MEALEY'S LITIGATION REPORT: **Asbestos**

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Commentary

Two Forks In The Road Of Asbestos Litigation

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Six years ago, the United States Supreme Court said that this country was in the midst of an "asbestos-litigation crisis."[1] Since that time, the litigation has grown worse. In fact, according to former United States Attorney General Griffin Bell, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections."[2]

The numbers tell the story. In the 1990s, the number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000.[3] In 2001 alone, plaintiffs filed at least 90,000 new cases.[4] Up to 700,000 more cases are expected by the year 2050.[5]

Several recent studies have concluded that the vast majority of new asbestos claimants — up to ninety percent — are not sick.[6] The Supreme Court has recognized that "up to one half of asbestos claims are now being filed by people who have little or no physical impairment."[7] Many of these claimants may never develop an asbestos-related disease.

To date, at least 67 companies have been driven into bankruptcy. Almost one-half of these bankruptcies occurred within the past two years, according to the RAND Institute for Civil Justice.[8] And, the process is accelerating. As a result, plaintiffs' lawyers are actively looking for new "deep pockets" to sue. Lawsuits are now piling up against companies with only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners. Recent research by RAND shows that more than 8,000 companies now are named as asbestos defendants, up from only 300 in 1982.[9]

The impact on the economy is staggering. RAND estimates that $54 billion has been spent in the litigation — most of it going to lawyers or litigation costs.[10] Various estimates of the total future cost of the litigation range from $200 to $275 billion.[11] To put these sums into perspective, General Bell has explained that they exceed current estimates of the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."[12]

Columbia University Professor and Nobel-prize winning economist Joseph Stiglitz, Chairman of the Council of Economic Advisers during the Clinton Administration, recently estimated that as many as 60,000 people (many of them union workers) have lost their jobs and roughly 25% of their pensions as a direct result of the litigation.[13] A new study by NERA Economic Consulting predicts there will be as much as $2 billion in additional costs due to the indirect impacts of company closings.[14]

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Perhaps most disturbing, current trends in the litigation threaten payments to the truly sick. Indeed, lawyers who represent asbestos cancer victims, such as Oakland, California, attorney Steve Kazan, have expressed concern that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation.[15] Even Mississippi tort king Richard Scruggs has said, "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."[16]

Asbestos Litigation At The Crossroad

The current path of asbestos litigation is a dead-end road. The system is not working for courts, defendants, or the seriously ill. But what are courts to do?[17] What new paths exist? Two approaches have emerged, though not with equal success: mass consolidations and procedures to deal with the non-sick.[18]

Mass Consolidations

Some courts have turned to mass consolidations to clear their ballooning asbestos dockets. These courts have undoubtedly acted with the best of intentions – faced with overwhelming numbers of asbestos claims, they have worked to put money in the hands of the sick as quickly as possible, and also to clear crowded dockets. The situation was described by former Michigan Supreme Court Chief Justice Conrad Mallett, Jr.: "Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . The judge's first thought then is, 'How do I handle these cases quickly and efficiently?' The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder."[19]

For example, a mass trial held in West Virginia last September involved approximately 8,000 plaintiffs seeking damages from hundreds of defendants.[20] According to West Virginia Supreme Court Justice Elliott Maynard, the plaintiffs had worked in dozens of occupations at hundreds of different work sites located in a number of different states over a sixty-year period.[21] They alleged many different conditions. It is likely some were not impaired at all.

Another mass trial held about the same time in Virginia involved 1,300 claimants and numerous defendants.[22] Again, the claims consolidated involved plaintiffs who worked in a number of different jobs, were exposed to asbestos for time periods ranging from a few months to several decades, and alleged a variety of conditions. The highly individualized nature of the many claims led the trial court to conclude "that consolidation of all of the cases would adversely affect the rights of the parties to a fair trial."[23] Nevertheless, the case proceeded to trial.

Justice Mallett's observation explains how courts may view such "mass joinders" as a quick way to resolve a very large number of cases. But, as it turns out, bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. Rather than making cases go away, it invites new ones.[24] As mass tort expert Francis McGovern of Duke Law School 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."[25] Likewise, RAND recently concluded "it is highly likely that steps taken to streamline the litigation actually increased the total dollars spent on the litigation by increasing the numbers of claims filed and resolved."[26]

The consolidated trial is a blunt instrument. It does not allow individual claimants to be treated individually; everyone is thrown into the "courtroom Cuisinart." This raises serious due process issues and is constitutionally problematic. Such trials also foster payments to the non-sick, depleting assets needed to compensate the seriously ill. This occurs because consolidated actions

produce coercive legal "blackmail settlements."[27] The effect is to speed the bankruptcy process and put greater pressure on solvent "attenuated defendants." Harvard Law School Professor Christopher Edley, Jr. has also pointed out that the sick often end up receiving smaller awards than they would if their cases were considered individually.[28]

Some courts may find it less facially offensive to join smaller numbers of cases, such as "10 packs," in an attempt to avoid the problems caused by the truly extraordinary mass trial. But, many of the serious legal and public policy problems that exist in jumbo consolidations remain in mini-consolidations. For example, unimpaired or mildly impaired claimants are still encouraged to file actions, because defendants continue to face heavy pressure to settle. Mini-consolidations also do nothing to slow the accelerating bankruptcy trend and resulting "dragnet search" for new peripheral defendants. And, payments to the truly sick remain threatened.

For these reasons, many courts are likely to decide that case consolidation is not the best course for the future resolution of asbestos claims.

Inactive Dockets

A growing number of courts have decided to take a different path; one that is more surgical in its approach to the asbestos litigation problems of today. These courts have focused on the "root cause" of the current crisis – mass filings by the unimpaired or only mildly impaired. These filings are largely responsible for the exploding asbestos dockets that many courts are now experiencing. Such claims are also a driving force behind mass trials.

More importantly, payments to the non-sick represent perhaps the most serious threat to the ability of the truly sick to obtain timely and proper compensation, now and in the future. As New York City Judge Helen Freedman recently concluded: "The large number of claims made by or on behalf of unimpaired or the minimally impaired impedes the ability of the much smaller group of seriously ill plaintiffs and decedents to recover for their injuries."[29] Filings by the unimpaired also have fueled the "dragnet" search for new defendants to be pulled into the litigation.

Why are so many unimpaired claimants electing to bring suit? A key reason is that many claimants fear their claims may be time-barred if they sue in the future. They are afraid that statutes of limitations laws may block their claim. Financial reasons are part of the answer too — as more companies declare bankruptcy, claimants may feel pressure to bring claims while defendants are still solvent.

To address these issues, courts increasingly are electing to give trial priority to the sickest claimants while acting to preserve the claims of people who are not sick today, but may develop an illness in the future.[30] Some courts have done so by adopting an inactive docket (also known as a pleural registry).[31] Claims of plaintiffs who allege exposure to asbestos, but who are not presently sick, are transferred to an "inactive" or "deferred" docket where they remain, and all proceedings (including discovery) are stayed, until the plaintiff can show, based on minimum objective medical criteria set forth by the court, that they are actually impaired or have developed an asbestos-related cancer. Other courts have decided to dismiss without prejudice claims brought by the non-sick, while tolling statutes of limitations to allow these individuals to refile their claims if they should develop an asbestos-related illness in the future.

Courts are looking to these plans to deal with the recent flood of claims brought by the unimpaired. They are also acting to help preserve assets needed to compensate future claimants by slowing the flow of money to the non-sick. For example, Judge Richard Rombro, who oversees the asbestos litigation in Baltimore, Maryland, recently concluded that "with the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos."[32]

There are several benefits to an inactive docket or similar case management order system. First, sick claimants are not forced to wait in the civil justice system behind individuals who are not presently ill. In essence, the sick are moved "to the front of the line." Second, all statutes of limitations are tolled, so that plaintiffs need not worry that their claims will be time-barred if they do become ill in the future. Finally, such procedures help preserve resources needed to compensate the truly ill.

The inactive docket idea is not new. Such docket management plans have existed in Boston, Chicago, and Baltimore for over a decade.[33] And, according to a recent article, judges in all three areas believe that their plans are working well for all parties involved.[34]

Very recently, this approach has gained momentum elsewhere. Within the past few months, judges in New York City, Syracuse, Seattle, and Greenville, South Carolina, have joined the list of pioneering courts.[35] Other courts are currently exploring similar docket management solutions.

At the federal level, Senior United States District Judge Charles Weiner, who oversees the federal asbestos Multidistrict Litigation Panel, has ordered that all cases initiated through a mass screening be subject to dismissal without prejudice until the claimant can produce evidence of an asbestos-related disease.[36] Very recently, Judge Alfred Wolin, who is presiding over the USG bankruptcy in Delaware, has decided to give priority to the sickest individuals and has ordered that the claims of the individuals who have a claim for cancer resulting from asbestos will be compensated in the bankruptcy proceedings before other asbestos claimants.[37]

The Path Most Courts Will Choose

The current asbestos compensation system is not working. In the next year or two, more courts will reach this conclusion and stand at the same fork in the road that has been reached already by some of their colleagues. Any court that handles significant numbers of asbestos cases will reach the fork at some point.

When they get there, judges can follow the West Virginia and Virginia courts, and allow consolidation of individualized asbestos claims. Or, they can join the growing list of courts that have more carefully examined the current asbestos litigation crisis and its roots — and have tailored sound solutions to give priority to sick claimants while preserving the claims of individuals who have been exposed to asbestos but are not presently ill. Our prediction is that as courts examine both approaches, they will see the potholes in the consolidation road and will go the other way.

ENDNOTES

1. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

2. The 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 2 (Nat'l Legal Center for the Pub. Interest monograph), *available at* http://www.nlcpi.org.

3. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter Prof. Edley Testimony].

4. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1.

5. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 *Mealey's Litig. Rep.: Asbestos* 22 (June 18, 1999).

6. *See* Jennifer Biggs *et al., Overview of Asbestos Issues and Trends* 3 (Dec. 2001), available at http://www.actuary.org/mono.htm.; Stephen Carroll *et al., Asbestos Litigation Costs and Compensation: An Interim Report* 20 (RAND Inst. for Civil Justice, Sept. 2002) [hereinafter RAND Rep.].

7. *Amchem*, 521 U.S. at 631, (Breyer, J., concurring).

8. *See* Stephen Carroll & Deborah Hensler, *Facts and Figures About Asbestos Litigation: Highlights from the New Rand Study* (RAND Inst. for Civil Justice, Jan. 2003).

9. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1.

10. *See* RAND Rep., *supra* note 6, at 53.

11. *See id.* at vii; Biggs, *supra* note 6, at 4.

12. Bell, *supra* note 2, at 4.

13. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, at 42 (Sebago Assoc., Dec. 2002).

14. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities*, (NERA Econ. Consulting, Jan. 23, 2003).

15. *See Oversight Hearing on "Asbestos Litigation," Before the Sen. Comm. on the Judiciary*, 107th Cong. (Sept. 25, 2002) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise); *see also* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36.

16. *'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 *Mealey's Litig. Rep.: Asbestos* 39 (Mar. 1, 2002).

17. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do In The Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Bell, *supra* note 2.

18. Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).

19. *The Fairness in Asbestos Compensation Act of 1999: The Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court).

20. *See State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 n.3 (W. Va. 2002).

21. *See State ex rel. Mobil Corp. v. Gaughan*, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring).

22. *See In re Hopeman Bros., Inc.*, 569 S.E.2d 409, 409 (Va. 2002) (Lemons, J., dissenting).

23. *Id.*

24. 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).

25. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997); *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1822 (1995).

26. RAND Rep., *supra* note 6, at 26.

27. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (class action involving blood products).

MEALEY'S LITIGATION REPORT: **Asbestos**

Vol. 18, #3

March 7, 2003

28. *See* Prof. Edley Testimony, *supra* note 3, at 6-7.

29. *In re New York City Asbestos Litig.*, Order Amending Case Management Orders dated Sept. 20, 1996 and amended as of July 23, 2001, at 1 (S. Ct. N.Y. Cty., N.Y. Dec. 19, 2002).

30. *See* Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1.

31. *See* 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 (2001); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 553 (1992).

32. *In re Personal Injury and Wrongful Death Asbestos Cases*, Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria, No 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002).

33. *See In re: Mass. State Ct. Asbestos Personal Injury Litig.*, Order Establishing An Inactive Docket For Asbestos Personal Injury Cases, Consol. Docket (Middlesex Super. Ct. Sept. 1986) (as amended Sept. 22, 1994); *In re Asbestos Cases*, Order to Establish Registry For Certain Asbestos Matters (Cir. Ct., Cook Cty., Ill. Mar. 16, 1991); *In re Asbestos Personal Injury and Wrongful Death Asbestos Cases*, Order Establishing An Inactive Docket For Asbestos Personal Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992).

34. *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?* HarrisMartin Columns: Asbestos, Feb. 2002, at 2.

35. *See In re New York City Asbestos Litig.*, Order Amending Case Management Orders dated Sept. 20, 1996 and amended as of July 23, 2001 (S. Ct. N.Y. City., N.Y. Dec. 19, 2002); *In re Fifth Jud. Dist. Asbestos Litig.*, Amendment to Case Management Order No. 1 (S. Ct. N.Y. 5th Jud. Dist. Jan. 31, 2003); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties (Dec. 3, 2002); *In re: Wallace & Graham Asbestos-Related Cases*, Wallace & Graham Case Management Order (Greenville County, S.C. 2002).

36. *See In re Asbestos Prods. Liab. Litig. (No. VI)*, (E.D. Pa. Jan. 16, 2002).

37. *See In re USG Corp.*, Memorandum Opinion and Order (Bankr. Del. Feb. 19, 2003).