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JUDGE'S SILICA OPINION EXPOSES MANUFACTURED TORT CLAIMS TO ANTISEPTIC SUNSHINE

by

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Over the past decade state and federal courts have been inundated with hundreds of thousands of asbestos and silica personal injury claims involving hundreds of defendants and driving over seventy companies into bankruptcy. The U.S. Supreme Court has described this welter of tort litigation as “an elephantine mass” for which some national legislative solution is necessary. *See Ortiz v. Fiberboard Corp.*, 527 U.S. 815, 821 (1999). The most salient feature of these mass tort claims is that upwards of eighty percent of the claims filed involve plaintiffs who have no symptoms of physical injury or impairment. *See James A. Henderson, Jr. & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C.L.REV. 815, 823 (2002); Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 1 (Dec. 2001), available at <http://www.actuary.org/mon.htm>. (estimating that over ninety percent of current asbestos claimants nationwide allege nonmalignant injuries). Indeed, these asymptomatic or “massbestotis” claimants account for the anomaly of asbestos litigation: the sharp increase in the number of claims being filed despite the marked decrease in workplace asbestos exposures since the 1970’s, when OSHA began promulgating regulations severely restricting asbestos exposure in the workplace. *See American Thoracic Society, Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, AM. JOUR. RESP. & CRIT. CARE MED. 2004; 170: 691-715 (“In work sites around the world that meet recommended control levels, high exposure to asbestos is now uncommon and clinical asbestosis is becoming a less severe disease that manifests itself after a longer latent interval.”).

A large number of these asbestos and silica tort filings resulted from chest x-ray screenings that were conducted on a mass scale in portable medical vans and trailers at union halls, shopping malls, or workplace locations and have been sponsored by unions and plaintiffs’ attorneys. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 297, 309 (E.D.N.Y. & S.D.N.Y. 2002); *Eagle-Picher Indus. Inc. v. Am. Employers’ Co.*, 718 Supp. 1053, 1057 (D. Mass. 1989). The screening companies typically work closely with the unions and plaintiffs’ attorneys to refer the x-rays and other medical documents for diagnosis to physicians acceptable to the plaintiffs’ attorneys. In most of these instances, the physicians will find some radiographically detectable markings on plaintiffs’ lungs, which they assert are “consistent with” asbestos or silica-related disease regardless of whether plaintiffs have any physical

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impairment. In recent years, concerns have steadily increased about the legitimacy of these litigation-driven screenings and diagnoses, primarily as a result of Manville asbestos bankruptcy trust audits of physicians' x-ray reports which were submitted by plaintiffs that participated in the screenings. Those audits demonstrated that a substantial number of persons filing claims with the Trust during 1995-2000 were misdiagnosed as having an asbestos-related lung injury. See Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, Jan. 2003 at 98.

The full extent of screening abuse in mass toxic tort litigation was recently exposed in the federal Multidistrict Litigation ("MDL") proceeding established to manage pre-trial activities in some 10,000 silica-related personal injury claims, most of which were filed in Mississippi. See *In Re Silica Products Liability Litig.*, 2005 WL 1593936 (S.D.Tex.). In that MDL, U.S. District Judge Janis Graham Jack of the Southern District of Texas presided over extensive coordinated discovery, which culminated in several days of hearings devoted to examining the reliability of the medical diagnoses by physicians hired by plaintiffs to support their claims. After a comprehensive review of the evidence, Judge Jack, a former nurse, concluded that these claims represented a "phantom epidemic" of silicosis generated by a litigation-driven screening process featuring attorneys or screening companies running advertisements in local newspapers promising free x-rays; mobile x-ray screeners ignoring proper safety or medical examination standards and reaping significant financial rewards from plaintiff law firms for rendering positive diagnoses of silicosis; and doctors providing "scientifically virtually impossible" diagnoses of silicosis for plaintiffs for whom they previously diagnosed asbestos-related injuries.

For-Profit Mass Screening and Medical Fraud. Underscoring how these diagnoses were "about litigation rather than health care" and were "manufactured for money," Judge Jack noted that based on silicosis mortality statistics maintained by the National Institute for Occupational Safety ("NIOSH") for the period between 1990 and 1999, "one would anticipate approximately eight new silicosis cases per year in Mississippi." In contrast, in 2002, 10,642 silicosis claims were filed in Mississippi, and another 7,228 claims were filed in 2003. This number of claims, Judge Jack explained by referencing data maintained by the U.S. Center for Disease Control, is "over five times greater than the total number of silicosis cases one would expect over the same period in the entire United States."

In scrutinizing the medical testimony, Judge Jack found that several of the physicians who reviewed plaintiffs' chest x-rays as part of the mass screenings had never in fact diagnosed silicosis, even though plaintiffs had submitted sworn statements that those diagnoses supported their claims. Indeed, one of the reviewing physicians, Dr. George Martindale of Mobile, Alabama, a radiologist who examined x-rays for the Mississippi screening company N&M Inc. that produced a large percentage of the claims in the MDL, testified at deposition he did not intend to sign his name to thousands of diagnoses, conceding that "I can't diagnose silicosis on the basis of that chest X-ray..." Martindale admitted he did not even know the criteria for making a diagnosis of silicosis and that he did not examine or speak to a single plaintiff; he simply prepared reports based on his interpretation of plaintiffs' chest x-rays. Over the period between March 2001 and June 2002, Martindale interpreted chest x-rays and made reports for approximately 4,000 plaintiffs; he diagnosed 3,617 plaintiffs with silicosis. He rendered these diagnoses on only 48 days, a rate of 75 per day for which he was paid a total of \$125,000.

Another physician used frequently by asbestos and silica litigation plaintiffs, Dr. Ray Harron, a radiologist from West Virginia hired by N&M to read chest x-rays and render diagnoses for the MDL plaintiffs, admitted he directed his employees to produce form letters of diagnoses on which they were

to stamp his name. He further admitted he never reviewed the letters before they were sent to plaintiffs' counsel with respect to his diagnoses for some 6,300 plaintiffs. Dr. Harron's work for N&M from 1995 to 2000 was focused on asbestosis cases; beginning in 2001 his focus suddenly shifted to silicosis cases. Harron also testified that the plaintiff law firms or N&M collected the plaintiff's medical history and if that history turned out to be unreliable, he would have to retract the diagnosis. Moreover, he stated he did not agree that one of the criteria for diagnosis of silicosis is the "absence of any good reason to believe that positive x-ray findings are the result of some other condition." Judge Jack ruled that his opinion in this regard "is contradicted by all of the major textbooks in the field, as well as by the testimony of the other physicians at the hearing."

Furthermore, one of the owners of N&M testified that plaintiffs' law firms paid N&M only for positive diagnoses, thus showing that the screening companies and the physicians to whom they referred the x-ray film had a strong economic incentive to render silicosis diagnoses. For example, N&M was paid \$335 for each of the approximately 2,000 silicosis diagnoses it provided to one plaintiffs' firm. Overall, N&M generated diagnoses for approximately 6,800 of the MDL plaintiffs in just two years, which as Judge Jack notes, was "400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same year."

One of the other physicians used by plaintiffs, Dr. B.S. Levy, similarly testified that he prepared 1,239 medical evaluations in 72 hours. He also admitted that he frequently based his diagnoses on the chest x-ray interpretations of another doctor, Dr. James Ballard, who was retained by plaintiffs' counsel in these cases and who himself admitted that his interpretations were not based on his independent medical judgment, but on what plaintiffs' attorneys instructed him to find. Dr. Levy further admitted that he never examined nor spoke with any of the plaintiffs for whom he prepared diagnoses; that he relied on a one-page "Fact Sheet" submitted to the court for each plaintiff and on some communications with plaintiffs' attorneys; and that his own actions in the MDL litigation contradict textbooks he has authored or edited which discuss the proper methods for diagnosing lung diseases.

Most troubling of all, these MDL hearings revealed that more than 5,000 of the silicosis plaintiffs had also previously been diagnosed with asbestosis, an extremely curious occurrence because it is very rare clinically for someone to suffer from both asbestosis and silicosis, according to experts cited by Judge Jack. Indeed, as those experts explain, asbestosis and silicosis have very different appearances on an x-ray. Dr. John Parker, former administrator of NIOSH's x-ray B-Reader program and current revisor of the guidelines used to interpret x-rays, testified in the hearings he has never seen a clinical case of asbestosis and silicosis in the same individual. In addition, although many of those asbestosis diagnoses had been rendered by the same doctors who submitted diagnoses to support plaintiffs' silica claims (Dr. Harron, among others), those doctors did not reference their earlier diagnoses in their silicosis reports.

In the initial stages of the MDL proceeding, Judge Jack directed plaintiffs to disclose to defendants whether they had previously been diagnosed with asbestosis and to provide the x-ray reports and other documentation related to those diagnoses. However, very few of the MDL plaintiffs admitted their earlier asbestosis diagnoses or produced the required documentation. Defendants ultimately obtained plaintiffs' medical records in third-party discovery from the Johns-Manville Trust, among other sources. Those records revealed that many of the physicians who diagnosed plaintiffs solely with silicosis for purposes of the silica MDL litigation had earlier diagnosed the same plaintiffs solely with asbestosis, *based on the same x-ray films*. For example, Judge Jack found that "when Dr. Harron first

examined 1,807 plaintiffs' x-rays for asbestos litigation (virtually all done prior to 2000, when mass silica litigation was just a gleam in a lawyer's eye), he found them all to be consistent only with asbestosis and not silicosis. But upon reexamining these MDL Plaintiffs' x-rays for silica litigation, Dr. Harron found evidence of silicosis in every case." Evidence also came to light during the hearings that plaintiffs' counsel attempted in many cases to hide these earlier inconsistent diagnoses by retaining other physicians (Drs. Martindale and Levy, among others) to render new silicosis diagnoses. Many of these second silicosis diagnoses were eventually withdrawn by those physicians when they testified they never intended their reports to be medical diagnoses.

Preclusion of Medical Testimony and Sanctions. The evidence described above led Judge Jack, in at least 100 of the MDL cases before her, to grant defendants' motion to exclude the testimony of Dr. Harron and Dr. Levy, as well as to grant defendants' motion for sanctions against plaintiff's counsel in that action, O'Quinn, Laminack & Pirtle, L.L.P. ("O'Quinn") for "multiplying the proceedings unreasonably and vexatiously." Judge Jack determined that O'Quinn should have realized that it was "medically implausible" for those 100 Plaintiffs' silicosis diagnoses to have been accurate in view of the CDC statistics, and that "the implausibility should have been even more starkly apparent" to the firm since it was also "in the process of filing silicosis cases for over 1,900 other [MDL] Plaintiffs (almost all of whom were Mississippi or Alabama residents),..." The court ruled that O'Quinn "exhibited a 'reckless disregard of the duty owed to the court'" because it should have realized at an early stage of the proceedings, even if it did not know when it filed the claims, that the N&M-produced silicosis diagnoses for thousands of MDL plaintiffs were "scientifically virtually impossible" and, thus, it should not have continued to prosecute the claims and insist that the diagnoses would be proven legitimate at the evidentiary hearings.

Judge Jack also criticized O'Quinn for taking the medical and occupational histories for their plaintiffs and for "micro-management of the diagnostic process." She concluded that O'Quinn's "clear motivation" for doing so "was to inflate the number of Plaintiffs and claims in order to overwhelm the Defendants and the judicial system, all with the hope "of extracting mass nuisance-value settlements because the Defendants and the judicial system are financially incapable of examining the merits of each individual claim in the usual manner."

Implications for Other Asbestos and Silica Claims. Judge Jack's comprehensive findings of litigation abuse and medical fraud in the silica MDL proceedings should put a damper on the activities of for-profit litigation screening companies responsible for generating most of the asbestos and silica personal injury claims over the past ten years. The spotlight thrown on the activities of such screening companies, and the plaintiff firms associated with them, may also result in closer scrutiny by federal or state prosecutors. See Jonathan D. Glater, *Lawyers Challenged On Asbestos*, N.Y. TIMES, July 20, 2005, at C1. Other toxic tort claimants may now be revealed as asbestos or silica "retreads" or "repeat litigants," as has been discovered recently in the federal MDL court handling welding fume exposure cases. See Timothy Aepfel, *Plaintiffs in Welding-Fume Case Win A Skirmish in Federal Court*, WALL ST. J., July 26, 2005, at D4 (noting that many of the claimants in that MDL became litigants as a result of medical screenings organized by plaintiff lawyers and had previously filed claims for asbestos exposure). Most important, the revelations in the silica MDL may significantly reduce the number of future misdiagnoses of asbestos and silica-related injuries, as well as the number of unimpaired and asymptomatic claims that have clogged the state and federal courts and forced many companies into bankruptcy.