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It's Time To Fix NYC's Broken Asbestos Litigation System

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Willie Sutton famously said that he robbed banks “because that’s where the money is.” New York became a hub for asbestos tort claims for the same reason. The judge in charge of the asbestos docket for the past six years made New York a highly lucrative place to file asbestos lawsuits.

We now know why. Federal corruption charges against former Assembly Speaker Sheldon Silver, the judge’s retirement and investigative reports have exposed how this judicial hellhole was built. The new asbestos docket judge can restore confidence in New York’s judiciary by taking three steps: (1) stop consolidating dissimilar cases, (2) restore the ban on punitive damages and (3) have true transparency between the tort system and asbestos bankruptcy trusts.

Until 2009, New York had a reputation for fairly administering its asbestos docket. The New York Consolidated Asbestos Litigation ("NYCAL") had a case management order ("CMO") that was the result of a negotiation between plaintiffs and defendants. In 2009, Judge Sherry Klein Heitler, who has ties to Sheldon Silver, took NYCAL’s reins. She broke the CMO’s careful compromises to advantage the plaintiffs, leading the American Tort Reform Foundation to label NYCAL its number one "judicial hellhole" in 2014. Judge Heitler retired this year.

Manhattan Chief Civil Judge Peter Moulton replaced Judge Heitler. In signaling a clean break from the past, Judge Moulton held a town hall-style meeting in February with 200 lawyers who regularly represent plaintiffs and defendants in NYCAL cases and promised to “look under the hood” of the CMO.

In March, more than 40 law firms that together represent roughly 200 companies named as defendants in NYCAL asbestos lawsuits urged Judge Moulton to temporarily suspend the docket, with individual exceptions at the court’s discretion, so a new CMO can be implemented that addresses today’s asbestos litigation challenges. In doing so, Judge Moulton should prioritize the following three corrective steps.

First, he should assure that each claim can be adjudicated on its own merits by stopping the practice of the consolidating dissimilar cases. Consolidating cases can sometimes facilitate justice, such as when several people claim injury from the same facts or circumstances. But, under Judge Heitler, cases were

regularly consolidated even when they involved different defendants, different plaintiff occupations, different exposure periods, different diseases and different legal theories. These consolidations are highly prejudicial; they blur allegations by making it impossible for defendants to respond to individual claims.

Consolidating dissimilar cases has been discredited in many jurisdictions. Studies show that plaintiffs' probability of winning typically increases by 15 percent when a group of claims are heard together rather than separately. An article in Mealey's Asbestos Bankruptcy Report on "The Consolidation Effect" in NYCAL found that jury awards in consolidated cases have been 250 percent higher per plaintiff since 2010 than awards in individual trials. Judge Moulton should level the playing field and give each claim the individual attention it deserves.

Second, Judge Moulton should restore NYCAL's long-time ban on punitive damages in asbestos cases. Punitive damages punish and deter egregious conduct. They are awarded above and beyond what it takes to make a plaintiff whole. In 1996, NYCAL joined with many courts and deferred all punitive damage claims in asbestos cases. The judge at the time explained that while they serve no corrective purpose, as asbestos was no longer sold, they have the downside of depleting funds "better used to compensate injured parties." Judge Heitler reversed this policy at the behest of Sheldon Silver's former law firm.

Finally, Judge Moulton should stop double dipping by requiring a plaintiff's lawyer to file and disclose all claims being made to asbestos bankruptcy trusts before the plaintiff can proceed to trial in the tort system. This problem is unique to asbestos litigation; more than 100 companies have been forced into bankruptcy due to asbestos lawsuits. Many of these companies set up trusts to pay asbestos claimants. As of 2011, the Government Accountability Office calculated that there was almost $37 billion in collective assets in these trusts to pay asbestos plaintiffs. The process for filing a trust claim is simple, requiring basic information on work history and injury.

The lack of meaningful transparency between claims a plaintiff makes to the trusts and those alleged in tort cases has led to documented abuses. The issue first publicly came to light in 2007, when a Cleveland judge allowed defense lawyers to obtain copies of trust claims filed by a plaintiff. The trust claims revealed that the plaintiff's lawyers detailed entirely different exposure histories in the court case from the trust claims, each written to maximize recovery in the particular forum. The judge told The Plain Dealer, an Ohio-based newspaper, "I never expected to see lawyers lie like this. ... It was lies upon lies upon lies." Last year, a North Carolina federal bankruptcy judge, in In re Garlock Sealing Technologies LLC found systematic "manipulation of exposure evidence by plaintiffs and their lawyers" between the two systems.

Judge Moulton can address this problem by clarifying that the NYCAL CMO requires the filing and disclosure of all trust claims before trial. Judge Heitler created a loophole in the CMO. She held that plaintiffs' lawyers need only file and report such claims if they "intend" to file them, but would not have to do so if they say they did not anticipate filing the claims. One lawyer reportedly said at an American Bar Association meeting, "I am not under any requirement to file them ... she did it for a reason." Judges are supposed to call the game fairly — not help a plaintiff score.

Asbestos litigation has long been subject to abuse. In most places, judges have taken corrective action when uncovering irregularities. They know the civil justice system is a public good that is relied upon to resolve litigation accurately. Judge Moulton should restore NYCAL's sense of public good and stop New York's courts from being systematically manipulated to maximize profits at the expense of the fair resolution of claims.

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