

STATE COURT ASBESTOS RULINGS PROVIDE GUIDANCE TO CONGRESS

by
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Two state trial courts issued decisions late last year that are likely to substantially reduce the number of active asbestos personal injury cases in New York and Washington. Those courts ruled that all claims of plaintiffs who allege exposure to asbestos, but who presently have minimal or no physical or functional impairment, will be stayed and transferred to “deferred” or “inactive” court dockets, where they will remain (without discovery or trial proceedings) until plaintiffs can show, based on minimum objective medical criteria set forth by the courts, that they are actually impaired or have developed an asbestos-related cancer. *See In Re New York City Asbestos Litigation*, (N.Y. Sup., N.Y.Co., Index No. 40000/88, Order dated December 19,2002) (Freedman, J.); *In Re Certain Asbestos Cases*, (Wash. Sup. Ct., Kings Co., Index No. 89-2-18455-9-SEA, Letter Ruling dated December 3, 2002) (Armstrong, J.). These decisions should provide guidance for Congress as it considers the United States Supreme Court’s call for a national legislative solution to the “elephantine mass of asbestos cases.” *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

The inactive docket programs established in these rulings will apply to more than 21,000 pending cases as well as subsequently filed cases. They follow in the footsteps of the “pleural registry” systems that were adopted in the early 1990’s by some state courts in Illinois, Massachusetts and Maryland. *See, e.g., In re Asbestos Cases*, 586 N.E.2d 521, 524 (Ill. App. Ct. 191) (finding that “the registry is a tool whereby the court may prioritize the litigation of cases already filed and [is] an example of the court exercising its inherent authority to control its own docket”); *In re Asbestos Personal Injury and Wrongful Death Asbestos Cases*, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992). Those courts were then facing the first wave of claims by asbestos plaintiffs who had some marker of exposure to asbestos, such as changes in the pleural membrane covering their lungs (pleural plaques and pleural thickening) or microscopic scarring in the body of the lung itself (“asbestosis”), but who had not developed any actual impairment or sickness and were not likely to. *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets for Asbestos Victims Through Inactive Docket Programs*, 33 TEXAS TECH L. REV. 1, 14-15 (2002); *In re Hawaii Fed Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (finding that “[I]n virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring”); *In Re Asbestos Prod. Liab. Litig.* (No. VI), 1996 WL 539589, at *1 (stating that “only a small percentage of the cases filed have serious asbestos-related afflictions”). Similarly, in 1997, the federal Multidistrict Litigation Panel (“MDL”) responsible for overseeing federal asbestos claims effectively created an inactive docket for unimpaired asbestos claimants by ordering the dismissal of such claims “without prejudice and with all statutes of limitation tolled”. *See In Re Asbestos Prod. Liab. Litig.* (No. VI), MDL 875, Order of Oct. 16, 1997 (E.D. Pa.) (dismissing approximately 3,200

unimpaired claims). Unfortunately, most state courts dealing with asbestos claims have not adopted deferred dockets or pleural registries as a means of administering those claims.

As Judge Helen Freedman notes in her decision in the New York cases, such claim deferral dockets have become even more imperative since the early 1990's as the number of pending asbestos claims has doubled to well over 200,000, with tens of thousands of new claims being filed each year. See Stephen J. Carroll, Deborah Hensler, et al., RAND Institute for Civil Justice, *Documented Briefing: Asbestos Litigation Costs and Compensation, An Interim Report* (Sept. 2002) at vi. A recent study suggests that up to eighty percent of these new claims were brought by asymptomatic or otherwise unimpaired plaintiffs. See, e.g., 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* 3 (Dec. 2001), available at <http://www.actuary.org/mon.htm>. (estimating that over ninety percent of current claimants nationwide allege nonmalignant injuries).

Many of those case filings resulted from mass x-ray screenings conducted in medical trailers at occupational locations and sponsored by unions and/or plaintiffs' attorneys. See *Eagle-Picher Indus. Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989). Moreover, based on audits by the Manville bankruptcy trust of physicians' reports submitted by plaintiffs who participated in such screenings, it appears that a substantial portion of persons filing claims with the Trust in the 1995-2000 period were misdiagnosed as having an asbestos-related lung injury. See Roger Parloff, *Mass Tort Medicine Men*, THE AMERICAN LAWYER, Jan. 2003 at 98. These asymptomatic or "massbestosis" claims account for the paradox of asbestos litigation: the sharp increase in the number of claims filed over the past five years despite the marked decrease in workplace asbestos exposure since the 1950's, and especially since the early 1970's when OSHA began promulgating regulations severely restricting asbestos exposure in the workplace. See American Thoracic Society, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, AM REV RESP DIS 1986;134:363-368 ("With exposures below the current recommended permissible limit value, asbestosis is not likely to be found during a working career.").

The Washington and New York trial judges handling asbestos cases have now concluded that, given the mounting number of asbestos defendants filing for bankruptcy (now standing at well over sixty companies), deferral dockets are the only effective means of preserving the rapidly diminishing pool of funds needed to compensate the truly sick or disabled. As Judge Freedman starkly described the situation:

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. Recoveries by unimpaired or minimally impaired deplete the funds needed to compensate present and future claimants with serious illnesses, and resources are dwindling as the 'elephantine mass of asbestos cases' nationwide drives large numbers of potentially culpable parties into bankruptcy.

Under the terms of the new case management order entered by Judge Freedman, in order to be placed on the active docket, claimants will need to meet specific medical criteria: (1) for non-malignancies, they must show (a) scarring of their lung tissue, or pleural thickening, to a certain defined level as manifest on chest x-rays, (b) impairment of their pulmonary lung function, and (c) their lung scarring is "a substantial contributing factor to their pulmonary function change"; and (2) for malignancies, they must receive a diagnosis of cancer by a board certified internist, pulmonary specialist, oncologist or pathologist "showing the diagnosis as a primary cancer, which states to a reasonable degree of medical certainty that the cancer in question is caused by asbestos exposure." [The Washington trial court is in the process of devising objective medical standards for placing asbestos cases on the active docket.] The courts' application of these criteria will ensure that those actually impaired or sick from asbestos exposure will get to the "front of the line" and have their claims litigated without undue delay. See Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 542 (1992).