutional shareholders – the pension funds and IRAs of ordinary Americans all across America. They, too, were all unfairly injured when our stock price, and the stock prices of similarly affected companies, plummeted. The money to pay asbestos claims comes out of their pockets, too.

Governor Thornburgh: Victor, how should America's courts deal with peripheral defendants in asbestos litigation? Are there examples in other litigation contexts where courts have had to deal with the targeting of peripheral defendants?

Mr. Schwartz: As Bob Vagley had mentioned, the first round of asbestos defendants were at the core of causing injury; they made products containing asbestos. As these companies have gone into bankruptcy, plaintiffs' lawyers have sued defendants that are on the outer edge or periphery. For example, let me suggest that some of the defendants maintain factories where asbestos exposure occurred. Here is an illustration of the difference between a company that manufactures a product and a company that has the product in a factory. Suppose a company manufactures a new, high-intensity radio but uses radium in its core. An individual worker who hears that radio at his workplace is exposed to radium and is harmed. Obviously, the manufacturer of the radio knows about the potential risks of the product. A company that buys the radio and operates it in a plant for the enjoyment of workers is far less culpable or may not be culpable at all. This illustration shows the difference between a core and a peripheral defendant. Courts should deal with peripheral defendants in a responsible way. They should require proof that the defendants knew or should have known about a particular risk and then acted to conceal that risk from the injured worker. Courts should not assume that peripheral defendants have guilt that is the same as those who manufactured products. There has not been any other major litigation where peripheral defendants have been assaulted with claims, but the precedents established in asbestos lawsuits could augur problems for potential peripheral defendants in the future.

Governor Thornburgh: Let's stay with you for the moment, Victor, on the role of the judiciary in all of this. As in many other mass tort contexts, judges overseeing asbestos litigation, in pursuit of what they feel is a fair and efficient management of massive caseloads, have widely used consolidation techniques to bring thousands of cases together. How have such consolidations led to the current crisis the legal system now faces?

Mr. Schwartz: As your question suggests, case consolidation can help with good and solid litigation management. Consolidation of cases may be appropriate when the diseases are similar, the type of exposures is similar, the period of exposures is similar, and there is a reasonable identity of other issues. The problem with asbestos litigation is that in some jurisdictions, some judges have allowed consolidation of claims by persons who are sick with claims by persons who are unimpaired. Plaintiffs' lawyers have seized upon this opportunity to extract settlements for plaintiffs who are unimpaired far beyond what is reasonable. Our understanding is that in some situations, not only are unimpaired plaintiffs paid more than they should be, but persons who are seriously injured are paid less than they should be. Plaintiffs who are really sick are used as a lever to extract higher settlements for those who are unimpaired.

Governor Thornburgh: What traditional rules of tort law and principles of due process have been ignored in the judicial process of addressing mass asbestos lawsuits? Are there some specific examples of judges ignoring basic principles or expediently creating new ones to address asbestos cases?

Mr. Schwartz: As I had indicated previously, some judges handling mass asbestos lawsuits are ignoring traditional tort law principles and rules of procedure. For example, under standard product liability law, a plaintiff must show that a defendant knew or should have known of a particular risk. Beginning in New Jersey, then in Louisiana and other jurisdictions, this principle

was abandoned. Fortunately, both the legislatures in New Jersey and Louisiana overruled their "asbestos only" rules of law, but the principles of absolute liability in asbestos cases have traveled to other jurisdictions. As I have also indicated, some judges have abandoned normal discovery rules. A defendant is entitled to know whether a person really has been injured and whether the defendant was the party responsible for the injury. Some courts have abandoned these fundamentals.

Governor Thornburgh: What are the broader ramifications of the precedents that have been set in asbestos litigation with regard to causation, requirements of proof, speculative damages, and other basic legal principles?

Mr. Schwartz: The broader ramifications of the precedents are that if you have a defendant who is perceived to be "unpopular" or you have a situation where there is "mass" litigation, judges may perceive a need to move forward their goal of expediency, and that goal will come at the expense of preserving basic principles of law. The good news is that these "abandonments" have only occurred in few jurisdictions. The bad news is that venue rules have allowed plaintiffs' lawyers to pour cases by the thousands into those jurisdictions.

Governor Thornburgh: Beyond courts acting assertively, what can be done on the state or federal level legislatively to solve the crisis and be fair to injured plaintiffs? Will standard tort reform solutions solve the problem?

Mr. Schwartz: Individual states and the United States Congress can enact legislation that would separate the claims of the truly sick from the unimpaired, using objective medical criteria as the standard. Legislation also could preserve the claims of unimpaired plaintiffs in the event they become ill in the future. Legislatures also should limit venue rules so that a plaintiff can only bring a claim where he or she lives or where exposure to asbestos occurred. This will stop voracious forum shopping that is taking place in asbestos litigation.

Governor Thornburgh: In fact, some coalitions and business groups, like yours, Bob Vagley, are in active pursuit of a legislative solution at the federal level. What is AIA's involvement in pursuing federal reform?

Mr. Vagley: Enactment of federal legislation to solve the asbestos litigation crisis is AIA's number one national public policy priority. It is unconscionable that billions of dollars in compensation are being funneled to healthy plaintiffs, while mesothelioma victims are unable to recover the amounts that are due to them under the tort system.

AIA and our member companies are active members of the Asbestos Alliance, a broad national coalition comprising the business community, insurers, and a number of trial lawyers who represent critically ill asbestos plaintiffs. In describing the coalition, one trial lawyer member said, "Look up 'strange bedfellows' in the dictionary, and you'll find our picture." Indeed, it is a unique coalition with a unique legislative solution. The case being made collectively by these varied, and normally conflicting interests is extremely compelling and, we believe, will lead to successful enactment of legislation within the next two years.

Governor Thornburgh: What type of legislation has the coalition been advocating?

Mr. Vagley: The legislation is actually pretty simple, and based on the concepts of equity and fairness to asbestos victims – by that I mean both medical and financial victims. The core of the bill is establishment of objective national medical criteria for asbestos-related impairment. These medical criteria would set the minimum requirements for an "injury" in asbestos lawsuits. The medical criteria would be derived primarily from the AMA Guides for the Evaluation of Permanent Impairment, which Congress adopted by reference in the Longshore Act and which already serve a similar function under that Act.

In order to make sure that any person who becomes sick from an asbestos-related disease will have their day in court, the bill also would

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liberalize statutes of limitations. No longer would claimants be forced to file a lawsuit before they become ill in order to prevent the statute of limitations from running out on an eventual claim.

AIA thinks it is critical to eliminate the case consolidations that create "bet-the-company" situations for defendants. Such consolidations lead to shotgun settlements with thousands of people who are not sick. We think both plaintiffs and defendants are entitled to an individual trial that focuses on the facts of their own specific cases. This way, neither side would risk getting lost in the aggregate.

In addition, AIA believes that abusive forum shopping, which today concentrates thousands of claims in jurisdictions that have no connection whatever with those claims, must stop. Claims should be brought in the state where the plaintiff resides or where exposure occurred.

The medical criteria-based proposal would preserve every plaintiff's right to sue. No one would lose his or her right to go to court. At the same time, it would preserve defendants' ability to compensate those who have cancer and other serious asbestos-related diseases now, and those who become ill in the future. All of this could be achieved without creating a new bureaucracy and without the expenditure of federal or state funds.

Governor Thornburgh: Past efforts in Congress have been quite rancorous and unsuccessful, with the opponents of past legislation labeling it as yet another broad "tort reform" effort. Do you feel the legislative solution that is being crafted and discussed will be any more successful?

Mr. Vagley: We are certainly mindful that previous legislative efforts have not been successful. As noted earlier, however, this effort is unique – and we are very optimistic that we will succeed. There are several reasons for this optimism. For example, institutionally, Congress is much better at remedial legislation than proactive solutions. Asbestos litigation has reached such a state of crisis that Congress cannot ignore it any longer. From our meetings with both members and their staff, we know that there is broad, bipartisan support for enactment of meaningful asbestos litigation reform. Also, our proposal targets ongoing asbestos litigation abuse in a balanced and equitable way. The proposal does not affect the rights of any injured person to sue for damages. In addition, adding in the supportive voices of plaintiffs' lawyers (and an increasing number of victims) is crucial. Who better than they can make the case that those hurt most by the current system are those most in need of meaningful justice? In short, the time is right, the proposal is right, and the politics are right for Congress to act.

Governor Thornburgh: Do you feel the proper public environment exists to succeed in Congress?

Mr. Vagley: I think most members of the public think that asbestos litigation was resolved long ago; they are surprised to hear it's still an issue, let alone a crisis. However, when informed about the current state of things, such as the inequity of healthy people being paid the same as those who are dying, people grasp very quickly that something has to be done. Americans are fair-minded. They value justice.

Broad-based, grassroots coalitions are active in nearly 20 key states. These coalitions are composed of local businesses and a growing number of trial lawyers and victims. They are in frequent contact with their senators, and numerous House members, to tell them how the current system negatively affects each of them, and their state's economy. The media also has taken an active interest in the asbestos issue. Respected national publications such as the *New York Times*, *Wall Street Journal*, and *Fortune* magazine have published articles and/or editorials sharply critical of the current litigation morass. Increasingly, local and regional media outlets are carrying the same messages.

Governor Thornburgh: Victor, what are your thoughts on congressional creation of a compensation fund? How would it work?

Mr. Schwartz: This is a question I would leave to Members of Congress. Similarly, I have no observations to make on behalf of any clients of Shook, Hardy & Bacon. As a former torts professor, I would make the following observations about compensation funds. In general, funds have been much more costly than anticipated by those who created them. An example was the Federal Black Lung Fund, whose expenses far exceeded its estimated cost. The Fund had to be substantially revised and there were great political as well as financial costs in persuading Congress to accept those revisions. Second, any fund that allows victims to escape into the tort system is usually doomed to failure. Even if the escape to the tort system is narrowly defined, somewhat like a run in a stocking, it eventually expands the worker claims to the Fund. The stronger claims escape to the torts system. This type of fissure had devastating impacts on early "auto no-fault funds" which allowed so-called "victims" to escape into the tort system under certain criteria. Third, the concept of a fund is often attractive in the abstract, but when it gets down to the nitty-gritty of who contributes how much, it often creates turmoil within the business community. Fourth, for thirty years, the federal government has absolutely resisted any contribution to any fund of any kind. The government believes it has resolved its asbestos obligations through FECA, the Federal Employers Compensation Act (federal worker compensation). It will not pay into a Fund. As a former law professor, I believe that certain issues need to be resolved if that avenue is to prove successful.

Governor Thornburgh: What impact will individual companies' settlement of their asbestos problems, and ongoing discussions between other companies and plaintiffs' lawyers about settlements, have on the momentum for congressional reform?

Mr. Schwartz: I do not believe that individual company settlements of their asbestos problems and on ongoing discussions about settlements should have any impact on the need for congressional reform. Resolution of asbestos cases has been going on for many years, but the crisis – as clarified by the recent RAND Report [2] – has not abated; in fact, it has accelerated. While some companies in limited situations may buy peace (e.g., some companies whose exposure is based solely on the fact that they acquired another company with an asbestos exposure), universal resolution of the asbestos crisis is unlikely to be achieved in a piecemeal fashion. Asbestos is a national crisis. Individual settlements may resolve issues for some companies, but they will not address the national problem of 500,000 - 2,500,000 claims arising within the next ten years (according to RAND).

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Governor Thornburgh: Bob, your organizational priorities related to asbestos also include possible state legislation to address the issue. Certainly some specific jurisdictions have been magnets for asbestos plaintiffs' lawyers. What sort of reforms do you feel would be effective at the state level?

Mr. Vagley: Asbestos cases have been migrating to five states – Mississippi, New York, West Virginia, Ohio, and Texas – over the past several years. In fact, these jurisdictions accounted for only 9 percent of cases filed before 1988, but for 66 percent of all filings between 1998 and 2000. Such states certainly are candidates for reform efforts of some kind. We are assessing each state to determine what fix would be most effective, given the political climate and other relevant factors.

While each state is unique and we will have to tailor any reform program accordingly, there are a few general approaches under consideration, such as adapting parts of the federal litigation reform proposal for implementation at the state level, and working to implement changes in state court rules.

Another helpful reform – one that by itself does not go far enough, but could be included in a larger, overall systemic reform package – was enacted last year in Pennsylvania. The new law limits asbestos liability of a corporation assumed by merger to the asbestos-tainted company's value at the time of its acquisition.

2. *See* RAND Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002) (RAND 2002 Report).

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William Gallagher

I'm sure that Bill Gallagher can speak to this law and how it affects his company's situation.

Governor Thornburgh: Bill, why don't you tell us about this new law. How well informed were legislators of the problem?

Mr. Gallagher: Last year, local legislators became concerned with out-of-control asbestos liability and its effect on Pennsylvania businesses like Crown. Frustrated by the lack of any action on the federal level, they took action on their own. The result was a new corporate law that fairly limits a Pennsylvania company's merger successor asbestos liability for the activities of a predecessor to the total value of the predecessor's assets adjusted for inflation. In the case of Crown, the total asset value of the merged company, Mundet, at the time of the merger was $12 million, an amount that becomes $52 million when adjusted for inflation. Crown's payments to asbestos claimants of $400 million far exceed this cap.

Governor Thornburgh: I heard that the law enjoyed the support of national and local labor unions in the Pennsylvania legislature. Tell me about that.

Mr. Gallagher: We were pleased to have the support of national and local labor unions. Unionized and non-unionized workers across the country are bearing the economic consequences of asbestos liability. Lost jobs and lost medical and retirement benefits are an inevitable consequence of this growing asbestos problem. The unions are beginning to recognize this. We hope our nationally elected legislators will recognize the need to resolve the asbestos problem on a fair basis on a national level.

Governor Thornburgh: Are there efforts ongoing in other states to seek adoption of laws similar to the ones Pennsylvania has enacted? Would more such state legislative action specific to asbestos successor liability be good public policy?

Mr. Gallagher: We know that it has been introduced in at least two other states. We think that it would be good public policy for all states to adopt similar laws soon. It is important to note that corporate law statutes like the new Pennsylvania statute do not undermine the deterrence goal of product liability law. Companies that manufactured asbestos products would not be able to structure mergers using the corporate law cap on asbestos merger liability to escape their responsibility. Remember, prior to any merger, such a company's net worth is all that is available to satisfy asbestos liability claims. After a merger, under a corporate merger statute like that in Pennsylvania, the predecessor's entire gross asset value becomes available to satisfy asbestos claims. Encouraging such mergers through fair corporate merger laws is surely good public policy. The surviving acquiring company is not unfairly and disproportionately punished for claims it is not responsible for. Meanwhile the value of 100% of the assets of the predecessor company is now made available just for asbestos claimants, above and beyond the claims of any other creditor of the predecessor company. And, the larger merged company is probably better able to finance the asbestos liability.

Governor Thornburgh: One final question for you, Bill, on state legislation. Pennsylvania recently adopted a new law on joint and several liability. What is the nature of that law and how might it have an impact on asbestos litigation in the state?

Mr. Gallagher: Put simply, the law limits a defendant's liability in any particular case to a percentage of the total recovery that corresponds to the defendant's negligence. Thus, a defendant who was only 1% responsible for an accident in a particular case can no longer be required to pay 100% of the damages. Under the new law, a defendant can be 100% responsible for damages only if it is at least 60% responsible for the accident or injury in question. The law, which is known as the "Fair Share Act," will stop plaintiffs from gaining disproportionate recoveries against "deep pocket" defendants only minimally responsible for the plaintiffs' injuries. The law continues a trend of other states passing similar laws to fairly apportion liability to fault. The law will affect asbestos litigation in the

same way it will impact all other types of litigation – it helps ensure that no company pays more than its fair share of a plaintiff's injuries.

Governor Thornburgh: The general consensus here seems to be that state or federal legislative approaches are needed to truly address the pervasive problems that exist with asbestos litigation, but I think we also would all agree that the wheels of legislative change move slowly. In the meantime, judges will continue to be the key "policy makers" on this issue. Victor, other than fidelity to the rule of law, what can the judiciary do to address the current crisis? Are there examples of courts successfully taking control of asbestos litigation to the benefit of defendants and sick plaintiffs?

Mr. Schwartz: Courts can create inactive dockets, also known as deferral registries or pleural registries. Under these plans, individuals who cannot meet certain objective medical criteria are placed on an inactive docket with statute of limitations being tolled, and all discovery stayed. Claimants are moved to the active civil docket when they present credible medical evidence of impairment.[3]

Inactive docket plans have several obvious benefits. First, sick claimants are able to have their claims heard faster; they can move "to the front of the line" and not be forced to wait until earlier-filed unimpaired claims are resolved. This can be especially important if the claimant has a fatal disease or is an older person. Second, inactive docket programs help unimpaired individuals by protecting their claims from being time-barred should an asbestos-related disease later develop. This would address a primary engine driving the filing of many claims by unimpaired claimants. Third, because there is no discovery or pressure to settle inactive claims, inactive dockets conserve scarce financial resources that are needed to compensate sick claimants – resources that are now spent litigating claims that are premature, because there is not yet any impairment, or actually meritless, because there never will be. Fourth, inactive dockets reduce the specter of more employers being driven into bankruptcy, and can help slow the spread of the litigation to "peripheral" defendants.

Some inactive docket plans have existed for many years; they have proven to be fair and effective. For example, the Massachusetts inactive asbestos docket was created in 1986. An inactive docket was established in the Circuit Court for Cook County (Chicago), Illinois in 1991. The Circuit Court for Baltimore City established an inactive docket in 1992.[4]

At the federal level, Senior United States District Judge Charles R. Weiner, who oversees the federal multidistrict asbestos litigation that has been consolidated in the Eastern District of Pennsylvania ("the federal MDL Panel"), has recently ordered that all cases initiated through a mass screening shall be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.

In addition to creating inactive dockets, courts can put an end to punitive damage awards in asbestos cases. Enough punishment has been imposed; the purpose of punitive damages in asbestos litigation has been fulfilled.[5] Some courts have acted to curb punitive damages abuse in asbestos cases. For example, the U.S. Court of Appeals for the Third Circuit recently approved a decision by the federal MDL Panel to sever all punitive damages claims from federal asbestos cases before remanding compensatory damages cases for trial. Judge Marshal A. Levin has stayed all punitive damage awards in Baltimore City asbestos cases until compensatory claims are satisfied. Northampton County (Bethlehem and Easton), Pennsylvania Administrative Judge Jack Panella has severed all asbestos-related punitive damages claims from discovery, pre-trial motions and trial in his court. In nearby Philadelphia, a three judge panel has severed and deferred all pending and future punitive damage claims in the Philadelphia Court of Common Pleas.[6]

These two steps can do a great deal to curtail the asbestos litigation crisis.

Governor Thornburgh: How much responsibility do asbestos plaintiffs' lawyers bear for the current crisis? In what ways does the "representation" of massive numbers of claimants, such

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3. *See* Peter Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 553 (1992); Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).

4. *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, COLUMNS – ASBESTOS RAISING THE BAR IN ASBESTOS LITIG. 2 (Feb. 2002) (discussing various inactive docket plans and reporting that state judges who oversee asbestos dockets in states with inactive dockets find the plans fair and effective).

5. *See Asbestos Litigation Today – A Discussion of Recent Trends*, COLUMNS – ASBESTOS RAISING THE BAR IN ASBESTOS LITIG. 5 (Jan. 2002).

6. *See* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 TEX. REV. L. & POL. 137 (2001).

as in the asbestos context, lead to ethical lapses by lawyers?

Mr. Schwartz: Many of the plaintiffs' lawyers in asbestos cases who represent persons with malignancies have been responsible. For example, Richard Scruggs, a prominent Mississippi lawyer, has indicated that it is inappropriate to provide compensation to plaintiffs who are unimpaired and it is inappropriate for peripheral defendants to be held responsible for claims.[7]

Unfortunately, a few plaintiffs' lawyers have gamed the system. They have used shoddy evidence in regard to whether an individual is sick; they also have used x-rays that are not carefully obtained or evaluated; they have herded plaintiffs together like cattle without any specific knowledge of the people they represent. At times, these lawyers may have helped unimpaired plaintiffs at the expense of those who are very sick.[8]

Governor Thornburgh: One final question. Bill, what has been most unique for you as a lawyer in defending your company against a coordinated mass litigation campaign like the asbestos suits?

Mr. Gallagher: As General Counsel of a manufacturing company, you would think you would spend most of your time dealing with legal issues involving co-workers, customers and suppliers. This would include using the money we make selling our cans and closures to our customers to fairly resolve product liability claims for the rare defective cans or closures we may have manufactured. However, I've found my time taken up helping to defend our company against the greatest mass litigation in the history of mankind arising from a product our company never manufactured and related to exposure to another company's asbestos products that occurred before almost every man and woman working for our company finished school. It is certainly not fair, and it was this fundamental fairness that the Pennsylvania legislature addressed with this new law.

Biographies

The Honorable Dick Thornburgh *is a former Attorney General of the United States, Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the law firm Kirkpatrick & Lockhart LLP, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.*

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Robert E. Vagley *is President of the American Insurance Association (AIA), a position he has held since 1986.*

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7 See 'Medical Monitoring and Asbestos Litigation' – A Discussion with Richard Scruggs and Victor Schwartz, Vol. 17, No. 3 MEALEY'S LITIG. REP:. ASBESTOS, MAR. 1, 2002

8 See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L.J. 1 (2001).