

Commentary***The Michigan Supreme Court:
Will It Help Curb Asbestos Litigation Abuse
And Help The Truly Sick?***

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[Editor's Note: Mark A. Behrens and Philip S. Goldberg are attorneys in the Public Policy Group of Shook, Hardy & Bacon L.L.P. in Washington, D.C. They represent the Coalition for Litigation Justice, Inc. and filed a memorandum on behalf of the Coalition and sixteen other policy organizations, business associations, and insurance groups asking the Michigan Supreme Court to establish an inactive asbestos docket. Copyright 2004 by the authors. Replies to this commentary are welcome.]

Asbestos litigation has bankrupted 78 companies and clogged the courts with over 200,000 pending cases. Before it ends, the litigation may cost upwards of \$200 billion. Cancer victims are worried they may not receive adequate or timely compensation.

Many hoped that Congress would provide a comprehensive solution to the litigation this year. That has not happened, despite persistent and hard work by those closely involved in the negotiations. The U.S. Supreme Court has also indicated that it will not approve mass asbestos settlements under the Federal Rules of Civil Procedure. Consequently, in 2004, courts and legislatures are likely to work with a greater sense of urgency to improve the asbestos litigation environment at the state and local levels.

Reforms at the state level are likely to focus on giving priority to the truly sick while suspending the claims of people who have been exposed to asbestos, but who are not presently sick. As the manager of the federal asbestos docket, Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, has noted: "Oftentimes, these suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims."

A number of key jurisdictions have acted to address filings by the non-sick by adopting inactive asbestos dockets, also called pleural registries or deferred dockets. Under these plans, the claims of individuals who cannot meet certain objective medical criteria specified by the court are suspended. The statutes of limitations on their claims are tolled, permitting these claimants to sue later should they develop an asbestos-related disease in the future. Claimants with actual injury can be removed to the active docket and have their cases set for trial. Other courts have entered innovative case management orders that accomplish the same public policy and legal objectives.

On September 11, 2003, the Michigan Supreme Court announced that it would consider a Petition supported by almost seventy companies to create a statewide inactive asbestos docket. Sixteen national and state associations representing thousands of large and small businesses and the companies that insure them, and a policy organization, filed a memorandum with the Court to support the Petition.

The Asbestos Litigation Crisis In America

Why the sudden interest in reforming asbestos litigation? When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing what the U.S. Supreme Court has called an "asbestos-litigation crisis." Many believed that asbestos litigation would be a serious but diminishing problem by now — some twenty-five years after most companies stopped using asbestos in products.

Instead of declining, however, the crisis is worsening at a much more rapid pace than even the most pessimistic projections. The number of asbestos cases pending nationwide doubled during the 1990s. 90,000 new cases were filed in 2001 alone. Recent reports indicate that as many as 90 percent of these new claimants are not sick. The RAND Institute for Civil Justice predicts that the litigation will worsen, and that an additional 2.4 million claims may be filed. Former U.S. Attorney General Griffin Bell has pointed out that, unless the unimpaired claims are put aside, the total cost of the litigation may exceed the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."

Payments to the non-sick and legal costs spent defending their claims have set off a devastating chain reaction. Scores of so-called "traditional" asbestos defendants have been forced into bankruptcy. This, in turn, has created ripple effects throughout the entire business community. When "traditional" defendants are forced into bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider and sue more defendants. Now, more than 8,400 defendants have been named in asbestos cases — up from 300 in 1982. Some of these new "peripheral defendants" have themselves begun to collapse under the great weight of claims against them. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

Mass Filings by Unimpaired Plaintiffs Are At The Core Of The Crisis

A primary reason that so many unimpaired individuals are filing claims is the fear that their claims might be time-barred should they wait until their asbestos-related condition progresses to disability. Another reason may be that plaintiffs' lawyers are aware that many traditional asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later.

There is also evidence that mass screenings conducted by plaintiffs' law firms and their agents are fueling the recent explosion in asbestos filings. Lawyers' recruit plaintiffs with enticing advertisements that suggest the possibility of a windfall award: "Find out if YOU have MILLION DOLLAR LUNGS!"

The problem presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to the sick and the dying, their widows and survivors. Steven Hantler, assistant general counsel for DaimlerChrysler Corp. in Michigan, has stated: "The tragedy is that as plaintiffs' lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying."

Giving Trial Priority To The Truly Sick

The Michigan Supreme Court would be the first state supreme court to adopt a statewide inactive docket to deal with claims filed by the unimpaired, but similar plans have existed for over a decade in Baltimore, Maryland (1992), Cook County (Chicago), Illinois (1991), and Boston, Massachusetts (1986). These plans have restored a sense of order, balance, and fairness to asbestos cases there and provide a proven framework for statewide action.

Former Judge Hiller Zobel of Massachusetts recently commented that his state's inactive docket has been "really a very good system that has worked out. . . ." Jim Ryan, special master of the Massachusetts asbestos litigation, has described the inactive docket as "an extremely useful tool," saying, "I don't see any downside for creating one anywhere else." Circuit Court Judge Richard Rombro, who oversees the asbestos litigation in Baltimore, recently said that "the docket is working and that a substantial number of cases have been moved to the active docket while those without any impairment remain on the inactive docket."

The exponential increase in asbestos filings by the non-sick recently led New York City (December 2002), Syracuse, New York (January 2003), and Seattle, Washington (December 2002) to join the list of pioneering courts that have adopted inactive dockets to manage their growing asbestos caseloads.

Other courts, such as the Pennsylvania Supreme Court, have held asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action. Still other courts have chosen to dismiss without prejudice claims filed by the unimpaired (i.e., Federal District Court Judge Weiner, January 2002, and Judge Larry Patterson of Greenville, South Carolina, April 2002). The Court of Common Pleas of Cuyahoga County (Cleveland), Ohio, now limits discovery and trial groupings to plaintiffs whose claims seek redress for functional impairment due to asbestos exposure (January 2002).

A "Win-Win-Win" Solution

These various plans, all of which give trial priority to the truly sick while preserving the claims of the non-sick, are gaining momentum because they have proven to be fair and workable, and they represent good public policy.

The truly sick: Lawyers who represent cancer victims, such as Oakland attorney Steve Kazan, have expressed strong concern that filings by the unimpaired may result in their clients being left uncompensated. Peter Kraus, a lawyer from Dallas, has said that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired." Seattle attorney Matthew Bergman has written: "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."

Trial plans that focus on the needs of the truly sick help preserve assets needed to compensate cancer victims and allow such claimants to move "to the front of the line," rather than be forced to wait until earlier-filed claims by unimpaired individuals are resolved.

Businesses and workers: Suspending the claims of the non-sick may also help stem the recent tide of asbestos-related bankruptcy filings. This, in turn, may take pressure off remote defendants. Each time a defendant declares bankruptcy, mounting and cumulative financial pressure is placed on the remaining defendants, who have to pick up the share of the bankrupt defendants. "If the acceleration and expansion of asbestos lawsuits continues unaddressed," Senior U.S. District Court Judge Jack Weinstein has said, "it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy."

As the Enron debacle illustrated, corporate bankruptcies represent more than the demise of a business. They also have real impacts on the job prospects of employees, the retirement savings of ordinary citizens, and the economy as a whole. A 2002 study led by Nobel Prize-winning economist Joseph Stiglitz found that bankruptcies resulting from asbestos litigation put approximately 52,000 to 60,000 people (many of them union workers) out of work between 1997 and 2000. Those workers and their families lost \$175 million to \$200 million in wages. A 2002 study by National Economic Research Associates found that workers, communities, and taxpayers will bear as much

as \$2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos. The RAND Institute for Civil Justice recently estimated that \$70 billion was spent in asbestos litigation through 2002. The remaining future cost of the litigation is an estimated \$130 billion, according to Jennifer Biggs, a Consulting Actuary for Tillinghast-Towers Perrin.

The judicial system: With roughly 90,000 asbestos claims being filed a year and the potential for additional 2.4 million claims on the horizon, judges in some jurisdictions could spend their entire careers just hearing asbestos cases and barely make a dent in their caseloads. Suspension of unripe or meritless claims would allow judges to focus the resources of the courts on processing those claims that are most worthy of attention. This would include not only claims filed by sick asbestos claimants, but also claims filed by other litigants in the civil justice system.

Conclusion

Until Congress acts to address the asbestos litigation crisis, courts and legislatures must do what they can to solve the problem within their borders. Increasingly, state courts are recognizing the urgent need for action and have begun to prioritize the treatment of asbestos cases. These plans seek to give trial priority to the truly sick while helping to ensure that future cancer victims are able to obtain fair compensation. These plans also seek to slow the proliferation of asbestos bankruptcies and the effects of Chapter 11 filings on joint defendants, workers in affected businesses, their communities, and the economy as a whole.

The Michigan Supreme Court will soon decide whether it will become part of the solution or a mere bystander with regard to the worsening asbestos litigation environment. The Court should seize the opportunity before it, make a difference, and provide an example for other courts to follow. ■

