Legal Opinion Letter

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STATE-BASED MEDICAL CRITERIA FOR ASBESTOS SUITS GAINS MOMENTUM

By

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Asbestos litigation reform is receiving significant attention nationwide as lawmakers and courts work to solve the nation's longest running mass tort problem. The U.S. Supreme Court has described the situation as an "asbestos-litigation crisis." A report just announced by the RAND Institute for Civil Justice describes the magnitude of asbestos litigation: through 2002, almost three-quarters of a million people filed claims; at least seventy-three employers had been forced into bankruptcy; over 8,400 defendants have been dragged into the litigation; and $70 billion had been spent. Between 2000 and mid-2004, there were thirty-six bankruptcy filings, according to RAND – more than in either of the prior two decades. These bankruptcies have caused serious repercussions for employees, retirees, communities, and the economy as a whole. Former Attorney General Griffin Bell has observed that the litigation has worsened "at a much more rapid pace than even the most pessimistic projections."

Mass filings by individuals who are not sick are driving the recent explosion in the number of asbestos claim filings. Some estimate that unimpaired claimants may account for up to ninety percent of all new asbestos filings. These claimants continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement, and no change in their well being. The claimants typically are recruited through mass screenings conducted by plaintiffs' lawyers and their agents, often in response to exaggerated ads, such as "Find out if YOU have MILLION DOLLAR LUNGS." Lawyers who represent cancer victims have criticized these screenings and the "file now" trend by the unimpaired as threatening the ability of the truly sick to obtain adequate, timely compensation.

In response, courts and legislatures are acting aggressively to adopt new rules and statutes to address filings by functionally unimpaired claimants. Several state courts, including those in Arizona, Delaware, Maine, and Pennsylvania, have held that unimpaired claimants do not have a legally compensable claim as a matter of substantive law. Other courts have adopted inactive dockets or similar case management orders to prioritize asbestos claims. In the past year, four states – Ohio, Georgia, Florida and Texas – have enacted laws requiring claimants to demonstrate actual impairment before they may bring an action for asbestos and silica-related exposures. These various approaches all represent a sound and narrowly tailored mechanism for setting aside the claims of the non-sick so that scarce and diminishing resources can be focused on the people who need and deserve compensation the most – the sick and dying, their widows, and survivors.

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Medical Criteria-Based Judicial Solutions. For more than a decade, courts have prioritized asbestos cases by requiring claimants to demonstrate actual asbestos-related impairment in order to proceed to trial. In the late 1980s and early 1990s, three jurisdictions that were experiencing problems caused by large numbers of claims filed by the non-sick – Massachusetts (September 1986), Chicago (March 1991), and Baltimore (December 1992) – adopted inactive dockets. These plans allow the sick to move "to the front of the line" and not have to wait until earlier-filed claims by the unimpaired are resolved. Claims on the inactive docket are exempt from discovery and do not age. A claimant may petition to have his or her claim removed to the active trial docket by presenting the court with credible medical evidence that an impairing asbestos-related condition has developed. Inactive dockets relieve court congestion and allow defendants to conserve scarce financial resources that are needed to compensate the truly sick, now and in the future.

Judges from these pioneering courts have stated that their plans have been successful. For example, Judge Hiller Zobel, who implemented the inactive docket in Massachusetts, commented that the inactive docket has been "really a very good system that has worked out." Baltimore City Circuit Court Judge Richard Rombro has written that "the docket is working and . . . a substantial number of cases have been moved to the active docket while those without any impairment remain on the unimpaired docket."

Recently, inactive dockets have been adopted in St. Clair, Illinois (February 2005); Portsmouth, Virginia (August 2004); Madison County, Illinois (January 2004); Syracuse, New York (January 2003); New York City (December 2002); and Seattle, Washington (December 2002). RAND's 2005 report concluded that one of the "most significant developments in asbestos processing" has been the "reemergence of deferred dockets as a popular court management tool." Other jurists, including the coordinating judge for all South Carolina asbestos cases and the judge presiding over the federal asbestos docket, have entered orders dismissing claims filed by the non-sick.

Medical Criteria-Based Legislation. In the past year, as the problems caused by the non-sick have become more recognized, state legislatures have used their overlapping authority to adopt their own medical criteria-based solutions to the litigation. In 2004, Ohio became the first state to pass legislation (H.B. 292) requiring plaintiffs to demonstrate impairment in order to bring or maintain an asbestos-related action. Ohio also passed silica medical criteria legislation (H.B. 342) to help ensure that silica filings would not be exacerbated by plaintiffs' lawyers who might be discouraged from bringing weak or meritless asbestos suits as a result of H.B. 292.

In 2005, Georgia (H.B. 416), Florida (H.B. 1019), and Texas (S.B. 15) enacted similar medical criteria laws for asbestos and silica claims. In each state, these laws passed with overwhelming bipartisan support. These laws draw support from proposals adopted by the American Bar Association and American Legislative Exchange Council, the nation's largest nonpartisan membership organization of state legislators.

Conclusion. After thirty years of a downward spiral, recent actions by state courts and legislatures in key jurisdictions that have experienced large numbers of asbestos filings provide hope that a major fuel behind the recent explosion in the litigation – mass filings by the non-sick – may be waning. Significantly, courts and legislatures in Texas, New York, Ohio, Maryland, Florida, Pennsylvania, and Illinois – where RAND estimates fifty-eight percent of asbestos claims were filed from 1998 to 2000 – have adopted rulings, orders, and laws to prioritize asbestos cases by filtering out or suspending the claims of the unimpaired. A federal solution ultimately is needed to provide a global solution to the litigation, as other issues remain and forum shopping can allow claims to migrate to states and jurisdictions with more lenient laws. In the meantime, it is encouraging to see that the states are finally acting aggressively to restore common sense to asbestos litigation.

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