Legal Backgrounder

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CLEARING UNINJURED PLAINTIFFS FROM THE TORT SYSTEM: THE ROAD TO A SOLUTION

by

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It is now well accepted that the way the tort system handles personal injury mass torts is in need of repair.[1] One of the most obvious and alarming signs is that unfounded claims — claims without any medical impairment — continue to be filed and paid in large number. Such claims are notorious and ubiquitous in the history of asbestos litigation, but asbestos is no exception: claims of this type have been documented in litigation involving Agent Orange, breast implants, Dalkon Shield and diet drugs.

Calls for tort reform have focused on the greed of the plaintiffs' bar. This view, however, is misguided: the breakdown results from a complex set of institutional failures that have received less attention. The institutions that share the blame include a small number of state court systems with pro-plaintiff procedures, legislatures in those same states that have been slow to adopt tort reform, Congress, which has until recently failed to heed repeated calls for tort reform, and a number of medical professionals that certify impairment where none exists.[2]

In the past few years, a number of favorable institutional changes may have begun to turn the tide of asbestos litigation. Bankrupt trusts have enacted or proposed to enact more stringent criteria. State and federal courts have begun to create inactive dockets that stay the payment of claims if and until a compensable injury

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[1] *See*, *e.g.*, *Amchem Products, Inc.* v. *Windsor,* 521 U.S. 591 (1997); American Bar Association Commission on Asbestos Litigation, *Report to House of Delegates, Recommendation*, Feb. 2003 ("ABA Report, 2003"); Rothstein, Paul S., *What Courts Can do in the Face of the Never-Ending Asbestos Crisis*, MISS. LAW J., Fall 2001 ("Rothstein, 2001"); Bell, Griffin B., *Asbestos Litigation and Judicial Leadership*, National Legal Center for the Public Interest, 2002; American Academy of Actuaries, *Overview of Asbestos Issues and Trends*, Public Policy Monograph, Dec. 2001.

[2] ABA Report, 2003. Rothstein, 2001. Carroll, Stephen J., et al., *Asbestos Litigation Costs and Compensation*, Rand Institute for Civil Justice, 2002 ("Carroll, et al., 2002"). White, Michelle, *Explaining the Flood of Asbestos Litigation*, NBER Working Paper 9362, Dec. 2002 ("White, 2002").

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arises.

Encouragingly, such reforms have recently extended outside the asbestos arena, with a clamp down on the medical profession specifically. In late 2002, for example, a federal judge dismissed 78 plaintiffs from a class action involving the diet drug Fen-Phen because suspect doctors supported the claims of those plaintiffs. This decision could be another brick in the wall that will finally put a stop to unfounded claims.

The Problem: Evidence from Asbestos Litigation. At least as early as the mid-1990s, asbestos defendants were generally alarmed about fraudulent claims. In 1995, for example, it was reported that: "Doctors diagnose asbestosis based on occupation — not proof. Most significantly, 95 percent of claimants against Keene [Corp.] are not sick."[3] In 1996 and 1997, Owens Corning filed suits under the federal Racketeer Influenced and Corrupt Organizations Act against certain laboratories conducting pulmonary function testing ("PFT"), alleging that 40,000 of its recent claims involved plaintiffs whose tests were improperly administered or manipulated by the testing laboratory or otherwise inconsistent with proper medical practice.[4,5]

The ability of plaintiffs to find doctors, among other experts, who would testify to junk science was one of the reasons the Supreme Court was asked to determine the standards for admitting scientific testimony in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). The problem confronting a mass tort defendant, however, is that most of the claims will be made either in state court or in a bankruptcy trust with a trust distribution process negotiated without federal evidence rules.[6] These venues have allowed medical evidence that arguably would not stand up in federal court. Mississippi, for example, has been a favorite location for asbestos claims because of, among other reasons, the courts' inability to order independent medical examinations limits "defendants' ability to challenge asbestos plaintiffs' disease allegations."[7]

Substantial Proportion of Asbestos Claims Fail Audit. Although skeptics may view these observations as no more than the advocacy of a defendant, the same cannot be said of an audit of claims made on the Manville Asbestos Trust, an institution partially designed and influenced by the plaintiffs' bar. Beginning in 1995, a medical audit randomly selected pending claims alleging pleural disease, asbestosis, and lung and other cancers that were eligible for payment. The initial results, which were validated by statistics professors at Pennsylvania State University, were summarized in letters from the Executive Director of the Trust:

> [T]he failure rate at first review is around 60%, and the aggregate failure rate after two reviews is approximately 50%.[8]
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> The dozen or so doctors that constitute the vast majority of diagnosticians being used have demonstrably dreadful audit records. . . These doctors are

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[3]Mealey's Litigation Reports: Asbestos, Jan. 6, 1995.

[4]Owens Corning 10Q, 11/5/98, at 27. Owens Corning 10K Annual Report, 3/15/99, at 84.

[5]Owens Corning 10K Annual Report, 3/20/97, at 61-62.

[6]Three pro-plaintiff states (Texas, Mississippi and West Virginia) and two high-claim states (New York and Ohio) accounted for over 66% of all national asbestos claim filings from 1998-2000, up from nine percent before 1998. Carroll, et al., 2002, at 32. "…[I]n the three most pro-plaintiff states of Mississippi, West Virginia and Texas, the expected return from trial increases by one to two million dollars compared to other states. Thus it is not surprising that all three of these states have become centers for asbestos litigation." White, 2002, at 24.

[7]Carroll, et al., 2002, at 35.

[8]Letter from Patricia Houser to Elihu Inselbuch, Sept. 15, 1995 (Bates #CRMC 0189508 (*Falise v. American Tobacco Co., et al.* ["*Falise*"])). *See also* Houser Deposition, at 193, lines 6-16; Memo to David T. Austern and Richard E. Flynn from Terry F. Lenzer and Kathy Lavinder, Re: Asbestos Settlement: Background Investigation of Doctors, Mar. 2, 1996 (Bates #CRMC 0189815-30 (*Falise*)).

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finding disease where there is none, with little regard for medical certainty or accuracy."[9]

In 1998, the Trust determined that it would require 100% x-ray submission for asbestosis claims for review by up to two B-readers.[10] The plaintiffs' bar then sued the Trust.[11]

National Economic Research Associates, Inc. found that of all the Manville claims up through 1995 that named a doctor, 45% of the asbestosis and 26% of the pleural plaque claims identified the same ten high volume doctors as had been identified by the medical audit. That research demonstrated that a gravitation toward the use of these high volume doctors has occurred over time, finding that these doctors supported 1% of all asbestosis claims against the Manville Trust in 1983, but 60% in 1995. One such doctor supported over 30% of *all* the asbestosis cases filed against the Manville Trust in 1995.

The Road to a Solution. A slow march toward a solution has begun to emerge, observed most prominently in the area of asbestos litigation. Encouragingly, this trend has been recognized and has begun to be replicated outside the asbestos arena.

Bankruptcy Trust Reform. On October 11, 1996, the Manville Trust announced that starting from December 2, 1996, it would require PFT results that adhered to American Thoracic Society ("ATS") standards on how the tests were to be administered to patients. The Trust agreed that all claims filed before December 2, 1996 would not be audited so they did not need to comply with ATS standards. In the seven weeks between the announcement and the implementation of the ATS standards, claimants filed 4,270 disabling asbestosis claims including 1,838 filed on December 2, 1996 alone. As evidence of the rule's impact, this rate was about 62 times higher than the average after December 2, 1996.

More recently, the Manville Trust has considered splitting into two trusts, one that would compensate malignant claims, the other non-malignant claims. The scheduled values, as well as the proposed cents on the dollar, paid to the malignant claims would be higher than to the non-malignant claims. While the 2002 Trust Distribution Plan still treats malignant and non-malignant claims the same with respect to cents paid on the dollar, the scheduled value for mesothelioma has been increased substantially relative to the other diseases. Other trusts still in the formation stages have considered implementing a structure that treats malignant and non-malignant claims differently.

State Courts Initiate Reform. In response to payments to unimpaired claimants, many state courts have placed these claims into an inactive docket, or pleural registry. For these claims, statutes of limitations are tolled. All proceedings for claims in inactive dockets are stayed, and claims are not moved into an active docket until impairment can be documented. Within the last six months, judges in Syracuse, Seattle, and Greenville, South Carolina adopted inactive dockets as a mechanism for managing caseloads.[12] Quantitatively, the biggest impact will come from New York where Judge Freedman, who handles the lion's share of that state's asbestos litigation, also recently adopted an inactive docket for all nonmalignant claims.

Federal Reform: MDL Asbestos Panel. A Multi-District Litigation ("MDL") panel manages and

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[9]Letter from Patricia Houser to Elihu Inselbuch, Esq., Oct. 23, 1997 (Bates #CRMC 0123381–CRMC 0123382 (*Falise*)); *see also* Individual Evaluation Manual, Claims Department, Mar. 1996 (Bates #CRMC 0013573 *(Falise*)).

[10]Memorandum to Manville Trustees from Patricia Houser, Re: Response to the Selected Counsel for the Beneficiaries, June 9, 1998 (Bates #CRMC 0191675-76 at 75, *Falise*). B-readers are specially trained medical personnel who review chest x-rays to look for abnormalities. The term B-reader comes from black lung disease, an affliction of coal miners caused by coal dust. The scale used by B-readers to describe abnormalities on a lung x-ray was originally developed as part of a special program for black lung benefits.

[11]Complaint, *James T. Adams, David W. Andrews, et al. v. Manville,* (Bates #CRMC 0116682-726 (*Falise*)).

[12]Behrens et al., 2003.

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processes personal injury claims brought in multiple Federal Districts. As at the state court level, the federal asbestos MDL panel has been periodically placing claims into inactive dockets for years. However, with the recent surge in claims filed by unimpaired individuals, this mechanism has played an increasingly important role in case management.

The MDL 875 docket operating in the Eastern District of Pennsylvania is exemplary. In January 2003, Judge Weiner of MDL 875 ordered that all nonmalignant claims assigned to the MDL docket and initiated through a mass X-ray screening would be subject to administrative dismissal without prejudice, with the tolling of all applicable statutes of limitations.[13] In the MDL 875 docket, plaintiffs must now provide evidence of impairment before claims are reinstated. In his order, Judge Weiner explained 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."[14] Judge Weiner transferred 5,500 actions to MDL 875's inactive docket on March 31, 1997 and another 976 cases on April 29, 1999.[15]

Reform Spreads Outside Asbestos: Diet Drugs Trust. Encouragingly, the trend toward limiting the filing and payment of unimpaired claims has begun to extend outside the asbestos arena, as evidenced by a recent ruling by Judge Bartles, who oversees the $2.55 billion American Home Products Settlement Trust relating to diet drugs.[16] First, he knocked out 78 claims, all coming from two law firms and two cardiologists alleging valvular heart conditions caused by using Fen-Phen; he also granted the settlement trust the authority to audit all claims from those lawyers and doctors; and he referred this matter to New York disciplinary authorities "for further review."

Some of the salient facts cited in the decision were: (1) over a ten month period one doctor had earned $750,000 from these two law firms; (2) an employee of the law firm, rather than the doctor, established the criteria for a finding of disease on the echocardiograms and filled out the medical history portion of the claim form; (3) the second doctor had a contingency fee arrangement with the law firm; finally, (4) yet a third doctor, brought in by plaintiffs' law firms to testify to the reasonableness of the findings of the other two, was found by the Judge to be evasive and not credible on the stand.

Conclusion. Just as institutions can create a crisis, they can also adapt and respond. As an example, in just six years, the lobbying machine of the medical profession has been able to get medical liability reform legislation passed in 24 states. The portrayal of doctors as innocent victims of the plaintiffs' bar in the medical malpractice setting, however, conceals an uncomfortable fact: some in the medical profession itself have been complicit in what it calls the tort system crisis. In fact, some medical professionals have been paid handsomely by these same plaintiffs' attorneys for their role in unfounded personal injury claims against non-medical defendants.[17]

Recent institutional changes should reduce the prevalence of unfounded claims supported by these suspect doctors. It is imperative that these institutions continue to respond, both inside the confines of asbestos litigation and in other emerging tort areas.

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[13] "MDL Judge Issues Order to Administratively Dismiss X-Ray Screening Cases," *Mealey's Litigation Reporter*, Vol. 17, Issue 1, 2003.

[14] *Id.*

[15] "Judge Weiner Lists 5,500 MARDOC Actions for Administrative Dismissal," *Mealey's Litigation Reporter*, Vol. 12, Issue 6. *See also Mealey's Litigation Reporter*, Vol. 14, Issue 7.

[16] *In re: Diet Drugs* (Phentermine, FenFluramine, Dexfenfluramine) Products Liability Litigation, MDL Docket No. 1203, Civil Action No. 99:20593, United States District Court for the Eastern District of Pennsylvania, 2002 U.S. Dist. LEXIS 23592.

[17] Although the medical profession sanctions doctors who testify against other doctors, there are no reports of sanctions against those who would give the same testimony against non-doctors.

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