

## JUDGES MUST PLAY KEY ROLE IN STEMMING TIDE OF ASBESTOS LITIGATION

by

Steve Hantler

Several years ago, the U.S. Supreme Court lamented that “[t]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Three times the nation’s highest court has urgently pleaded for Congress to stem the flood of asbestos cases — each time, to no avail. *See generally* [www.asbestossolution.org](http://www.asbestossolution.org). In the last seven years, matters have become worse with the mass filing of asbestos lawsuits in “magic jurisdictions.” These are the jurisdictions where, according to leading trial lawyer Dick Scruggs, “the judiciary is elected with verdict money” and “the trial lawyers have established relationships with the judges.” In these courts “it’s almost impossible to get a fair trial if you’re a defendant” and “[a]ny lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or the law is.” Richard Scruggs, *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Services and Regulatory Conference (May 9, 2002), *in* *Industry Commentary* (Prudential Securities, Inc., New York, N.Y.), June 11, 2002, at p. 5.

The time has come for judges to take control of asbestos litigation and shut down these “magic jurisdictions.” This LEGAL BACKGROUNDER identifies the Three Catastrophes of Asbestos Litigation and what judges can do to curtail abusive asbestos litigation.

**Background.** The link between asbestos and lung disease was firmly established when inordinate numbers of shipyard workers who had installed asbestos-insulated pipes into U.S. warships during the Second World War contracted lung disease. Other workers in industries with high exposures to asbestos also showed signs of lung disease. Some suffered from severe asbestosis, a stiffening of lung tissue that can overwork the heart. Some suffered from mesothelioma — a deadly malignancy. It is for cases like these that America’s civil justice system exists. Trusts were set up and formulas devised to compensate injured people as expeditiously as possible.

What should have been a straightforward matter, however, was complicated by inventive legal strategies driven more by the profit motive than any quest for justice. With the aging of potential plaintiffs, and the abandonment of widespread use of asbestos decades ago, one would expect cases to follow a bell-shaped curve, with the crest of the wave at least within sight. In fact, National Cancer Institute data shows the number of annual mesothelioma deaths declined in the 1990s. SEER Data, National Cancer Institute *available at* <http://seer.cancer.gov>. While the incidence of asbestos-related disease may be cresting in life, in the courtroom

it is building to tsunami-like proportions. Analysts believe that some trusts could see 2.5 million claims in the near future. Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 12 (RAND Inst. for Civil Justice Aug., 2001). This has resulted in three catastrophes.

***The First Catastrophe: Stealing from the Sick.*** The sustained boom in asbestos litigation is happening, in large part, because trial lawyers actively recruit plaintiffs who, by any reasonable standard, are not sick, injured or even necessarily exposed to asbestos. Motions filed in federal court indicate that hordes of people have been lured into mobile vans to undergo free lung examinations performed by companies sponsored by trial lawyers. Before each exam, the prospective plaintiff is required to sign a representation contract, enrolling as a potential plaintiff. Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1. When independent academic researchers studied X-rays from the mid-1980s of tire workers (whose case had subsequently bankrupted a defendant), they found that “possibly 16, but more realistically 11 of the 439 tire workers evaluated may have a condition consistent with exposure to an asbestiform material.” Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, March 2002, at 154. Audits of claimants’ X-rays in other cases have found similar disparities between diagnoses — from the highly dubious to the outright bogus. *Id.*; see also Lester Brickman, *Lawyers’ Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 243, 281-94 (2001). “In many cases,” writes Professor Brickman of the Benjamin N. Cardozo School of Law, “reading the X-ray is like taking a Rorschach test; whatever is there is totally in the eye of the beholder.” Brickman, *id.* at 283.

In the early 1980s, traditional plaintiffs — people with obvious asbestos exposure — accounted for about three-quarters of expenditures. By 1997, Supreme Court Justice Stephen Breyer noted that “[u]p to half of asbestos claims are now being filed by people who have little or no physical impairment.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (citing Edley & Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. LEGIS. 383, 384, 393 (1993)). The RAND Institute for Civil Justice estimates that nonmalignant cases now account for 90 percent of filings. Hensler, *supra* at 29.

What should have been a large, but finite, group of plaintiffs — persons who had actually suffered a legally cognizable injury from their exposure to asbestos — has taken on freakish proportions. RAND reports that more than 500,000 claimants have filed asbestos-related litigation, typically against several dozen defendants. At least five companies have been hit with at least 300,000 claims each. Three bankruptcy trusts have received 360,000 claims or more. *Id.* at 3.

Why the ever-expanding pool of asbestos plaintiffs? Asbestos litigation is a very profitable industry for trial lawyers. As Stephen Kazan, a leading plaintiffs’ attorney, has candidly explained: “The asbestos companies are really cash cows that we should care for and cultivate so we can milk them for years as we need to. But I have colleagues who would rather kill them, cut them up and put them on the grill now.” Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. TIMES, Dec. 17, 2001, at A1.

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. The Manville Trust can now only pay out about five cents on the dollar to sick people. David Austern, *Mem. to Attorneys Who File Manville Trust Claims*, Claims Resolution Mgmt. Corp., July 5, 2001; see also, Hensler, *supra*. at 13.

The U.S. Supreme Court was so alarmed by this state of affairs that, eleven years ago, it empaneled the Judicial Ad Hoc Committee on Asbestos Litigation to rationalize the system. This panel found that “unless Congress acts to formulate a national solution . . . all resources for payment will be exhausted . . . That will leave many thousands of severely damaged Americans with no resource at all.” Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991). Unfortunately, for the genuinely sick, that day is here.

***The Second Catastrophe: Targeting the U.S. Economy.*** As incredible as it may seem, asbestos litigation is emerging as a prime threat to renewed U.S. economic growth. Consider the following disasters:

- The California Northridge earthquake, which devastated much of the Los Angeles area, cost insurers \$17 billion.

- Hurricane Andrew, which ravaged the Southeast, cost insurers \$21 billion.
- Asbestos litigation will cost insurers alone \$130 billion. Total costs for insurers and defendant corporations could reach as high as \$200 billion. Michael Freedman, *The Tort Mess is Worse Than You Think: Out-of-Control Lawsuits Are Shutting Down Medical Practices, Killing Businesses and Costing the Economy \$200 Billion a Year*, FORBES, May 13, 2002, at 90.

Where will those billions come from? As professor Christopher Edley, Jr. of Harvard Law School has noted, “[t]here is no ‘asbestos industry’ anymore. . . . And many, perhaps most, of today’s defendants cannot accurately be described as ‘asbestos companies.’” Christopher Edley, Testimony before the Judiciary Committee of the House of Representatives, (1999), *quoted in* Douglas McLeod, *Asbestos Continues to Bite Industry*, BUSINESS INS., Jan. 8, 2001. Nonetheless, more than 1,000 American corporations, across half of the Department of Commerce’s industrial categories, today have been targeted by asbestos litigation firms. Hensler, *supra* at 11.

Following the bankruptcy of Johns-Manville, once ranked 181 on the Fortune 500 list, companies have fallen like tenpins. See Roger Parloff, *The \$200 Billion Miscarriage of Justice*, FORTUNE, Mar. 2002, at 154. Since January 2000, at least 16 asbestos defendants have entered Chapter 11. As company valuations are hit, loyal employees are the real losers. When auto-parts conglomerate Federal-Mogul filed for bankruptcy, its employees — who held 16 percent of the company’s stock — saw their assets fall by 99 percent. About 14 percent of Owens Corning’s shares — which lost 97 percent of their value in the two years before its filing — were owned by employees. Hardest hit are those building savings through Employee Stock Ownership Plans and 401(k) plans. *Id.*

RAND reports that “[b]oth plaintiff and defense attorneys also told us that as one defendant has followed another into Chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants.” Hensler, *supra* at 25. As a result, companies that seem unlikely targets — from Chiquita Brands to General Electric — have been hit with asbestos suits seeking huge damages. Ford Motor, General Motors and DaimlerChrysler have seen claims alleging injury by auto mechanics from asbestos in brakes rise significantly recently, Parloff, *supra* at 154, although about a dozen, well-controlled epidemiological studies have found no relationship between brake-repair work and asbestos-related disease.<sup>1</sup> In fact, auto mechanics are somewhat less likely to develop mesothelioma than teachers, librarians and secretaries. Otto Wong, *Malignant Mesothelioma and Asbestos Exposure Among Auto Mechanics: An Appraisal of Scientific Evidence*, 34 REG. TOXIC. & PHARM. 170, 174 (2001); see also Kay Teschke, et al. *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88 CANADIAN J. PUB. HEALTH 163 (1997).

***The Third Catastrophe: Degrading the Law.*** More than a decade ago, the Supreme Court’s ad hoc committee determined that: “What has been a frustrating problem is becoming a *disaster of major proportions* . . . which the courts are ill-equipped to meet effectively.” Report of the U.S. Judicial Ad Hoc Committee on Asbestos Litigation (1991). As asbestos litigation overwhelms dockets, judges are pressured to let standards of due process slip in the name of administrative fairness.

The worst abuses arise from absurd extremes of venue shopping, the search for “magic jurisdictions,” says Mississippi state attorney general Mike Moore. John Porretto, *Moore Says Serious Discussions Needed on Tort Reform*, AP Business Wire, June 9, 2002. One such venue, the courthouse in rural Jefferson County, between 1995 and 2000, has processed twice as many plaintiffs as its county has residents. Robert Pear, *Mississippi Gaining As Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1. In the name of efficiency, courts often allow small, questionable venues like these to handle some of the biggest collections of cases — thereby setting national standards.

In the name of efficiency, courts are allowing cases for healthy claimants to move forward absent any

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<sup>1</sup>To name three: Kay Teschke et al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, 88 CANADIAN J. PUB. HEALTH 163 (1997); Robert Spirtas et al., *Malignant Mesothelioma: Attributable Risk of Asbestos Exposure*, 51 J. OCC. & ENVTL. MED. 804 (1994); Aaron Blair et al., *Mortality Patterns of U.S. Veterans by Occupation*, 75 J. NCI 1039 (1985).

proof of any injury or even connection to a defendant's products.<sup>2</sup> In the name of efficiency, the courts allow plaintiffs' attorneys to seek batch settlements by lumping a few very sick people with those lacking any symptoms — a cynical use of the dying as “trump cards” to up the ante for meritless cases.

Then there is the question of causation. In the name of efficiency, all lung abnormalities are presumed to be caused by the defendant's products, even if the plaintiff is a smoker. In many cases, plaintiffs cannot remember which asbestos product — if any — they might have been exposed to decades ago. To skirt this problem, many courts have relaxed the standards of proof so that practically any asbestos defendant can be linked to any plaintiff's injury. Trial lawyers facilitate this end-run around traditional tort principles by essentially advising their clients to lie. One memo handed out to asbestos plaintiffs, later revealed in court, advises claimants: “Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case. You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered . . . .”<sup>3</sup>

Judges, concerned that some defendants may go bankrupt before a plaintiff develops a disease, have even allowed large verdicts to go to plaintiffs who seek compensation for their *fear* of cancer. In some states, nonmalignant cases outnumber cancer cases by margins as wide as 47 to 1. Parloff, *supra* at 154.

The courts — again, in the interest of administrative efficiency — are also ignoring their mandate to be “gatekeepers” under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). If any batch of cases has ever required gatekeepers, asbestos is it.

***Time for Judges to Take Control.*** One judge, Reynaldo Garza, implored “Congress to heed the plight of the judiciary and the thousands of individuals and corporations involved. Congress alone has the power to devise a system . . . in response to the asbestos litigation crisis.” *Cimino v. Raymark Indus.*, 151 F.3d 297, 339 (5<sup>th</sup> Cir. 1998) (Garza, J. concurring). But despite the pleas of judges such as Mr. Garza and the U.S. Supreme Court, Congress has failed to act. Therefore, the time has come for the courts to exercise greater responsibility in managing the flood of asbestos litigation:

1. Judges should refuse to allow plaintiffs' attorneys to park cases packed with specious claims to gain economic leverage over defendants.
2. Judges should use the tools available to batch similar cases so that *Daubert* standards can be applied.
3. Judges should broom out their dockets. Where no disease exists, no case should either. Judges should either transfer these cases to an inactive file or dismiss them without prejudice.
4. Judges need to inform juries when other defendants settle out of a case — juries need to hear all of the facts to avoid over-compensation.
5. Judges should place limits on punitive awards or retire punitive damages to the sideline since there is simply no conduct left to deter.

Above all, judges should do the job the Supreme Court assigned to them. For the sake of the injured, for the sake of the economy, and for the sake of the law itself, it is time for judges to become the nation's gatekeepers. The courts must stem the tide of abusive asbestos litigation before it overwhelms us all.

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<sup>2</sup>For a discussion of the “special asbestos law” created by courts for this purpose, see Lester Brickman, *The Asbestos Litigation Crisis: Is There A Need for an Administrative Alternative?*, 13 CARDOZO L. REV., 1819, 1840-52 (1992).

<sup>3</sup>Roger Parloff, *The \$200 Billion Miscarriage of Justice*, Fortune, March 2002, at 154. For a detailed discussion of how medical evidence is used, see Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. at 273-81.