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COMMENTS SOUGHT ON STATE COURT PLAN TO ADDRESS ASBESTOS SUITS

by

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Ignoring cries by opponents to simply continue the interminable wait for “inevitable” tort reform legislation to reign in the asbestos litigation morass, the Michigan Supreme Court recently took action with a unique version of “court reform.” On August 9, 2006, the sharply divided Court, relying on its inherent authority to manage state lower courts, issued an Administrative Order prohibiting “bundling” of asbestos-related cases for either settlement or trial. Michigan Supreme Court, Administrative Order No. 2006-6 Prohibition on “Bundling” Cases, available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-47-080906.pdf> “Bundling” is when multiple plaintiffs’ cases are consolidated for the trial phase of the case. Typically, a large number of *unimpaired* claimants are consolidated with a more difficult to defend cancer case. The sole purpose of this is to leverage the value of a severely injured plaintiff’s claim to force defendants to either try all of the cases together or over-pay on the claims of little or no value. This Order attempts to halt that practice.

This form of court-sanctioned blackmail is the by-product of the mass screening efforts by the asbestos plaintiffs’ bar and the cottage industry of screening companies and experts who were spawned largely during the 1990’s. Unfortunately, in spite of recent efforts to expose the seamy side of these litigation factories, they continue to generate *unimpaired* claimants that represent what the ABA’s Commission on Asbestos Litigation has reported as anywhere from 66% to 90% of the total asbestos claims clogging our court system.

In response to this flood, overburdened judges have let justice take a back seat to short-term expediency. Disturbing facts surfacing during the course of public input on the Court’s three-year effort to consider various asbestos docket control options included that although we are now over 30 years beyond the type of occupational exposures associated with the disease asbestosis, the asbestos docket for Wayne County (Detroit) had almost tripled over just one recent three year period, swollen largely by unimpaired plaintiff claims. Before this prohibition on “bundling,” the Wayne County Court had been consolidating 100 cases for trial once every two months. When combined with other Michigan counties applying similar “bundling” processes, many defendants faced “going to trial” in approximately *500 cases each month*. With this “gun” to their heads, options beyond a forced settlement are few.

The Michigan Supreme Court’s Administrative Order was put into immediate effect, although

public comments are being invited until **December 1, 2006**. While critics of this Order complain that it will only add costs and delays for the courts and parties, the Michigan Supreme Court has announced through its Order that docket management concerns will no longer trump traditional principles of due process. Hopefully other courts around the country will take note.

Thomas Foley and **Richard Baron** are founders of the Detroit-area law firm of Foley, Baron & Metzger. Mr. Foley specializes in the defense of mass tort and product litigation in Michigan and nationally. He tried what is believed to be the largest “bundled” group of plaintiffs – 129 in total – to go to a defense verdict. Mr. Baron specializes in toxic tort, environmental and complex litigation.

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