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The Journal of the Federalist Society's Practice Groups

A Project of the E.L. Wiegand Practice Groups

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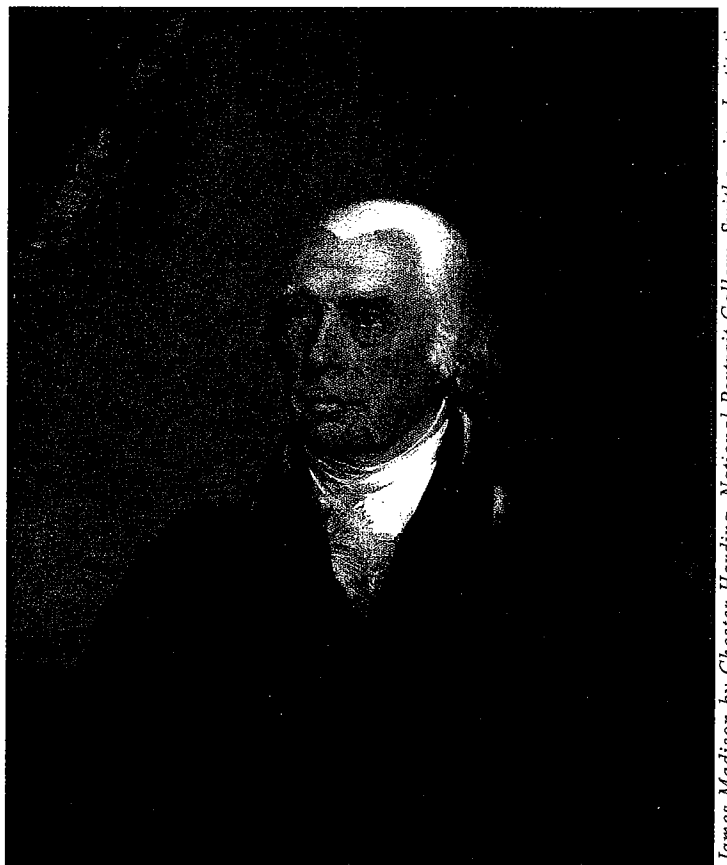
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LITIGATION

STOPPING ASBESTOS LITIGATION ABUSE

BY MARK A. BEHRENS & PHIL S. GOLDBERG*

Widespread abuse and even fraud have long been rumored to be a part of asbestos litigation. A recent study, published in *Academic Radiology*, is the latest confirmation that over-diagnosis of asbestos-related conditions is a major problem. The study suggests that x-ray readers used by plaintiffs' lawyers in asbestos cases are not detached medical experts, but hired guns retained because they will reach conclusions that support the lawyers' cases.

In conducting the study, Drs. Joseph Gitlin and Elizabeth Garrett-Mayer of the Johns Hopkins School of Medicine had six independent experts evaluate 492 x-rays used by plaintiffs' lawyers as a basis for asbestos claims. The study's authors did not tell the experts the source of the x-rays or that the films already had been entered into evidence in litigation. The x-ray readers hired by plaintiffs' lawyers found evidence of possible asbestos-related abnormalities in a staggering 95.9% of the cases, but the independent radiologists found abnormalities in just 4.5% of the cases. As Drs. Gitlin and Garret-Mayer concluded, this enormous disparity is too great to be explained by a reasonable difference of opinion.¹

Previous attempts to assess the scope of unreliable x-ray readings in asbestos cases resulted in similar findings. For example, in 1990, an independent panel of radiologists studied 439 tire worker claimants "diagnosed" by plaintiffs' doctors as having an asbestos-related disease. The researchers, however, found that only 2.5% of the claimants had conditions consistent with asbestos exposure, leading them to conclude that "the plaintiffs' doctors' diagnoses of asbestos related conditions was 'mistakenly high.'"²

United States District Court Judge Carl Rubin of the Southern District of Ohio studied the merits of sixty-five asbestos bodily injury cases by appointing medical experts to evaluate the claims. All of the plaintiffs had claimed some asbestos-related condition, but the court-appointed experts found that sixty-five percent of the claimants had no asbestos-related conditions at all. Of the remaining thirty-five percent of claimants, approximately fifteen percent had asbestosis, and the rest presented only pleural conditions.³

In another study, neutral academics appointed by the Manville Personal Injury Settlement Trust evaluated the results of more than 6,400 audited claims of alleged asbestosis and pleural disease. In approximately forty-one percent of the cases, the Trust's physicians disagreed with the plaintiff experts, finding that the claimant had either no disease or a less severe condition than alleged.⁴

Mass Screening Mischief

X-rays like those reviewed in the Johns Hopkins study typically result from mass screenings conducted by plaintiff lawyers and their agents. Such screenings are frequently

conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos.

The lawyers and the screening firms recruit plaintiffs through exaggerated claims, such as "Find out if YOU have MILLION DOLLAR LUNGS!"⁵ Senior United States District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: "Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media."⁶ Former United States Attorney General Griffin Bell has pointed out that "[t]hese screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up."⁷

The Association of Occupational and Environmental Clinics has stated its concern that "medically inadequate screening tests are being conducted to identify cases of asbestos-related disease for legal action. These tests do not conform to the necessary standards for screening programs conducted for patient care and protection."⁸ Dr. Michael Harbut, an occupational health specialist in Michigan, expressed particular outrage at this practice, saying that any lawyer who "degrades the value of human health by relying only on x-rays for making a diagnosis of asbestosis is certainly morally corrupt, if not criminally corrupt."⁹

In 2003, the American Bar Association's Board of Governors authorized the formation of a commission to study the issue. With the assistance of the American Medical Association, the ABA Commission on Asbestos Litigation consulted some of the Nation's most prominent physicians in the field of occupational medicine and pulmonary disease. The Commission's report confirmed that a large percentage of asbestos claimants are recruited through litigation screenings:

For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done — usually only chest x-rays. Promotional ads declare that "You May Have Million \$ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The x-rays are usually taken in "x-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation-screening companies commonly administer the x-rays in violation of state and federal safety regulations. In order

to get an x-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."

The x-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the x-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for x-ray evidence that is "consistent with" asbestos-related disease. Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars – in some cases, millions – in the aggregate by the litigation screening companies due to the volume of films read.¹⁰

In the wake of these studies, "considerable doubt" has been placed on the reliability of claims generated through mass screenings.¹¹ As one physician has explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf."¹² Moreover, some attorneys reportedly pass an x-ray around to numerous radiologists until they find one who is willing to say that the film shows symptoms of an asbestos-related disease – a practice strongly suggesting unreliable scientific evidence.¹³ One plaintiffs' expert medical witness has remarked that he "was amazed to discover that, in some of the screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one."¹⁴

The result is "the epidemic of asbestosis observed . . . in numbers which are inconceivable and among industries where the disease has never been previously recognized by medical investigation."¹⁵ In fact, in 2003, more than 100,000 new asbestos claims were filed – "the most in a single year."¹⁶

Impact on Compensation for the Truly Sick

Given the abuse of mass screenings and the unreliable medical reports generated as a result of the screening process, it should not be surprising that most new asbestos claimants – up to ninety percent – have no medically cognizable injury or impairment.¹⁷ These claimants "continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."¹⁸ Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said that "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants.¹⁹

The presence of unimpaired claimants on court dockets and in settlement negotiations "inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."²⁰

Consider, for example, the litigation involving Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990, and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."²¹ The Trust is now paying out just *five cents on the dollar* to asbestos claimants.²² The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants.²³

The same injustice can be seen on an individual level. For example, the widow of a Washington State man who died from mesothelioma has been told that she should expect to receive only fifteen percent of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.²⁴ The widow of an Ohio mechanic will recover at most \$150,000 of the \$4.4 million award that she received for her husband's death.²⁵

For these reasons, lawyers who represent cancer victims have been highly critical of mass screenings and the filings they generate. They appreciate that payments to the non-sick, and transaction costs spent litigating their claims, are depleting scarce resources that should go to "the sick and the dying, their widows and survivors."²⁶ Here is what some of the lawyers have said:

- Richard Scruggs of Mississippi: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."²⁷

- Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system . . . the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."²⁸

- Peter Kraus of Dallas has said that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."²⁹

- Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.³⁰

- Terrence Lavin, an Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray."³¹

Filings by unimpaired claimants not only threaten payments to the truly sick, they also have serious consequences for defendants. Asbestos litigation has already forced more than seventy companies into bankruptcy.³²

As a result, "the net has spread. . . to companies far removed from the scene of any putative wrongdoing."³³ Peripheral defendants are being dragged into the litigation to make up for the "traditional defendants" that are no longer around to pay their full share.³⁴ The RAND Institute for Civil Justice has now identified more than 8,500 asbestos defendants,³⁵ up from only 300 in 1982.³⁶ Asbestos litigation now touches firms in industries engaged in almost every form of economic activity that takes place in the economy.

Solutions

The United States Supreme Court has said that this country is in the midst of an "asbestos-litigation crisis."³⁷ Efforts need to be made now to police abuse in the litigation and help preserve resources needed to compensate the sick.³⁸

First, state courts should dismiss claims initiated through mass screenings. This has been the practice in federal asbestos cases since January 2002. The judge who issued that order, Senior United States District Judge Charles Weiner of the Eastern District of Pennsylvania, observed that "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."³⁹

Second, courts should use objective medical criteria to ensure that claimants who are sick with an asbestos-related illness can have their cases tried first. The claims of the unimpaired should be suspended and preserved so they can file claims in the future should they become sick.⁴⁰ This practice is the trend in state court asbestos litigation.⁴¹

For example, courts in New York City, Chicago, Boston, Baltimore, Seattle, Syracuse, Portsmouth (Virginia), and Madison County (Illinois), have ordered the claims of individuals with no present asbestos-related impairment to be placed on an inactive docket (also called a pleural registry or deferred docket).⁴² Statutes of limitations are tolled and discovery is stayed with respect to claims placed on the inactive docket. A case may be removed to the active docket and set for trial when the claimant presents the court with credible medical evidence of asbestos-related impairment. Unimpaired dockets relieve the pressure on courts to decide "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."⁴³

Other courts have entered orders requiring potential plaintiffs to meet certain objective medical criteria in order to proceed with a claim in that court.⁴⁴ Claimants not able to demonstrate functional impairment will have their claims administratively dismissed until an impairing condition develops. Should a claimant develop such an impairing condition, he or she would be permitted to re-file a claim.⁴⁵

Third, courts should exercise their "gatekeeper function" to ensure that only sound science is presented at trial.⁴⁶ The recent Johns Hopkins study suggests that courts should view x-ray evidence skeptically.

Fourth, courts should not join dissimilar cases for trial. Some courts have tried to address the overabundance of asbestos claims on their dockets by joining asbestos claims for resolution, either in mass consolidations or in clusters. In such proceedings, people with serious illnesses are often lumped together with claimants having different alleged harms or no illness at all; frequently, multiple defendants are named.⁴⁷ The cases generally involve aggressive management of the docket by the trial judge and pressure on the defendants to settle.

The motivation for case consolidation seems logical. If asbestos claims are crowding court dockets, then it would seem sensible to resolve the claims as efficiently as possible and to reduce the transaction costs in doing so. Unfortunately, in lowering the barriers to litigation, these courts have unintentionally encouraged the filing of more claims.⁴⁸ As Duke Law Professor Francis McGovern has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam."⁴⁹

Fifth, courts should preserve assets for sick asbestos claimants by severing, deferring, or staying punitive damage claims.⁵⁰ As the United States Court of Appeals for the Third Circuit concluded when it approved a decision by Judge Weiner to sever all punitive damages claims from federal asbestos cases: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . ."⁵¹ Repeated punitive damages awards serve no constitutionally justifiable or sound public policy goal in asbestos cases.⁵²

Finally, courts should impose *ad hoc* public policy limitations on joint liability in asbestos and other appropriate cases. As Pepperdine Law Professor Richard Cupp, Jr. has written: "unlimited and unrestrained joint liability represents unsound public policy in the current asbestos litigation environment."⁵³

Conclusion

The current asbestos litigation system is not working for sick claimants, defendants, or society as a whole. Changes are needed. As Senior Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants.... [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for

congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.⁵⁴

The sound and fair reforms we suggest would be a good place to start for courts interested in solving serious problems in the litigation and helping sick claimants.

*The authors are attorneys in the law firm of Shook, Hardy & Bacon L.L.P. in Washington, D.C. They represent a coalition of companies with an interest in asbestos litigation.

Footnotes

¹ See Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843 (2004).

² Lester Brickman, *On The Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 105 (2004) (citation omitted); see also *Raymark Indus., Inc. v. Stemple*, 1990 WL 72588, *10 (D. Kan. May 30, 1990) (unpublished decision).

³ See Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 FR.D. 35, 37-39 (1991).

⁴ Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, BRIEFLY, Vol. 6, No. 6, June 2002, at 18 (Nat'l Legal Center for the Pub. Interest monograph), available at <<http://www.nlcpi.org>> (last visited Dec. 1, 2004).

⁵ Roger Parloff, *The \$200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 154, available at 2002 WL 2190334.

⁶ *In re Joint E. & S. Dist. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E. & S.D.N.Y. 2002).

⁷ Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1 (2004); see also Letter from U.S. Senator Don Nickles, Chairman, Committee on Budget, to Hon. Timothy J. Muris, Chairman, Federal Trade Commission and Lester M. Crawford, D.V.M., Ph.D., Acting Commissioner, Food and Drug Administration 1 (Apr. 28, 2004) (on file with authors) (calling for a Federal inquiry into the "widespread use of for-profit mass X-ray screening vans and trucks to generate lawsuits by claimants, many of whom are not sick.").

⁸ ASS'N OF OCCUPATIONAL & ENVTL. CLINICS, ASBESTOS SCREENING (2002), available at <<http://www.aoc.org/asbestos-screen.htm>> (last visited Dec. 1, 2004).

⁹ Greg Gordon, *Have Asbestos Diagnoses Been Exaggerated?*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 5, 2004, at 3A, available at 2004 WL 83077304.

¹⁰ See American Bar Association, Commission on Asbestos Litigation, *Report to the House of Delegates* 8 (Feb. 2003). As a result of its findings, the ABA Commission proposed the enactment of federal medical criteria standards for nonmalignant claims. The ABA's House

of Delegates adopted the proposal in February 2003. See *Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of the Hon. Dennis Archer, President-elect, American Bar Association).

¹¹ Editorial, *X-Raying an Asbestos Quagmire*, CHI. TRIB., Aug. 16, 2004, at 16, available at 2004 WL 89474404; see also Murray L. Janower & Leonard Berlin, Editorial, "B" Readers' Radiographic Interpretations in Asbestos Litigation: Is Something Rotten in the Courtroom?, 11 ACAD. RADIOLOGY 842 (2004).

¹² See David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.) [hereinafter "Bernstein"].

¹³ See David Egilman, *Asbestos Screenings*, 42 AM. J. OF INDUS. MED. 163 (2002).

¹⁴ Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, CLEVELAND PLAIN DEALER, Nov. 5, 2002, at A1, available at 2002 WL 6382801 [hereinafter "Hudak & Hagan"].

¹⁵ Andrew J. Ghio, M.D., Editorial, *Asbestos: Over Diagnosed?*, THE NEWS & OBSERVER (Charlotte, North Carolina), Apr. 12, 2004, at A11, available at 2004 WL 56033533.

¹⁶ Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16, available at 2004 WL-WSJ 56925100.

¹⁷ See Stephen Carroll et al., *Asbestos Litigation Costs and Compensation (Draft)* 11 (RAND Inst. for Civil Justice, Feb. 2004); Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 1 (Dec. 2001), available at <<http://www.actuary.org/mono.htm>> (last visited Dec. 1, 2004); Roger Parloff, *Asbestos*, FORTUNE, Sept. 6, 2004, at 186, available at 2004 WL 55184416.

¹⁸ *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990); see also *Simmons v. Pacor, Inc.*, 674 A.2d 236 (Pa. 1996) ("When the pleural thickening is asymptomatic, individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring.").

¹⁹ See Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001).

²⁰ Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 393 (1993).

²¹ Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683.

²² See *id.*

²³ See Mark Goodman et al., Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, NAT'L L.J., Apr. 1, 2002, at B14.

²⁴ See Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, WASH. POST., Sept. 25, 2002, at E1, available at 2002 WL 100084407.

²⁵ See Hudak & Hagan, *supra* note 14.

²⁶ *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom. *Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted).

²⁷ *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 MEALEY'S LITIG.

